ROYAL INSTITUTE OF COLOMBO LAW JOURNAL

2023

VOLUME IV

Royal Institute of Colombo Law Journal 2023
Volume IV

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

Copyright ©2023 Royal Institute of Colombo, Sri Lanka. All rights reserved.

No part of this publication may be reproduced, distributed, or transmitted in any form or by means whether electronic or otherwise, including but not limited to photocopying, recording or other forms of electronic or mechanical communication methods, without prior written permission from the Editor-in-Chief of the Law Journal and Royal Institute of Colombo, except in relation to the use of brief quotations embodied in reviews of the articles and certain other non-commercial uses permitted by copyright law.

Disclaimer

The views expressed in the articles and literary contributions contained in Volume IV of the RIC Law Journal 2023 are strictly those of the respective authors. Neither the Editorial Committee of the Law Journal of RIC nor the Senior Review Committee is/are liable jointly or separately for the views expressed by the authors in the articles contained in this publication, as the tasks undertaken by such committees were to ensure that all literary contributions were of sound quality and that the same were of a publishable calibre. Further, or opinions promulgated by the authors in their respective articles, nor is any responsibility taken for such stances of the authors in this journal.

SENIOR REVIEW COMMITTEE

Mr. Seevali Amitirigala, PC
Prof. Naazima Kamardeen
Dr. Asanga Welikala
Dr. Nishara Mendis
Dr. Dan Malika Gunasekera
Mr. Amila Siriwardena
Mr. Mahela Liyanage
Mr. Rashmin Tirimanne De Silva
Mr. Kavindu Hewa Geeganage
Ms. Sandunil Meepe
Dr. Kalana Senaratne

EDITORIAL COMMITTEE

Editor-in-Chief

Mr. Adheeb Anwar

Deputy Editor-in-Chief

Ms. Hesara Wijayanama

BOARD OF EDITORS

Mr. Adheeb Anwar
Ms. Amandha Wanduragala
Ms. Anuradhika Uduwana
Ms. Binuri Weerasinghe
Ms. Chanmini Perera
Ms. Chathuni Namaratne
Ms. Deana Perera
Ms. Dinithi Wijayaratne
Mr. Hashendra Jayasuriya
Ms. Hesara Wijayanama
Mr. Imadh Imran
Ms. Isuri Kumbukage
Ms. Jaindee Jayarathne
Ms. Janithri Panditharatne
Ms. Khadeeja Pasha
Mr. Naika Gooneratne
Ms. Nethara Vaas
Mr. Onel Edirisinghe
Mr. Ruchith Ranasinghe
Ms. Sajani Jayasinghe
Ms. Sajani Pathiranage
Mr. Sarith Abeygunawardena
Ms. Shaneen Perera
Mr. Treshan Fernando
Ms. Vishmi Jurangpathy

LAW STUDENTS' ASSOCIATION OF ROYAL INSTITUTE OF COLOMBO 2022/2023

PRESIDENT

Ms. Vishmi Jurangpathy

VICE PRESIDENT

Ms. Deana Perera

SECRETARY

Mr. Imadh Imran

SENIOR TREASURER

Mr. Nevanka Jayatilleke

JUNIOR TREASURER

Ms. Chathuni Namaratne

EDITOR-IN-CHIEF

Mr. Adheeb Anwar

HEAD OF MOOTING

Ms. Janithri Panditharatne

HEAD OF DEBATING

Mr. Naika Gooneratne

HEAD OF PUBLIC RELATIONS

Ms. Chanmini Perera

BATCH REPRESENTATIVES

Mr. Daniel Abeyratne

Mr. Onel Edirisinghe

Mr. Lahan Welgama

CHIEF ACADEMIC COORDINATOR - LLB

Ms. Madusha Jayasena

ACKNOWLEDGEMENTS

The Fourth volume of the Royal Institute of Colombo Law Journal is the culmination of the combined efforts of several individuals. In light of the extensions of support granted towards this publication, the Editorial Committee of the RIC Law Journal would like to express its sincere gratitude to:

The Senior Review Committee, for providing their expert guidance amidst their demanding schedules to assist this year's publication by reviewing the articles and providing constructive criticism and suggestions for revisions to ensure that the Journal is of the highest calibre;

Mr. Prasantha Lal De Alwis PC for his timely contribution of an article towards the Journal;

Mr. Ikram Mohamed PC for accepting our invitation to be the Chief Guest of the Journal Launch;

Mr. Kalinga Indatissa PC, Mrs. Farzana Jameel PC and Mr. Chanaka de Silva PC for accepting our invitation to be Panelists for a discussion which was moderated by the Editor-in-Chief, Mr. Adheeb Anwar; held on the day of the launch of the Journal;

The authors, without whom this Journal would not be a success nor in existence. Your articles will not merely enrich the legal community but also act as a symbol of encouragement to all future aspiring authors who would immensely benefit from the wealth of knowledge you have shared through this publication;

Much gratitude is also expressed to the Editorial Committee Members of the RIC Law Journal 2023, for their support, commitment, dedication and perseverance to ensure a Journal of high order is made possible;

Mr. G.T. Bandara, the Chairman of the Royal Institute of Colombo 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 of RIC for their unstinted support and assistance in ensuring the smooth publication of this Journal;

Muve Colombo, for their generous financial contributions towards this publication;

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

Ms. Hesara Wijayanama, the Deputy Editor-in-Chief for her untiring efforts and contribution throughout the entirety of the publication process of the Journal;

Ms. Chanmini Perera for not only designing the cover of the Journal but for also taking care of the Public Relations sector of the Journal;

Mr. Amila Siriwardena for sharing his immense knowledge and experience on legal citations and legal research at the webinar conducted for the Editorial Committee and the law students of RIC; and

All individuals without whose effort, commitment and dedication this Journal would have not been a reality nor a success;

Our deepest gratitude is conveyed to all who were instrumental in making this publication a reality. Their efforts despite a challenging calendar year, has resulted in the launch of the Law Journal for 2023. We truly appreciate and thank everyone involved in the above process for their timeless efforts, hard work and perseverance in making Volume IV of the Journal a successful publication.

NOTE FROM THE EDITOR-IN-CHIEF

"*Reading maketh a full man; conference a ready man and writing an exact man*"

- Francis Bacon.

Mastering the art of constructing legal articles is no simple feat. It requires the author to possess command over skills of analysis, reading and writing. The articles contributed to this Volume of the RIC Law Journal reflect the exact same, showcasing this year's line-up of stellar authors.

Law Journals, since the birth of the legal profession, have proven to be a vital platform for recognizing upcoming legal professionals and students. This mechanism not only allows the free expression of arguments, opinions and ideologies but also contributes to the ever-expanding global and local legal literature.

The articles in this volume, as in previous years, have undergone a thorough process of editing and reviewing. Sessions of intense editing and formatting were successfully carried out by the Student Editorial Committee. These articles were then shared with the Senior Review Committee, involving them in reviewing the articles for the precision of arguments and analysis.

On behalf of the Editorial Committee and the RIC, I wish to express my heartfelt gratitude to the Senior Review Committee members for spending their valuable time assisting us in publishing yet another high-quality publication, as in the previous years. I also wish to extend our appreciation to the authors for their cooperation and contribution towards this Volume of the Journal; without their interest and contributions, this Journal could not have been published.

I take this opportunity to express my sincerest gratitude to the Deputy Editor-in-Chief and the Editorial Committee for rendering their effort and hard work in bringing this publication to life. A special mention must be made of the Law Students' Association of RIC for supporting the Committee in publishing and launching the Fourth Volume of the Journal.

We also gladly welcome your feedback that would help us improve our publication in the coming years. It is our hope that the readers of this publication will find the content of these articles valuable and that it will interest more students to partake in similar activities that enable the enhancing of their skills and career. Thank you.

Mr. Adheeb Anwar
Editor-in-Chief
RIC Law Journal 2023 - Volume IV

MESSAGE FROM THE CHAIRMAN OF
ROYAL INSTITUTE OF COLOMBO

I would like to extend my heartiest congratulations to the Editorial Committee of the Law Students' Association of Royal Institute of Colombo for the compilation of this marvelous volume of legal writings, embedded into the Fourth Volume of the RIC Law Journal 2023.

Being an entirely student-run journal, the commendable efforts of the law students at RIC in executing this compilation are truly noteworthy. The creation of this journal aligns harmoniously with the overarching concept of the 'Spring of Wisdom,' a guiding principle at RIC that seeks to mould undergraduates into refined individuals capable of navigating intellectually challenging situations by themselves. By effectively leveraging their skills in academic pursuits and co-curricular activities, these students emerge as better versions of themselves. The RIC Law Journal, an embodiment of this vision, showcases the remarkable achievements of our students. Within the pages of this journal, we find unique perspectives and insights that invite you to explore the uncharted territories of knowledge and wisdom.

I envisage the readers will find the knowledge stored in these pages ignite a passion for you to engage in life-long learning and stimulate your interest to engage in legal research for the betterment of the legal profession.

My sincere appreciation is extended to the authors, contributors, Senior Review Committee, and the Editorial Committee of the LSARIC for their collective efforts in bringing this insightful and thought-provoking collection to fruition. May the knowledge shared within these pages inspire further inquiry, discussion, and progress within the ever-evolving landscape of legal scholarship.

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

MESSAGE FROM THE ACADEMIC DIRECTOR OF ROYAL INSTITUTE OF COLOMBO

It is with tremendous pleasure that I extend my heartfelt congratulations to the esteemed Editorial Committee of the LSARIC 2022/2023 for the remarkable accomplishment of completing the fourth volume of the RIC Law Journal.

The creation of a law journal is an endeavour that demands exceptional dedication, enthusiasm, and unwavering determination. This year's journal stands as a testament to the commitment and tireless efforts of the editorial committee, under the leadership of the Editor-in-Chief. It is a noteworthy achievement for budding young legal minds to engage in publishing an article under the guidance of the esteemed senior editorial board. My congratulations to these law undergraduates for contributing to the scholarly pursuits of this year's journal.

The spectrum of topics covered in this edition reflects the multifaceted nature of the legal landscape today. From timely topics such as the artificial intelligence to the critical examination of international protection of human rights, the exploration of intellectual property and criminal law, and the complex nuances of marine law, together have created a comprehensive repository of legal research.

This journal stands as a testament to the immense talent, passion, and intellectual rigour that embodies the legal community. I commend all the contributors, the Senior Review Committee, the Editorial Committee, and their outstanding efforts in producing a journal of such high calibre.

Warm regards to all involved in this outstanding achievement!

Dr. Nirodha Bandara
Academic Director
Royal Institute of Colombo

In this Issue

I. SPECIAL CONTRIBUTIONS

1. Bail: The Philosophy with Special Reference to Sri Lanka
Prashantha Lal De Alwis PC……1
2. The Law Merchant Today
Shane Foster, AAL……8
3. The Rise of Virtual Arbitration Hearings in the Wake of Technological Advancement and Internationalization: Challenges and Drawbacks
Shenella Fonseka, AAL…… 18

II. ADMINISTRATIVE LAW

4. Reimagining the Sri Lankan Ombudsman: A Comparison with The United Kingdom
Treshan Fernando ……28

III. ADMIRALTY LAW

5. Sailing Through Turmoil: Unraveling the Legal Ramifications of Oil Spills in Sri Lanka's Coastal Waters
Disarah Wimalatunge and Merosha Paskaran……44

IV. ARTIFICIAL INTELLIGENCE

6. The Transformative Impact of AI in Law
Pabasara Jayakody and Tilini Ruwanga……61
7. Artificial Intelligence Goes Global: Embracing A New Frontier of Opportunities & Obstacles.
Redha Refai……78

V. COMPANY LAW

8. Can Derivative Claims Proceed Via Oppression Remedy?
Nishadharan Sundararaj……95
9. Can Section 172 of the United Kingdom's Companies Act 2006 Move from A No Man's Land to Everyone's Land?
Shenaz Rumana Hajireen……109

VI. CONFLICT OF LAWS

10. Should 'Renvoi' Be Retained or Set Aside in Conflict of Laws?
Kaveen Saparamadu……125

VII. CRIMINAL LAW

11. Drug Laws of Sri Lanka: A Comparative Analysis and Proposals for Systematic Reform
Sajani Jayasinghe and Isuri Kumbukage……134

VIII. DATA PROTECTION

12. Data Privacy in Sri Lanka: The Right to Privacy in an Emerging Digital Economy
Naika Gooneratne……154
13. The Impact of the GDPR on Data Privacy and Its Significance in the Digital Age: A Comprehensive Analysis
Sanduni N.H Kotigala……170
14. Data Protection and Privacy Concerns in the Metaverse.
Thanuki Natasha Goonesinghe……191

IX. INTERNATIONAL LAW

15. Foreign Cyber Interference in Elections: A New Paradigm of Non-Intervention
Shabnam Mohamed……209
16. A Critique of the Effectiveness of the International Legal Regime in Responding to the Russia-Ukraine Conflict, With Reference to the Sources of International Law
Thishmi Wanigasooriya……218
17. Legal Implications with Regards to the Use of Outer Space for Strategic and Commercial Purposes in the 21st Century
Udam Wickremasinghe……228

X. INTERNATIONAL HUMANITARIAN LAW

18. The Turn Away from 'Conventional' Armed Conflict: The Impact of Militant Non-State Actors on International Humanitarian Law in the 21st Century
Amisha De Alwis……245
19. Counter-Terrorism in Sri Lanka: A History of Abuse and the Need for Democratic Reform
Isuri Kumbukage and Jaindee Jayarathne……260

20. An Analysis on the South Asian Trans-National and Trans-Continental Migration Dilemma
Omandee Samaratunge and Nisal Deelaka Pathiraja).....280
21. Building Democratic Militaries: A Critical Review of the Sri Lankan Military Justice System
Sanduni Rathnayake.....305

XI. INTELLECTUAL PROPERTY LAW

22. Overview of the Trademark Law in Sri Lanka: Gaps Between Sri Lankan Law and International Practices
Chanmini Perera.....320
23. Performers' Rights in Sri Lanka: A Tone-Deaf Regime
Joshua Weerasingham.....337

XII. INTERNATIONAL PROTECTION OF HUMAN RIGHTS

24. Prohibited but Still Practiced: An Analysis of Torture in Sri Lanka
Anuradhika Uduwana.....354
25. Art, Blasphemy and the Way Forward for Sri Lanka
Sarith Abeygunawardena.....371

XIII. PUBLIC INTERNATIONAL LAW

26. Regime Governing the Legality of the Use of Armed Force in the Russian Invasion of Ukraine
George Kiralos Abdelmassih.....386

XIV. MISCELLANEOUS

27. The Miscarriage of Fast Track Justice
Yasith Hathurusinghe and Saundarya Wellaboda 403

SPECIAL CONTRIBUTIONS

BAIL: THE PHILOSOPHY

WITH SPECIAL REFERENCE TO SRI LANKA

Prasantha Lal De Alwis PC

1. INTRODUCTION

In the criminal justice process, a person goes through different stages: being named as a suspect, accused, or convict, when one is arrested, charged, and convicted after trial respectively.

When a police officer has 'reasonable suspicion' that an offence has been committed by a person, he is arrested as a 'suspect'. After the investigation is completed, a charge will be framed[1] in the magistrate court, or an indictment will be filed in the High Court by the Attorney General[2], and the person's status will change from 'suspect' to 'accused'.

After the conclusion of the trial conducted as stipulated by the Criminal Procedure Code and Evidence Ordinance, if the prosecution has proved the case beyond reasonable doubt[3] or the defence has failed to prove exculpatory exemptions (defences[4]) on a balance of probability,[5] the accused is convicted of the alleged offences and will be there after referred as a 'convict'. The defendant is free to appeal and thereafter will be referred to as the 'accused-appellant.'

When a person is arrested, his body is confined by the arresting authority, or if a jail term or a death sentence is imposed by the courts, he is confined in prison.

The process of 'bail' is available in the criminal justice system and allows such a person to get out of such confinement. The author endeavours in this article to ascertain the philosophy behind the bail process, without going into detailed procedural aspects.

[1] Section 182 of The Criminal Procedure Code Act No. 15 of 1979.
[2] Section 162 of ibid.
[3] ***Woolmington v. DPP*** (1935) AC 462.
[4] Chapter IV of the Penal Code of Sri Lanka.
[5] ***King v. James Chandrasekara*** (1942) 44 NLR 97.

2. CONCEPTUAL FRAMEWORK

When a person is arrested or subsequently convicted and jail time is imposed, he is confined, and therefore free movement is restricted. Wrongful restraint[6] and wrongful confinement, where a person is restricted wrongfully within a 'circumscribing limit[7], are designated as criminal offences. Further, freedom of movement[8] is enshrined as a Fundamental Right in Sri Lanka and therefore is enforceable[9] through the Supreme Court. It is patently clear that illegal and wrongful restriction of movement is controlled by both criminal law and constitutional law, thereby the concept of 'bail' plays a pivotal role in the judicial system of Sri Lanka.

Laying down the 'guiding principle'[10], the Bail Act of Sri Lanka, states 'that the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception.' The word 'shall' make it mandatory to grant bail in given instances, while non-granting of bail is given only under 'exceptional circumstances.' This concept is limited to 'the implementation of the provisions of this Act.'

However, it can be considered that the philosophy or concept of the granting of bail generally in Sri Lanka even goes beyond the Bail Act.

2.1. History

From 1979, general provisions were governed by the amended Code of Criminal Procedure Act No. 15 of 1979[11]. The Bail Act No. 30 of 1997 came into operation on November 28, 1997, and a connecting provision was provided that if there was any reference by written law to a provision of the Criminal Procedure Court Act relating to bail, it was deemed a corresponding provision to the Bail Act.[12]

Further, the Bail Act was excluded from situations of accused and convicted under the Prevention of Terrorism (Temporary Provision) Act No. 48 of 1979 or Emergency Regulations made under the Public Security Ordinance.[13] This extraordinary situation was recognized as an exclusion from the normal prevailing law, which can be justified in context.

[6] Section 330 of the Penal Code of Sri Lanka prevents from preceding in any direction.
[7] Section 331 of the Penal Code of Sri Lanka.
[8] Article 14 (1) (h) of The Constitution of Sri Lanka.
[9] Article 126 of The Constitution of Sri Lanka.
[10] Section 2 of the Bail Act No. 30 of 1997, ***Anuruddha Ratwatte v. AG*** (2003) 2 Sri. LR 39.
[11] Chapter XXXIV (Section 402 – 408).
[12] Section 3 (3) Of the Bail Act No. 30 of 1997.
[13] Section 3(2), ibid.

The Bail (Amendment) Act No. 7 of 2022 only increased the fines in sections 6(2) to 12(2) and 18(5), which is not a substantial amendment of both context and content.

Special laws such as the amended Poison, Opium, and Dangerous Drug Ordinance, the amended Firearm Ordinance, the amended Immigrants and Emigrants Act No. 20 of 1948, the amended Offences Against Public Property Act No. 12 of 1982, and the Amended Antiquity Ordinance no. 9 of 1940 have provisions relating to the granting of bail. Considering any conflict with Bail Act provisions, the Latin maxim of *generalia specialibus non-derogant*, which means 'the general does not derogate from the special,' will operate. This concept was declared by Justice Griffith in ***R v. Greenwood***,[14] ***State of Gujarat v. Paul Ram Jibhai***,[15] and ***Paradip Port Trust v. Workman in India***.[16]

3. GRANTING OF BAIL

Though it gives a *prima facie* wrong impression of not granting bail, offences are categorized as 'bailable' and 'non-bailable'.

Bailable offences are offences where the suspect or accused is entitled to be released on bail as a matter of right[17] and the officer in charge of the police must grant him release on a 'written undertaking' without producing before the magistrate.[18] However, if it is a non-bailable offence, bail may be granted at the discretion of the courts,[19] thereby not as a right.

Further, if a 'public reaction' to the alleged bailable offence being investigated is likely to give rise to a 'breach of peace' the officer in charge of police, depending on his opinion, may produce the suspect before the magistrate. In Penal Code offences, the distinction between bailable and nonbailable is clearly stated in the 'First Schedule'[20] of the Code of Criminal Procedure Act No. 15 of 1979, where offences such as accidents occurring due to rashness and negligence (section 298), abortion (miscarriage, Section 303), causing simple hurt and grievous hurt (Section 314/316), misappropriation (section 385), and mischief (section 404) are 'bailable', whilst murder (section 246), aiding and abetting suicide (section 294), causing hurt with dangerous weapons (section 317), and cheating (section 400) are non-bailable offences. Therefore, the principle of this distinction is

[14] (1992) 7 O.R (3d)1.
[15] 1979 AIR 1098, 1979 SCR (3) 788.
[16] AIR 1979 SC 36.
[17] Section 4 – Bail Act No. 30 of 1997.
[18] Section 6 – ibid.
[19] Section 5 – ibid.
[20] Line 5.

easier when the gravity of the offence is greater, as it becomes non-bailable, requiring judicial intervention.

A suspect has to be produced before the magistrate within 24 hours by police,[21] and if remanded by the judge, the suspect is conceptually transferred from Executive (police) Custody to Judicial Custody. In that situation, the suspect is 'remanded', keeping him under prison authority, where the judge is duty-bound, even in certain circumstances, to visit the prison to ascertain the prison conditions and to have the case called in open court every 14 days.

Though the rule is granting bail, a magistrate can refuse bail if the judge is of the opinion that the suspect will not appear to stand his inquiry or trial, interfere with witnesses, obstruct the course of justice, and have the possibility of committing another offence. If the offence is of such gravity, 'public disquiet' will result due to 'public reaction.'[22] Further, the judge must not merely refuse bail or vary an order; he must give reason for such refusal or variation.[23]

The grounds above clearly demonstrate that the objective of bail is not only to maintain the decorum of courts, but also contributes to the continuity of a smooth uninterrupted judicial process, and, interestingly, to preserve peace in the community or society at large. The limitation of the time period of remand is imposed as 12 months[24] with exceptions that on an application of the Attorney General to the respective High Court, it can extend this period by three months, however to an aggregate of further 12 months.[25]

4. CONDITIONS OF BAIL

Conditions such as cash bail, certified bail, having government servants as sureties, impounding the passport and informing the Department of Immigration and Emigration of a travel ban out of Sri Lanka, and periodical reporting to the police on stipulated dates are some of the conditions of bail to ensure suspect or accused's participation in the judicial process.[26] The objective is evident: when a person appears on a summon, thereby respecting the judicial process, he can sign his own bail bond (personal bond or own recognition') unless the court thinks otherwise which requires reasons to be recorded by him.[27]

[21] Section 33(1) Code of Criminal Procedure Act No. 15 of 1979.
[22] Section 14, Bail Act No. 30 of 1997.
[23] Section 15, Bail Act No. 30 of 1997.
[24] Section 19, ibid.
[25] Above provision.
[26] Section 7, ibid.
[27] Above provision.

5. AFTER CONVICTION

When a person gets convicted, naturally he will attempt to evade the system, where there is a threat of incarceration, even extending it to life imprisonment.

When an appeal is made against a conviction by the magistrate court, the magistrate has the discretion either to grant bail or, considering the 'gravity' of the offence and the antecedents of the accused, refuse to release him on bail.[28] Further, where an appeal is preferred against an acquittal, the magistrate 'may' commit him to prison, pending the determination of the appeal[29]. Similarly, if there is an appeal from a conviction, bail may be granted 'pending appeal' by the High Court. Before the Bail Act, when an appeal was preferred from a conviction, it was mandatory for the magistrate to grant bail.

In ***Ramu Thamotharampillai v. AG***[30], stressing the imposed requirement of 'exceptional circumstances' brought in factors of the serious nature of the charge, the severity of the punishment, and the consequent temptation to abscond, the appellant was sentenced to 7 years.

When Rigorous Imprisonment is imposed the factor of having six children who are attending school was stated as 'scarcely bears examination' (following the case of ***Cornelis Silva***[31]), and the factor of retaining counsel to appear for approval was referred to as 'common to many accused persons.' There is no bail pending appeal if one is convicted of murder.

6. JURISDICTION

While the police have the duty to grant bail for bailable offences, the magistrate has discretion to grant bail for non-bailable offences. However, under Section 13 of the Bail Act, the High Court has exclusive jurisdiction to grant bail for charges of murder and if the sentence is Life Imprisonment s imposed for an offence such as possession of an automatic weapon under the Firearms Ordinance. The Supreme Court has jurisdiction over offences under the Offensive Weapons Act.[32] Amended Section 83 of the Poison, Opium, and Dangerous Drugs (Amendment) Act No. 41 of 2022 Jurisdiction was shifted to the Court of Appeal from High Courts, where pure quantity exceeds 10 grammes and is punishable with death or life imprisonment.[33] It is evident that offences that cause greater harm have higher courts in the hierarchy. therefore, creating a different deterrent effect on society due to difficulty in access and the higher cost of litigation.

[28] Section 19 (2) and 19 (3) of Bail Act No. 30 of 1997.
[29] Section 19 (1) ibid.
[30] (2004) 3 SLR 180.
[31] 74 (NLR) 113.
[32] Section 10.
[33] Section 4.

7. ANTICIPATORY BAIL

Due to political and social pressure, people are subjected to baseless, false, trumped-up charges.[34] Therefore, following the Indian experience, the Sri Lankan legislature introduced the concept of 'anticipatory bail' which allows bail to be granted before being arrested for only 'non-bailable offences.'[35]

Anticipatory bail is limited to offences for which the magistrate has jurisdiction to grant bail; thereby, bailable offences such as murder, firearms, and special offences such as offences against public property and bribery are excluded.

Gurbaksh Singh Sibbiya (State of Punjab)[36] decided that a 'blanket order of bail' that covers all offences without specification can result in dangerous, negative outcomes and therefore avoided the above. However, such an application does not prevent police from interrogating the suspect and seeking a court order of warrant or detention, thereby retaining the essential powers of law enforcement authorities.[37]

Sri Lankan[38] and Indian[39] experiences reveal that this safeguard is practically used by elites and politicians, thereby negating the objective of avoiding common people being arrested and harassed by The Police without basis.

8. SPECIAL SITUATIONS

In cases where the magistrate receives information, generally from the police, that any person is likely to commit a breach of peace or to do any wrongful act that may constitute a breach of peace, courts may order the execution of a bond with or without sureties to keep peace for a maximum of 2 years.[40]

When the police file a case under Primary Court Procedure Act No. 44 of 1979, when a breach of peace occurs due to a land dispute, the bail system will not operate as the appearance of 'respondent' (not accused) is not mandatory, and as any person can intervene when Court issues notice. However, the Court may receive a bond to assure attendance and police may arrest 'if necessary' to preserve the peace.[41]

[34] Hansard Speech - Professor G.L. Peiris, Minister of Justice.
[35] Section 21(1), Bail Act No. 30 of 1997.
[36] 1980 AIR, (1980) 25 CC 565 created 8 guidelines.
[37] Section 25 Bail Act No. 30 of 1997.
[38] Ravi Karunanayake (2005) 1 Sri LR 18, Thilanga Sumathipala (2004 1 Sri LR 210).
[39] Maneka Gandhi, Gurbaksh Singh in note 36 was a Minister of Irrigation and Power.
[40] Section 81 - Code of Criminal Procedure (Code at Number 15 of 1979).
[41] Section 66.

The Bail Act had not defined 'reason to believe,' when the application is to be made. It cannot be mere imagination or fear, but the belief should be tangible or visible.

A Bail Application cannot be made when a person is convicted of murder, and other offences where the death sentence is imposed when a mandatory appeal is preferred according to law.[42]

9. CONCLUSION

Sri Lanka possesses an exhaustive, comprehensive bail system, through the Bail Act and other specific laws, where an attempt is made to balance the interest of the suspect or accused in particular, and society at large.

It is evident that consistent policy emerges that granting bail is the rule and refusal is the exception. The concepts of 'exceptional circumstances' and 'anticipatory bail' have created new dimensions.

However, it is evident that the elite and politically powerful have abused the system,[43] thereby resulting in losing the faith of the general public in the concept of bail.

[42] Section 20 (3) Bail Act No. 30 of 1997.
[43] Anticipatory bail is used by them, even when remanded, getting luxuries such as entering prison hospitals faster than the general public.

THE LAW MERCHANT TODAY

Shane Foster, AAL.

1. INTRODUCTION

The volume and complexity of modern-day trade invariably mean that international cooperation is required for the efficient and smooth functioning of such.[1] A logical and necessary corollary of international cooperation in cross-border trade is the existence of a uniform trade law by and through which all international tradespeople are informed of their rights and duties.[2] This law was in the past given the name 'the law merchant'.[3] In the medieval period, tradespeople would conduct their business on the law merchant and not based on any national law. It was truly transnational in its application and would be given effect to in various countries by merchants in courts made specially for that purpose. As time progressed, the law merchant was incorporated into national laws as a form of private international law.[4] Today, international bodies such as UNIDROIT[5] *inter alia*[6] have taken steps to codify the law merchant. The UNIDROIT principles are a modern, clear, and non-binding restatement of the law merchant.[7] This article proposes that the law merchant can never hope to achieve its heights of glory in the medieval period and that if it were to do so today, it must at least provide for the transnational application of its laws and an efficient adjudication and enforcement mechanism. Can it do so?[8]

2. THE EXTENT OF THE LAW MERCHANT

The law merchant is not amiable composition, *jus cogens*, or an international organization's self-regulatory rules.[9] 'The law merchant describes both the reality of an emerging set of legal norms, procedures, and institutions outside the state and its institutions, as well as the romantic ideal of a

[1] See Professor Roy Goode, *Goode on Commercial Law, Part 1* (Ewan McKendrick ed, 4th edn, Penguin Books 2010) 16 for a discussion on the law merchant's importance in modern trade.
[2] Richard J. Howarth, 'Lex Mercatoria: Can General Principles Of Law Govern International Commercial Contracts?' (2004) 10 Canterbury Law Review 36.
[3] B L Benson, 'The Spontaneous Evolution of Commercial Law' (1989) 5 Southern Economic Journal 644, 654 - The characteristics of this law were 1) universal character, 2) flexibility and dynamic ability to grow, 3) informality and speed, and 4) reliance on commercial custom and practice.
[4] Private International Law.
[5] The International Institute for the Unification of Private Law.
[6] *Ibid* (n 1) 16 - Professor Goode also lists UNCITRAL, The Hague Conference on Private International Law, the organs of the Council of Europe and the European Community.
[7] Model Clauses for the use of the UNIDROIT Principles of International Commercial Contracts.
[8] There are those who hold the view that the law merchant can never truly be transnational in today's context - Gunther Teubner, "Global Bukowina: Legal Pluralism in the World Society," Gunther Teubner ed., *Global Law Without a State* (Dartmouth: Aldershot, 1997) at 3-28.
[9] *Ibid* (n 2).

spontaneous law created in, by, and for commerce, independent from the state.'[10] This illustrates the fact that the law merchant was (and ought to be) both substantive and procedural in nature.[11] It is autonomous[12] and self-perpetuating.[13] It was made for merchants by merchants. It was truly transnational in the medieval period and wholly outside the state's influence.[14] According to Lord Mustill, the entire gamut of the law merchant can be distilled into 20 general rules[15] which are explanatory of its general substantive ambit but must, it is submitted, be read within the context of it being a generalized statement of the law merchant's main principles/aims. It is unlikely that anybody can hope to codify the true extent of the law merchant at all, it being continuously subject to change and adapting to meet current needs.

3. THE DEVELOPMENT OF THE LAW MERCHANT

The law merchant's metamorphosis over the years is explainable in three different stages. These are the ancient the law merchant in the Middle Ages, the "new law merchant" in the 20th century and then the "new new the law merchant" (a phrase coined by Michaels) which is evidenced by foremostly the UNIDROIT Principles and which are applied by institutionalized international

[10] Ralf Michaels (2007) 'The True Lex Mercatoria: Law Beyond the State' (2007) Indiana Journal of Global Legal Studies Vol. 14: Iss. 2 Article 11, 447.

[11] Sir Michael J. Mustill and Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworth 1989) 57 - Mustill and Boyd confirm the effect of the law merchant on procedure – "many trades have their own way of conducting arbitrations. Courts have been willing to give effect to these practices (such as in *E E and Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd* (1939) 63 Li L Rep 237) and do so by implying a term into the arbitration agreement to that effect. Thus, shipping arbitrations are informal whereas engineering and construction contracts are more formal in nature. Thus, exempli gratia, both shipping and commodity arbitrations are informal but have specific procedures to be adopted.

David St. John Sutton and Judith Gill, Russel on Arbitration, (22nd edn, Sweet and Maxwell 2003) 1-034 - The uncodified effect of trade usages on procedures and practices adopted in commercial arbitrations is so great that Sutton and Gill state that the greatest source of the law merchant are the awards of arbitral tribunals.

[12] This is seen in the dictum of the Lord Chancellor of the Star Chamber when his Lordship stated that a foreign merchant cannot be judged in terms of English Law but must be judged according to the law merchant - *Anon. v. Sheriff of London (The Carrier's Case)*, YB Eas. 13 Edw. 4, fol. 9, pl. 5, in Exchequer Chamber Cases, 2:32.

[13] Peter Mazzacano, "The Lex Mercatoria as Autonomous Law" (2008) CLPE 29 – "The term lex mercatoria or law merchant is used to designate the concept of an a-national body of legal rules and principles, which are developed primarily by the international business community itself based on custom, industry practice, and general principles of law that are applied in commercial arbitrations (Commercial Arbitration, International) in order to govern transactions between private parties, as well as between private parties and States, in transborder trade, commerce, and finance."

[14] There are divergent views today on the transnational nature of the LM.

All Answers ltd, 'Lex Mercatoria in International Commercial Arbitration' (Lawteacher.net, October 2023) <https://www.lawteacher.net/free-law-essays/commercial-law/lex-mercatoria-in-international-commercial-arbitration-commercial-law-essay.php?vref=1> accessed 27 October 2023 - "Two approaches are generally considered when it comes to the principle of Lex Mercatoria. The autonomist concept regards Lex Mercatoria as having autonomous character independent from any national system of law. The positivists, on the other hand, believe that Lex Mercatoria in itself is not comprehensive and even though it is transnational it exists only by virtue of state laws and is therefore ultimately founded on national law."

[15] Lord Michael Mustill, 'The New Lex Mercatoria: the First Twenty-Five Years' (1988) 4 Arbitration International 86, 91.

arbitration.[16] The ancient the law merchant appears to have found its origins in the *ius gentium*[17],[18] (although this theory is not without its criticisms),[19] or ancient Egypt, or the Greek and Phoenician tradespeople.[20] However the origin, it is unarguable that the medieval the law merchant subsisted as a separate source of rights based on reasonableness[21] and faith in a given word.[22] These rights were administered by merchants in courts of their own (devoid of state actors).[23] An equal number of local and foreign merchants acted as jurors in such courts.[24] It must be noted that the chief assets of the law merchant during this period of time were its transnational and uniform flavor,[25] the speed of its adjudication processes bereft of technicalities,[26] its adaptability,[27] lack of involvement of legal personnel,[28] and possibly even its lack of codification.[29] The law merchant was ever ready to recognize new trade practices and give effect to such practices. The emphasis on speed of adjudication is particularly noteworthy and bears repeating especially since certain scholars are of the opinion that the procedural nature of the law merchant was its very nature.[30] Special statutes

[16] *Ibid* (n 10) 448.
[17] This is the body of Roman law that regulated economic relations between Roman citizens and foreigners.
[18] Mariana Pendás, 'Principles of Contract Law: A Compilation of Law Mercatoria?' (Transnational Notes, 22.11.2012) <https://blogs.law.nyu.edu/transnational/2012/11/principles-of-contract-law-a-compilation-of-lex-mercatoria/> accessed on 16.10.2023.
[19] The criticism is that since Ius gentium was part of Roman law rather than independent and extraneous to it, it cannot be the precursor of today's lex mercatoria.
[20] Mariana Pendás submits that this theory is plausible since lex mercatoria is used by merchants in international trade, and commercial exchanges in the antiquity are considered to have been governed by customary commercial rules.
[21] Klaus Peter Berger, 'The Creeping Codification of the Lex Mercatoria' (1999) The Hague, London, Boston 169 - This standard is even to be seen in modern codifications of the law merchant – "In spite of its general and vague character, Art. 1.7 of the UNIDROIT Principles may rightly be characterized as the Magna Charta of international commercial law. The principle of good faith and fair dealing performs a central function in the interpretation of the Principles and in transnational commercial law in general."
[22] *Ibid* - "The ancient lex mercatoria of the middle-ages was thus built on the faith in a given word, thereby allowing the actionability of pacta nuda 'in curia mercatorum."
[23] *Ibid* (n 1) 3
[24] Carta Mercatoria 1303
[25] *Ibid* (n 1) 4 - The very essence of the lex marcatoria is that it is accepted by all, is adopted by all, and hence is applied by all. Therefore, a trader in Venice should have the benefit of the application of the same law and achieve the same effect of such anywhere else in the world.
Other learned jurists reconfirm this as well, such as Judge Story in the 1842 case of Swift v. Tyson 41 U.S. (16 Pet.) 1 (1842). – the law merchant "may be truly declared in the language of Cicero […] to be in great measure, not the law of a single country, but the commercial world."
[26] According to Dr. Charles Gross (*Gross, Select Cases, vol I*, pxxvi) a whole debt recovery, commencing from the institution of the action and the execution of the Judgment were done within a day in a Court in Colchester in 1458, applying the law merchant.
[27] Such as the recognition that bills of exchange and promissory notes were transferable by mere delivery when the common law did not even recognize the assignability of debts.
[28] *Ibid* (n 1) 5
[29] *Ibid* (n 1) 3
[30] J. H. Baker, The Law Merchant and the Common Law Before 1700' (1979) 38 CLJ 295, reproduced in J. H. Baker (ed), The Legal Profession and the Common Law: Historical Essays (1986), ch 1: Rogers, Bills and Notes, ch 1. - Certain scholarly articles have submitted that its rules were not substantive but procedural in nature: offering speedy justice etc. This submission is interesting in that it also notes that there was no such thing as a separate substantive law merchant - John Baker, 'The Law Merchant as a Source of English Law' in William Swadling and Gareth Jones (eds), Essays in Honour of Lord Goff (1999) at p 96.

were enacted for inter alia speedy decision-making and the paramount jurisdiction of mercantile courts to determine matters relating to merchants.[31] The common law courts[32] played a limited role in commercial transactions during this period.[33]

4. THE END OF THE ROAD FOR THE LAW MERCHANT OF THE MIDDLE AGES

By the time of Coke, CJ. (early 17th century), the common law began to displace the law merchant.[34] At first, the common law adopted only certain principles of the law merchant as a form of private international law, with the view to enticing merchants to use the common law courts instead of their own courts.[35] The 19th century saw eminent jurists[36] take up the task of codifying commercial law, including the law merchant.[37] This was the beginning of the stultification of the law merchant's aforenoted attributes.[38] Goode[39] notes that after the promulgation of the Bills of Exchange Act 1882 and the Sale of Goods Act 1893, less interest was shown towards recognizing and giving effect to new developments in trade practices.[40] The usages of merchants were deemed to not be binding on common law courts but were instead treated as ordinary questions of fact, which had to be proved in order to be given effect to.[41] The rise of the state is credited to have led to the decline of the law merchant during this time.[42]

5. THE NEW LAW MERCHANT

[31] Carta Mercatoria 1303, Statute of the Staple 1353.
[32] English Courts for present purposes.
[33] *Ibid* (n 1) 6 - Goode notes that common law courts were, even in the middle ages, building up a body of commercial law and that they even sometimes sought the assistance of merchants when applying the law merchant.
[34] *ibid* (n 13) - "The lex mercatoria governed international commerce for an extremely long period, until the early seventeenth century. At this point, the autonomous mercantile courts began to decline in relative importance and the lex mercatoria began to merge with common law."
[35] However, eminent commercial law jurists such as Lord Mansfield and Holt, CJ. saw to it that by the end of their retirements from professional life, that almost the entire corpus of the law merchant was part of the common law.
[36] such as Sir Mackenzie Chalmers.
[37] Such attempts by Sir Chalmers included the Bills of Exchange Act 1882 and the Sale of Goods Act 1893. Other attempts also included the French Code de Commerce,1807 and the German publication of a Uniform Commercial Code in 1861.
[38] *Ibid* (n 1) 6 - Goode notes that "the assumption of mercantile jurisdiction by the common law courts, resulted in a loss of flexibility and sensitivity to current trade usage that had characterized the old merchant courts."
[39] *Ibid* (n 1) 7.
[40] *Crouch v Credit Foncier of England* (1873) LR8QB 374 - Lord Blackburn held that whilst merchants could establish rights by trade usage, those merchants could not rely on new trade usage to displace such rights. This position was disproved by Cockburn, CJ. in *Goodwin v Robarts* (1875) LR 10 Ex Ch 337. Courts today are still loath to change settled rules (with the intent of giving effect to certainty), although being more receptive to new trade customs than the common law Courts of 1873 in the UK. In *Re Spectrum Plus Ltd* (2005) the House of Lords overruled a decision which was more than 25 years old despite banks claiming to have placed much reliance on it.
[41] Errol P. Mendes, "The U.N. Sales Convention & U.S.-Canada Transactions; Enticing the World's Largest Trading Bloc to Do Business Under a Global Sales Law" (1988) 8 J.L. & Com. 109.
[42] *Ibid* (n 10) 456.

In the 1960s two authors, Schmitthoff[43] and Goldman,[44] came to the fore. Goldman in particular emphasized the law merchant's general applicability and self-governing nature.[45] In fact, even at this point in time, Goldman was of the opinion that, in an international commercial arbitration, the parties could detach themselves from national rules and opt instead to apply the law merchant.[46] This evinces a recognition of the law merchant's transnational nature. The revival of the law merchant during this period is credited to the law merchant's a-political nature (as applied by arbitral bodies whose chief drawback was the unreported nature of its awards).[47] The rediscovering of the law merchant has been credited to the decline of the state and the rise of transnational commerce.[48] The law merchant, however, still remained uncodified.

6. THE CODIFICATION OF CUSTOMS AND USAGES AND THE NEW NEW LAW MERCHANT

Goode notes that it is the nature of unwritten customs and usages to be vague.[49] Such drawbacks are alleviated by codification.[50] Codifications of transnational trade laws, when promulgated, are usually given effect to as a mandatory condition of membership or by incorporation into contracts.[51] International organizations such as UNCITRAL and UNIDROIT actively take part in the harmonization of trade law through codification. These codifications are the new form of the law merchant. The clearest codification of the law merchant is to be seen in the UNIDROIT principles.[52] The drawback, however, is that adherence to the UNIDROIT principles is not mandatory.[53]

[43] See C. J. Cheng (ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law* (Nijhoff, 1988). This collection comprises nearly all English writings of Schmitthoff. It does not contain C.M. Schmitthoff, 'Das neue Recht des Welthandels,' 28 Rabels Zeitschrift, p. 47 and C.M. Schmitthoff, 'International Trade Usages', Institute of International Business Law, and Practice Newsletter (1987).
[44] B. Goldman, 'Frontières du droit et lex mercatoria', 9 Archives de philosophie du droit (1964), p. 177; B. Goldman, 'La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives', 2 Travaux du Comité français de droit international privé ([1979] 1980), p. 221; B. Goldman, 'Lex Mercatoria', 3 Forum Internationale (1983), p. 3; B. Goldman, 'The Applicable Law: General Principles of Law – The Lex Mercatoria', in J.D.M. Lew (ed.), 'The Applicable Law: General Principles of Law – The Lex Mercatoria', in J.D.M. Lew (ed.), *Contemporary Problems in International Arbitration* (Springer, 1986) p. 113; B. Goldman, 'Nouvelles réflexions sur la Lex Mercatoria' in Christian Dominicé, Robert Patry and Claude Reymond (eds.), *Etudes de droit international en l'honneur de Pierre Lalive* (Helbing & Lichtenhahn, 1993) p. 241.
[45] *Ibid* 18.
[46] *Ibid* - As noted by Mariana Pendás.
[47] *Ibid* (n 10) 455.
[48] *Ibid* 455.
[49] *Ibid* (n 1) 14.
[50] Vanessa M. Johnson, 'Codification of the Lex Mercatoria: Friend or Foe' (2015) Law and Business Review of the Americas Law and Business Review of the Americas, Volume 21 Number 2, 161.
[51] *Ibid* (n 1) 14.
[52] *Ibid* 18.
[53] *Ibid* 18 – as cited - There are several sources of this nature to which recourse can be had for evidence of trade practice. According to Lando, these are public international law, uniform law, general principles of law, the rules of international organizations, customs and usages, standard form contracts and the reports of arbitral tribunal awards.

7. THE APPLICATION OF UNCODIFIED TRADE USAGES AS PART OF THE LAW MERCHANT

It must be noted however that even today, the uncodified the law merchant is a distinct source of commercial law.[54] It is precisely the uncodified nature of the law merchant that distinguishes commercial law from other branches of law.[55] These uncodified usages[56] become part of the contract (in English law) by virtue of being recognized as an implied or express term of the contract.[57] In other systems, such is not even a pre-requisite and uncodified usages take effect just because of their normative force.[58] It has the ability to change the approaches of entire legal systems, such as the reception into English Law of a restrictive doctrine of sovereign immunity.[59] This normative ability of the uncodified the law merchant has led to it being recognized as a transnational commercial law in its own right.[60] This must also be recognized as a form of the new new law merchant, although it is difficult to find.

8. THE REAL ISSUE WITH NEW NEW LAW MERCHANT

Michaels notes that institutionalizing the new new law merchant is one of its chief attractions.[61] The judges of the new new law merchant must be professionals, their awards must be reported, and its proceedings must be apolitical.[62] It is submitted that the difference between the medieval "pure" law merchant and the current version of it[63] is that the current version does not have the same reach or acceptance. As such, it lacks teeth. It also lacks a mechanism for recognizing new developments. It is submitted that in order for the new new law merchant to have the same reach as the law merchant of old,[64] the awards of international commercial arbitrations must be reported, and there must be a process by which any new developments in international trade practice appearing from such awards can be included in regular restatements of the UNIDRIOT principles, and such arbitral awards must be capable of being enforceable transnationally.

---

[54] *Ibid* (n 1) 13 - Goode lists such as uncodified customs and usages.
[55] Ibid.
[56] As distinguished from customs of a particular locality.
[57] Such as in the case of *Peter Darlington Partners Ltd v Gosho Ltd* (1964) 1 Lloyd Rep 149 where usage was capable of displacing the perfect tender rule.
[58] *Ibid* (n 1) 14.
[59] *Ibid* 20 - Goode notes that by the time the House of Lords recognized a restrictive doctrine of sovereign immunity (acta jure imperii), such had already been adopted by almost all other influential trading nations, citing Lord Wilberforce at 261 Playa Larga v I Congreso del Partido (1983) 1 AC 244.
[60] *Ibid* (n 1) 20.
[61] *Ibid* (n 10) 457.
[62] Ibid.
[63] For the purposes of this study, the form it has taken in the UNIDROIT principles.
[64] Although whether such is actually required today is a separate issue altogether seeing as though modern trade works fine without the need for the advantages of the 'pure' law merchant.

A study of the different stages of the law merchant will show that the law merchant has never actually recovered from its loss of prominence in the medieval period. One need only point to the specialized courts of the medieval period which applied the law merchant, and which were able to provide relief for creditors within a day[65] to note the gulf with the law merchant and the new new law merchant. Other differences are also noticeable.[66] For Michaels, these differences are due to the fact that the old law merchant was a status-based law for merchants,[67] whereas the new new law merchant is a law for commerce.[68] It is also due to the fact that in the present day, the law merchant can never truly be a supra state law but must always be dependent on the state for its application. All the new new law merchant can hope to be is 'non-political.'[69]

9. APPROACHES OF THE CIVIL AND COMMON LAW DISTRICTS

Civil law jurisdictions are apparently more liberal in their treatment of the law merchant relative to Common law jurisdictions today.[70] The French 1981 New Code of Civil Procedure[71] allows room for the law merchant even where 'the parties have not agreed on a decision based upon these sources'.[72] In the *Compania Valenciana* case[73] the French Supreme Court showed a very real inclination towards allowing the application of the law merchant. This is not the only case it has done so.[74]

---

[65] *Ibid* (n 1) footnote 6.

[66] Where are the specific institutions which serve the law merchant? Where are the specific courts? Where is the speed of arriving at decisions of those institutions? What is the law that is used by those institutions? Is lex mercatoria the only law used? It appears to be the case that even where codified lex mercatoria is used, they are used by international arbitrations as one of many bodies of law to which they look to for guidance. Even if an award is given based on the law merchant, how is a merchant to enforce an award in a separate country? He will still have to depend on the national courts to enforce such awards. Different issues crop up here in that countries must have reciprocal recognition of awards before a merchant can ever dream of enforcing an award in such other country. Moreover, what is to say that arbitration bodies acting as quasi law merchant courts are preferred to local courts? Why should such arbitral bodies be preferred to local courts?

[67] "European merchants essentially rejected the political and legal authority of individuals or institutions that were not a part of this class. In essence, these merchants believed that only members from their own class had the authority to make and enforce the rules that governed their lives. The principle of legal autonomy eventually evolved into a body of rules. At the core of the lex mercatoria is a set of autonomous commercial customs, which materialize in the form of trade usages and commercial practices, including arbitral procedures and institutions." - Peter Mazzacano, THE LEX MERCATORIA AS AUTONOMOUS LAW, CLPE 29/2008, 4.

[68] *Ibid* (n 10) 466.

[69] *Ibid* 467.

[70] Leo D'Arcy, Carole Murray and Barbara Cleave, Schmitthoff's Export Trade: The Law and Practice of International Trade (10th ed, 2000) 132.

[71] Article 1496.

[72] Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' (1985) 34 International and Comparative Law Quarterly 747, 757.

[73] *Compania Valenciana de Cementos SA v Primary Coal Inc* [1991] Mealey's International Arbitration Report7 (Judgement No. 1534 PRF, 22 October 1991, Courde Cassation-France).

[74] *Fougerolles (France) v Banque du Proche Orient (Lebanon)* [1982] 109 Journal du Droit International (Clunet) 931 (Cour de Cassation - France) and *Norsolor SA v Palbalk Ticaret Ltd Sirketi* (1985) XXIV ILM 360 (Cour de Cassation - France).

This is in stark contrast to the common law systems where the courts are often reticent to apply the law merchant.[75] In fact, initially, English Courts have held that their courts will not recognize awards not based on formal law.[76] The *Eagle Star Insurance case*[77] and then the *Channel Tunnel case*[78] provided a shift of focus for English law. The Arbitration Act 1996 now provides the necessary legislative background for recognizing awards based on the law merchant.[79] In the US, the Courts are more inclined to respect party autonomy and provide enforcement to any award based on the parties' choice of law, including the law merchant.[80] As observed by Stoecker, 'The existence ... of the law merchant will largely depend on its acceptance and application in national courts'[81] and as such it is good to see the recognition of such awards by those courts, at least on the basis that the law merchant is a form of private international law. This is because without states awards based on the law merchant cannot be enforced.[82]

10. ARBITRATION AS A MEANS OF APPLYING AND ENFORCING THE LAW MERCHANT

It is unlikely that state courts would want to apply the law merchant due to it ceding part of state sovereignty.[83] Arbitrations therefore are the perfect forum for applying the law merchant.[84] It is

[75] *Ibid* (n 2) - "It is very rare that common law courts even mention the Lex Mercatoria. Only two pertinent cases have been identified, with both references made in obiter: Lord Mustill mentioned the doctrine to clarify the distinction between matters of procedure and substantive law in the context of the stateless award, and very recently in the High Court of Australia Kirby J discussed the Law Merchant in the context of an internet defamation case."

[76] Michael T Medwig, 'The New Law Merchant: Legal Rhetoric and Commercial Reality' (1993) 24 Law and Policy in International Business 589, 605.

[77] *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357.

[78] *Channel Tunnel Group Ltd v Balfour Beatty Constructions Ltd* [1993] AC 334.

[79] providing that 'if the parties so agree [the arbitral tribunal shall decide the dispute] in accordance with such other considerations as are agreed by them or determined by the tribunal'. - Sub-Article 46(1)(b).

[80] *Scherck v Alberto-Culver Co* [1974] USSC 173; 417 US 506 (1974) where at 515 Mr Justice Stewart held 'a contractual provision specifying in advance the forum for litigating disputes and the law to be applied is an almost indispensable precondition to achieving the orderliness and predictability essential to any international business transaction. Such a provision obviates the danger that contract dispute might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.'

[81] Cristoph Stoecker, 'The Lex Mercatoria: To what Extent does it Exist?' (1990) 7 Journal International Arbitration 101, 105.

[82] "The Lex Mercatoria: an open door to legal insecurity?" (Lawright) <https://www.law-right.com/the-lex-mercatoria-an-open-door-to-legal-insecurity/#_ftnref1> accessed on 27.10.2023 "Indeed, it is clear that there is dependence of the lex mercatoria to the domestic laws as far as the State only has the ability to recognize and to enforce the arbitral awards. Thus, even if the parties have expressly opted for the lex mercatoria to regulate their contract, its application will not be effective without the intervention of the State since it holds the monopoly on violence. As a matter of fact, arbitrators will be reluctant to apply the lex mercatoria when the rules embodied in the instrument threaten the fundamental interests of a State."

[83] *Ibid* 81.

[84] "Advocates within the business community believe that arbitration is preferable over litigation because arbitration is thought to be informal, faster, less costly, equitable, a way to avoid unfavourable publicity, relatively conciliatory, absorbs less management time, and is a way to get those dreaded lawyers ... out of the picture. Most importantly, arbitration is seen as providing the best chance to save the underlying business relationship." - Meason & Smith, 'Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench' (1991) 12 Northwestern Journal of International Law and Business 24, 27/8.

faster than litigation, allows for forum selection, can be enforced through various conventions, can avoid problems of state sovereignty, and allows for sanctions arising from peer pressure.[85] The parties can choose the law merchant as the applicable law by basing their agreement on it or as a means of gap-filling.[86]

Where the arbitration is conducted in accordance with a model law not incorporated into local law, then it arguably also becomes stateless and this raises issues as to enforcement.[87] Although, ccurrent arbitration practices have a tendency to apply the law merchant even in the lack of a party agreement,[88] these awards may not be enforced by states.[89] There are also problems with arbitral awards in that they are not reported and that there is no system of binding precedent for arbitral awards,[90] (although being capable of being used a system of persuasive precedent[91]) hence, there is no means of learning from past practices and building up a repository of experience.

11. THE PROPOSALS FOR REFORM

These issues are addressable. The new new law merchant must have state sponsorship. This is because, unlike the days of old, the law merchant is not driven by a particular class of society without international boundaries for their own benefit. International trade, and therefore international trade law, exists within the context of sovereign states pushing for international trade to prop up their economies. The new new law merchant therefore requires state sponsorship to survive.

However, too much of state input, and the new new law merchant may dwindle away, such as after the ousting of the law merchant by the common law. Too little state input and the law merchant will be bereft of teeth. A threefold proposal is submitted: that policy-wise, merchants from all over the world ought to demand that their trade counterparts adopt, e.g., the UNIDROIT principles in all their contracts; procedurally, states must legislate to provide ability for merchants to enforce their arbitral awards, no matter which country they are obtained in; practically, the UNIDROIT

[85] *Ibid* (n 2).
[86] Zlatan Meškić and Almir Gagula, 'Lex Mercatoria and Its Limits in International Arbitration' (2020) Nederlands Internationaal Privaatrecht 7
[87] *Ibid* (n 2)
[88] C. Manjiao, 'The Iceberg Beneath The Water: The Hidden Discrimination Against The Lex Mercatoria In Chinese Arbitration' (2011) Journal of Private International Law Vol. 7 Issue 2, p. 357.
[89]Ole Lando, "The Lex Mercatoria in International Commercial Arbitration." The International and Comparative Law Quarterly, vol. 34, no. 4, 1985, pp. 747–68. 762. JSTOR, http://www.jstor.org/stable/759197. Accessed 27 Oct. 2023.
[90] *Ibid* (n 2).
[91] Iwan Davies, 'The New Lex Mercatoria: International Interests in Mobile Equipment' (2003) 52 International and Comparative Law Quarterly 151, 166 in quoting McGairl, 'The Proposed UNIDROIT Convention: International Law for Asset Finance (Aircraft)' (1999) 2 Uniform Law Review 439, 440

principles themselves must be regularly updated. This can be done by regularly reporting of awards in international commercial arbitrations and incorporating them into new versions of the UNIDROIT principles.

The procedural aspect is of the greatest importance. Because, if the new new law merchant is effective, then it is likely to be used. An international convention in the vein of the New York Convention[92] is proposed. It would apply to awards made across the world. A party, unless expressly negativing its effect by contract, must be said to have included such terms in its contracts. States must enforce such awards unless there is a good ground for refusal.[93] The mandatory codification of the law merchant, which is to be adopted by the parties to the contract will help with this,[94] although by so codifying the law merchant, we may in fact lose its greatest strength: its flexibility. In doing so we may also end up with the codification being the law merchant, and not the codification being a representation of what the law merchant is.[95] This is why regular restatements of the codified versions will be required.

12. CONCLUSION

There is no doubt that the law merchant continues to inform trade law. However, to be truly effective, it must be uniformly applied by a majority of international tradespeople. The best way to bring about this state of affairs is to ensure that there is a means of efficient enforcement.

[92] New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitration Awards.
[93] Article V of the Convention.
[94] Adaora Okwor, 'Lex Mercatoria as Transnational Commercial Law: is the Lex Mercatoria Preferentially for the 'Mercatocracy'?' (2011) Theory And Practice of Harmonisation 393, 394.
[95] *Ibid* (n 50) 163

THE RISE OF VIRTUAL ARBITRATION HEARINGS IN THE WAKE OF TECHNOLOGICAL ADVANCEMENT AND INTERNATIONALIZATION: CHALLENGES AND DRAWBACKS

Shenella Fonseka[1]

1. INTRODUCTION

The fact that technological advancement and internationalization have boosted e-commerce at a global level is no longer a matter of surprise. With the rise of e-commerce and internationalization came a boom in cross-border investments, international trade, and international business relationships. Inevitably, it has given rise to disputes and differences between parties in different countries. This necessitated a move towards online dispute resolution methods. Additionally, the COVID-19 pandemic has affected all industries around the world. The legal industry and international arbitration are no exception. Although in most legal systems, technology was integral to dispute resolution well before COVID-19, the pandemic accelerated the use and implementation of technology solutions on an unprecedented scale because it became the only way for parties to resolve disputes.

Technological developments in the 21st century have changed the way in which people communicate and interact with each other.[2] This has inevitably impacted the ways in which disputes are managed and resolved.[3] Unlike domestic legal systems which are entrenched in tradition, arbitration has the flexibility to use technology advantageously.[4]

This paper aims to identify the rise in online alternate dispute resolution methods, particularly arbitrations, the advantages of the same, and also the challenges surrounding online arbitrations. The paper particularly discusses the challenges in connection with confidentiality of arbitrations and cyber laws, and due process concerns in virtual hearings of arbitrations, in detail.

[1] LLB (Hons.) (London), BA (Spec.) (Colombo), *Attorney-at-Law.*
[2] Blake S., Heather JB, & Stuart S., A Practical Approach to Alternative Dispute Resolution. 2nd Edn Oxford University Press, 2016, pp. 67.
[3] *Ibid.*
[4] Namrata Mayur Shah, "Think Arbi: Has Technology Worsened the Conduct of Arbitrations?," Lexology, December 23, 2021, https://www.lexology.com/library/detail.aspx?g=6b27e7da-d318-4017-8e42-2faebe402e05.

2. ONLINE ARBITRATIONS

In virtual arbitrations, parties communicate with the arbitrator and submit their documents, evidence, and documents electronically via emails and teleconferences.[5] This form of arbitration can be more expeditious and cost effective since it eliminates the need of having to travel to a physical location for the arbitral hearings and filing of voluminous documents.[6]

Virtual trials were embraced in various jurisdictions during the pandemic. The English Commercial Court conducted its first successful virtual trial in the case of *NBK and RoK v Bank of New York Mellon and the Stati Parties*.[7] The United States Supreme Court heard oral arguments via telephone even in 2020 during the peak of COVID-19.[8] In fact, many arbitral institutions have also adopted their own rules and guidelines in connection with the conducting of virtual arbitral hearings.[9] The Sri Lanka National Arbitration Centre,[10] has conducted several remote hearings in arbitration proceedings, both domestic and international, since the pandemic. This Centre has adopted a safe approach by recording the consent of parties to be conducting proceedings remotely.[11]

The advantages of remote arbitration hearings are numerous. While lengthy testimony does not translate as well in an online format, this promotes more time-efficient, focused hearings, which will result in cost reductions for parties.[12] The novelty of an online format also allows for a more flexible dispute resolution process where parties can tailor the proceedings according to their requirements. Further, international arbitration involves travel and presents scheduling challenges which can delay the proceedings. A remote forum allows proceedings to be scheduled in a timelier manner and avoids the costs associated with travel and accommodation. In addition to the cost and time efficiencies that can be realised through a remote forum, some participants may feel that their

[5] Kallel. S., Online Arbitration, Journal of International Arbitration, 25 (3): 345-353, 2008.
[6] *Ibid.*
[7] Linklaters, 'Drafting For Virtual Hearings In Arbitration: Helping To Keep Matters Moving In Light Of COVID-19' <https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/april/drafting-for-virtual- hearings> accessed 10 November 2022.
[8] Supreme Court of the United States, COVID-19 Announcements, https://www.supremecourt.gov/announcements/COVID-19.aspx accessed 09 November 2022.
[9] For example, the *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic* (adopted on 19 April 2020), *HKIAC Guidelines for Virtual Hearings* (issued on 14 May 2020), and *Seoul Protocol on Video Conference in International Arbitration* (released on 18 March 2020) were drafted to assist tribunals.
[10] The oldest arbitration centre in Sri Lanka.
[11] Sri Lanka National Arbitration Centre, "SLNAC Safety Guidelines for Its Staff and Patrons for Covid-19", available at <https://www.slnarbcentre.com/pdf/GUIDELINES.pdf> Accessed 12 November 2022.
[12] Timothy St. John Ellam, Nicole Fitz-Simon and Britt Morrow, 'Remote arbitration hearings: advantages, challenges and participant considerations' (Financier Worldwide Magazine, December 2020) <https://www.financierworldwide.com/remote-arbitration-hearings-advantages-challenges-and-participant-considerations#.Y3CO8C8RpQI> accessed 09 November 2022.

experience is enhanced as they are able to participate on equal terms with the tribunal and the counsel team, rather than only engaging from the back row of a hearing room.[13]

However, there are multiple issues in connection with online arbitrations, such as the infringement of confidentiality and concerns of due process being followed, that are rather alarming.

3. CONCERNS OF DUE PROCESS

Due process issues raised by the use of technology in arbitration essentially relate to the right to be heard, the right to adversary proceedings, and the right to be treated equally, which means that the parties must be granted a reasonable opportunity to present their case, i.e. to allege facts, present legal arguments, and to produce evidence on relevant facts.[14] Due process is an essential aspect of international arbitration. Due process rules act as a shield for parties against unfairness. They ensure that the exercise of a tribunal's jurisdiction is constrained, such that all parties are given a reasonable opportunity to present their cases.[15]

There has been a notable increase in the number of parties who have sought to invoke due process as a sword.[16] It has become increasingly commonplace for parties to abuse their due process rights or seek to abuse the concept of due process by engaging in dilatory or guerilla tactics, such as by advancing numerous or late procedural applications or raising due process objections, while threatening the tribunal with annulment of their award in the event of non-compliance.[17] The abuse of due process has led to the phenomena of due process paranoia, defined in the 2015 Queen Mary International Arbitration Survey,[18] as "*a perceived reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully*."

[13] *Ibid.*
[14] *See for instance* Poudret/Besson, *Droit comparé de l´arbitrage internationa*, Brussels 2002, p. 499; C. Liebscher , *The Healthy Award*, The Hague 2003, pp. 243–273,344 51.
[15] J Feng, B Teo, 'Judicial Support against Due Process Paranoia in International Arbitration' http://arbitrationblog.kluwerarbitration.com/2020/06/16/judicial-support-against-due-process-paranoia-in-international-arbitration/ accessed 05 November 2022.
[16] L Reed, *Ab(use) of due process: sword vs shield*, Arbitration International, Volume 33, Issue 3, September 2017, Pages 361–377.
[17] *Ibid.* See also, K P Berger, J O Jensen, *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, Arbitration International, Volume 32, Issue 3, September 2016, Pages 415–435. See also, Singapore Court of Appeal Decision in *China Machine New Energy Corp v Jaguar Energy Guatemala* [2020] SGCA.
[18] Friedland, Paul, and Loukas Mistelis. "2015 Queen Mary International Arbitration Survey: Improvements and innovations in international arbitration." *White case* (2015). Available at: https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

Reed has described it as having three observable elements: (i) a tribunal making case management decisions that are overly deferential to due process considerations, protecting one party's interests over the other (usually the respondent's); (ii) the tribunal's belief that a cautious stance is necessary to guard against the risk that the award may otherwise be set aside and/or refused enforcement, and; (iii) the erroneous character of the tribunal's inflated perception that this level of caution is warranted.[19]

One view expressed by Berger and Jensen[20] is that due process paranoia "*not only originates from the arbitrators' interest that their awards will not be set aside or denied enforcement – an unwelcome smudge on their track-record – but is sometimes also induced by the applicable rules*," and would "*lead the arbitrator to grant unreasonable procedural requests, thus prolonging the proceedings unnecessarily*." As such, arbitrators face a very real stake in ensuring that their awards are annulment-proof – otherwise, they risk the creation of a record that they have violated a party's due process rights. Pursuant to several institutional rules,[21] draft awards are subjected to either formal or informal scrutiny. Tribunals are under the duty to (or are expected to) make every reasonable effort to ensure the enforceability of the award.[22]

Due process paranoia affects the ability of tribunals to identify and resolve genuine due process issues. This leads to delays and increase the costs of the arbitration,[23] wasted time and costs in setting aside applications and in resisting enforcement of the arbitral award.[24] Lastly, such due process paranoia adversely affects the integrity of arbitral proceedings and the system of international arbitration as a whole: such inefficiency undercuts the efficiency, fairness and enforceability which are the key underpinnings of the arbitral system. These disadvantages apply across the board to all countries; developed, and developing, including Sri Lanka.

The threat posed to arbitration by such due process paranoia has been recently noted, both by the Malaysian High Court in *Allianz General Insurance Company Malaysia Berhad v Virginia Surety*

[19] *ibid, supra note* 16.
[20] K P Berger, J O Jensen, *Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators*, Arbitration International, Volume 32, Issue 3, September 2016, Pages 415–435.
[21] Article 42 of the ICC Rules 2017, Article 32.2 of the LCIA Rules 2014 and Article 41.2 of the SIAC Rules 2016.
[22] *ibid, supra note* 26.
[23] As tribunals labour to accommodate the party's demands etc.
[24] This drains the resources of not only the parties and the tribunal, but national courts as well.

Company Labuan Branch,[25] as well as by the Singapore Court of Appeal in *China Machine New Energy Corp v Jaguar Energy Guatemala* [2020] SGCA.[26]

In Sri Lanka, extensive research has not been conducted on the possible due process paranoia among arbitrators. However, the judiciary has upheld party autonomy in connection with the process of arbitrations. In the case of *Merchant Bank of Sri Lanka Ltd. v. D.V.D.A. Tillekeratne*,[27] the Supreme Court held that the procedure followed had been in observance of the arbitration clause and went on to hold that "party autonomy is a fundamental principle of Arbitration Law, and this is given effect to by the legislation in Section 7(1) of the Arbitration Act". This case has been cited with approval in the more recent case of *Wakachiku Construction Co. Ltd., v. Road Development Authority.*[28] Furthermore, in *State Timber Corporation v. Moiz Goh Pte (Ltd)*[29] and *Kristley (Pvt) Limited v. The State Timber Corporation*[30] where the Supreme Court observed that "Section 17 of the Act gives the parties the freedom to agree on the procedure to be followed by the arbitral tribunal. Section 19 makes any decision made during arbitral proceedings binding".[31]

Further, Courts have also held that if a party were to seek to set aside an award on the grounds of a violation of public policy on the basis that he was not afforded a physical hearing, alleging that this amounts to a breach of public policy of the country, such party would have to adduce sufficient material in the application to set aside the award, since a court cannot *ex mero motu* set aside an award on the grounds of a violation of public policy under Section 32(1)(b) of the Act, in the absence of such material.[32]

If a party seeks to resist enforcement on the basis that he was not afforded an opportunity to present his case and due process was not respected, a court could, if there is sufficient ground, interpret

[25] Originating Summons No. WA-24NCC(ARB)-13-03/2018. In *Allianz*, the Malaysian High Court dismissed a due process challenge against an arbitral award, and also emphasized that "*[n]atural justice does not demand that a party is entitled to receive responses to all submissions and arguments presented for only the right to be heard is fundamental*."

[26] In *China Machine,* the Singapore Court of Appeal dismissed China Machine New Energy Corp's ("**CMNC**") appeal against an earlier High Court decision declining to set aside an arbitral award on the basis of breach of natural justice. CMNC alleged that the tribunal's case management decisions (a) allowing the respondent's rolling production of documents, (b) not granting CMNC a further extension of time to file a responsive expert report or admitting the Report, (c) not admitting CMNC's supplementary expert report, and (d) allowing the respondent's disclosure of documents in a disorganized manner were in breach of natural justice.

[27] (2001) B.A.L.R. 71. A case where the non-appointment of an arbitrator by one party was challenged on the basis that the arbitration could not have proceeded with a single arbitrator.

[28] [2011] (Supreme Court) Case No. Misc. 01/2011 decided on 6 February 2013.

[29] [2002] BALR 44.

[30] [2002] (1) SLR 225.

[31] Line 420.

[32] *Southern Group Civil Construction (Pvt) Ltd. v. Ocean Lanka (Pvt) Ltd*. [2002] 1 SLR p. 190.

such circumstances to come within the ambit of Section 34(1)(ii) and Section 34(1)(iv) of the Act.[33] The Supreme Court has clearly expressed the view that the legislative intent behind the Act is clearly that a degree of finality is attached to the decision of the arbitral tribunal, which is the judge of both questions of fact and law referred to it, and that therefore, in exercising jurisdiction under the Act, the Court cannot review the conclusions of the arbitral tribunal by re-scrutinizing and re-applying the evidence considered by the arbitral tribunal.[34]

Therefore, it appears that the Courts have sufficiently dealt with a possible challenge of arbitral awards citing concerns in relation to due process. However, it is a significant drawback affecting online arbitrations and their efficacy and efficiency, that parties may continue to challenge awards based on concerns of due process, and that arbitrators tend to be more lenient as a result of due process paranoia.

4. CONFIDENTIALITY AND CYBER LAWS

Privacy and confidentiality are hallmark attributes of arbitration. The arbitration process is carried out through private telephone calls, video conferences and/or in-person meetings among counsel, arbitrator, and party representatives. However, the concerns differ in the situation of an online arbitration. In this regard, cybersecurity concerns arise in the context of *inter alia* (a) electronic data breaches, (b) cyberattacks that could affect the security and privacy of customer and case information, (c) secure internet connections, (d) invitations and access, (e) exchange and use of exhibits, and (f) the recording of hearings. For example, incidents such as 'Zoombombing', where uninvited attendees were able to access and disrupt Zoom meetings during April 2020,[35] highlight privacy issues that may arise if the parties do not take steps to ensure the security of their online connection.

[33] Dilumi De Alwis, "Does a Right to a Physical Hearing Exist in International Arbitration?", (ICCA Reports, Sri Lanka, 2020). Available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Sri-Lanka-Right-to-a-Physical-Hearing-Report.pdf.

[34] *Light Weight Body Armour Limited v. Sri Lanka Army* [2007] 1 SLR 411. The Supreme Court in this case, has held that the concept must be construed narrowly.

[35] Born, Gary. 'Videoconferencing Technology in Arbitration: New Challenges for Connectedness (2020 Survey' < http://arbitrationblog.kluwerarbitration.com/2021/07/08/videoconferencing-technology-in-arbitration-new-challenges-for-connectedness-2020-survey/> accessed on 04 November 2022.

A duty of confidentiality can be based on national law, on institutional arbitration rules, or on agreement between the parties, be it express or implied in an arbitration agreement.[36] Currently, very few national legislations provide expressly for a general duty of confidentiality in arbitration.[37]

Arbitration is a creature of contract, and confidentiality, as an aspect of arbitration, may be achieved by the parties' agreement. A confidentiality agreement may be expressly provided for in the underlying arbitration clause, or it may be imbedded in the adoption of the arbitration rules of a designated arbitration service provider that requires specified confidentiality levels.[38] Many commentators agree that some general duty of confidentiality is implied in an arbitration agreement, although the precise scope of the same is unclear.[39] In contract, others consider there to be no such duty even if the arbitration agreement contains a clause requiring the proceedings to be conducted in private.[40] Still others hold an intermediary position, arguing that since the parties have the option of agreeing that their arbitration process be confidential, a legal requirement of confidentiality not only exists if they have so chosen.[41] Decisions of National Courts too differ in this instant.[42]

Pursuant to the outbreak of COVID-19, a number of organisations have issued helpful guidance on the measures that one can take to protect data within arbitral proceedings. Most recently, draft

---

[36] Kaufmann-Kohler, Gabrielle, and Thomas Schultz. "The use of information technology in arbitration." *Jusletter* 5. Dezember (2005), 39.

[37] Although some aspects of confidentiality are covered by national provisions. Exceptions are found in Art. 14 Arbitration Act 1996 of New Zealand where the Arbitration Act provides for a duty of confidentiality in domestic and international arbitration, and in Spain, where Art. 24 Spanish Arbitration Act 2003 of Spain compels the parties, the arbitrators and the arbitral institutions to maintain the confidentiality of any information provided in the course of arbitral proceedings.

[38] Singer, David C. "Arbitration Privacy and Confidentiality In the Age of (Coronavirus) Technology." *Alternatives to the High Cost of Litigation* 38.7 (2020): 107.

[39] See further Paulsson/Rawding, *´The Trouble with Confidentiality´*, Arbitration International, Vol. 11 No. 3 (1995), p. 303 (concluding that specific provisions should be drafted on the confidentiality of information generated during the proceedings and the award, and on the duties of participants in the arbitration); Y. Fortier, *´The Occasionally Unwarranted Assumption of Confidentiality´*, Arbitration International, Vol 15 No.2 (1999) p. 132 (*´The issues of privacy and its corollary, confidentiality . . . have, in fact been the subject of much heated debate recently, in various jurisdictions and institutions. The conclusions reached in those instances demonstrate what might be called a definite lack of consensus´*) and p. 138 (*´What is evident today is that, with respect to confidentiality in international commercial arbitrations, nothing should be taken for granted´*), and Redfern/Hunter, *International Commercial Arbitration*, Edn 4, pp. 27–30 (discussing the importance of confidentiality and the confidentiality of hearings, documents produced in arbitration and awards), C. Müller, *La confidentialité en arbitrage commercial international; un trompe-l´oeil?*, in 23 ASA Bulletin 2/2005, June, p. 217.

[40] F. Fracassi, *Confidentiality and NAFTA Chapter 11 Arbitrations*, 2 Chicago Journal of International Law, 2001, p. 201.

[41] E. C. Chiasson, *Confidentiality and Arbitration*, 58 Advocate 417 (2000).

[42] The French and English Courts have found that there is an implied duty of confidentiality in arbitration giving rise to damages in case of violation. For the Paris Court of Appeal, such a duty is, "in the very nature of arbitral proceedings".[42] Although the same Court has been less categorical thereafter.102 For the English Court of Appeal, in the case of *Dolling-Baker v. Merrett*, the "nature of arbitration" creates an implied duty of confidentiality, subject to some exceptions.[42] *Ali Shipping* reaffirmed the *Dolling-Baker* finding, holding that "confidentiality attaches to arbitration agreements as a matter of law".[42]

guidance has been published by a task force jointly established between The International Council for Commercial Arbitration ("ICCA") and the International Bar Association ("IBA") (the "Task Force"). The Task Force was created in 2018 to "produce a practical guide that identified ways in which data protection may need to be taken into account during the course of an arbitration".[43]

The introduction of the European Union's General Data Protection Regulation ("GDPR") in 2018 set out some, potentially, steep financial penalties for those who breach its provisions on data protection. This has resulted in various industry bodies setting out guidance and protocols in relation to the handling of data.[44]

In developing countries like Sri Lanka too issues in connection with confidentiality and cyber security prevail and are of utmost importance. Data leaks and breaches of privacy in both local and international arbitrations. Provisions relevant to data protection in Sri Lanka is spread over several pieces of legislation such as the Computer Crime Act No. 24 of 2007, Telecommunications Act No. 25 of 1991. Following the GDPR, Sri Lanka enacted the Personal Data Protection Act No.9 of 2022, which is said to further develop electronic commerce and encourage international business and cross-border investments.

The preamble of the said Act identifies that it has become necessary to facilitate the growth and innovation in the digital economy in Sri Lanka whilst ensuring the protection of personal data rights of the data subjects, and that it has become necessary to improve interoperability among personal data protection frameworks as well as to strengthen cross-border co-operation among personal data protection enforcement authorities. In the said circumstances, it has become necessary for the government of Sri Lanka to provide for a legal framework to provide for mechanisms for the protection of personal data of data subjects ensuring consumer trust and safeguarding privacy whilst respecting domestic written laws and applicable international legal instruments.

Therefore, it is clear that the intention and hope of Sri Lankan authorities that with the adoption of this new piece of legislature, most issues in connection with confidentiality and cybersecurity would be resolved. Whether this is true is for time to tell, as disputes in connection with the same have not matured enough to be decided by the superior courts of Sri Lanka.

[43] International Arbitration, *GDPR and cybersecurity obligations in the rapid 'virtualisation' of arbitration hearings*, (Stewarts, July 2020) https://www.stewartslaw.com/news/gdpr-and-cybersecurity-obligations-of-virtual-arbitration-hearings/ accessed on 03 November 2022.
[44] *Ibid.*

5. CONCLUSION

The above analysis makes clear that the effects of technological advancement and internationalisation on the global economic structure have a large impact on tcross-border investment, and international trade. The digital transformation of dispute resolution, namely arbitration, have generated numerous new business opportunities while also posing risks which were not adequately addressed by existing laws, especially in Sri Lanka.

Concerns of breach of due process have challenged the efficacy and efficiency of arbitrations, resulted in additional costs and time, constraining the exercise of the tribunal's jurisdiction, etc. In this regard, whilst existing laws do not address the said concern, the judiciary of Sri Lanka have played an active role in attempting to uphold party autonomy and also to offer a degree of finality is attached to the decision of the arbitral tribunal.

As the paper makes clear, despite the many challenges faced globally in relation to confidentiality and cybersecurity, Sri Lanka only adopted the Personal Data Protection Act No.9 of 2022 in the year 2022 filling a massive lacuna in cybersecurity and data protection Whilst there is a lack of data in deciding whether the new legislature is adequate to protect parties from possible challenges of online arbitration.

ADMINSTRATIVE LAW

REIMAGINING THE SRI LANKAN OMBUDSMAN: A COMPARISON WITH THE UNITED KINGDOM

Treshan Fernando

ABSTRACT

This article explores the Parliamentary Commissioner for Administration, also known as the Ombudsman. In Sri Lanka, the discourse surrounding the Ombudsman has waned. In response, this article hopes to refresh the reasons why the Ombudsman remains an essential component of Sri Lankan administrative law. Having highlighted why the Office is of value, this article compares the Sri Lankan Ombudsman to the UK Ombudsman with the hope of identifying areas for improvement. The comparisons focus on accessibility, scope of application, compliance and the relationship with the judiciary. In each of these areas, the article spotlights the strengths and weaknesses of the Sri Lankan Ombudsman along with proposals for reform. Finally, given the lack of contemporary research, this article also hopes to circle avenues for future scholarly research which would benefit the process of reforming the Sri Lankan Ombudsman.

The Parliamentary Commissioner for Administration is seen, even as far as legal topics are concerned, as a drab and dismal subject. Often relegated to the final few chapters of administrative law textbooks, this Office receives scant recognition for its work. The consequence of this relative obscurity is that in the past two decades Sri Lanka's Parliamentary Commissioner for Administration, also known as the Office of the Ombudsman, has rarely been the subject of legal discourse. It has led to the depreciation of the Office and fewer constructive proposals for reform.

This article hopes to resolve these two problems. Firstly, it intends to articulate the usefulness of the Ombudsman in a modern constitutional democracy, with reference to its intended role and the scope of its powers. Secondly, this article aims to compare Sri Lanka's and the United Kingdom's (UK) Offices and to subsequently identify areas for the former's improvement. Given the unfortunate lack of academic discourse on the topic of the Ombudsman, a tertiary objective of this article is to highlight potential areas for future academic research which is beyond the scope of this article.

1. THE ROLE OF THE OMBUDSMAN

Given the aforementioned lack of discussion on this subject, at least a rudimentary introduction to the Ombudsman is appropriate. Its origins may be traced back to Sweden in the late 18th and early 19th centuries where the Ombudsman acted as a representative of parliament, tasked with addressing complaints made by the citizenry against the king, i.e. the executive.[1] Today, the Ombudsman maintains its role as an impartial investigator but also serves as "an informal and accessible avenue of redress against infringements of fundamental rights and other injustices."[2]
In Sri Lanka, the Ombudsman is an Office created by the Constitution.[3] The nuances of its Office, however, as in the UK, are determined through statute. The Parliamentary Commissioner for Administration Act 1981 (SL) and the Parliamentary Commissioner for Administration Act 1967 (UK) are the two founding statutes for Sri Lanka's and the UK's Offices of the Ombudsman respectively. Both statutes have been amended subsequently and the Parliamentary Commissioner for Administration (Amendment) Act 1994 (SL) is of particular importance for Sri Lanka.

Finally, although the Ombudsman has powers of investigation that are similar to a court's, which includes the ability to request evidence and summon witnesses,[4] it should not be thought of as a court's mirror image. Timothy Endicott argues that the Ombudsman's process is investigative rather than adjudicative therefore explaining why, in Sri Lanka and the UK at least, the Ombudsman's recommendations lack the legal enforceability of a judicial decision.[5] These characteristics stem from the debate over whether the Ombudsman should only be viewed as an adjunct to parliament or whether it should be seen as an informal alternative to courts in its own right.[6] This debate will feature heavily in various discussions about the Ombudsman's reform.

2. AN OMBUDSMAN'S VALUE

Developing the Office of the Ombudsman will invariably require time, effort and funding. Therefore, prior to discussing potential areas for improvement, it is vital to articulate precisely why the Ombudsman matters. This is especially true given that the Ombudsman is often overlooked and undervalued.[7] Accordingly, Sri Lanka ought to value the Office of the Ombudsman for three reasons: firstly, because the Office deters poor administration, secondly, since it provides

[1] Timothy Endicott, Administrative Law (5th edn, OUP 2021) 503.
[2] Centre for Policy Alternatives, Role of the Ombudsman (1998) 9.
[3] The Constitution of Sri Lanka, Article 156.
[4] Parliamentary Commissioner for Administration Act 1981 (SL), s 16(1).
[5] Endicott (n 1) 506.
[6] Paul Craig, Administrative Law (9th edn, Sweet & Maxwell 2021) 376-78.
[7] Cyrene Siriwardhana, 'A Critical Analysis of the Role of the Ombudsman in Sri Lanka and Some Comparisons with South Africa' in Centre for Policy Alternatives, Role of the Ombudsman (1998) 18-19.

complainants with a cost-effective mechanism for resolving their grievances, and thirdly, because it reduces the burden placed on the Supreme Court.

2.1 Deterring Poor Administration

Prior to even a single complaint being made to it, the Ombudsman has the opportunity to nip poor administration in the bud. Former UK Ombudsman Cecil Clothier posits that an adverse report may damage the reputation of a professional administrator.[8] The presence of an active and efficient Ombudsman means that, at any time, an administrator's behaviour "might be examined impartially and exposed to public criticism and censure."[9] Therefore, to avoid the attention of the Ombudsman, public officials will be incentivised to act according to the principles of good administration.

The purported drawback of this deterrent effect is that public officials may adopt, as Clothier explains, work that is sluggish and overly cautious.[10] However, as long as the Ombudsman is transparent about the type of work expected from public officials, this issue will be avoided. After all, work that is cautious and sensible albeit slow ought to be an example of good administration.[11] On the other hand, overly cautious work, which invariably results in unwanted delays, will highlight rather than hide poor administration, resulting in greater Ombudsman attention. Clothier refers to the National Audit Commission in the UK which has served to greatly improve the careful spending of public funding as a consequence of a similar deterrent effect.[12] It highlights a lack of empirical evidence to support the argument that departments under scrutiny adopt an overly cautious work ethic. Therefore, even the mere presence of an effective Ombudsman encourages better administration.

2.2 Cost-effective Grievance Resolution

Where the deterrent effect is insufficient and an injustice or infringement of a fundamental right has occurred or is likely to occur imminently, the uses of the Ombudsman continue. It is naturally difficult for ordinary citizens to refer matters to a court, especially to the Supreme Court, given the expenses, time and formalities involved.[13] Therefore, where judicial review is unaffordable, the vulnerable risk is left without a remedy. This profoundly undesirable outcome is avoided by the presence of an effective Ombudsman. As the Ombudsman bears the expenses of investigating and

[8] Cecil Clothier, The Value of an Ombudsman (1983) PL 204.
[9] Clothier (n 8) 207.
[10] ibid.
[11] cf Parliamentary and Health Services Ombudsman, Principles of Good Administration (2009).
[12] Clothier (n 8) 207.
[13] GL Peiris, The Importance of the Office of the Ombudsman (2000) 10 Law & Society Trust 2.

reporting on complaints, costs cease to be an obstacle to justice, enabling even the most vulnerable to complain against injustices and infringements of fundamental rights.

Before proceeding, however, two criticisms must be pre-empted. The first is that the Ombudsman's recommendations are not legally binding thereby mitigating their usefulness. While the lack of legal effect is true, other factors like the threat of being sanctioned before parliament pressure public authorities to accept the recommendations, amply making up for the lack of enforceability.[14] As a consequence, in the UK, the Ombudsman's recommendations are "almost always" adopted.[15] Clothier says that in his six years in office, "I was never finally denied the remedy I asked for, although I occasionally had to press a little to get it."[16] Admittedly, however, the criticism is correct to point out that grievance resolution is largely contingent upon the compliance of public authorities – a matter to which this article will return.

The second criticism is that the State is now forced to bear the cost of the investigations even if the complaints are frivolous. However, the Ombudsman is not compelled to investigate every complaint they receive.[17] This facilitates a filtration process where frivolous complaints may be identified and dismissed. While the State invariably must bear the cost of investigating genuine complaints, the response to this concern is that the promotion of good administration requires investment. In return for a well-funded Ombudsman, the State receives a stronger administration with less mistakes and inefficiencies, in addition to a mechanism through which the vulnerable can protect their rights.

2.3 Reducing the Burden on the Supreme Court

The Sri Lankan Constitution establishes that the Supreme Court is the sole legal authority empowered to enforce fundamental rights.[18] This means that the Sri Lankan Supreme Court is both "the first and last resort" for matters concerning fundamental rights.[19] As a result, the Supreme Court is overburdened with fundamental rights petitions, having to deal even with minor issues, such as transfers and appointments.[20] Alternative avenues that allow for fundamental rights issues to be resolved without Supreme Court involvement would undoubtedly relieve some of this strain.

[14] Endicott (n 1) 518.
[15] ibid 517.
[16] Clothier (n 8) 210.
[17] Parliamentary Commissioner for Administration 1981 (SL), s 14.
[18] The Constitution of Sri Lanka, Article 126.
[19] Peiris (n 13) 1.
[20] Rohan Edrisinha, A Critique of the Office of the Ombudsman in Sri Lanka (2000) 10 Law & Society Trust 19.

The Office of the Ombudsman assists in resolving this shortcoming. The Constitution expressly empowers the Ombudsman to investigate and report on alleged infringements of fundamental rights.[21] Since the Ombudsman's recommendations are not legally binding, it does not interfere with the Supreme Court's exclusive jurisdiction to make determinations on fundamental rights. Moreover, where a question of law arises, the Ombudsman must refer the matter to the Supreme Court.[22] Therefore, an efficient Ombudsman would alleviate the burden of the Supreme Court by resolving minor complaints where the applicable law is settled.

3. A COMPARISON WITH THE UK OMBUDSMAN

Given that the Ombudsman is an essential piece of Sri Lanka's Constitutional puzzle, work must be done to determine how to optimise the Office in a Sri Lankan context. Unfortunately, as pointed out in the introduction, Sri Lankan scholarship has proved unwilling in recent years to engage in this discourse. This next section will identify potential reforms by comparing the Ombudsman systems in Sri Lanka and the UK, focusing on their accessibility, scope of application, compliance by public authorities and relationships with their respective courts.

3.1 Accessibility and Awareness

According to statute, any complaint sent to the UK's Ombudsman must proceed through an MP.[23] Although this process, known as the MP filter, is the cause of much discussion in the UK, Sri Lanka removed the MP filter in 1994.[24] The presence of such a filter is attributed to the notion that the Ombudsman is viewed as an adjunct to parliament rather than a citizen protector.[25] Consequently, if the Ombudsman's purpose is to serve parliament rather than the citizens, it flows that complaints ought to be received from parliament and not the citizens. Doctrinal inconsistencies aside, however, the more tangible controversy centres around whether the MP filter acts as an obstacle to the Ombudsman's accessibility.

Endicott has argued that the MP filter is merely a "technicality," serving only a symbolic purpose since MPs are easily emailed and happy to complain.[26] G.L. Peiris has similarly written that opposition MPs tend to be more than willing to raise a complaint against the government.[27] However, there appears to be some strength to the argument that the MP filter deters complainants.

[21] The Constitution of Sri Lanka, Article 156.
[22] Parliamentary Commissioner for Administration 1981 (SL), s 12(1).
[23] Parliamentary Commissioner for Administration 1967 (UK), s 5(1)(a).
[24] Parliamentary Commissioner for Administration (Amendment) Act 1994 (SL), s 2(1).
[25] Craig (n 6) 373-74.
[26] Endicott (n 1) 507.
[27] Peiris (n 13) 3.

For instance, Endicott points out that when a similar filter was removed from a local government Ombudsman in the UK, investigations jumped by 44% in just one year.[28] There is no reason why the removal of the MP filter would cause a different effect. If complainants want an informal mechanism to resolve their grievances, the need to approach an MP seems antithetical to that informal ideal. Therefore, as far as accessibility is concerned, Sri Lanka's decision to repeal the MP filter was a welcome amendment.

Leaving aside the MP filter, complainants in both jurisdictions must nonetheless submit their complaints in writing.[29] This stands in contrast to the original Scandinavian Ombudsman system where the Ombudsman was meant to be, quite literally, just one call away.[30] While removing the written requirement will increase accessibility by relaxing the complaints process, Cyrene Siriwardhana points out that Sri Lanka's high literacy rate means that such an increase will be marginal.[31]

Instead, the suggestion to appoint regional Ombudsmen deserves more attention. Presently, the Ombudsman has its offices in Colombo. Complainants outside Colombo will not be obstructed from submitting complaints, since a letter or email will suffice, but they may struggle to give evidence and otherwise participate in the Ombudsman's investigation. In addition, G.L. Peiris argues that the Ombudsman's proximity engenders confidence in the process because complainants and citizens may observe the process in action.[32] However, a geographically spaced-out Office may hinder coordination and accentuate shortages by spreading out essential staff and scarce resources. Therefore, a decision to appoint regional Ombudsmen will improve accessibility but such decisions must be supported with adequate funding, sufficient staffing and effective management.

Finally, awareness is a pre-requisite for accessibility. The premise of G.L. Peiris' argument that proximity creates confidence is the idea that citizens must *know* about the Ombudsman before they begin to appreciate it. This yields a problem because, as Siriwardhana argues, few lay people are truly aware of the Ombudsman's function and utility.[33] Fundamental rights are seen as the purview of, and only of, the Supreme Court.[34] Consequently, complainants who may greatly benefit from

[28] Endicott (n 1) 508.
[29] Parliamentary Commissioner for Administration 1967 (SL) as amended by Parliamentary Commissioner for Administration (Amendment) Act (SL), s 10(2); Parliamentary Commissioner for Administration 1967 (UK), s 5(1)(a).
[30] Peiris (n 13) 2.
[31] Siriwardhana (n 7) 21.
[32] Peiris (n 13) 5.
[33] Siriwardhana (n 7) 19.
[34] ibid.

submitting their complaints to the Ombudsman rather than the courts, are prevented from accessing the Ombudsman because they are either unaware of the Ombudsman or believe it to be ineffective.

Therefore, accessibility requires better awareness of the Ombudsman's role and work. Edrisinha believes that the Ombudsman should adopt "slightly unorthodox" approaches, such as releasing their annual report at a press conference.[35] A more modern unorthodox approach would be the use of social media. The UK Ombudsman (@PHSOmbudsman) actively uses Twitter to promote its work and keep the public informed regarding its operations. Meanwhile, the Sri Lankan Ombudsman (@OfficeSri) also has a Twitter account, but it has posted no tweets and has just one follower. This is simply unfortunate. Social media offers the Sri Lankan Ombudsman a cost-effective means of occupying the public consciousness by directly communicating with the public. When the public sees the Ombudsman on social media successfully delivering redress for grievances, it engenders confidence in the Office, prompting more complaints and a stronger deterrent effect.

Sri Lanka made progress by removing its MP filter. However, more remains to be done in terms of improving access to the Ombudsman. Unless the process is made more accessible, either through the appointment of regional Deputy Ombudsmen or through stronger social media communications, the Ombudsman will remain out of reach for genuine complainants.

3.2 Scope of Application

A more expansive scope of application results in a strengthened Ombudsman that is better able to acquire redress for the complainant. Since the Ombudsman is paid for out of the taxpayers' pocket, a narrow scope of application would simply be a wastage of the resources spent on the Ombudsman. Accordingly, reform must enable the Ombudsman to cast its net as wide as possible to ensure that the State receives sufficient return on its investment.

In the UK, the Ombudsman may examine matters of "maladministration."[36] While parliament has not defined this concept expressly in statute, Endicott suggests that "Maladministration is just bad administration."[37] But even this definition remains somewhat hazy. In search of an outline, the UK judiciary has referred to the parliamentary Hansard.[38] Member of Parliament Richard Crossman,

[35] Edrisinha (n 20) 19-20.
[36] Parliamentary Commissioner for Administration 1967 (UK), s 5(1)(a).
[37] Endicott (n 1) 509.
[38] R (Rapp) v Parliamentary and Health Services Ombudsman [2015] 1344 EWHC (Admin) 37 see also R v Local Commissioner for Administration ex parte Bradford Metropolitan City Council [1979] 2 WLR 1 310 (Lord Denning).

who introduced the bill which founded the Office of the Ombudsman, admitted that maladministration could not easily be defined but would include "bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on."[39]

Maladministration, therefore, certainly includes unlawful behaviour such as bias, bad faith and the unfair disappointment of legitimate expectations.[40] However, modern UK jurisprudence indicates that even lawful behaviour may constitute maladministration.[41] Endicott posits that delay and ineptitude may not constitute unlawfulness as far as judicial review is concerned but may nonetheless be considered by the Ombudsman as maladministration worthy of redress.[42] This highlights that, at times, the redress made available by the Ombudsman is more expansive than even a traditional court.

In Sri Lanka, the concept of maladministration is absent. Instead, the Ombudsman is empowered to investigate "fundamental rights and other injustices."[43] Rohan Edrisinha argues that the term "injustices" is narrower than "maladministration" and advocates for Sri Lanka to adopt the latter.[44] Doing so, however, may prove challenging especially since the term "injustices" is present within the Constitution. Instead, there is no reason why an expansive interpretation of "injustice," perhaps limited to the context of the Ombudsman, cannot be entertained.

Importantly, the UK Ombudsman may only investigate maladministration which has caused "injustice."[45] Therefore, maladministration is itself insufficient; the Ombudsman must perceive an injustice. However, injustice has been interpreted broadly and includes even a feeling of outrage at the maladministration.[46] In other words, the threshold for injustice has been lowered by the judiciary ensuring that complainants are not unfairly prevented from receiving redress from the Ombudsman. The Sri Lankan Ombudsman ought to also adopt this expansive definition of "injustice." It would enable a greater scope of application, preventing complaints from being lost to the technicalities of the law.

Regardless of whether the Ombudsman adopts an expansive interpretation of "injustice," in Sri Lanka, the statute bars investigations into, among other things, the appointment, transfer and

[39] HC Deb 18 October 1966, vol 734, col 51.
[40] Endicott (n 1) 513.
[41] Rapp (n 38) 38.
[42] Endicott (n 1) 512.
[43] The Constitution of Sri Lanka, Article 156(1); Parliamentary Commissioner for Administration Act 1981 (SL), s 10(1).
[44] Edrisinha (n 20) 22.
[45] Parliamentary Commissioner for Administration Act 1967, s 5(1)(a).
[46] R v Parliamentary Commissioner for Administration ex parte Balchin (2000) 79 P.& CR 170.

dismissal of public officers, any member of the police or armed forces and the exercise of Public Security Ordinance.[47] Moreover, the Constitution excludes Ministers and Deputy Ministers from the definition of "public officials," which further limits the Ombudsman's scope.[48] Cyrene Siriwardhana points out that these restrictions diminish the powers of the Ombudsman, especially the restriction on investigating Ministers because the "decisions of Ministers permeate every aspect of public administration in this country."[49]

Ostensibly, therefore, reform is required and if the Ombudsman were to function effectively and usefully, its scope must be expanded. This will require legislative or even Constitutional reform, and it will undoubtedly take significant political will and courage to expand the scope of the Ombudsman further into the government heartland. But there is little use in funding an Ombudsman who is unable to tackle the most potent injustices. In the meantime, however, the statute provides that these limitations will only apply where the injustice does not amount to an infringement of fundamental rights.[50] In other words, the Ombudsman's scope may exceed these limitations if a fundamental right has been breached. Accordingly, as Siriwardhana argues, the Ombudsman must pay close attention to whether a complaint could be categorised as a fundamental rights issue which enables the Ombudsman to override these restrictions.[51]

Finally, the Ombudsman must be enabled to investigate on its own. Neither the UK nor Sri Lankan Ombudsman may investigate without first receiving a complaint.[52] Consequently, the Ombudsman cannot investigate any maladministration/injustice, no matter how prominent, unless they receive a complaint first. This limitation's rationale – the same reason favouring the MP filter – is that the Ombudsman is viewed not as a citizen's defender but rather as a parliamentary adjunct.[53]

Rohan Edrisinha argues that this distinction is of little use and that the Ombudsman can interpret its founding statute creatively to avoid limiting itself to complaints.[54] While Edrisinha is correct to point out that the archaic doctrinal reasoning is of too little use to cling to, there are limits to creative interpretation. The Constitution expressly refers to a duty to investigate "complaints or allegations"

[47] Parliamentary Commissioner for Administration Act 1981 (SL), s 11; cf Parliamentary Commissioner for Administration Act 1967 (UK), Schedule 3.
[48] The Constitution of Sri Lanka, Article 170.
[49] Siriwardhana (n 7) 20.
[50] Parliamentary Commissioner for Administration Act 1981 (SL), s 11(b).
[51] Siriwardhana (n 7) 19.
[52] Endicott (n 1) 505-06; Siriwardhana (n 7) 21.
[53] Craig (n 6) 373-74; Endicott (n 1) 507.
[54] Edrisinha (n 20) 23.

which is a straightforward limit on the Ombudsman's powers.[55] Reform is necessary but once again, Constitutional change seems unlikely.

Therefore, in many ways, the Sri Lankan Ombudsman's ambit is more limited than its UK counterpart. An increased scope ensures that the funding for the Ombudsman is unwasted and allows complainants to receive adequate redress. Whether through creative interpretations or legislative amendments, the Ombudsman is in serious need of a reformed ambit.

3.3 Compliance

It bears repeating that perhaps the most salient aspect of the Ombudsman scheme is the lack of legally enforceable recommendations. In other words, regardless of the scope of injustice or maladministration uncovered, the Ombudsman only offers redress, not remedies, but *recommendations*. The word itself lacks compulsion. The nature of the Office is such that a public authority that is subject to an adverse report is entitled to refuse to adopt the Ombudsman's recommendations.[56] This follows from the Ombudsman's perceived constitutional role as only an adjunct to parliament rather than a purely judicial body.

The problem with this lack of legal enforceability becomes easily evident. If an Ombudsman's recommendations are rarely taken seriously enough to be adopted, vulnerable complainants will be left without adequate redress, resulting in a weaker deterrent effect and fewer cases being diverted away from the Supreme Court. The Ombudsman becomes merely a government reporter, with its reports being worth not more than the paper it was printed on. Therefore, the value of the Office itself hinges upon the rate at which public authorities voluntarily comply with the Ombudsman's recommendations.

Both the Sri Lankan and UK Offices provide in their annual report the rate of compliance for that particular year. In the UK Ombudsman's most recent report, for the year 2021-22, only two recommendations out of 863 were accounted as being refused.[57] Between 2019 and 2022, the number of recommendations refused never exceeded two.[58] In Sri Lanka, the most recent Ombudsman report available is from 2020, which concluded that only two recommendations had been disregarded in that year.[59] In 2019, the Sri Lankan Ombudsman reported that none of their

[55] The Constitution of Sri Lanka, Article 156(1).
[56] Endicott (n 1) 561.
[57] Parliamentary and Health Service Ombudsman, The Ombudsman's Annual Report and Accounts 2021-2022 HC 526 (Stationary Office 2022) 33.
[58] ibid.
[59] Parliamentary Commissioner for Administration, Annual Performance Report (2020) 143.

recommendations were refused.[60] Therefore, both Ombudsmen have, at least according to their own reports, remarkably high compliance rates despite a lack of legal enforceability.

This raises the question of accuracy regarding these self-reported compliance rates. This is not to cast aspersions on either Office by claiming the data has been wrongfully manipulated. Instead, it is simply prudent to corroborate any piece of evidence, especially those of significant importance, in case the sole source of the data is mistaken. Therefore, academic scholarship should seek alternative means of affirming or disaffirming the compliance rates reported by the Ombudsman.

In the UK, evidence suggests that the Ombudsman is correct to report such a high compliance rate. For example, in the UK Ombudsman is unsatisfied with the action taken by a public authority in response to an adverse report, the Ombudsman is empowered to place its report before parliament.[61] It is then for parliament to determine how the matter should be resolved. However, in its entire history, this mechanism has only been used a handful of times, suggesting that the Ombudsman's recommendations are rarely refused.[62] Moreover, academics have broadly agreed that public authorities overwhelmingly accept the Ombudsman's recommendations.[63] The UK Ombudsman's high compliance rate has therefore been persuasively corroborated by external evidence.

Contrastingly, the Sri Lankan Ombudsman has been criticised for lacking efficient enforcement. Siriwardhana notes that an "inadequacy of enforcement" is one of the most crucial pitfalls of the Ombudsman.[64] Similarly, Edrisinha affirms this view and wonders if the drastic reform of providing legal force to the Ombudsman's recommendations is necessary to resolve this issue.[65] Consequently, there appears to be a contradiction between academic discourse regarding compliance and Sri Lankan Ombudsman's own report. In the defence of the latter, it must be noted that both Siriwardhana and Edrisinha presented their views around two decades prior to the 2020 report. During the intervening years, there is certainly the possibility that the Ombudsman's compliance rates have risen.

This highlights the dire need for a contemporary academic deep-dive into the particulars of compliance to either corroborate or contradict the Ombudsman's reports. Such an analysis is outside the scope of this article. Therefore, the Ombudsman's high compliance rates will be presumed as true in the absence of more recent evidence or discourse to the contrary. But, if this

[60] Parliamentary Commissioner for Administration, Annual Performance Report (2019) 25.
[61] Parliamentary Commissioner for Administration 1967 (UK), s 10(3).
[62] Parliamentary and Health Service Ombudsman, The Parliamentary Ombudsman: Withstanding the test of time HC 421 (Stationary Office 2007).
[63] Endicott (n 1) 517; Clothier (n 8) 210 see also Parliamentary and Health Service Ombudsman (n 62) 13-14.
[64] Siriwardhana (n 7) 19.
[65] Edrisinha (n 20) 22.

presumption is displaced, an examination of Edrisinha's question of whether to grant legal effect to the Ombudsman's recommendations becomes prudent. On one hand, it will improve the rate of compliance dramatically since refusal comes with the threat of judicial review. On the other hand, as Clothier explains, an Ombudsman whose recommendations have legal effect "would be a potential tyrant."[66]

Clothier's argument, however, seems misguided. It implies that, if the Ombudsman's recommendations were given legal effect, a public authority is left helpless and has no choice but to dutifully abide by an unfair Ombudsman report. In truth, should the Ombudsman report be deemed unfair, the public authority will most likely maintain the option of judicial review against the offending recommendations. For example, in the UK, the Ombudsman's recommendations lack legal effect. However, jurisprudence has evolved to the point where a public authority must have "cogent reasons" to refuse to comply with a recommendation.[67] This nuanced middle-ground between possessing and lacking legal effect prevents the Ombudsman from assuming the tyrannical powers which Clothier fears.

Siriwardhana advocates for an alternative approach to increasing compliance which avoids the concern of the tyrannical Ombudsman entirely. She identifies that the Ombudsman lacks "stature" and it is the lack of stature, rather than the lack of legal power, that results in weaker compliance.[68] Conversely, Siriwardhana argues that public authorities will "take the Ombudsman's findings and recommendations more seriously if the office was widely known and respected."[69] While her argument is persuasive, Siriwardhana fails to elaborate on precisely how an Ombudsman may go about becoming a more respected officer. In addition to conducting prudent and fair investigations, becoming more complainant-friendly, publishing the results of their work on social media and ensuring that public authorities who refuse to comply with the recommendations are faced with comprehensive and well-reasoned reports before parliament are all means an Ombudsman may adopt to increase its own stature.

Therefore, if Sri Lanka lacked effective compliance (which the Ombudsman reports say is not the case), there are two avenues available. Siriwardhana's softer approach lacks controversy and increased respect is undoubtedly beneficial for any Ombudsman. The harder approach of providing legal effect to recommendations, meanwhile, is certainly controversial. Even if judicial review tempers the Ombudsman's power, the perception that an unelected public official can obstruct the

[66] Clothier (n 8) 210.
[67] R (Bradley) v Secretary of State for Work and Pensions [2008] 36 EWCA Civ 72.
[68] Siriwardhana (n 7) 19.
[69] ibid.

operation of public authorities seems likely to garner unwanted political attention. As a result, unless the compliance rate drops to unbearable levels, arming an Ombudsman with legal enforceability appears an unnecessary decision.

3.4 The Ombudsman and the Judiciary

The final area of comparison looks at the relationship between the Ombudsman and the judiciary in both jurisdictions. The preceding section of this article has examined compliance and concluded that, in the absence of contrary evidence, it must be presumed that Sri Lanka has no problem with public authorities complying with the Ombudsman's recommendations. However, compliance is only the final phase in the Ombudsman's complaints process. Prior to compliance, the Ombudsman will determine whether to investigate, whether there was maladministration/injustice and what redress the complainant deserves. In any one of these phases, the Ombudsman may err or act in a manner that disappoints the complainant.

Unlike compliance, it is difficult to analyse quantitatively whether the Ombudsman has acted effectively in these phases. For example, in the year ending in 2019, the UK and Sri Lankan Ombudsmen refused to investigate 981 and 494 complaints respectively.[70] Many of these complaints were rejected on the basis that the Ombudsman lacked the jurisdiction to hear them. However, the number of complaints rejected says nothing about whether the Ombudsman *correctly* determined its own jurisdiction. Therefore, the Ombudsman may incorrectly interpret a statute, resulting in an erroneous rejection of maladministration/injustice, but none of this will be identified through its annual reports.

Accordingly, the lack of self-reported data highlights once again the need for more recent academic or media scrutiny of Ombudsman decisions. A study into whether complaints are too easily refused or whether the Ombudsman is hesitant to find maladministration/injustice would undoubtedly be of value in determining the route for future reform. The absence of such information in a Sri Lankan setting means that civil society remains in the dark as to the effectiveness of the Ombudsman in these areas. It is of little use for the Sri Lankan Ombudsman to have a near-perfect compliance rate if complaints are hardly investigated or investigated poorly.

This inefficiency is somewhat combatted in the UK through the process of judicial review. In *R v Parliamentary Commissioner for Administration ex parte Dyer*, Simon Brown L.J. rejected the

[70] Parliamentary and Health Service Ombudsman, The Ombudsman's Annual Report and Accounts 2018-2019 HC 2198 (Stationary Office 2019) 28; Parliamentary Commissioner for Administration, Annual Performance Report (2019) 25.

argument that the Ombudsman is answerable only to parliament and not the judiciary.[71] He held that "Many in government are answerable to Parliament and yet answerable also to the supervisory jurisdiction of this court."[72] Although the applicant in *ex parte Dyer* was, on the facts of the case, unsuccessful in her argument that the Ombudsman wrongly refused to investigate certain complaints, the conclusion of the court was that the Ombudsman nonetheless would be subject to judicial review.

This illustrates how the Office of the Ombudsman itself is subject to judicial review for mishandling any phase of the complaints process. This even extends to the Ombudsman's report and their conclusion as to the presence of maladministration. For example, *R v Parliamentary Commissioner for Administration ex parte Balchin (No 3)* was the last in a series of judicial review cases where the judiciary concluded that the Ombudsman failed to provide sufficient reasons for their findings against maladministration.[73] Hence poor administration on the Ombudsman's part is kept in check by the possibility of judicial review.

However, research for this article found no significant cases in Sri Lanka where judicial review was sought against an Ombudsman. This conspicuous absence is explained by two key provisions in the Parliamentary Commissioner for Administration Act 1981 (SL). According to section 14, a refusal to investigate or a decision to discontinue an investigation "shall not be called in question, in any court or tribunal, or be reviewed or quashed in proceedings for orders in the nature of writs of *certiorari*, *prohibition*, *mandamus*, *procedendo* or otherwise." Additionally, section 21(3) provides that the Ombudsman cannot be sued for any of its reports.[74]

These ouster clauses have evidently prevented complainants from receiving the same protection from the court offered by UK jurisprudence. This leaves vulnerable complainants without any recourse for the errors and misjudgements of the Ombudsman. Certainly not all complainants will have the resources to challenge the Ombudsman in court. As in the UK, however, there will invariably be a few complainants who will challenge the Ombudsman. Their challenges often yield benefits for future complainants.

If a complainant successfully challenges an incorrect interpretation of a statute, for instance, their challenge may benefit hundreds more who come to the Ombudsman relying on that same statutory provision. Moreover, in the same way the threat of an Ombudsman investigation will deter poor

[71] [1994] 1 WLR. (QB) 621.
[72] ibid 625.
[73] [2002] EWHC 1876 see also Endicott (n 1) 523-25.
[74] Parliamentary Commissioner for Administration Act 1981 (SL), s 21(3).

administration, the threat of judicial review will equally deter careless or overly-cautious Ombudsman investigations. While enabling judicial review will increase the judicialisation of the Ombudsman, there is no reason why the Ombudsman should not have to defend their decisions before a court in the same way that nearly every public authority it investigates must. Sri Lanka's ouster clauses, therefore, must be repealed.

4. CONCLUSION

This article has been purposefully broad. It sought to refresh the minds of its readers the value and function of the Sri Lankan Office of the Ombudsman and to suggest necessary reform through a comparison with the UK. Through this process several recommendations for the Sri Lankan Ombudsman have been identified and reiterated below for clarity and emphasis.

Firstly, access to the Ombudsman should be made easier through the introduction of well-funded Regional Ombudsmen and the savvy use of social media to increase awareness about the Ombudsman's work. Secondly, the Ombudsman must adopt a broad interpretation of "injustice" to ensure it retains a wide scope of application and the legislative limitations imposed on who and what the Ombudsman cannot investigate must be relaxed.

Thirdly, increasing the "stature" of the Office by conducting prudent investigations, making the complaints process friendlier, producing well-reasoned reports before parliament regarding public authorities who refuse to comply with recommendations, etc. will result in a robust compliance rate. Finally, the ouster clauses that prevent the judiciary from keeping the Ombudsman accountable through judicial review must be repealed.

Undoubtedly any of these reforms will take time, effort and funding. However, the Office of the Ombudsman must be viewed as an investment. Only if the State is willing to invest in the development of this Office will the State yield the benefits of better administration and less stress on the Supreme Court.

In the meantime, legal scholarship in Sri Lanka must return to the Ombudsman. The accuracy of self-reported compliance rates, the difficulty of accessing and processing a complaint through the Ombudsman and whether the Ombudsman properly handles complaints are all areas of crucial importance to the development of this Office. These are areas ripe for scholarly research and it is only with the assistance of such research that effective reform is possible.

ADMIRALTY LAW

SAILING THROUGH TURMOIL: UNRAVELING THE LEGAL RAMIFICATIONS OF OIL SPILLS IN SRI LANKA'S COASTAL WATERS

Assessing and evaluating the challenges faced by law enforcement personnel in investigating and prosecuting oil spills while identifying strategies to enhance their capacity through imperative legal amendments.

Disarah Wimalatunge | Merosha Paskaran

ABSTRACT

This article undertakes a comprehensive examination of the intricate legal ramifications arising from oil spills in the coastal waters of Sri Lanka. By meticulously scrutinizing the regulatory framework, liability concerns, and environmental repercussions, this study aims to provide a profound understanding of the legal landscape surrounding oil spill incidents. Moreover, it explores the legal responsibilities of stakeholders, response mechanisms, compensation procedures, and the significant role of International Conventions, with particular emphasis on esteemed domestic organizations such as the Marine Environment Protection Authority (MEPA) and International organizations such as the United Nations Environment Programme (UNEP). The multifaceted regulatory framework governing oil spills in Sri Lanka entails a complex interplay of national and international legislation. The pivotal Marine Pollution Prevention Act of 1981 which has been replaced with the Marine Environment Protection Authority Act No. 35 of 2008 serves as primary legal instruments, intricately delineating the roles and responsibilities of pertinent entities, specifying prohibited activities, and delineating penalties for non-compliance. The multifarious liability issues that ensue from oil spills necessitate a meticulous examination of causation, fault attribution and the quantification of damages. Adjudicating liability involves the application of intricate legal principles, encompassing strict liability, negligence and contributory negligence, which necessitates astute analysis and expert evaluation. Additionally, the assessment of environmental consequences resulting from oil spills mandates the application of complex scientific methodologies, encompassing both immediate and long-term, on marine ecosystems, biodiversity and public health by comprehensively exploring the above mentioned details this article endeavors to shed light on the profound legal implications associated with oil spills, fostering informed decision-making and proactive measures to safeguard Sri Lanka’s precious marine ecosystems and coastal communities.

1. INTRODUCTION

Oil spills, a form of pollution resulting from the release of liquid petroleum hydrocarbons into the environment due to human activity, pose significant challenges to coastal regions worldwide. These spills not only have immediate environmental consequences but also cause long-term harm to marine ecosystems. Factors such as human error, lack of information, equipment failures, technical errors, explosions and fires often contribute to ship casualties that lead to oil spills. The repercussions of such incidents can persist for months or even years, requiring extensive cleanup efforts. In Sri Lanka, the Marine Pollution Prevention (MPP) Act of 1981 replaced by the Marine Environment Protection Authority Act No.35 of 2008 serves as the primary legal framework for addressing marine pollution from ship-based sources.

Under the 1981 Act, the Marine Pollution Prevention Authority (MPPA) was established to implement its provisions. The MPPA was renamed the Marine Environment Protection Authority (MEPA) by Act No. 35 of 2008, who is now in charge of creating and carrying out the National Oil Spill Contingency Plan. Furthermore, it is crucial to note that Sri Lanka's adherence to International Conventions on Oil Pollution Preparedness, Response and Cooperation (OPRC) and the International Convention on Civil Liability for Oil Pollution Damage (CLC), to which the country is a signatory, reinforces the nation's commitment to adhering to stringent guidelines and standards for oil spills prevention, response and liability.

Authorities which are responsible to assist the MEPA in instances of oil spills are namely, Sri Lanka Ports Authority (SLPA),Ceylon Petroleum Corporation (CPC), Sri Lanka Navy/ Sri Lanka Coast Guard, Sri Lanka Army, Sri Lanka Air Force, Sri Lanka Police/ Marine Police, Coast Conservation Department, DG Merchant Shipping, Central Environmental Authority (CEA), Department of Fisheries & Aquatic Resources (DFAR), National Aquatic Resources Research & Development Agency (NARA), Ceylon Fishery Harbors, Corporation, National Water Supply & Drainage Board (NWS&DB), Department of Wildlife Conservation and Meteorology Department.[1]

Section 38 of the MPP Act imposes a duty on polluters to report any discharge of oil or other pollutants into Sri Lankan waters promptly. This obligation requires the responsible parties to notify MEPA without delay in the event of an incident. Additionally, Section 39 gives MEPA the

[1] W Wickremerathne, 'Progress of Implementation of MARPOL Convention Executing in Sri Lanka for Preventing Marine Pollution by Ships' (*auditor general*, 2020) <http://www.auditorgeneral.gov.lk/web/images/audit-reports/upload/2021/performance_2021/8-iv/Marpol-English-report.pdf> accessed 10 July 2023.

authority to order the managers of ports, harbors, terminals, and repair yards to submit plans for dealing with an oil leak[2]. Part VIII of the MPP Act contains provisions dedicated to preventing pollution caused by the discharge or escape of oil, harmful substances, or other pollutants into Sri Lanka's territorial waters or any other maritime zone[3]. Violations of this section, which include the discharge or escape of oil or pollutants into the sea from ships or other sources, are considered offenses.

While Sri Lanka's National Oil Spill Contingency Plan encompasses all oil spills in its waters, it faces limitations[4] in effectively managing even medium sized spills due to resource constraints. Consequently, there is a pressing need to update the plan and bolster the relevant organizations by providing additional equipment and resources. In light of these circumstances, it is vital to delve into the legal implications of oil spills in Sri Lanka's coastal waters. By examining the regulatory frameworks established by the MPP Act, the roles of MEPA and its obligations and the inadequacies of the current oil spill contingency plan, this study aims to shed light on the legal complexities and challenges associated with addressing oil spills in Sri Lanka's marine environment. Furthermore, it seeks to propose measures to enhance preparedness, response capabilities and the overall protection of Sri Lanka's coastal ecosystems.

2. DISCUSSION

Sri Lanka, as a sovereign state, has demonstrated a steadfast commitment to upholding international conventions and treaties in order to safeguard its marine environment from pollution. Notably, the United Nations Conventions on the law of the sea (UNCLOS) and the International Convention on the Prevention of Pollution from Ships (MARPOL) stand as paramount international agreements ratified by the Sri Lankan government. Among these, MARPOL holds particular significance as the foremost global treaty for averting pollution stemming from ship operations. It encompasses regulations concerning ship design, equipment standards, certification, inspection systems, and state obligations to thwart marine pollution while providing facilities for the proper disposal of oil waste and chemicals.

In accordance with the tenets of UNCLOS and MARPOL, Sri Lanka has enacted the Marine Pollution Prevention Act of 1981 (henceforth referred to as the Act), establishing the legal

[2] V Sivarajah and M Surenthini (*"Legal Solutions for Marine Pollution in Sri Lanka"*, 11 July 2021) <https://www.ijsrp.org/research-paper-0621/ijsrp-p11468.pdf> accessed 3 July 2023.
[3] ibid.
[4] Ibid.

groundwork for national jurisdiction. The Act expressly aims to prevent, control, and reduce marine pollution within Sri Lanka's territorial waters and exclusive economic zone. Consequently, it is evident that Sri Lanka possesses a robust legal mechanism through which it endeavors to avert vessel-source marine pollution, as manifested through a range of international and domestic legal instruments. By being signatory parties to these conventions, States are compelled to protect the marine environment, all the while maintaining their rights to exploit the natural resources found therein.

Under the provisions of UNCLOS, states bear an unequivocal duty, as outlined in Articles 192 and 194 of Part XII, to adopt measures that prevent, reduce, and control pollution in the marine environment[5]. This encompasses a particular emphasis on minimizing pollution resulting from vessel activities, averting accidents, and efficiently managing emergencies to ensure the safety and security of maritime operations. Furthermore, Article 235 of UNCLOS elucidates that states bear the responsibility for the protection and preservation of the marine environment[6]. As such, they are liable and obligated to establish effective legal mechanisms that facilitate the reparation of damages inflicted by marine pollution, in strict adherence to the existing body of international law[7].

In Sri Lanka, the Marine Environment Protection Authority (MEPA) plays a pivotal role in the prevention, control, monitoring, mitigation, and management of pollution within the country's waters, while simultaneously spearheading the restoration of any impaired environments. Established as the national authority, the MEPA assumes overall command during major spills at sea or in instances where substantial quantities of oil escape the confines of ports. For smaller spills, typically less than 100 tonnes, the Sri Lankan Port Authority assumes primary responsibility for matters of oil discharge in the respective port area, with the MEPA adopting a supervisory role. In the event of heightened exigencies, an Advisory Committee may be constituted, comprising representatives from the local oil industry and governmental bodies[8]. This committee provides essential support to the On-Scene Commander appointed by the MEPA. In situations necessitating extensive resources, external assistance may be sought from neighboring countries or spill experts. To effectively combat oil spills, a combination of mechanical recovery techniques and dispersants

[5] S Thalakiriyawa (*Analysis of International Instruments in Relation to Vessel Source Marine Pollution with special reference to Marine Pollution Prevention Act of Sri Lanka*) <http://ir.kdu.ac.lk/bitstream/handle/345/2582/Law%20new_18.pdf?sequence=1&isAllowed=y> accessed 15 July 2023.
[6] ibid.
[7] ibid.
[8] 'Competent National Authority' (*ITOPF*, 2023) <https://www.itopf.org/knowledge-resources/countries-territories-regions/sri-lanka/> accessed 3 July 2023.

are employed. However, the use of mechanical cleanup equipment is often restricted to port areas or sheltered waters due to inherent operational limitations. Notably, the Ceylon Petroleum Corporation (CPC) possesses specialized containment and recovery equipment, as well as vessel-mounted offshore dispersant spraying capability[9]. Additionally, both the Port Authority and the CPC maintain vessel-mounted offshore dispersant spraying systems. Furthermore, a limited supply of dispersants is held by private entities such as Colombo Dockyard Ltd.

Although Sri Lanka has experienced previous oil spill incidents, including the grounding of the *KOMSOMOLETS AZERBAYDZHAN* in 1994, resulting in the spillage of approximately 100 tonnes of fuel oil outside Galle harbor without impacting the coastline, the country currently lacks a national contingency plan and dedicated equipment for handling spills of hazardous and noxious substances (HNS)[10]. However, discussions are underway with other South Asian countries to establish a memorandum of understanding (MoU) specifically addressing HNS spills[11]. In particular, the chemical tanker MT GRANBA reported a leak in her sulphuric acid cargo in 2009, and the Sri Lankan Navy responded. Unfortunately, the ship eventually sank in 3,800-meter-deep waters off the east coast of Sri Lanka[12].

In terms of regional and bilateral agreements, Sri Lanka actively participates in the South Asia Cooperative Environment Programme (SACEP) alongside Pakistan, India, Bangladesh, and the Maldives. SACEP, established under the auspices of the United Nations Environment Programme (UNEP), fosters regional collaboration and cooperation on diverse environmental concerns.[13] It must also be understood that several incidents related to Sri Lanka have been the spur for the existing legal system and have contributed to the existing developments from time to time.

Date	**Incident**	**Location**	**Amount of oil**
09.09.1997	MV Cordiality	30 km North of Trincomalee	Less that 700 Mt
30.06.1998	Floating hose burst at Sea terminal	Colombo SPBM	90 Mt
19.09.1998	MV Zim Piraeus in collision with MV Leerot	Colombo	70 Mt

[9] ibid.
[10] ibid.
[11] ibid.
[12] ibid.
[13] ibid.

03.08.1999	MV Meliska grounded in heavy weather when under tow	Off south coast	200 Mt
09.09.2006	MV Amanat Shah	Koggala	25 - 50 Mt HFO
05.08.2007	MV Marina Sedna	Galle	20 Mt HFP

Table 01. *Past oil spills in Sri Lankan waters* (The list remains non exhaustive)

Collectively, Sri Lanka's legal framework and response mechanisms exemplify the nation's unwavering commitment to averting marine pollution and safeguarding its marine environment. By ratifying international conventions, enacting national legislation, establishing dedicated authorities, and formulating comprehensive contingency plans, Sri Lanka diligently endeavors to fulfill its obligations and effectively respond to pollution incidents occurring within its coastal waters. At this very outset, it is important to grasp certain peculiar arrangements in our domestic legal framework as well. Marine Environment Protection Authority Act No. 35 of 2008 (MEPA), enacted in Sri Lanka, have been significant milestones in addressing the menace of maritime pollution. In particular, Section 59 of the Act repeals its predecessor, the Prevention of Marine Pollution Act No.59 of 1981, signifying a transition in regulatory paradigms. Observations pertinent to this matter have been made, drawing attention to certain critical aspects. Firstly, it was noted that the introduction of the Prevention of Marine Pollution Act No.59 of 1981 was deemed necessary in preparation for an imminent international convention aimed at curbing maritime pollution.

However, the enforcement of the Marine Environment Protection Authority Act No.35 of 2008 has not added to the legislation required to fully implement the MARPOL Convention by incorporating its provisions into domestic law[14]. Secondly, the scope of the older Act, No.59 of 1981, explicitly encompassed the International Convention 1973 for the prevention of ship pollution and the Alliance 1978 for implementing international conventions[15]. Regrettably, the Prevention of Marine Pollution Act No.35 of 2008 lacks a similar explicit reference, as Section 6(f) only vaguely alludes to acceptance and recommendation of international conventions and

[14] S Jayawardana (*Grey areas in SL law hamper implementation of marine pollution convention: NAO report*, 19 September 2021) <https://www.sundaytimes.lk/210919/news/grey-areas-in-sl-law-hamper-implementation-of-marine-pollution-convention-nao-report-455650.html> accessed 7 July 2023.
[15] MARPOL 1973,1978

protocols[16]. This ambiguity hinders a clear understanding of the Act's direct contribution to convention enforcement.

Moreover, the absence of provisions for hazardous container shipments in the new Act raises concerns. In the event of incidents involving such shipments, obtaining specific compensation and addressing legal matters become challenging. Consequently, there is an urgent need to amend the Act to accommodate hazardous container shipments and ensure effective legal recourse[17]. A glaring issue lies in the stagnation of the Marine Environment Protection Authority Act No.35 of 2008, which has remained unamended since its enactment about 12 years ago. The significance of amending this Act becomes evident when considering several factors. Firstly, it does not adequately delegate the powers necessary to implement the Marine Pollution Prevention Act, resulting in potential regulatory gaps. Secondly, non-compliance with the International Maritime Organization's Mandatory Convention to which Sri Lanka signed as a party to in 1997 has so far only enforced V of the VI annexures where it can be observed how annexure VI governing the regulations to prevent air pollution from ships has been approved by the cabinet but how action still not been taken to enforce it[18] is a concerning issue that must be rectified through amendments[19].

Furthermore, the existing Act lacks provisions to incorporate international standards concerning oil disposal and hazardous material handling. These standards are crucial for fostering global cooperation and aligning the nation's practices with international norms, thereby facilitating international trade. An amended Act would not only enable Sri Lanka to access instrumental, technical, and financial assistance for sea restoration during emergencies but also streamline the process of obtaining compensation from relevant parties in accordance with international law. Amending the Prevention of Marine Pollution Act No.35 of 2008 is imperative to address the observed shortcomings, enhance international compliance, and foster a sustainable approach to marine pollution prevention and management. By doing so, Sri Lanka can actively contribute to safeguarding marine ecosystems and upholding international standards for a cleaner and more sustainable maritime future. Observations on provisions of the Marine Environment Protection Authority Act No. 35 of 2008 and orders issued by the Marine Environment Protection Authority:

[16]ibid.
[17] S Smith, 'Oil, Acid, Plastic: Inside the Shipping Disaster Gripping Sri Lanka' (*UNEP*, 12 January 2022) <https://www.unep.org/news-and-stories/story/oil-acid-plastic-inside-shipping-disaster-gripping-sri-lanka> accessed 5 July 2023.
[18] S Jayawardana (*Grey areas in SL law hamper implementation of marine pollution convention: NAO report*, 19 September 2021) <https://www.sundaytimes.lk/210919/news/grey-areas-in-sl-law-hamper-implementation-of-marine-pollution-convention-nao-report-455650.html> accessed 7 July 2023.
[19] ibid.

During a comprehensive sample audit encompassing 7,9,26,34 and 36 of the Prevention of Marine Pollution Act No.35 of 2008, various crucial aspects have been brought to light[20].

Firstly, under Section 9(7) of the Act, the Minister possesses the authority to mandate charges for investigations concerning equipment and machines prescribed by specific acts or their regulations[21]. However, as of the audit date on 31st December 2020, no provisions have been established regarding the necessary equipment to be fitted on ships and their subsequent inspection. This absence of regulations has resulted in the non-levying of charges for inspections in this domain. Moreover, the existence of Annexure l to the MARPOL Convention and the International Convention on Civil Liability for Oil Pollution established in 1992 by the Alliance, alongside the 1971 Sri Lankan-adapted convention, ratified the 'International Convention for the Establishment of an International Fund for Oil Pollution Compensation' in 1983. The Maritime Environmental Protection Authority is the National Centre responsible for implementing this Convention in Sri Lanka since 1983 and 1987[22].

However, it is disconcerting to note that despite the necessity to make all relevant national constitutions and provisions active in Sri Lanka to uphold these conventions, this task had not been accomplished as of the audit date. The failure to enforce the required legal provisions for convention implementation in Sri Lanka may lead to the forfeiture of the potential maximum compensation provided for civil liability and could impede international cooperation during the claim application process, especially when the state is affected by a maritime disaster. Regarding compensation for oil pollution, the International Monetary Fund identifies four primary instances of coverage, including cleanup operations and property damage costs, ancillary losses, net economic damages, and compensation for environmental measures to prevent or minimize pollution. However, formal statutes have yet to be drafted to recover damages in these specific areas[23].

Regarding insurance coverage, the Club Insurance Pollution Cover and conventions on civil liability and funding come into play in the event of an oil spill by a ship in the Exclusive Economic Zone (EEZ). Sri Lanka being a party to these conventions enables the pursuit of compensation for maritime pollution thus, enabling compensation for damage resulting from minor spills can be sought through social insurance coverage, while major spills fall under the purview of the civil convention. In case of further damages, compensation can be claimed through the funding

[20] Marine Pollution Prevention Act No 59 of (1981).
[21] ibid.
[22] (n 4).
[23] (n 2).

convention. It's important to note that these conventions apply solely to oil tankers, whereas the Bunker Convention addresses oil pollution from other types of ships. However, it is a matter of concern that Sri Lanka has not become a party to the international conventions of HNS (International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea) and LLMC-76/96 (Convention on Limitation of Liability for Maritime Claims) to obtain compensation for damages in connection with the transportation of hazardous and noxious substances and maritime claims, respectively.

Furthermore, orders issued by the Marine Environment Protection Authority under Section 31 of the Marine Environment Protection Authority Act No.35 of 2008 have been examined[24]. Notably, these orders encompass specific regulations concerning maritime protection, with a particular emphasis on marine pollution due to petroleum. However, no provisions have been issued to prevent maritime pollution caused by other pollutants such as sewage, wastewater, solid waste, air pollution, and hazardous cargo transportation. Additionally, it was observed that the orders issued thus far only cover some of the regulations contained in Annexures I and V of the MARPOL convention, leaving gaps in addressing various aspects of maritime pollution.[25]

Furthermore, the Act's Section 34 concerning the recovery of damages resulting from maritime disasters, like the incident involving the ship New Diamond on 3rd September 2020 within the Exclusive Economic Zone of Sri Lanka, has not been effectively utilized until April 30, 2021.[26]This section also incorporates the protection and preservation of living marine resources and wildlife, yet no action has been undertaken to recover damages caused by the New Diamond's accident amidst an action in personam has commenced in the Admiralty Court in Sri Lanka just prior to the expiry of the two year prescriptive period. Lastly, it is evident that essential actions to identify sensitive areas for the protection and conservation of living marine resources and wildlife, along with gazetting, have not been executed as of the audit date, signifying a need for prompt attention to this aspect. In light of these observations, it is crucial to address the gaps in the Act and enforce the necessary provisions to ensure effective prevention and management of marine pollution in Sri Lanka.

The X-Press Pearl incident, an unfortunate maritime disaster involving a container vessel from Singapore, has plunged Sri Lanka into a pressing environmental crisis. As Sri Lankan authorities brace themselves for the anticipated oil spill, the ramifications of this incident demand a meticulous

[24] ibid.
[25] International Convention for the Prevention of Pollution from Ships (MARPOL).
[26] 'Competent National Authority' (*ITOPF*, 2023).
<https://www.itopf.org/knowledge-resources/countries-territories-regions/sri-lanka/> accessed 3 July 2023.

examination of the legal framework and response mechanics in place. The complexity of the situation is compounded by the mishandling of hazardous materials on board, including plastic pellets that have washed up on Sri Lanka's western coast.[27] On May 20th, the X-Press Pearl, while anchored at the port of Colombo, was engulfed in a devastating fire that ravaged the vessel for a harrowing 13 days before finally being extinguished. Tragically, containers carrying plastic pellets, essential for producing shopping bags, spilled into the ocean during this inferno. Although efforts were made to tow the vessel away from the coast, adverse weather conditions and treacherous seas thwarted these attempts. Consequently, the rear section of the X-Press Pearl sank and now rests on the seabed, further complicating salvage operations[28].

The potential for an oil spill looms large, given that the vessel contained approximately 350 tonnes of oil[29], which poses a grave threat to Sri Lanka's fragile marine ecosystem[30]. In preparation for such an event, the Marine Environment Protection Authority (MEPA) has mobilized resources, including oil dispersants, booms and skimmers to contain and mitigate the possible oil spill's environmental impact. As Sri Lanka contemplates the legal recourse against the perpetrators of this disaster, numerous factors come into play. The actions of the X-Press Pearl clearly constitute a crime, as the vessel was well within Sri Lanka's territorial waters and the ensuing fires and ensuing damage to the marine ecosystem demand restitution. Sri Lanka possesses the authority to invoke criminal law to punish the offenders, namely the captain and potentially other officers, as their violation of procedures and protocols is evident[31].

Under the MEPA Act, Section 26, the discharge or escape of oil, harmful substances or other pollutants into Sri Lanka's territorial waters constitutes an offense. Therefore, the actions of the X-Press Pearl fall squarely within the purview of this section[32], enabling legal action against the responsible parties. Sri Lanka's legal case is further bolstered by its ratification of international conventions, including the International Convention for the Prevention of Pollution from Ships (MARPOL) and its relevant annexes. These conventions regulate the control of pollution by noxious liquid substances and the prevention of pollution by harmful substances carried by sea.

[27] 'Oil Spills in Sri Lanka' (*Charter Activations,* 4 June 2021) <https://disasterscharter.org/web/guest/activations/-/article/oil-spill-in-sri-lanka-activation-715-> accessed 10 July 2023.
[28] ibid.
[29] ibid.
[30] ibid.
[31] C Rubesinghe, S Brosché, H Withanage, D Pathragoda, T Karlsson, 'X-Press Pearl: A "New Kind of Oil Spill" A Toxic Mix of Plastics and Invisible Chemicals' (*ipen*, February 2022) <https://ipen.org/sites/default/files/documents/ipen-sri-lanka-ship-fire-v1_2aw-en.pdf> accessed 11 July 2023.
[32] ibid.

The X-Press Pearl's violations of these conventions strengthen Sri Lanka's legal standing and increase the likelihood of securing justifiable damages and fines.

However, Sri Lanka's ability to pursue substantial fines and damages is impeded by limitations within its current criminal law. The maximum fine allowable under the MEPA stands at a paltry 15 million Sri Lankan Rupees, which may inadequately compensate for the extensive damage caused However, it is evident that it's merely a criminal sanction. This stark limitation raises the need for an urgent review and amendment of the legal framework to ensure commensurate penalties for such grave offenses. Sri Lanka's laws should mirror those of nations that have enacted separate legislation, specifically targeting MARPOL violations and imposing substantial fines and damages on offenders. For instance, it can be observed how the United States has been able to incorporate MARPOL to its domestic legislature through the Act to Prevent Pollution from Ships (APPS) in terms of enacting annexes I,II,V, and VI of the said Convention. Another crucial aspect to consider is Sri Lanka's failure to ratify essential international treaties, such as the Bunker Oil Convention of 2001 and the International Convention for Safe Containers of 1977. These omissions significantly weaken Sri Lanka's legal capacity to address pollution incidents involving ships and containers. Ratification of these treaties would grant Sri Lanka the authority to claim damages and impose fines for violations, aligning the country's legal framework with international standards[33].

Sri Lanka's geographical location, positioned along major shipping routes, renders it vulnerable to oil spills and other maritime accidents[34]. To mitigate these risks effectively, Sri Lanka must ratify and implement vital international conventions such as the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC) and conventions such as the Convention on Civil Liability for Bunker Oil Pollution Damage. Additionally, the country should urgently consider enacting domestic legislation addressing MARPOL requirements comprehensively. By doing so, Sri Lanka can strengthen its ability to take swift and effective action in response to maritime disasters. [35]

[33] K Samarasena, 'Sri Lanka's Maritime Law – a Victim of an Inept Legislature.' (*Linkedin*, 21 June 2021) <https://www.linkedin.com/pulse/srilankas-maritime-law-victim-inept-legislature-kelum-samarasena> accessed 9 July 2023.
[34] ibid.
[35] (n 1).

The Sri Lankan government has now given the go-ahead for a French-funded project that aims to set up a satellite system to identify and track oil spills caused by ships within Sri Lankan waters.[36] This cutting-edge technology, supported by Collected Localisation Satellites (CLS), will provide real-time data, enabling rapid response measures to prevent marine pollution, identify responsible vessels and pursue necessary legal actions. This reveals that the X-Press Pearl incident serves as a poignant reminder of the pressing need for robust environmental regulations and a comprehensive legal framework in Sri Lanka[37]. By addressing the existing gaps and limitations, Sri Lanka can hold responsible parties accountable for their actions, seek appropriate compensation for damages and safeguard its invaluable marine ecosystem. Only through proactive measures and enhanced legal mechanisms can Sri Lanka effectively protect its coastal waters and ensure the sustainable future of its marine resources.

Despite the occurrence of significant maritime accidents resulting in severe marine pollution within Sri Lanka's territorial waters, the country has yet to take essential legislative measures to fully implement the MARPOL convention. This revelation comes from a report by the National Audit Office (NAO), which highlights the urgent need for comprehensive legal provisions to align with this critical international maritime pollution prevention convention, ratified more than two decades ago[38]. The MARPOL Convention, initially adopted by the International Maritime Organization (IMO) in 1973 and subsequently modified by a Protocol in 1978, aims to prevent and minimize pollution arising from normal shipping operations and shipwrecks[39]. Currently possessing 156 signatories, the convention comprises six annexures that have been adopted over the years, containing regulations addressing pollution prevention from oil, harmful liquids, substances transported via the ocean, ship sewage disposal, ship waste disposal and ship-induced air pollution. Sri Lanka became a party to the convention on July 24,1997 and has successfully implemented five of the six annexures. However, Annexure VI, which encompasses regulations to prevent air pollution from ships, has yet to be enforced, despite receiving approval from the cabinet.[40]

The NAO report identifies several enforcement and detection challenges, emphasizing the inadequacy of existing practical measurement methods in Sri Lanka for evidence collection and

[36] N Rajawasam, 'After High Profile Marine Disasters, Sri Lanka Approves French-Funded Oil Spill Monitoring Service' (*Economynext*, 12 July 2023) <https://economynext.com/after-high-profile-marine-disasters-sri-lanka-approves-french-funded-oil-spill-monitoring-service-125808/> accessed 13 July 2023.
[37] ibid.
[38] S Jayawardana (Grey areas in SL law hamper implementation of marine pollution convention: NAO report, 19 September 2021) <https://www.sundaytimes.lk/210919/news/grey-areas-in-sl-law-hamper-implementation-of-marine-pollution-convention-nao-report-455650.html> accessed 7 July 2023.
[39] ibid.
[40] ibid.

reporting. It emphasizes the necessity to fortify the country's legal framework to enable effective action against vessels that discharge harmful substances or violate the terms of the convention. Additionally, the report notes that Sri Lanka is not a party to the Salvage Convention, which restricts its ability to be listed as a contractual salvor during ship rescue operations[41]. Being a contractual salvor would enable the country to recover costs associated with rescue operations and provide hull and machinery insurance. The report underscores the importance of including provisions in future plans for Sri Lanka to act as a statutory arbitrator, as stipulated in the Merchant Shipping Act.

MEPA serves as the national focal point for MARPOL Convention implementation in Sri Lanka. However, the report highlights the frequent changes in the line ministry overseeing the authority, which can lead to operational challenges and coordination issues. In light of these findings, the NAO report presents a series of recommendations[42]. It urges the prioritization of locally implementing legal provisions to establish the MARPOL Convention, including the identification of specific institutions responsible for its implementation. The report also recommends active engagement by Sri Lanka with the International Maritime Organization (IMO) and the exploration of opportunities to become a statutory salvage member.

Additionally, it calls for the establishment of search and rescue industries, improvements in human physical facilities, the creation of a 24/7 operation center for prompt response to maritime accidents and expediting the formulation and legalization of marine damage compensation[43]. By diligently addressing the recommendations and amending existing legislation, Sri Lanka can fortify its legal framework, effectively implement the MARPOL Convention and safeguard its marine environment from the devastating effects of maritime pollution.

3. RECOMMENDATIONS

Addressing Legal Framework Gaps: The study highlights gaps in the domestic legal system regarding the enforcement and implementation of measures to prevent marine pollution from vessel sources. It is recommended to identify and address these deficiencies through appropriate legal reforms, ensuring effective enforcement and implementation. *Constitutional Provision for Marine Environment Defense*: To ensure comprehensive protection of the marine environment, provisions within the Sri Lankan constitution should be expanded to encompass areas beyond territorial

[41] ibid.
[42] ibid.
[43] ibid.

waters. This will facilitate the defense and preservation of the marine environment in a more holistic manner.

Accountability for Compensation: To expedite the process of compensation for oil spill incidents, it is recommended to introduce new legislation that holds the shipping agent in Sri Lanka or the charterer responsible for paying fines[44]. This will ensure that financial responsibilities are met and promote greater accountability in the shipping industry. *Full Implementation of International Conventions:* Sri Lanka should fully implement and enforce international conventions, including the MARPOL Convention and the International Convention on the Prevention of Pollution from Ships (OPRC). Regular evaluation and updating of national legislation should be conducted to align with international obligations. *Become an active member of the International Maritime Organization (IMO):* Sri Lanka should take action to become an active member of the IMO, an international body responsible for regulating maritime activities. Active participation in the IMO will allow Sri Lanka to stay updated on international maritime standards and collaborate with other member states[45].

Explore the potential for statutory salvage: Sri Lanka should consider the potential to become a statutory salvage member, enabling the country to recover costs associated with rescue operations and provide insurance coverage for hull and machinery. This would enhance Sri Lanka's ability to respond effectively to maritime accidents and disasters. *Strengthening Enforcement Agencies:* Provide adequate funding, training, and technical resources to the responsible agencies, such as the Marine Environment Protection Authority (MEPA) and the Coast Guard. This will enhance their capacity to effectively implement and enforce environmental laws related to oil spills. *Establish a forensic laboratory:* Sri Lanka should focus on establishing a forensic laboratory dedicated to identifying the causes of accidents and the impacts on marine life and thus improving the laboratory facilities provided to institutions such as the NARA in regards to conducting effective coordinated research activities. This would facilitate accurate investigations and provide valuable insights for prevention and mitigation strategies.

Develop a funding mechanism: Consideration should be given to establishing a funding mechanism based on the concept that the polluter must pay. This mechanism would ensure that the costs associated with maritime accidents are covered by the responsible parties rather than burdening the national treasury. Through the process of ratification of conventions such as the convention on

[44] (n 4).
[45] (n 24).

Limitation of Liability for Maritime Claims (LLMC) the state can with ease obtain access to sufficient compensation funds while paying attention to the liability of the shipowners. *Courts be granted adequate power:* courts such as the Admiralty Court should be provided with sufficient level of power and legal authority necessary to prosecute and convict in a more effective manner and implement necessary advances in order to improve the knowledge of the judges in Maritime Law. By implementing these recommendations, Sri Lanka can enhance its legal framework, strengthen enforcement mechanisms, and improve the overall management of oil spills in its waters. This will contribute to the protection of the marine environment, safeguard the interests of affected parties, and mitigate the long-term impacts of oil pollution[46].

4. CONCLUSION

Sri Lanka has demonstrated its commitment to protecting its marine environment by ratifying international conventions and implementing national legislation. The country's adherence to the United Nations Conventions on the Law of the Sea (UNCLOS) and the International Convention on the Prevention of Pollution from Ships (MARPOL) underscores its dedication to combating marine pollution. Through the Marine Environmental Protection Act, Sri Lanka has established a legal foundation for addressing pollution within its territorial waters and exclusive economic zone. However, there are areas that require attention and improvement. The study highlights gaps in the domestic legal framework, particularly in relation to the prevention of marine pollution from vessel sources. The constitution of Sri Lanka lacks provisions for the defense of the marine environment beyond territorial waters, and the MEPA Act needs clearer and more effective provisions, especially regarding innocent passage. Addressing these gaps is crucial, as is the need to ensure accountability for compensation in cases of marine pollution due to casualties.

The current practice of holding ship owners responsible and liable for damages and compensations can be time-consuming and impractical. Introducing new laws to charge fines from shipping agents or charterers can help expedite the process and ensure sea worthiness and accountability. To strengthen Sri Lanka's response to oil spills and marine pollution, several comprehensive recommendations can be made. These include the full implementation and enforcement of international conventions and agreements, such as MARPOL and the International Oil Pollution Compensation Funds (IOPC), which provide access to adequate compensation for affected parties.

[46] (n 1).

Additionally, developing strategies for monitoring pollutants after spills, establishing a system for reporting lost containers, and classifying plastic pellets as hazardous substances can enhance prevention and mitigation efforts. It is essential to work collaboratively internationally since marine contamination from sea-based sources is transnational and calls for international solutions. While seeking assistance from the international community for accident investigations and risk mitigation, Sri Lanka should continue to be a proactive member in international accords and arrangements.

As a result of its legislative system and involvement in international conventions, Sri Lanka has undertaken sizable efforts to eliminate marine pollution. But there are still some issues that need to be resolved, particularly in terms of bolstering the domestic legal system, expanding compensation responsibility, and enhancing response procedures. Sri Lanka can strengthen the protection of its marine environment and meet the difficulties posed by oil spills and marine pollution by putting into practice thorough recommendations and developing international cooperation.

ARTIFICIAL INTELLIGENCE

THE TRANSFORMATIVE IMPACT OF AI IN LAW

Pabasara Jayakody | Tilini Ruwanga

ABSTRACT

The legal profession is not an exception to how Artificial Intelligence (AI) has emerged as a potent force reshaping numerous industries. In this article, we set out on an intellectual journey to investigate the fascinating nexus between AI and law. We explore the numerous uses of AI in the legal field through an engrossing narrative, explore the ethical and legal ramifications of its use, and highlight the problems and opportunities that still lie ahead. We provide an exciting window into the current state and future directions of AI regarding law by synthesizing previous research, real-world case studies, and empirical data.

1. INTRODUCTION

An entirely new body of knowledge—the incorporation of Artificial Intelligence (AI) —has appeared in the vast field of law. AI has drawn the attention of both legal experts and researchers due to its promise of improved efficiency, improved decision-making, and streamlined processes. As Elon Musk, a founder of OpenAI, infamously stated: "I think AI will end up being the best or worst thing ever for humanity, so it's crucial that we get it right."[1] It is crucial that we steer its development with the utmost care and responsibility because the future of AI has the potential to either be humanity's greatest success, or its most catastrophic downfall. In this article, we lay the groundwork for our investigation by highlighting the goals of studying AI in law, and arousing interest in the fascinating journey that lies ahead.

2. UNMASKING THE POWERHOUSE: UNDERSTANDING ARTIFICIAL INTELLIGENCE

AI refers to the development of computer systems capable of performing tasks that typically require human intelligence, such as learning, problem-solving, and decision-making. As we stand in the dawn of the 3rd decade of the 21st century, AI has become an everyday companion in the lives of majority of the population. From personalized content recommendations on streaming platforms such as Netflix and TikTok, music recommendations on Spotify, and virtual assistants like Alexa and Siri, to Large Language Models (LLMs) such as ChatGPT and Generative Fill in Adobe

[1] Cameron Hashemi-Pour, 'What is OpenAI? Definition and History from TechTarget' (*Enterprise AI,* 24 March 2023) <https://www.techtarget.com/searchenterpriseai/definition/OpenAI> accessed 16 August 2023.

Photoshop, etc. AI has evolved into an indispensable companion, effortlessly intertwining itself within the tapestry of our lives. It has come to a point where AI has started to take over a large percentage of jobs in the world.

AI has seeped its way into the legal field as well. Legal research and case analysis have traditionally been labour-intensive and time-consuming tasks for legal professionals. However, AI has brought forth a wave of innovation, significantly transforming these processes. AI-powered legal research platforms leverage natural language processing and machine learning algorithms to analyse vast amounts of legal texts, court opinions, and statutes. By extracting relevant information, identifying patterns, and providing comprehensive summaries, these tools empower lawyers to conduct more efficient and thorough research. For example, ROSS Intelligence's AI platform has become renowned for its ability to assist in legal research by offering instant answers to legal questions and providing relevant case law references.[2]

3. THE AI TAPESTRY: COLORFUL APPLICATIONS IN LAW

3.1 Painting the Legal Landscape with AI's Brush: Revolutionizing Legal Research and Case Analysis.

AI-powered tools are using their brushes to create a fresh and effective picture in the large field of legal research and case analysis. According to the Economist: "Generative AI could radically alter the practice of law. Even if it doesn't replace lawyers en masse."[3] For instance, Natural Language Processing (NLP) systems can easily filter through legal documents, identifying pertinent cases, statutes, and regulations, saving legal experts numerous hours of work. Advanced machine learning algorithms using AI-powered research platforms allow them to scan through enormous libraries, extracting important information, and accurately summarizing complicated legal concepts. These technologies improve efficiency whilst enabling legal professionals to make more informed decisions by expediting the research process.

In the area of case analysis, AI has also unveiled its artistic brilliance by providing legal professionals access to a potent set of analytical tools. Machine learning-powered predictive analytics algorithms can examine historical case data to find patterns, trends, and possible outcomes. AI can assist in predicting the probability of success in a specific case by evaluating enormous collections of legal material, assisting practitioners in planning and efficiently allocating resources. With the use of sentiment analysis, which evaluates the emotional undertone and setting of legal writings, this innovative technology also makes it possible to evaluate the merits of various

[2] 'What is AI?' (*ROSS Intelligence)* <https://www.rossintelligence.com/what-is-ai> accessed 16 August 2023.
[3] 'Generative AI could radically alter the practice of law' *The Economist* (London, 6 June 2023) <https://www.economist.com/business/2023/06/06/generative-ai-could-radically-alter-the-practice-of-law> accessed 16 August 2023.

arguments. These AI-driven solutions allow legal professionals to more accurately predict case outcomes, enabling more accurate decision-making and enhancing overall litigation strategy.

3.2 Contract Analysis and Management: A Masterpiece of AI-Powered Efficiency.

AI has altered the manner in which legal professionals manage this crucial area of their profession by emerging as a brushstroke of incomparable efficiency in contract analysis and management. Contract review has often been a labour and time-intensive procedure that necessitates close attention to detail. However, the use of AI techniques, which includes contract analysis software, has fundamentally changed this environment. These tools can quickly scan and interpret contracts using machine learning algorithms, extracting important clauses, spotting possible risks, and guaranteeing legal compliance. AI tools automate the review process thereby greatly reducing the time and effort required, and enabling legal experts to concentrate on more valuable activities and strategic decision-making.[4]

Additionally, AI-driven contract management systems have evolved into crucial tools for planning and simplifying the contract lifecycle. These systems build structured, searchable archives of contract data using data extraction and natural language processing methods. To facilitate successful contract monitoring and retrieval, tools such as eBrevia and Kira Systems, for example, may automatically extract crucial information from contracts, such as parties involved, relevant dates, and financial terms. AI systems can also notify legal teams of important dates and contract achievements, reducing the possibility of missed deadlines or neglected duties. Contract analysis and management have improved tremendously in efficiency owing to AI, relieving legal practitioners from time-consuming administrative duties and allowing them to concentrate on providing strategic value to their clients.

3.3 Predictive Analytics and AI in Legal Decision-Making: Creating A Symphony Of Foresight

Predictive analytics and AI have merged to create a symphony of foresight in the world of legal decision-making, arming legal practitioners with data-driven insights and boosting their capacity to make wise strategic decisions. Large amounts of legal data, such as past case outcomes, court rulings, and legal precedents, can be assessed by AI systems with advanced predictive analytics algorithms. AI tools such as Premonition and Lex Machina can assist legal practitioners in anticipating possible outcomes and creating strong litigation strategies by finding patterns and connections within this plethora of data.[5] With the help of these tools, attorneys can assess the

[4] 'Legal AI tools: Essential for attorneys' (*Thomson Reuters Law Blog*, 17 January 2023) <https://legal.thomsonreuters.com/blog/legal-ai-tools-essential-for-attorneys/> accessed 16 August 2023.
[5] Edgar A. Rayo, 'AI in Law and Legal Practice' (*Premonition*, 1 February 2018) <https://premonition.ai/ai-law-legal-practice/> accessed 16 August 2023.

strength and weaknesses of their cases, determine their chances of success, and decide on case settlements, plea agreements, or trial tactics with greater knowledge.

In addition, tools powered by AI are now used outside of courtrooms to support legal judgements in a variety of practice areas. For instance, AI algorithms are used in intellectual property law by applications like PatentSight and Darts-ip to interpret patent data, evaluate patent validity, and predict the possible value of patents. Legal practitioners can gain a competitive edge by utilizing AI's data-crunching capabilities, proactively advising clients on issues such as managing patent portfolios, licensing prospects, and intellectual property challenges. These AI tools orchestrate the harmonic fusion of legal expertise with predictive insights, acting as a symphony conductor to provide more precise and well-informed legal decision-making.

3.4 Unraveling Mysteries: AI-Assisted Document Review and E-Discovery

AI has become a powerful assistant in the fields of document review and e-discovery, helping to solve challenges buried in vast amounts of digital data. Reviewing papers for litigation or regulatory compliance has historically been a time-consuming and labour-intensive process. However, by speeding up and automating the review process, AI tools have completely changed this scenario. Advanced machine learning algorithms can quickly scan huge volumes of texts, finding patterns, pertinent keywords, and possibly privileged information.[6] These algorithms are used by programs such as Relativity and Everlaw. These systems may choose the most pertinent papers for inspection using methods consisting of predictive coding, greatly decreasing the time and effort needed by legal practitioners. AI-assisted document review ensures accurate and thorough assessment of electronic data while also increasing productivity and effectiveness.

Furthermore, AI tools have become crucial in the field of e-discovery, where it is necessary to sort through enormous amounts of digital data in order to find relevant evidence. AI algorithms are used by programs such as Logikcull and Disco to automatically identify, retrieve, and arrange pertinent electronic evidence. Legal practitioners may quickly find crucial information using these tools, which analyse emails, documents, and other digital data using text mining, natural language processing, and machine learning. AI-driven tools can also help with data filtering and deduplication, removing redundant or unnecessary data and lowering the overall volume of data that needs to be examined. AI tools enable lawyers to quickly, accurately, and effectively manage the intricacies of document review and e-discovery by solving the mysteries buried in digital haystacks.

[6] Hindawi, 'Advanced Machine Learning Algorithms for Multi-Sensor Data Processing' (*Hindawi,* 1 January 2023) <https://www.hindawi.com/journals/js/si/954696/> accessed 16 August 2023.

3.5 Automating the Mundane: Ai's Brushstrokes in Legal Process and Administrative Tasks

AI has become an influential force in the world of legal procedure and administrative duties, using its brushstrokes to automate tedious and time-consuming procedures. Legal practitioners frequently have to perform repetitive tasks including data input, contract creation, and document preparation. However, AI tools have intervened to lessen this burden, allowing legal professionals to concentrate on higher-value tasks. NLP and machine learning methods are used by programs that include LawGeex and ContractPodAI to automate the examination and creation of legal documents. These AI-powered tools not only speed up the preparation of documents but also improve accuracy and consistency by analysing trends, detecting essential clauses, and guaranteeing compliance with legal standards.

Additionally, AI has broadened its brushstrokes into the legal sector's administrative duties by providing technologies that expedite workflows and boost efficiency. For instance, AI algorithms are used by virtual legal assistants comprising ROSS Intelligence and Evisort to help with activities like legal research, scheduling, and client contact.[7] These resources can include legal advice, case studies, statutes, and even analysis of client documents for particular information. AI enables legal practitioners to maximize their time and resources, concentrate on strategic decision-making, and provide higher-quality legal services by automating routine administrative activities. AI streamlines and nimbly expands the legal profession by injecting efficiency and productivity into administrative and legal processes.

4. ETHICAL AND LEGAL ENIGMAS: THE DARK SIDE OF AI IN LAW

The integration of AI in the legal field presents a range of ethical and legal challenges that must be carefully addressed to ensure responsible and fair implementation. As we unveil the potential of AI in law, we must also confront the shadows it casts, grappling with the following concerns:

4.1. Bias, Fairness, And Transparency: Wrestling with The Shadows of Ai Systems

The pervasive problem of bias in the field of AI presents a significant challenge in the legal field. AI systems are made to learn from past data in their pursuit of effectiveness and accuracy. However, if this data is tainted with prejudices, the AI systems may unintentionally support discriminatory behaviours, amplifying current societal inequalities. Imagine a situation where a legal decision-making tool powered by AI, trained on past court decisions, unintentionally favours some demographics over others due to systemic biases present in the data. This might result in inconsistent access to justice and subpar results.

[7] McFarland A, '7 "Best" AI Legal Assistants (*Unite.Al*, June 2023)' <https://www.unite.ai/best-ai-legal-assistants/> accessed 17 August 2023.

The "COMPAS"[8] system, which is used in some U.S. jurisdictions to evaluate the propensity of criminal defendants to recidivate, is one illustration of bias in AI. According to studies, the algorithm displays racial bias, which causes marginalized people to receive higher risk scores. This demonstrates how AI has the potential to amplify existing disparities in the criminal justice system, raising significant questions about justice and fairness. To reduce the spectres of bias, promoting fairness and transparency in AI algorithms becomes essential. To carefully choose and curate training data that is diverse, representative, and free of bias, legal professionals and AI developers must collaborate. Researchers are also working on explainable AI (XAI) techniques to improve transparency in AI systems. With the help of XAI,[9] legal professionals will be able to comprehend how AI systems make decisions, challenge the results, and identify and correct biases. Beyond discriminatory actions, bias in AI poses a challenge with wider societal ramifications. AI systems have been known to unintentionally reinforce gender biases, for example, in language models that produce gendered or stereotypical language based on training data. Legal professionals' interactions with clients, the creation of legal documents, and even negotiation strategies can all be negatively impacted by these biases.

4.2. The Privacy Paradox: Safeguarding Data Protection in an AI-Driven Legal Landscape

The application of AI to law has expanded the potential for data-driven insights and analysis. The privacy paradox is a serious issue that this advancement raises, though. Data protection becomes crucial as AI systems increasingly rely on vast amounts of legal and personal information to make judgement calls.

Think about using platforms with AI-powered legal research that comb through numerous legal texts, court rulings, and laws. To provide insightful legal advice, these platforms mine insights and patterns from the data. Nevertheless, the very nature of this analysis raises privacy concerns because sensitive data found in legal texts may be accessed and processed by AI algorithms. It becomes extremely difficult to balance the need for data-driven insights with preserving people's right to privacy.[10] The application of predictive analytics in the legal sector is one notable case study illuminating the privacy paradox. AI algorithms can examine personal information to forecast

[8] Larson J, Mattu S, Kirchner J and Angwin J, 'How We Analysed the COMPAS Recidivism Algorithm' (*Propublica*, 23 May 2016) <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm> accessed 19 August 2023.

[9] Gianarlo Mori, 'What is Explainable AI (XAI) and Why You Should Care' (*Medium*, 14 January 2023) <https://gcmori.medium.com/what-is-explainable-ai-xai-and-why-you-should-care-e0fd4663beac> accessed 19 August 2023.

[10] Mark van Rijmenam., 'Privacy In The Age Of Ai: Risks, Challenges And Solutions' (*The Digital Speaker*, 17 February 2023) <https://www.thedigitalspeaker.com/privacy-age-ai-risks-challenges-solutions/> accessed 19 August 2023.

a person's behaviour or outcomes in a legal situation. A person's financial history and other personal information, for instance, might be used by AI systems to predict whether they will default on a loan. The potential misuse or unauthorized access to personal information is a concern, despite the fact that these predictive capabilities can be useful in risk assessment.

AI developers and legal experts must put data protection measures first in order to solve the privacy paradox. Sensitive information should be protected by strict access controls, encryption methods, and strong security protocols.[11] Furthermore, privacy-enhancing technologies such as federated learning, which trains AI models on distributed data, can help protect privacy, while still gaining from shared insights. Additionally, legislative and regulatory frameworks are essential for data protection. For example, strict regulations for the gathering, storing, and processing of personal data have been established by the General Data Protection Regulation (GDPR)[12] in the European Union. To address the particular difficulties presented by AI in the legal sphere, similar rules and standards should be created or strengthened.

By proactively addressing the privacy paradox, legal professionals can prevent the erosion of people's privacy rights as a result of AI advancements. Maintaining public trust and upholding the legal notions of privacy depend on finding the right balance between data-driven insights and data protection. We can only fully utilize AI while upholding people's privacy rights and the integrity of the legal profession by ensuring data protection.

4.3. Accountability and Liability: Traversing the Blurred Boundaries of Ai-Generated Outcomes

Integrating AI into the legal industry raises difficult issues with regard to responsibility and liability. Determining who should be held accountable when AI-generated outcomes lead to errors or harm present a significant challenge because AI systems make decisions that have significant legal implications.

The application of AI to autonomous vehicles[13] is one illustration that emphasizes the accountability issue. If an autonomous vehicle causes an accident, who should be held liable? Is it the car maker, the person who created the AI system, the car owner, or a combination of these people or organizations? When an accident occurs as a result of a malfunction or error in the AI system's decision-making processes, determining liability becomes especially difficult.

---

[11] Brad Medairy, '4 Ways To Preserve Privacy In Artificial Intelligence' <https://www.boozallen.com/s/solution/four-ways-to-preserve-privacy-in-ai.html> accessed 19 August 2023.

[12] 'The General Data Protection Regulation' (*European Council*, 25 May 2018) <https://www.consilium.europa.eu/en/policies/data-protection/data-protection-regulation/> accessed 19 August 2023.

[13] Kerem Güle, 'A match made in transportation heaven: AI and self-driving cars,' (*Data Economy*, 29 December 2022) <https://dataconomy.com/2022/12/28/artificial-intelligence-and-self-driving/> accessed 19 August 2023.

Similar to this, AI-powered tools in the legal industry that support legal research, contract analysis, or decision-making may offer recommendations or suggestions that legal professionals rely on. Who is ultimately in charge if a mistake or oversight occurs as a result of the AI system's recommendation? Should the creators of the AI system, who created its algorithms, or the legal expert who followed their advice be held responsible? Re-evaluating current legal frameworks is necessary to address these novel issues given the changing landscape of AI-generated outcomes.

Setting up precise rules for responsibility and liability in legal contexts infused with AI becomes essential. Laws must be revised to take into account the special characteristics of AI decision-making, such as the complexity of algorithms and the dynamic nature of AI systems. These frameworks should cover issues with causation, predictability, and the standard of care when AI systems are used in legal proceedings.

In order to establish comprehensive rules for accountability and liability, cooperation between legal professionals, technologists, and policymakers is crucial. Clarifying the obligations of various stakeholders in the AI ecosystem should be the goal of this collaboration. In the event that human operators and AI systems share accountability for the results, this possibility of hybrid responsibility should also be taken into account.

Legal professionals should also use caution when using AI systems, carefully considering the constraints, dangers, and potential biases related to these technologies. In order to ensure accuracy and adherence to legal requirements, they should maintain a critical mindset and confirm and validate AI-generated outputs.

4.4. Regulating the Elusive: Confronting Challenges in Governing AI in the Legal Domain

Regulating AI's use in the legal sphere is difficult given the technology's rapid advancement. In order to effectively regulate AI in the legal sector, it is important to strike a careful balance between encouraging innovation and ensuring moral behaviour. As lawmakers and regulators work to keep up with technological advancements, the elusive nature of AI presents special challenges.

The complexity of the technology itself presents one difficulty in legislating AI. AI systems frequently use challenges to comprehend and assess machine learning algorithms and techniques.[14] Establishing precise regulations that cover the nuances and potential risks associated with AI is difficult due to this complexity. In addition, traditional regulatory frameworks, which have a tendency to be slower to adapt, are challenged by the dynamic and constantly changing nature of

[14] Maria Matkovska, 'Challenges in Validating Machine Learning and Artificial Intelligence Models' (*CXOTECH Magazine*) <https://cxotechmagazine.com/challenges-in-validating-machine-learning-and-artificial-intelligence-models/> accessed 19 August 2023.

AI. Regulations must be adaptable enough to take into account AI systems' ongoing learning and evolution based on new data without stifling innovation. This necessitates regulatory strategies that strike a balance between risk reduction and the advancement of responsible and moral AI use in the legal industry.

In addition, developing ethical guidelines for AI in the legal field presents its own set of difficulties.[15] The obligations of AI users and developers are questioned, as well as the necessity of AI systems being transparent and comprehensible. Should AI developers, for example, be forced to reveal the underlying algorithms and training data of their systems? What steps can lawyers take to ensure that AI systems adhere to moral and professional standards? In order to establish comprehensive regulations and ethical standards, it is necessary to work together with legal experts, technologists, policymakers, and stakeholders.

4.5.The Human Touch: Implications for Legal Professionals and The Evolving Workforce Dynamics

The use of AI in the legal industry has significant ramifications for legal professionals and the shifting nature of the workforce. While AI has many advantages, such as improved decision-making and increased efficiency, it also raises questions about the place of professionals and potential job displacement.[16]

Tasks such as document review, legal research, and contract analysis can be automated by AI technologies to save time and effort. There may be worries about job displacement even though this automation can free up legal professionals' time, and allow them to focus on higher-level tasks. For instance, AI-powered e-discovery tools can process and analyse large volumes of documents in a fraction of the time it would take a human, potentially reducing the need for time-consuming manual document review.

In the legal industry, however, the human touch is still crucial. Professionals in the legal field have specialized knowledge, the capacity for critical thought, and the capacity to interpret intricate legal concepts. They bring to their work, empathy, judgement, and ethical considerations—qualities that AI systems cannot fully replace. The opportunity for legal professionals to use AI as a tool to improve their capabilities and offer clients more value-added services is growing as AI takes on more routine tasks.

---

[15] 'AI and Law: What are the Ethical Considerations?' (*Clio*) <https://www.clio.com/resources/ai-for-lawyers/ethics-ai-law/> accessed 19 August 2023.

[16] Chris Kolmar, '23+ Artificial Intelligence and Job Loss Statistics [2023]: How Job Automation Impacts The Workforce' (*Zippia*, 11 June 2023) <https://www.zippia.com/advice/ai-job-loss-statistics/> accessed 19 August 2023.

5. UNVEILING PANDORA'S BOX: CHALLENGES AND OPPORTUNITIES IN AI ADOPTION

AI adoption on a large scale opens a Pandora's Box of opportunities and challenges.[17] On one hand, the prospect of increased effectiveness, better decision-making, and transformative abilities. AI has the power to transform entire sectors and alter how we work and live. However, this adoption also prompts questions about morality, privacy, bias, and job displacement. It is vital to carefully consider the path of AI adoption as organizations and society struggle with these issues, utilizing the technology's enormous potential while addressing any risks and guaranteeing accountability. The opportunities afforded by the deployment of AI can be appropriately tapped into, to encourage innovation and positive change with a proactive approach and a deep awareness of the complexity involved.

Unique difficulties and obstacles to the adoption and integration of AI are presented by the legal sector. However, the legal sector can fully realize the potential of AI and benefit from it by confronting these challenges head-on. The unwillingness to embrace change and use new technologies is a major hurdle. Legal practitioners may be wary about entrusting AI tools with crucial activities that used to be handled by humans out of concern for potential biases or inaccuracies.[18] Legal professionals must be educated and trained thoroughly in AI's capabilities, constraints, and ethical implications in order to overcome this. Transparency and clear explanations of how AI tools make choices are necessary to increase trust and confidence in the technology, enabling legal practitioners to use AI as a helpful tool rather than as a threat.

The availability and accessibility of high-quality data represent another obstacle. To train and produce accurate predictions, AI models need a lot of reliable and diverse data. However, it can be difficult to obtain and arrange legal data because it can be mixed up, unstructured, and dispersed across several sources. To enable AI algorithms to function properly, efforts should be taken to build reliable data management practices and standardize data formats. To address these data-related issues and guarantee the availability of high-quality datasets for legal AI applications, collaboration among legal practitioners, companies, and technology providers is essential. The legal sector can embrace AI's promise, improve efficiency, and provide legal services that are more effective by addressing these limitations head-on.

The combination of humans with AI has the potential to establish a harmonious duet in the quickly changing field of legal practice, where the capabilities of both parties are utilized for the best

[17] T. Fountaine, B. McCarthy and T. Saleh, 'Building the AI-Powered Organization' (*Harvard Business Review*, July – August 2019) <https://hbr.org/2019/07/building-the-ai-powered-organization> accessed 19 August 2023.
[18] 'New report on ChatGPT & generative AI in law firms shows opportunities abound, even as concerns persist' *Thomson Reuters* (United States of America, 17 April 2023) <https://www.thomsonreuters.com/en-us/posts/technology/chatgpt-generative-ai-law-firms-2023/> accessed 19 August 2023.

results. While human knowledge contributes critical thinking, contextual understanding, and ethical judgement to the table, AI technology may automate repetitive jobs, accelerate research, and deliver data-driven insights. To foster this partnership, one needs to change their perspective from seeing AI as a substitute for human experts to seeing it as a potent tool that expands their skills.

Furthermore, it is crucial for people and AI systems to communicate effectively and openly. Legal professionals must be able to critically assess and validate AI recommendations and judgements, which requires a thorough grasp of how AI generates its recommendations or decisions.[19] This openness not only increases confidence in AI but also enables people to correct errors, improve algorithms, and reduce biases. The partnership between humans and AI in legal practice can produce a harmonious duet that utilizes the capabilities of each to deliver more effective, accurate, and morally sound legal services by fostering an environment of open communication and reciprocal learning.

Law has a lot of room for transformation with the advent of AI, which offers a wide range of opportunities. AI has the potential to completely transform the way legal practitioners work, from automating tedious jobs to improving legal research, predicting case outcomes, and expediting administrative procedures.[20] Legal professionals can attain previously unheard-of levels of productivity, accuracy, and efficiency by utilizing AI.

The automation of repetitive operations will free up crucial time for legal practitioners to concentrate on higher-value work, which is a big promise for AI in law. AI-powered systems that can quickly filter through vast volumes of data, locate critical information, and extract pertinent insights can speed document review, contract analysis, and due diligence. Time is saved, accuracy is increased, and the possibility of human error is decreased as a result. AI enables legal practitioners to devote their time and skills to more sophisticated and strategic tasks including client counselling, developing legal strategies, and participating in negotiations by automating these labour-intensive processes. This change in emphasis has the potential to significantly improve both the value provided to clients and the general efficacy of legal practice.

Prioritizing appropriate AI use and reducing possible dangers are critical as AI becomes more pervasive in the legal sector. However, in order to tame the beast of AI and fully reap its benefits, there are inherent difficulties and ethical issues that must be taken into account.

---

[19] Micheal D. Murray, 'Artificial Intelligence and the Practice of Law Part 1: Lawyers Must be Professional and Responsible Supervisors of AI' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4478588> accessed 19 August 2023.

[20] Matthew Stepka, 'Law Bots: How AI Is Reshaping the Legal Profession' (*Business Law Today*, 21 February 2022) <https://businesslawtoday.org/2022/02/how-ai-is-reshaping-legal-profession/> accessed 19 August 2023.

Ensuring there is openness and accountability is a crucial component of using AI responsibly. Legal practitioners must be able to explain the logic behind AI-generated results and comprehend how AI algorithms make decisions.[21] Legal professionals may assess and validate AI's recommendations with the help of transparent AI systems, ensuring that choices are in line with moral and legal principles. Mechanisms for addressing potential biases in AI models should also be in place, as these flaws have the potential to exacerbate inequality and compromise the impartiality of legal procedures. To ensure that AI is used in a way that preserves justice and equality, regular auditing and monitoring of AI systems can help discover and correct biases.

Data security and privacy are also important factors to take into account. AI is heavily reliant on enormous volumes of data, particularly sensitive and private data. To preserve client privacy and stop unauthorized access, lawyers must give top priority to data protection techniques including anonymization and encryption. Additionally, sustaining trust and compliance in AI-driven legal practices requires adherence to data protection laws consisting of GDPR or Health Insurance Portability and Accountability Act (HIPAA). The legal sector may successfully tame the AI beast by proactively addressing these concerns and putting in place strong safeguards, assuring responsible and ethical use while reducing risks and maximizing the advantages AI brings to the profession.

6. ILLUMINATING THE PATH: CASE STUDIES AND EMPIRICAL REVELATIONS

The incorporation of AI into the legal field has not only sparked theoretical discussions but also produced real-world case studies and empirical findings that have illuminated the influence and potential of AI in law. The advantages, difficulties, and results of implementing AI in the legal profession are valuable insights offered by these real-world examples.

6.1. Glimpses Into the Real-World Tapestry Of Ai Applications in Law

Let us examine a few compelling case studies that highlight the various uses and results of AI in law to shed light on the impact of the technology in the real world. The use of predictive analytics with AI in the criminal justice system is one notable example. For instance, the COMPAS system created by Equivalent (formerly Northpointe) examines historical data on criminal trends and characteristics of offenders to produce forecasts on recidivism rates. Empirical studies, however, have raised questions about potential biases in these algorithms because it has been discovered that they are more likely to mistakenly classify African American defendants as higher risk. Such

[21] Daniel Faggella, 'AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications' (*EMERJ*, 7 September 2021) <https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/> accessed 19 August 2023.

instances emphasize how crucial it is to give careful thought to the fairness and transparency of AI systems when utilizing them in legal contexts.

6.2. Lessons Learned and Best Practices: Portraits Of Success and Cautionary Tales

The challenges and best practices related to AI in the legal industry can be better understood by looking at both successful AI implementations and cautionary tales. The application of AI to contract review and analysis is one instance of successful AI integration. By utilizing AI platforms[22] such as LawGeex and eBrevia, which automate the extraction of crucial data from contracts and identify potential risks, legal professionals have saved a lot of time and money. However, there are also cautionary tales, such as the well-known incident involving the "AI judge" algorithm used in Estonia,[23] which was criticized for its lack of accountability and transparency. These experiences highlight the significance of considering the restrictions, prejudices, and potential dangers of AI systems, as well as the necessity of using AI tools in conjunction with human oversight and collaboration.

6.3. Capturing the Essence: Impact Evaluation and the Voice of the Users

Empirical analyses and user viewpoints are essential for a thorough understanding of AI's effects on the legal system. The efficacy and efficiency of AI tools in legal settings can be determined by thorough impact evaluations. For instance, a study by the RAND Corporation assessed how well AI could be used to forecast case outcomes in immigration court.[24] The results demonstrated that AI algorithms outperformed human judges in terms of accuracy rates, pointing to the possibility of more accurate judgements. In addition, surveys and interviews with legal experts who have incorporated AI into their practice offer insightful data. For instance, discussions with lawyers who use platforms like Fastcase and ROSS Intelligence that use AI to assist with legal research have highlighted the benefits of time savings and improved research capabilities. A nuanced understanding of the advantages, constraints, and implications of AI in law can be gained from these real-world assessments and user viewpoints.

We gain a thorough understanding of the actual effects of AI on the legal system by looking at case studies, taking lessons from both successes and failures and taking into account user viewpoints. These empirical discoveries help us to navigate the complexities by emphasizing the fields where

[22] Raja, 'The top players in the AI-powered contract management space' (*Cenza*, 26 May 2022) <https://www.cenza.co/the-top-players-in-the-ai-powered-contract-management-space/> accessed 19 August 2023.

[23] 'BTI 2022 Estonia Country Report' (*BTI 2022*) <https://bti-project.org/en/reports/country-report/EST> accessed 19 August 2023.

[24] Osoba O and Welser W, 'The Risks of Artificial Intelligence to Security and the Future of Work' (*RAND Corporation*, 2017) <https://www.rand.org/content/dam/rand/pubs/perspectives/PE200/PE237/RAND_PE237.pdf> accessed 19 August 2023.

AI has proven to be useful and the lessons, we can use to ensure responsible and successful integration of AI in the legal sphere.

7. THE FUTURE GALLERY: PAINTING A VISION OF AI IN LAW

The future gallery presents an enthralling vision of the transformational potential of AI in the field of law. A new era of effectiveness, precision, and innovation is about to begin as a result of AI technologies, which are poised to revolutionize legal research, contract analysis, decision-making, and administrative activities. As we enter this gallery, we must, however, be mindful of the following:

7.1. Masterpieces on the Horizon: Emerging Trends and Technological Advancements in AI

There are several new trends and technological developments that hold the promise of producing masterpieces in a variety of areas, including law, as the field of AI continues to develop. The development of NLP and machine learning algorithms, which enables AI systems to better comprehend and analyse human language, is one key trend.[25] This innovation creates opportunities for more complex legal research, contract analysis, and case prediction because AI can go through enormous amounts of legal data, spot trends, and offer insightful information.

The blending of AI with several technologies, including blockchain, the Internet of Things (IoT), and big data analytics, is another new development. By combining AI and blockchain technology, legal transactions may be made more secure and transparent, and IoT devices can supply real-time data for more precise and context-aware decision-making. The combination of AI and big data analytics also makes it possible for legal practitioners to derive important data from enormous datasets, enabling thorough legal research and well-informed legal strategy. These new patterns and technological developments offer promising prospects for the use of AI in law, opening the door to innovations that will redefine the limits of legal practice and alter the structure of the industry.

7.2. A Legal Masterpiece: Navigating the Legal and Regulatory Considerations of AI

Understanding the legal and regulatory issues related to the usage of AI becomes increasingly important as it is integrated into more sectors of our society, including the legal sector. Law and AI interact in complex ways, raising difficult issues with regard to ethics, privacy, responsibility, and accountability. To ensure the ethical and fair use of AI in legal practice, governments and legal experts must address these issues.

[25] LawCrossing 'The Future of Legal Research: Leveraging Machine Learning and Natural Language Processing' (*LawCrossing.com*, 19 June 2023) <https://www.lawcrossing.com/article/900054550/The-Future-of-Legal-Research-Leveraging-Machine-Learning-and-Natural-Language-Processing/> accessed 19 August 2023.

The ethical application of AI is a key consideration. Questions about the openness, justice, and potential biases of these systems arise as they make judgements that affect people and society. Establishing legal frameworks is necessary to control the creation, use, and accountability of AI systems.[26] This entails making sure AI algorithms are clear and understandable, enabling efficient audits, and preventing discriminatory effects. To preserve sensitive information and guarantee compliance with relevant laws notably GDPR and HIPAA, considerations about privacy and data protection must also be made. The legal community may create a framework that protects justice, fairness, and the ethical use of AI in the legal realm by proactively addressing these legal and regulatory matters.

In the context of AI law, liability and accountability are also crucial issues to take into mind. It might be difficult to assign blame for mistakes, biases, or legal violations brought on by AI systems. The division of responsibility between humans and AI needs to be made clearer by the legal system, especially when AI systems make decisions or suggestions on their own. It's critical to strike a balance between accountability and the knowledge that AI works within certain constraints. In order to preserve people's legal rights and interests while supporting the continuous development and acceptance of AI technologies in the legal industry, legal professionals and policymakers must collaborate to create frameworks that clearly define boundaries of responsibility.

7.3. The Art of Collaboration: Fostering Interdisciplinary Connections

The art of collaboration takes front stage in the developing world of AI in law, highlighting the significance of encouraging interdisciplinary relationships. Collaboration between legal practitioners, technologists, data scientists, and ethicists is necessary for the successful integration of AI in the legal field.[27] Interdisciplinary collaborations can promote creativity, address complicated problems, and guarantee the ethical development and application of AI technology by bringing different viewpoints and areas of expertise together.

In order to bridge the gap between legal understanding and technical capabilities, collaboration between legal professionals and technologists is extremely crucial. Legal professionals can offer helpful insights into the nuances of legal procedures, ethical issues, and particular client demands. On the contrary, technologists offer their technical know-how in system creation, data analysis, and AI algorithms. This cooperative effort enables the development of AI tools that are specifically suited to the requirements of the legal sector, guaranteeing that they comply with legal requirements, moral principles, and professional values. Legal and technological professionals may

[26] CAHAI - Ad hoc Committee on Artificial Intelligence 'A Legal Framework For AI systems' (*Council of Europe*, 2021) <https://edoc.coe.int/en/artificial-intelligence/9648-a-legal-framework-for-ai-systems.html> accessed 19 August 2023.

[27] Hod S, Chagal-Feferkorn K, Elkin-Koren N and Gal A, 'Data Science Meets Law' (*SSRN,* 4 May 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4077216> accessed 19 August 2023.

cooperatively handle the opportunities and obstacles posed by AI in law by establishing a culture of collaboration, thereby improving the provision of legal services and the development of the field as a whole.

7.4. Shaping The Canvas: Long-Term Implications for The Legal Profession

The adoption of AI in the legal industry will have far-reaching long-term effects that will change the very nature of legal practice. The responsibilities and functions of legal practitioners are changing as AI technology develops, necessitating adaptability to the shifting environment. While some people worry that AI may eventually replace human lawyers, the truth is that AI is a potent tool that supplements and strengthens their abilities.

The modification of legal operations and processes is one important consequence. AI can automate tedious and time-consuming duties like document review and contract analysis, freeing up legal professionals to concentrate on higher-level work that calls for critical thinking, strategy formulation, and client interaction. This change in task distribution helps lawyers to work more productively, providing clients with quicker and more precise results. In addition, AI's capacity to analyse enormous volumes of legal data enables more thorough and educated decision-making, empowering lawyers to offer better legal counsel, predict case outcomes, and plan more successfully.[28]

The requirement for legal practitioners to acquire new skills and competences is another significant impact. Lawyers must get practical knowledge of AI technology, data analysis, and algorithmic decision-making as AI is increasingly incorporated into legal practice. This not only promotes efficient AI tool collaboration but also makes it possible for lawyers to assess AI-generated findings critically and validate them, promoting accountability and transparency. Additionally, to be able to confidently traverse legal and regulatory frameworks and maintain the highest levels of integrity, legal professionals need to have skills in data protection, cybersecurity, and ethical issues concerning AI use.

8. CONCLUSION

The application of AI to the legal industry has the potential to transform how lawyers practice their profession. Legal research, case analysis, contract management, and predictive analytics are a few examples of the transformative fields where AI is used. These developments increase accessibility to justice, efficiency, and accuracy. The use of AI in law, however, also raises moral and legal issues. Bias, fairness, and transparency in AI systems are subjects of concern. Privacy protection and data security become essential. It can be difficult to determine who is responsible and what is

[28] Ashley KD, 'Artificial intelligence and legal analytics: new tools for law practice in the digital age' (*Cambridge University Press*, 2017) <https://lawcat.berkeley.edu/record/93501?ln=en> accessed 19 August 2023.

liable for outcomes produced by AI. Furthermore, the rapid advancements in AI technology are outpacing the regulatory environment, making careful governance frameworks necessary.

The use of AI in law presents significant opportunities despite these obstacles. Working with AI systems can improve legal practice and decision-making. Adopting AI has the potential to lead to improvements in productivity, access to justice, and predictive insights. However, responsible AI use necessitates the reduction of risks such as bias, invasion of privacy, and excessive reliance on automated decision-making. Future technological developments offer AI in law promising opportunities. To successfully navigate this dynamic environment, legal and regulatory considerations must come first. Experts in law, AI, policy, and research must work together. To close gaps between the law and other fields, interdisciplinary connections should be encouraged. This will enable a thorough understanding and responsible AI application.

In conclusion, the nexus of AI and law necessitates investigation and prudent management. A future in which AI and human legal minds work together for justice, efficiency, and fairness can be shaped by accepting AI's transformative power while addressing related challenges. To successfully navigate this environment and uphold the ethical standards of the legal profession, policymakers, legal professionals, and researchers must collaborate.

ARTIFICIAL INTELLIGENCE GOES GLOBAL: EMBRACING A NEW FRONTIER OF OPPORTUNITIES & OBSTACLES.

Redha Refai

ABSTRACT

The manifestation that has unfolded over the past few decades to gradually becoming the focus of attention from the media and corporate organizations globally, is that machines are increasingly capable of onboarding more and more tasks that were exclusively manned by human professionals. This initiated a fundamental shift in the lines of employment and a gradual need for extensive retraining of new skills for humans to keep up with the modern scope of automation, AI. This article aims to put into perspective what the doctrine of Artificial Intelligence is, figuring out how this 'epic transformation' of Artificial Intelligence over the past 70 years impacted our daily lives and the legal profession, in an express and covert venture, as well as, figuring out, in time to come, whether this phenomenon should be regulated.

1. ARTIFICIAL INTELLIGENCE

John McCarthy, one of the "founding fathers" of Artificial Intelligence coined the term in 1955, interpreting it as "the science and engineering of making intelligent machines that are smart."[1] Artificial Intelligence is a doctrine of computer systems being able to perform tasks that normally require human intelligence with greater efficiency and significant cost savings. AI has its diverse application, from being involved in automating plagiarism checks to self-driving cars, drafting essential contractual documents, and robotic developments, inter alia.[2]

In his infamous book, "An Introduction to Your Future", R Susskind,[3] begins by realizing that specifically in the legal arena and in the provision of legal services, how lawyers work has changed rapidly, and this exponential growth is only the beginning. [4] He appreciates the multitude of factors that may have led to this rapid change, but he rides with conviction of the "three main drivers of this change." [5]

[1] The Royal Society, 'Explainable AI: The Basics' (November 2019) <https://royalsociety.org/-/media/policy/projects/explainable-ai/AI-and-interpretability-policy-briefing.pdf>, 6 accessed 17 February 2023.
[2] The Law Society of England and Wales, 'Horizon Scanning: Forward Thinking' <https://www.lawsociety.org.uk/topics/research/ai-artificial-intelligence-and-the-legal-profession> accessed 17 February 2023.
[3] R Susskind, 'Tomorrow's Lawyers: An Introduction to Your Future', (2nd edn, 2017), 6.
[4] ibid, 3.
[5] R Susskind and D Susskind, 'The Future of The Professions', (1st edn, 2015)

1.1 "3 DRIVERS OF CHANGE"

The first point of change is the idea Professor Susskind refers to as the "more-for-less" challenge,[6] where he recognizes that orthodox legal services are not available for every citizen to predominantly gain access to, because of the exorbitant costs borne by law firms when providing legal advice in its traditional form.[7] The cure for this unsustainability was pointed out by Susskind with the efforts of the "more-for-less" strategy; delivering more efficient legal services for substantially lower costs. This is further elaborated under the liberalization discussion below.

The second driver of change is liberalization. In the past, only qualified legal providers and lawyers were able to provide legal advice and services, thereby narrowing the scope of consumer choice in the way of specialism. Due to this lack of accessibility, the legal profession was described as an unjustifiable monopoly and that its practices were anti-competitive.[8] In England, onboarding this criticism and attempting to bolster consumer choice in the provision of legal services at more affordable costs, this was attempted to be done as early on as 2007.[9] This, inter alia, allowed for a proliferation of businesses being set up,[10] permitting 'Alternative Business Structures (ABS)'[11] to deliver legal services, including top tier companies like BT, a leader in the technological industry and AA, heads of the automobile association assuring the provision of legal services.[12] This allows non-traditional law firms to enter the legal services profession, facilitating consumers with a wider choice,[13] which was previously exclusively restricted. Statistically, this was highly regarded as the birth of licensing of ABSs regulated by the SRA, where over 500 licenses were granted in 2012 alone, of which, almost 75% were top-tier firms like Price Water House Coopers, Ernst & Young, KPMG.[14] At the same time, many law firms had collaborated with private equity firms for substantial investments when they became ABSs. This is a growing figure to this date, which represents significant departures to conventional law principles, allowing for a greater increase in consumer choice in the marketplace.[15] Through such developments, it is becoming more and more apparent that the legal marketplace has room for offering legal services at a significantly reduced

[6] ibid,135.
[7] See Susskind's observation in 'Tomorrow's Lawyers: An Introduction to Your Future (2nd edn, 2017): "they are being asked by their CEOs, CFOs, Board to reduce the amount they spend on external law firms. And yet, at the same time, they say they have more legal and compliance work than ever before." 4
[8] ibid (n 3), 6.
[9] Legal Services Act 2007.
[10] ibid, s.1(1).
[11] ibid, s.73.
[12] ibid (n 5), 85.
[13] See; Legal Services Act 2007, Part 1 <https://www.legalfutures.co.uk/latest-news/legal-services-act-a-decade-on-much-to-celebrate-but-much-to-do> accessed 17 February 2023.
[14] ibid (n 3), 7.
[15] ibid.

costs and more palatable for clients across spectrums. Amidst the multitude of business structures, Riverview Law was one institute within the specialisms of business law that employed and deployed experienced lawyers, data analysts, and other professionals to manage the company's legal team with fixed fees and at significantly lower costs than conventional law firms.[16] This was highly recognised in the public sphere when Ernst & Young made it publicly aware of acquiring Riverview Law Ltd to expand their legal services, considering this takeover "as a leading disruptor of legal services".[17] The CEO of Riverview Law Ltd recognised this monumental breakthrough as the legal profession was undertaking a global upheaval and thus opted for a more flexible and customer centric stance. It is therefore anticipated, that where legal services are met with liberalisation, this works towards the "more-for-less" challenge and in turn facilitates a ripple effect across legal services in different jurisdictions.

The final point in the way of an influential driving force of change and the proliferation of automation is the art of technology. Legal help, for example is freely accessible online with legislation, both primary and secondary sources, as well as case law, being available through the internet with very insignificant costs (in large part, owing to the pioneers of this e-commerce advancement).[18] To add to this, the COVID-19 pandemic and the world going into a global lockdown for a prolonged period raised key points, especially in the areas of civil justice systems, to promote Online Dispute Resolutions (ODRs).[19] The proposed recommendation was to revolutionise innovation and access courts through a completely online-based service via an internet-based domain, known as the Her Majesty Online Court (HMOC), consisting of 3 tiers. Upon passing the stages, the judges online will be providing solutions to the conflicts of citizens being delivered as they would in a traditional process, broadening access to justice while simultaneously delivering services at a fraction of the cost.[20] However, while also acknowledging an increase in litigation, which includes vexatious litigation, due to convenience and low costs, the

[16] MA Cohen, 'EY Acquires Riverview Law: A Different Perspective' (Forbes, 10 August 2018) <https://www.forbes.com/sites/markcohen1/2018/08/10/ey-acquires-riverview-law-a-different-perspective/?sh=2d8972bc1950> accessed 17 February 2023.
[17] T Connelly, 'Big Four Giant EY Buys NewLaw Firm Riverview and Pledges to 'Disrupt' Legal Market - Legal Cheek' (Legal Cheek, 7 August 2018) <https://www.legalcheek.com/2018/08/big-four-giant-ey-buys-newlaw-firm-riverview/> accessed 18 February 2023.
[18] The Australasian Legal Information Institute, <https://www.austlii.edu.au/> accessed 6 March 2023.
[19] Similar examples of ODR have been seen in other jurisdictions; Canadian Civil Resolution Tribunal <https://civilresolutionbc.ca/> accessed 20 August 2023. See also; Cybersettle based in the US <http://www.cybersettle.com/> accessed 20 August 2023.
[20] Online Dispute Resolution Advisory Group, 'Online Dispute Resolution – For low value Civil Claims' (Civil Justice Council, February 2015) <https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> Lord Dyson MR understanding this as "a catalyst for far-reaching reforms to our civil justice system." accessed 17 February 2023.

Committee suggests the fees of the tiers are to be set at a sufficient level which will make prospective users rethink on a reasonable standard before commencing any online actions.[21]

That being said, many lawyers still fail to recognize the emergent importance of technology in our daily lives, especially with the unassailable observations of Moore's Law; that every 2 years, the processing power of computers double, while the costs of making such computers halve.[22] Despite sceptics arguing that this will be short-lived,[23] Dr. Ray Kurzweil professes that in the next foreseeable future, there will be a pivotal shift in technological singularity, when Artificial Intelligence surpasses Human Intelligence.[24] A progress towards this observation was in 2011, where IBM Watson's computer system defeated 2 of the finest competitors in a general knowledge quiz, 'Jeopardy!' through various AI techniques and models including informational retrieval speech, advanced language understanding and various other Natural Language Processors inputted.[25] This was an early victory for AI which grew on other areas of specialism, notably with AI-based chatbot systems as currently GPT-4 by OpenAI and Microsoft launching Co-Pilot models. The algorithm provides reasonable and accurate feedback in real time upon the data that is inputted which is self-developed. Law firms like Hogan Lovells have used their technological prowess to build a machine learning software to streamline the logistical challenges of outsourcing agreements and filtering its robust processes and quality control.[26] This toolkit acted as a great asset to clients being offered more comprehensive reviews of agreements with stringent levels of accuracy for reduced costs. Therefore, the ongoing developments in areas of technology assists the pragmatic changes in delivering legal services and the innovation that is associated with the law in ways it hasn't been practiced before.

2. 2 TYPES OF AI & ITS APPLICATION

To understand the scope of AI and its impact on daily lives better, it is prudent to appreciate the 2 overarching types of AI that are used to solve problems and make decisions in this field: Rule-

[21] ibid.
[22] E Mollick, ' Establishing Moore's law'(IEEE Annals of the History of Computing 28(3), August 2006) <https://www.researchgate.net/publication/3331068_Establishing_Moore's_Law>, 62.
[23] ibid (n 5), 202, 206.
[24] K McSweeney, 'The Intersection of Technology, Innovation & Creativity.' (Now. Powered by Northrop Grumman, 2 December 2022) <https://now.northropgrumman.com/ray-kurzweil-predictions-persist-turns-70/> accessed 17 March 2023; See also, Koomey's Law—"Electrical efficiency of computation will double roughly every 18 months, as it has done for the last six decades."
[25] ibid (n 3), 14.
[26] 'Hogan Lovells Launches Artificial Intelligence-Based EBA Outsourcing Solution' (Hogan Lovells, 24 June 2020) <https://www.hoganlovells.com/en/news/hogan-lovells-launches-artificial-intelligence-based-eba-outsourcing-solution> accessed 7 April 2023.

based system (knowledge-based) and alternatively learning-based system (Machine-learning).[27] Rule-based systems capture knowledge, either linear or complex, of an expert human in a specialised domain being inputted in the system and the knowledge is simulated by the expert alone. This is particularly useful in legal industries, whereby the input is done generally by a lawyer (either that of a team of experienced Solicitors or Barristers). A project adopting a rule-based system that Professor R. Susskind takes pride in in his book, The Future of the Professions"[28] was a computer machine that was inputting data by legal experts to in principle, solve legal issues and offer sound legal advice on par or better than experts in the area. The success was remarkable when it was offered to the marketplace as the first electronic legal adviser in complex areas of law in the late 80's. The project coordinators revelled in what could be described as a self-fulfilling prophecy as they managed to build a problem solver for law that outperformed its responsibilities than the lawyers (i.e., the domain expert), displaying its wealth of resources and advantages to the legal fraternity.

Inter alia, Predictive analytics is one of the tools that can be used to further enhance such approaches identified above, by identifying patterns and historical data to improve rules. A relevant casing point would be the automated credit assessment.[29] Historically, the numeric score that was used to evaluate peoples' credit worthiness was done so by loan officers at the bank. However, Bill Fair and Earl Isaac in 1956 sought to replace this by automating credit scores, which proved highly reliable in terms of predicting loan repayments and credit worthiness. This significantly improved the decision-making process and identified anomalies that would reduce instances of fraud and discrimination.[30]

Conversely, learning-based systems focus on adaptive, general intelligence, which allows for an unlimited learning experience. This allows for the system to either amend, discard or acquire knowledge and improve the overall performance. This model typically uses artificial neural networks (ANNs), including NLPs, predictive modelling, image classification, speech recognition in dealing with tasks that have complex relationships between inputs and outputs. Google's DeepMind[31] is a mature example that aspired to use Artificial General Intelligence (AGI) in its findings, which had been successful. One of its first public demonstrations was in the area of

[27] 'AI in Software Testing: Rule-Based Testing vs. Learning Systems' (Tricentis, 11 May 2023) <https://www.tricentis.com/learn/artificial-intelligence-software-testing/ai-approaches-rule-based-testing-vs-learning> accessed 7 April 2023.
[28] ibid (n 5): "A Fifty-year overview."
[29] McAfee, 'Machine Platform Crowd: Harnessing our digital future' (2018), 46.
[30] There was a reduction of digital redlining and illegal behavior as credit decisions became more automated (McAfee, Harnessing our Digital Platform (2018), 47.)
[31] ibid, 77.

gaming technology, where DeepMind's algorithm, Deep Q-Network was not told by its developers and programmers which game it was playing, the rules of it or which controls were available at its disposal. It was simply shown the screen of each game, giving a visual representation of the score as input and told to surpass this by adjusting with the controller. The algorithm using its algorithmic "brain" and its sensory actions, could learn an array of challenging tasks that were 'novel' and still defeated expert human players in more than half of the 49 games played.[32]

To further understand this distinction that exists between rule-based AI and Artificial General Intelligence, this was compared to the ways children and adults acquire a language.[33] When children opt to learn a language, they do so often through implicit learning, which is being exposed to vast amounts of data, in the form of listening to their surroundings, engaging in conversation, formulating sentences, analogies, words and receiving feedback on such sentences. This is considered a form of 'narrow' intelligence because it is only engaging in a specific task of language learning. On the flip side, when adults learn a second language, they inevitably face a myriad of pre-existing rules they use to be confident and well-versed in the first language to master the second language. As an illustration, McAfee and Brynjolfsson provide an extensive array of challenges that adults encounter when mastering a second language. These challenges encompass using their grammatical knowledge and syntaxes from their first language, to help them better learn the new language, the correct proposition to use in a sentence, distinguishing between subjects and objects, discerning noun genders, among others.[34] These lists of rules, of which some may even be inconsistent in certain situations take a lot more weight on the individual. This, much like a machine learning algorithm is complex and seeks to create a tailored interface with the ample of data absorbed and stored and use backpropagation for optimization.[35]

3. 3 TYPES OF LEARNING EXPERIENCES

Within the learning-based model, there are a plethora of approaches used to navigate the type of learning and trains the algorithm to predict and analyse data more acutely and getting the computer

[32] V Mnih ,K Kavukcuoglu , D Silver, et al, 'Human Level Control through Deep Reinforcement Learning' (RSS) (Google Deepmind, 25 February 2015) <https://www.deepmind.com/publications/human-level-control-through-deep-reinforcement-learning> accessed 8 April 2023.
[33] ibid (n 29), 67.
[34] ibid (n 29), 68.
[35] E Foster , 'Choosing between a Rule-Based vs. Machine Learning System: TechTarget' (Enterprise AI, 2 August 2023) <https://www.techtarget.com/searchenterpriseai/feature/How-to-choose-between-a-rules-based-vs-machine-learning-system> accessed 8 April 2023. See also; European Parliamentary Research Service (EPRS), 'Digital Issues in Focus: General-Purpose Artificial Intelligence', <https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/745708/EPRS_ATA(2023)745708_EN.pdf> accessed 17 March 2023.

to act coherently.[36] Unsupervised machine learning allows for the machine to find hidden patterns within data and classify them in categories or find patterns of probabilities without human involvement. Whereas, supervised learning is greatly associated with human involvement, using the "garbage in, garbage out"[37] philosophy in the attempts of building up efficiency and accuracy. Majority of lawyers, for example, prefer the supervised learning approach as this allows for them to retain control and transparency over the data inputted in the algorithm and allows the lawyers to explain and justify the machine's sense of reasoning to clients, whereas in certain industries like the use of driverless cars and robotics, the output is more pertinent and necessary than the 'know-hows' and so unsupervised learning can be appropriate therein.[38]

The final based system that takes effective actions within an environment to reap the maximum reward is the reinforcement learning type.[39] This can be envisaged through the illustration of AlphaGo,[40] where Google's DeepMind created an algorithm that went on to defeat the world's champion top Go player 4-1, using deep neural networks, immersing the use of supervised learning (by looking at past games played by humans) and reinforcement learning (by playing themselves millions of times, improving their capabilities through constructive criticism and back propagation). Yet another case study that propels the significance of reinforcement learning was the project of DeepMind taking over the power supply and temperature checks in Google's ginormous data centre.[41] The result was a successful one, yet again, with the system using a layered approach and subsequently resulting in the energy used for cooling to reduce by 40% and the energy for untouched IT equipment's rising by 15%.[42]

4. FURTHER BENEFITS IN THE LEGAL FRATERNITY

To further investigate benefits of deep machine learning experiences, 2 professors, Ted Roger and Pauline Kim, together with political scientists, Professor Andrew Martin and Kevin Quinn, steered research to come up with a model that could foresee and predict a US Supreme Court ruling, better than a team of 83 diverse experts, which included clerks, law professors and deans. The result was successful as the team's prediction was less than 60% accurate, whereby, the algorithmic machine

[36] L Bell , 'Machine Learning versus AI: What's the Difference?' (WIRED UK, 1 December 2016) <https://www.wired.co.uk/article/machine-learning-ai-explained> accessed 17 March 2023.
[37] R Ozminkowski, "Garbage In, Garbage Out" (2021) <https://towardsdatascience.com/garbage-in-garbage-out-721b5b299bc1> accessed 20 February 2023.
[38] H Barker, Z Williams and C Brown, 'How Artificial Intelligence Is Used in Legal Practice' (Bloomberg Law, 17 August 2023) <https://pro.bloomberglaw.com/brief/ai-in-legal-practice-explained> accessed 10 January 2023.
[39] ibid (n 29), 77.
[40] ibid (n 3),14. See also; (n 29),74.
[41] ibid (n 29), 77-78.
[42] ibid.

had a 75% success rate.[43] This goes to show that generally, the use of clinical judgment is far less inferior to that of statistical judgment, one that uses an algorithm to make predictions.[44]

Additionally, another case study relating to Barack Obama's organisation[45] shows once again the benefits of machine learning in the extraction of accurate data that otherwise for machine learning, would be a far reach. Dan Wagner along with ex-US President Barack Obama's analytics team had 3 individual "scores" to predict the likelihood of votes in the election. Their team realised the advantages of knowing such intrinsic data and that the demographic data on TV shows that were taken were imprecise. By 2012, certain rating companies went beyond the demographic data shown on TV shows and instead were able to specify which individuals were of interest to the Obama organisation and who were watching specific channels, without any infringement of privacy and data protection right through complicating machine learning. What subsequently resulted was that there were a lot more "persuadable voters" on late-night programs, whom were their main target audience at a fraction of cost, turning out to be a win-win for Wagner & his analytics team.

5. LIMITATIONS

However, it is of vital importance to note that the litany of algorithmic victories come with certain qualifications, especially with cognitive biases that arise from the machines and the concept of Polyani's Pervasive Paradox;[46] a phenomenon that allows us humans to do more than we can tell. Humans know, in fact less than the machines know and so it is difficult to input the relevant data in the machine or predict potential patterns when the human element itself fails to know/understand the rationale behind such rules. An example was visualised in 2015,[47] where the algorithm Deep Patient was trained in Mount Sinai with the influx of data of more than 700,000 individuals to predict and judge certain diseases. However, it appears to predict diseases like schizophrenia, which realistically is difficult to predict and to date, this is still questionable in terms of justification by Dr. Dudley. The "black box" hidden layers that the machines have do not provide for a justifiable reason or rationale for the prediction to reassure the doctor or the clients of the reasons for their finding. These hidden patterns that exists in certain algorithmic tasks, are problematic, especially for lawyers as much as doctors since they owe a duty of care to clients to provide an explanation for the advice given.

[43] ibid (n 29), 40-41.
[44] Grove WM, 'Clinical versus statistical prediction: the contribution of Paul E. Meehl. J Clin Psychol' (2005 Oct;61(10):1233-43. doi: 10.1002/jclp.20179. PMID: 16041780.
[45] ibid (n 29), 50.
[46] ibid (n 29), 71.
[47] ibid (n 27).

Another questionable input that AI systems may exacerbate is the potential for algorithmic biases to heighten the already existing biases that are prevalent in society. Ryan Calo & Kate Crawford in an article published 7 years ago wrote that the downsides of AI include affecting groups that are already marginalised disproportionately such as race, gender and socio-economic backgrounds.[48] Latanya Sweeney, a famous professor cited on numerous occasions at Harvard was shown a criminal profile of her name on the ad when she has never been arrested.[49] On extensive fact finding, it appeared that the Google-ad algorithm produced those results for names and ads associated with black-sounding names. This approach therein results in a large amount of unfairness and unwanted biases, some of which may still be unknown of.

A final point of contention that ought to be factored is that humans (might I add, in varying capacity) have common-sense knowledge,[50] which machines do not. Humans tracing back and attempting to codify and comprehend their common-sense ability is not definitive and reasonable; so how is it possible for humans to then convert the input of common sense to the computer's algorithm?

With respect to the legal profession acutely, the magnitude of AI may have a more long-lasting effect. Previously, solicitors obtained great experience from 'working their way up' from previewing contractual documents, filing legal documents, attending client meetings and actively engaging with them in respect of the issue.[51] However, with the proliferation of AI taking over the basic captures of contractual documentation, document reviewing, would this impede the knowledge and experience of junior solicitors that will eventually erode the profession as they progress into senior lawyers? Janet Fuhrer, President of the Canadian Bar Association commented on an IBM-Watson engineered lawyer and its impact on junior lawyers especially; "junior lawyers will have access to 25-year-plus archive of experience and legal knowledge…"[52] This was made further aware by Pistone and Horn (2016), by acknowledging AI having a substantial impact on entry level solicitors. Non-law firms like Ayfie have a Universal Index that use NLP techniques to extract data, compile data in relevant categories and have prototypes assessing the potential risks and liabilities of the contractual arrangement without the need for a junior lawyer or paralegal to

[48] ibid (n 29), 52. See also; R Susskind and D Susskind, 'The Future of The Professions' (1st edn, 2015) 57 "strong status quo bias."
[49] ibid.
[50] ibid, 54.
[51] ibid (n 2).
[52] Queens University, 'How will artificial intelligence affect the legal profession in the next decade?' (2018) <https://law.queensu.ca/news/how-will-artificial-intelligence-affect-the-legal-profession-in-the-next-decade> accessed 8 March 2023.

waste significant time and energy on the myriad of documents that need to be considered.[53] This begs the undeniable question on the exclusivity of senior solicitors of the future.[54]

6. IS THERE AN UNAVOIDABLE NEED FOR AI REGULATION

Therefore, given the extensive use of AI while underlying its broad criticisms in this article, it is prudent to consider whether the debate as to regulating AI will succeed and be constructed in time to come.[55] Before indulging on the diverse opinion in this regard, it is important to realize the highly complex areas of law AI encompasses and the excruciating issues that would need to be considered pragmatically. On the one hand, the popular opinion from the outset was to allow the mechanisms of AI to run as it is and allow AI to be considered a fundamental technology that is still in its infancy. According to Xavier Amatriain, a former ML Researcher and a host of other analysts, regulating AI in its active setting will stifle development and innovation.[56] Being affiliated to areas like quantum science, biotechnology and nuclear energy, all of which are essential, fundamental research areas in modern development, there should be an open position to allow technological advances to be in line with other rapid changes that globalization and other externalities have brought with it over the past 50 years. This will be more visual as we consider the EU's approach in attempting to regulate AI in its hemisphere towards the end. Henceforth, for victories that are seen with AlphaGo[57] in the chess-reading algorithm game as well as Google's DeepMind in the conservation of electricity and energy consumption,[58] and other attributable events that were generated from AI, it is crucial that the mindset ought to not be completely focused on regulation, rather to be seen in tangent with liberalization as Professor Richard Susskind campaigns for and on creativity.

---

[53] 'Ayfie | Discover the Technology of the Ayfie AI and Software' (Ayfie) <https://www.ayfie.com/platform/overview> accessed 21 February 2023.
[54] M Pistone & M Horn, 'Disrupting Law School: How Disruptive Innovation Will Revolutionize the Legal World'(Clayton Christensen Institute For Disruptive Innovation, 15 March 2016) <https://www.christenseninstitute.org/publications/disrupting-law-school/#:~:text=Disrupting%20law%20school%3A%20How%20disruptive%20innovation%20will%20revolutionize%20the%20legal%20world,-By%3A%20Michael%20B&text=Facing%20dramatic%20declines%20in%20enrollment,law%20schools%20are%20in%20crisis.> accessed 21 February 2023.
[55] XAmatriain, 'Should Artificial Intelligence Be Regulated?' (Forbes, 31 August 2017) <https://www.forbes.com/sites/quora/2017/08/31/should-artificial-intelligence-be-regulated/?sh=1402209331d7> accessed 21 April 2023.
[56] T Worstall, 'Exactly What We Don't Need - Regulation Of AI And Technology' (Forbes, 12 October, 2016) <https://www.forbes.com/sites/timworstall/2016/10/12/exactly-what-we-dont-need-regulation-of-ai-and-technology/?sh=739f68a05333> accessed 21 April 2023.
[57] See (n 29).
[58] See (n 30), 31.

On the other hand, the increasing demand over recent times is that regulation ought to be implemented,[59] albeit not through conventional intervention. To put it into context, in 2016, a self-driving Tesla mistook a white truck for a bright sky and caused the death of the driver in the truck and stirred great criticism at the time.[60] This led to a surge of outcry in terms of reform, accountability and a call for a pause in the developments of AI proposed by government and select committees. The possibility of an AI dystopia was a cry for a utopian solution, and so the idea of explainability, and transparency was initially considered. This was the approach where any form of AI will have to be explainable to society and justified for the public benefit. The HL proposed a recommendation that all algorithms must be explainable to mitigate the effects of the "black box" as well as, particularly in the legal sector, allowing lawyers to conform with the duty of care owed to their clients and voicing the information that clients request.[61] The transparency-based approach is almost in tangent to a compulsory open-source system, albeit the drawbacks seen above will be in question. Therefore, amidst the government attempting to intervene as would be the case in every other scenario, the most effective form of imposing regulation ought to be through the introduction of AI-specific boards and select committees into the government, allowing AI experts and tech-savvy representatives to make do on regulations over politicians and the less abled individuals in this case.

7. INTERNATIONAL CASE STUDIES

As AI continues to span on an international scale, countries and trading blocs have attempted to intervene and codify the phenomenon of AI in its respective capacities. Looking at the world's largest trading bloc and the most outward-oriented economies[62] in the world, the European Union, the attempts of regulating horizontal proportionate AI advancement was spearheaded by Member of the EU Parliament, Mr. Dragos Tudorache, who is also the Co-Rapporteur of the EU AI Act that is currently in motion.[63] The versatile approach the EU is striving for is one of a hybrid, pyramid-type risk management, which according to the Council and European Parliament is to achieve the objective of allowing fast-moving tech companies to thrive in such an environment and innovate

[59] Stephen Hawkings, "The development of full AI could spell the end of the human race". See; Sundar Pinchai, "There is no question in my mind that AI needs to be regulated".
[60] D Yadron and D Tynan, 'Tesla Driver Dies in First Fatal Crash While Using Autopilot Mode' (the Guardian, 1 July, 2016) <https://www.theguardian.com/technology/2016/jun/30/tesla-autopilot-death-self-driving-car-elon-musk> accessed 22 April 2023.
[61] ibid (n 1).
[62] 'Trade Policy and Agreements – EU Action | European Union' (European Union) <https://european-union.europa.eu/priorities-and-actions/actions-topic/trade_en> accessed 20 April 2023.
[63] 'The Artificial Intelligence Act' (The AI Act, 28 July, 2023) <https://artificialintelligenceact.eu> accessed 20 April 2023.

confidently in Europe.[64] Its "first-of-its-kind" Act as acknowledged by MEP Tudorache in his discussion with the Canadian Security Intelligence Service (CSIS) proposes that at the top of the "pyramid", this will include AI systems that intrude with the fundamental rights of individuals in each member state, which will manipulate human behaviour and so are prohibited practices.[65] Such examples include the use of bio-metrics recognition in public places[66] and recently introduced, predictive policing, which is still seen as controversial.[67] The following tier was classed as "High Risk AI Systems,"[68] whereby certain sectors of General AI developments will have to go through rigid compliance requirements and protocols, much like the GDPR compliance protocol that companies in this category will have to prove. The intent of this position is to allow for greater transparency, requiring further documents and scrutiny to show that there is a legitimate purpose and instil the focus on explainability[69] in this type of AI, which will be highlighted later in this article.

Heading towards the lower ends of this "pyramid" management of AI, just above the lowest level is for systems that require certain levels of transparency, such as already established AI systems including DeepFace, developed by Meta which would require certain documentations and explanations or chatbots to allow for transparency to persist.[70] Finally, the lowest end of this "pyramid" representation which account for majority of AI Systems, as MEP Tudorache states are AI algorithms and systems that do not affect the interest of individuals and human rights that underpin the values of the Union and so will not be regulated by the Union.[71]

The enforcement of this piece of Regulation will be down to the National States,[72] but to prevent as much as possible conflicting rules within each state that would be counter-productive to the purpose of the EU AI Act,[73] there will be an EU AI centre-body overseeing Member States and having stakeholders that are tech-savvy in its committee to keep up across the Union. As mentioned earlier, the scrutiny and the detailed coherent framework is to aid innovation and allow for

[64] See; Center for Strategic & International Studies, 'The European Approach to Regulating Artificial Intelligence' (YouTube, 19 September 2022) <https://www.youtube.com/watch?v=BBmq4T_550U> accessed 20 August 2023.
[65] ibid (n 62) 12, 5.2.2.
[66] ibid (n 63) 6:40.
[67] ibid (n 63) 7:21.
[68] ibid (n 62) 13, 5.2.3.
[69] European Parliamentary Research Service (EPRS), 'Digital Issues in Focus: General-Purpose Artificial Intelligence in the proposed EU AI Act' (European Parliament, March 2023) <https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/745708/EPRS_ATA(2023)745708_EN.pdf> accessed 31 March 2023.
[70] ibid (n 62) 3.
[71] ibid (n 63) "around 80% of AI algorithms will be free from regulation."
[72] ibid (n 62) 3 1.1.
[73] ibid (n 62).

companies to grow with economies of scale across the Union, without having any doubt as to whether their product will be penalized in other Member States.

An additional measure that is crucial to support innovation in this regard is the regulatory sandboxes[74] that the Committee and the European Parliament are pushing for.[75] This is almost in tandem with a "safe space" for companies to test their domain and have direct feedback and notice from the Regulators to identify whether their products will be suitable to be free from regulation or if they are within the categories of regulation, which exact tier they would be subjected to.[76] They will further question how explainable and transparent the products tested are and if there are any further documentations that need to be submitted and any other material contribution it requires. This is advantageous for companies and individuals in terms of innovation and ease of doing business across the Member States because they will each have access to the Sandbox and be confident in inputting a product in the market.[77] This direct link to Regulators and having a national footing is one that the EU further aims to bolster innovation, attract companies into the Union, instead of the objective being purely "namesake."

However, despite the intricate details set forth in the Regulation there are still ongoing debates as to the content that is to be produced within the Regulation as well as the effects of an Act across the Union. The first contention was the precise definition of AI, where on the one hand, a broader definition was suggested and favoured, which was compared to defining a "software" [MEP Tudorache], focusing more on the categorization and risk assessment in its definition. On the other hand, certain critics believe in AI being precise and narrowly defined because that will enable companies to better predict and elevate innovation, ensuring legal certainty.[78]

Finally, this article will consider a country that is aspiring to become the first digital superpower, China and how the Chinese government approaches AI in its governance. Following the exceptional loss of the professional South Korean Go Player to Google's Deepmind AI algorithm, this victory brought immediate attention from the Chinese Government, with the 2017 "New Generation AI Development Plan" focusing on making China the world leader in AI by 2030.[79] China's strategy was to monitor and maintain control over its population through AI algorithms

[74] ibid (n 62), 5.2.5: "Title V: Measures in Support of Innovation."
[75] ibid (n 62), 8 3.1.
[76] ibid (n 62), 15 5.2.6 "Governance and Implementation."
[77] ibid (n 62), 34 (72).
[78] ibid (n 62), 18 (6).
[79] H Roberts, J Cowls, J Morley, *et al* , 'The Chinese approach to artificial intelligence: an analysis of policy, ethics, and regulation' (AI & Society 36:59–77 (2021), 17 June 2020) < https://doi.org/10.1007/s00146-020-00992-2> 1 accessed 20 April 2023.

and the digital world.[80] The strategy was to extend AI systems into defence and social welfare, as well as developing ethical standards and the fiscal component in their economy. This inspired effect ought to lead to more innovations coming out from China as well as the fiscal backing to achieve its targets.[81]

The Ministry of Science and Technology will be guiding a new AI Strategy Advisory Committee which will oversee the regulatory framework of AI. The actual innovation and transformation will be driven by private limited companies with gross support from this committee and government backing subsidies to facilitate the advancement. This expedited a host of AI schemed developments, from companies like Baidu Inc., which was tasked with the development of autonomous cars.[82] They had a strong foothold in the AI Tech industry, of which they have started offering driverless taxi cars across China from late 2022 and by the third quarter of 2023, they want to release their latest self-driving taxi service, Apollo Go.[83]

However, while the 2030 vision is in motion, certain fundamental elements like ethical considerations also raise tension in determining whether regulation is fair in China and whether it seems proportionate. Ethics, albeit an important subset of human rights and a central fragment in its application seems to be constructively downplayed given the lack of proper implementation and immediacy in the support of such behaviour.[84] This has its application in the medical arena, where the focus of health on the individual in the West is not as highly regarded as in China, which is more in line with the focus of health on the general population, questioning certain fundamental human rights claims. A similarity is seen in the way of privacy, where prima facie, the protection seems tight and robust. But, in fact, it exposes many loopholes and exceptions allowing the government and companies to tacitly endorse such behaviour, circumventing these protocols and be free from accountability.[85]

8. CONCLUSION

Therefore, the exponential growth of Artificial Intelligence through its modified versions in the legal industry across the globe should not be downplayed or simplified. The creators and developers

[80] F Westerheide, 'China – The First Artificial Intelligence Superpower' (Forbes, 14 January 2020) <https://www.forbes.com/sites/cognitiveworld/2020/01/14/china-artificial-intelligence-superpower/?sh=7924af2d2f05> accessed 23 April 2023.
[81] ibid (n 77).
[82] ibid (n 80).
[83] Z Kleinman, 'Baidu Unveils New Self-Driving Taxi in China' (BBC News, 21 July, 2022) <https://www.bbc.com/news/technology-62237612> accessed 22 April 2023.
[84] ibid (n 79).

[85] ibid (n 79).

of modern AI systems also vouch for a growing awareness of AI and its application in the daily life,[86] appreciating the widespread nature of its characteristics and the potential of reaching ubiquity soon, faster than the average timeframe for general acceptance of disruptive technologies in the past.[87] This article reconvenes the importance of AI in terms of its growth in digital technology and reiterates the need for a "standard partnership"[88] that exists in the form of division of labour of the minds and machines. This was cleverly articulated in "Machine Platform Crowd" by McAfee & Brynjolfsson, where this fusion was compared to a pilot who admittedly relies heavily on the plane's instrumentation and the computers that help run a smooth flight, but occasionally "looks out the window"[89] as a means of allowing machinery to run with expert human oversight.[90] The necessary attempts of regulation across the globe and treating AI as a priority makes it abundantly clear of how disruptive and fundamental this area will be in time to come and how eventually, the surrounding theme of more than capable machinery will transform the productivity of professionals in society. Instead of associating this change with a timeframe, which is in most part heavily dependent on a host of variables, it is said to be more of an incremental transition rather than an overnight revolution.[91] So much so, that forerunners in the technology industry are at present calling for a 6-month pause in the training of AI systems more powerful and potent as GPT-4.[92]

The expectation in the long run is that in a so called "post professional society",[93] there will emerge contemporary jobs suitable for future development, which may or may not be taken over once again, by machinery at a later stage. This leads us to the final observation made by the Susskind's in their book, "The Future of the Professions", which will be the closing takeaway in this article and something to ponder about. The doctrinal element of their book as mentioned above in detail focuses on the displacement of the work of human professionals with machinery. He draws reference to Professor Rawls "veil of ignorance"[94] to pose the thought that if we, as humans are, in fact, put behind this "veil of ignorance", where in other words, our knowledge of our surroundings

[86] "There is no question in my mind that AI needs to be regulated"- Google CEO, Sundar Pinchai. See; "The Development of full AI could spell out the end of the human race"- Stephen Hawking.
[87] M Thomas, 'The Future of AI: How Artificial Intelligence Will Change the World' (Built In, 10 August 2022) <https://builtin.com/artificial-intelligence/artificial-intelligence-future> accessed 25 April 2023.
[88] ibid (n 29), 46.
[89] T Davenport, J Harris, 'Analytics at Work: Smarter Decisions, Better Results' (Accenture Institute for High performance, 2009) < https://analytics.typepad.com/files/accenture_analytics_at_work.pdf > 16 accessed 25 April 2023.
[90] (n 29), 'Putting human intelligence in the loop, intelligently', 53-55.
[91] (n 5), 405.
[92] 'Pause Giant AI Experiments: An Open Letter - Future of Life Institute' (Future of Life Institute, 22 March 2023) <https://futureoflife.org/open-letter/pause-giant-ai-experiments/> accessed 20 August 2023.See also; I Johnston and T Bradshaw, 'Elon Musk and Other Tech Experts Call for "pause" on Advanced AI Systems' (Financial Times, 29 March 2023) <https://www.ft.com/content/3f584019-7c51-4c9c-b18f-0e0ac0821bf7> accessed 11 May 2023.
[93] I Illich, et al, 'Disabling Professions' (2000).
[94] John Rawls, 'A Theory of Justice' (1999).

and our personal circumstances are completely clouded, would we still prefer machines to take over majority of professionals and genuinely accept this displacement as a throe of an important shift?[95] Would this effect be even heightened in the legal profession as a firm disruptor given the contents of this article?

[95] ibid (n 5), 409-410.

COMPANY LAW

CAN DERIVATIVE CLAIMS PROCEED VIA OPPRESSION REMEDY?

Nishadharan Sundararaj

ABSTRACT

Derivative action and oppression remedy are two types of actions which play an important role in corporate governance. A derivative action is concerned with a wrong done to a corporation while an oppression remedy concerns itself with wrong done to a shareholder. While theoretically both differ, it is observed that there is an ambiguity and unsettled nature with regard to the boundary between derivative action and oppression remedy. This is due to the fact that a certain course of conduct may harm the corporation and shareholder simultaneously. In such instances, choosing whether to proceed with a derivative action or oppression remedy has important implications for the claimant. In this backdrop, judicial decisions in common law countries have embraced conflicting positions for the question 'Can derivative claims proceed via oppression remedy?'.

In the introduction, this paper seeks to provide an overview of both derivative action and oppression remedy as to their nature and purpose. Then, this paper analyses the origins and statuary framework of Sri Lanka's derivative action and oppression remedy. As both actions have originated in the United Kingdom, United Kingdom case law is provided. This paper then provides an overview of conflicting views embraced by both the courts and legislative committees regarding the relationship between derivative action and oppression remedy, intending to highlight the unsettled nature of the law in this area. In this section, Canadian case law is provided as the Companies Act No. 7 of 2007 is modelled after the Canada Business Corporations Act of 1985 and New Zealand Companies Act of 1993; henceforth, Canadian provisions are substantially similar to those of Sri Lanka. In conclusion, this paper seeks to highlight the implications of choosing between the derivative actions and oppression remedy and provide recommendations for a unified derivative/oppression provision derived from the legal literature of Canada.

1. INTRODUCTION

A derivative action is a type of suit in which the corporation asserts a wrong against the corporation and seeks relief.[1] As a corporation is only a legal person, derivative claims are brought by the corporation's shareholders with the leave of the court. Derivative action is based on the notion of 'separate legal personality of a corporation'. The House of Lords in its seminal decision in *Saloman*

[1] 'Derivative Action' (*Legal Information Institute*) <https://www.law.cornell.edu/wex/derivative_action> accessed 8 July 2023.

v Saloman[2] embraced the concept of corporate personality by holding that a duly incorporated company is an independent person with rights and liabilities appropriate to itself. This is also acknowledged in Sri Lanka via the Companies Act of 2007, in which Section 2 (1) states that 'A company incorporated under this Act shall, by the by which it is registered from time to time, be a body corporate',[3] i.e. an organisation that is considered to have its own legal rights and responsibilities. Derivative action provides a means for companies to use their legal standing to protect themselves. While the roots of derivative action lie in the common law, today, in most common law countries, statutory derivative action has eclipsed the common law derivative action.

On the other hand, oppression remedy is a type of action that departs from traditional common law concepts in relation to company matters such as majority rule. Unlike the derivative action, the oppression remedy traces its roots to a statutory invention back in 1948, when the United Kingdom Companies Act of 1948 made provision for the oppression remedy. In an action against oppression, minority shareholders sue under their own name and seek relief. It is also referred to as a personal action since it seeks to protect the personal rights of the shareholders who came before the court. Whilst the traditional common law approach is geared toward protecting majority rule in company matters, oppression remedy emphasises on minority protection. In order to do so, the oppression remedy grants wide discretion to the court to involve itself in the internal matters of a company. In Sri Lanka, oppression remedy is provided for in the Companies Act of 2007 as action against oppression and mismanagement.

The key contrast between derivative action and oppression remedy lies in to whom the harm is done. A derivative arises when the corporation is injured by the alleged wrongdoing without any specific harm to any shareholder, whilst in an action against oppression, the shareholders are harmed with a differential impact among them.[4]

2. ORIGINS & STATUTORY FRAMEWORK IN SRI LANKA OF DERIVATIVE ACTION & OPPRESSION REMEDY

2.1 Derivative Action

2.1.1 Origins

Derivative actions in common law have been traditionally regulated by the rule laid down in the landmark case of *Foss v Harbottle*.[5] The *Foss* rule seeks to limit derivative actions permitting

[2] [1896] UKHL 1.
[3] Companies Act 2007, s 2(1).
[4] Jeffrey G MacIntosh, 'The Oppression Remedy: Personal or Derivative', (1991) 70 Canadian Bar Review 29.
[5] [1843] 2 Hare 461 (CH).

derivative actions only in narrowly defined exceptional circumstances. In *Foss v Harbottle*,[6] two minority shareholders of a company brought an action against the directors of the company, among others, claiming property of the company has been misapplied and various mortgages were executed improperly over the property of the company. The Court of Chancery dismissed the claim and articulated the *Foss* rule.

The *Foss* rule consists of two major principles: the proper plaintiff principle and the majority rule principle.[7] Firstly, the proper plaintiff principle holds that in any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself, and such a wrong may only be vindicated by the company alone. In *Foss v Harbottle*,[8] Sir James Wigram VC explained the proper plaintiff principle as follows:

> *It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law the corporation and aggregate members of the corporation are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which, prima facie, would require that the corporation should sue in its own name and its corporate character, or in the name of someone whom the law has appointed to be its representative.*[9]

Secondly, the majority rule principle holds that the court would not interfere in case of a wrong which the majority shareholders might lawfully ratify. In *Edwards v Halliwell*,[10] Jenkins LJ explained the majority rule principle as follows:

> *Where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then [the question falls].*[11]

6 ibid.
7 Li Xiaoning, 'A Comparative study of shareholders' derivative actions' (Ph.D. thesis, University of Groningen 2006).
8 [1843] 2 Hare 461 (CH).
9 ibid (Sir James Wigram VC).
10 [1950] 2 All ER 1064 (CA).
11 ibid (Jenkins LJ).

English courts have also allowed four exceptions to the *Foss* rule which constitute the instances where a derivative action may be brought: personal rights exception, illegal or ultra vires acts exception, special majority exception and fraud on the minority exception.

Firstly, the personal rights exception means that where the alleged misconduct infringes the personal rights of a shareholder, such shareholder may initiate an action to redress his damage.[12] In *Pender v Lushington,*[13] the Court of Chancery held that in instances where there is an interference with a personal right of a shareholder, both a derivative claim and a personal action lie.

Secondly, the illegal or ultra vires acts exception means that principles laid out in the *Foss* rule would not apply to illegal acts or ultra vires acts as they cannot be ratified legally.[14] Thirdly, the special majority exception means that the above-mentioned principles will not apply to acts which need to be committed or ratified by a special majority of shareholders if they are only committed or ratified by a simple majority.[15]

Fourthly, fraud on the minority exception was illustrated in the case of *Prudential Assurance Co v Newman Industries Ltd (No. 2).*[16] The Court of Appeal held that where the alleged act amounts to fraud and wrongdoers are themselves in control of the company, the *Foss* rule is relaxed in favour of the minority shareholders who are allowed to bring a derivative action. The Court of Appeal justified this exception on the basis that if minority shareholders were denied the right to bring an action in such instances, such grievances would never reach the court as wrongdoers themselves, being in control, would not allow the company to initiate an action. This exception requires two elements to be present: fraud and wrongdoer control. This fraud on the minority exception is considered the most important exception to the *Foss* rule.[17]

Subsequent developments to the traditional *Foss* rule have tightened the restrictions on a shareholder's right to commence a derivative action. In *Prudential Assurance Co v Newman Industries Ltd (No. 2)*[18] The Court of Appeal held that the *Foss* rule not only constitutes a substantive requirement for derivative actions but also a locus standi requirement. Per this, the *Foss* rule not only provides for a substantive restriction on a shareholder's right to a derivative action but also a procedural restriction.[19] In *Taylor v National Union of Mineworkers (Derbyshire Area),*[20]

---

12 Xiaoning (n 7).
13 [1877] 6 Ch D 70.
14 Xiaoning (n 7).
15 ibid.
16 [1982] Ch 204.
17 Li Xiaoning, 'A Comparative study of shareholders' derivative actions' (Ph.D. thesis, University of Groningen 2006.
18 [1982] Ch 204.
19 Xiaoning (n 7).
20 [1985] BCLC 237.

the Court extended the 'wrongdoer control' element in the fraud on the minority exception to encompass all derivative actions. This further narrows the above-mentioned exceptions by adding a requirement that alleged wrongdoers must be in control of the company in relation to all derivative actions. In *Smith v Croft (No. 2),*[21] the Court recognized that where a majority of shareholders are not available to make a decision to commence litigation on behalf of the company, an appropriate independent body is still preferable to an individual shareholder in making such a decision. This added another restriction to the commencement of derivative actions by providing that a decision not to commence litigation by an appropriate independent body will bar a derivative action provided that such a decision was made in good faith and for the benefit of the company.[22]

As seen above, application of the *Foss* rule imposes strict requirements on derivative actions. Henceforth derivative actions played a minor and unimportant role in common law. This has reduced derivative actions to a weapon of last resort rather than a normal part of the enforcement apparatus of the law.[23] The rigidity of common law in relation to derivative actions has necessitated reforms in respect of the same in most common law countries including Sri Lanka and resulted in a proliferation of statutory derivative action in the common law countries.

2.1.2 Derivative Action in Sri Lanka

In Sri Lanka, English law in relation to commercial matters was introduced by way of statute. Section 3 of the Civil Law Ordinance provided that the 'Law of England to be observed in all commercial matters unless any other provision is or shall be made by any enactment now in force or hereafter be enacted'.[24] The later legislation, the Companies Ordinance of 1938 and the Companies Act of 1982 did not contain any reference to derivative actions. However, In *Amerasekere v Mitsui and Company Ltd and others*[25] the Supreme Court recognised derivative action by observing that 'if in the circumstances it is impossible to get the company itself to bring an action to protect its own interests because the directors are unwilling or helpless to intervene, a shareholder can sue in his own name, but in truth on behalf of the company, to enforce rights derived from it'. However, In Sri Lanka, the common law remedy of derivative action has not been

21 [1988] Ch 114.

22 Li Xiaoning, 'A Comparative study of shareholders' derivative actions' (Ph.D. thesis, University of Groningen 2006) citing Christopher Ryan, Derek French and Stephen W Mayson, *Mayson, French and Ryan on Company Law* (13th edn, Blackstone Press 1996) 538.

23 Li Xiaoning, 'A Comparative study of shareholders' derivative actions' (Ph.D. thesis, University of Groningen 2006) citing Paul L Davies and Laurence Cecil Barnett Gower, *Gower and Davies' Principles of Modern Company Law* (7th edn, Sweet & Maxwell 2003) 463.

24 Civil Law Ordinance 1852 s 3.

25 [1993] 1 Sri LR 22.

invoked very often due to reasons such as existence and common usage of action against oppression and mismanagement and a comparatively smaller corporate community.[26]

Later, the Companies Act of 2007 modelled after company legislation of Canada and New Zealand, introduced a statutory derivative action to Sri Lanka. Section 234(1) provides that the court may, on the application of a shareholder or director of a company, grant leave to that shareholder or director to bring proceedings in the name of or on behalf of the company or any subsidiary of the same or intervene in proceedings to which the company or any subsidiary of the same is party to, for the purpose of continuing, defending, or discontinuing the said proceeding.[27] Per Section 234(2), the court shall have regard to four factors in granting leave under the above provision: the likelihood of proceedings succeeding, the costs of the proceedings in relation to the relief likely to be obtained, any action already taken by the company or subsidiary to obtain relief and the interests of the company or subsidiary in proceedings being commenced, continued, defended or discontinued.[28] Under Section 234(3) such leave may only be granted if the court is satisfied that the company or subsidiary does not intend to bring, diligently continue, defend, or discontinue the proceedings, or that is in the interests of the company or subsidiary that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole.[29] Per Section 234(4) notice of the application must be served on the company.[30] Section 234(6) abolishes the common law derivative action by barring shareholders or directors from bringing or intervening in any proceedings in the name of or on behalf of a company or subsidiary of the same except as provided for under Section 234.[31]

The above provision is a verbatim reproduction of Section 165 of the New Zealand Companies Act of 1993 and substantially similar to Section 239 of the Canada Business Corporations Act.[32]

2.2. Oppression Remedy

2.2.1 Origins

Unlike Derivative action which has its roots in common law, Oppression remedy is a statutory invention. Under common law, the only remedy available for minority shareholders in challenging the conduct of majority shareholders, which does not fall under the above-mentioned exceptions to the *Foss* rule was to seek court's intervention to wind-up the company on 'just and equitable

26 Harsha Cabral, *Corporate Law, Derivative Actions: A Comparative Approach* (The Author 2004) 34.
27 Companies Act 2007, s 234(1).
28 ibid s 234(2).
29 Companies Act 2007 s 234(3).
30 Companies Act 2007 s 234(4).
31 Companies Act 2007 s 234(6).
32 New Zealand Companies Act 1993 s 165 and Canada Business Corporations Act 1985 s 239.

grounds.[33] When an order for winding-up is granted, company is dissolved, and its assets and property are redistributed among shareholders. Such winding-up entails the death of companies and results in the winding-up of companies which were otherwise prosperous to solve disputes between shareholders.[34] Minority shareholders were also prevented from pursuing winding-up applications as a remedy against abuse of power by majority shareholders due to the fact that oftentimes the break-up value of company assets was insufficient or the only available purchasers for the minority shareholders shares were the majority shareholders who were alleged of abuse of power.[35] This situation was also considered by the Cohen committee which was appointed in 1943 by the Government of the United Kingdom to recommend amendments to company law in the United Kingdom.

In this backdrop, Section 210 of the United Kingdom Companies Act of 1948 introduced the action that became widely known as the oppression remedy. Its purpose was to provide an alternative remedy to winding-up in instances constituting oppression of minority shareholders by the majority shareholders. Per the above provision, any member who complained that the affairs of the company were being conducted in a manner oppressive to some part of the members could petition the court.[36] The court if it is satisfied that the company's affairs are being conducted in the manner aforesaid and that winding-up the company would unfairly prejudice that part of the members, but otherwise facts would justify the making of a winding-up order on the ground that it was just and equitable to wind-up the company, may make such an order as it thinks fit.[37] This provision has completely upended the common law approach of remedying the wrongs done to shareholders by allowing the court to disregard the fundamental common law rules of company law such as majority rule in granting relief against conduct deemed as 'oppressive'.

However, this section was rarely used and narrowly construed in instances where it was used.[38] For instance, In *Scottish Co-operative Wholesale Society v Meyer*,[39] the term 'oppression' was construed as 'burdensome, harsh and wrongful'. In *Re Saul D Harrison plc*,[40] Hoffman LJ observed that this definition gave rise to doubt as to whether 'wrongful' required actual illegality or invasion of legal rights. Furthermore, In *Re Jermyn Street Turkish Baths Ltd*,[41] the Court ruled that a single

33 Avindra Rodrigo and Aruna de Silva, 'Minority Suits: Action to Prevent Oppression and Mismanagement in Companies', [2020] 1 RIC Law Journal 32.
34 ibid.
35 Committee on Company Law Amendment, 'Report of the Committee on Company Law Amendment' (1945).
36 United Kingdom Companies Act 1948 s 210(1).
37 United Kingdom Companies Act 1948 s 210(2).
38 Law Commission, *Shareholder Remedies* (Law Com No. 246, 1997) para 7.8.
39 [1959] AC 324.
40 [1995] 1 BCLC 14.
41 [1971] 1 WLR 1042.

act could not constitute oppression, and the section requires a course of conduct as distinct from an isolated act. The Jenkins Committee which was appointed in 1962 by the Government of the United Kingdom with the same mandate as the Cohen committee observed that this section should extend to instances where the conduct alleged falls short of illegality and where the conduct alleged is not only oppressive but also unfairly prejudicial to the interests of shareholders if it was to provide sufficient and effective protection to shareholders.[42]

Jenkins committee's recommendations paved way for the current iteration of the oppression remedy in the United Kingdom referred to as 'unfair prejudice remedy'. The 'unfair prejudice remedy' was introduced via Section 75 of the United Kingdom Companies Act of 1980, which subsequently formed Section 459 of the United Kingdom Companies Act of 1985. The current act, the United Kingdom Companies Act of 2006 also retains the 'unfair prejudice remedy' in Section 994.

Per Section 994(1), a member of a company may apply to the court for an order on the ground that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of the members generally or some part of its members, at least himself, or that an actual or proposed act or omission of the company (including an act or omission on behalf of such company) is or would be so prejudicial.[43] Section 996(1) provides that upon such application, if the court is satisfied that such an application is well founded, it may make such order as it thinks fit.[44]

However, the term 'unfair prejudice' is not defined either legislatively or judicially and depends upon the facts of the case. In *O'Neill v Phillips*,[45] Lord Hoffman observed as follows: 'Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used'.[46] In *Re Macro (Ipswich) Limited*,[47] Arden LJ described unfair prejudice as having 'an elastic quality which enables the courts to mould the concepts of unfair prejudice according to the circumstances of the case'.

In *Re Bovey Hotels*,[48] Slade J formulated a test to find whether alleged conduct constitutes unfair prejudice:

---

42 Committee on Company Law Amendment, 'Report of the Committee on Company Law Amendment' (1962).

43 United Kingdom Companies Act 2006 s 994(1).

44 ibid s 996(1).

45 [1999] 1 WLR 1092 (HL).

46 ibid.

47 [1994] 2 BCLC 354 (Ch).

48 *Re RA Noble (clothing) Ltd* [1983] BCLC 273 where Nourse J cited Slade J in *Re Bovey Hotels*, unreported, 31st July 1981.

> *A member of a company will be able to bring himself within the section if he can show that the value of his shareholding in the company has been seriously diminished or at least seriously jeopardized by reason of a course of conduct on the part of those persons who have had de facto control of the company, which is unfair to the members concerned…the test I think is whether a reasonable bystander observing the consequences of their conduct would regard it as having unfairly prejudiced the petitioner's interests*.[49]

Oppression remedy can be described as a flexible tool granting the courts wide discretion and freedom to protect the interests of minority shareholders, as opposed to derivative actions which is often seen as rigid and procedurally burdensome. In this backdrop, multiple common law countries including Sri Lanka, have incorporated the oppression remedy into their company law due to its versatility and effectivity.

2.2.2 Oppression Remedy in Sri Lanka

In Sri Lanka, statutory invention of the oppression remedy dates back to 1964. The Companies (Amendment) Act of 1964 introduced provisions which deal with the prevention of oppression and mismanagement as an alternative remedy for winding up.[50] Subsequently, Companies Act of 1982 contained provisions for the prevention of oppression and mismanagement as a stand-alone remedy instead of an alternative remedy.[51] Sri Lankan courts also adopted the English definition of oppression in *Ratnam and others v Jayathilake*,[52] where Udalagama J commented that 'I inclined to the view that the term did include "burdensome", "harsh" and "wrongful" acts'.

The Companies Act of 2007 retains similar provisions in relation to the prevention of oppression and mismanagement. Section 224(1) provides that a shareholder or shareholders of a company who has a complaint against the company, that affairs of such company are being conducted in a manner oppressive to any shareholder/s, may make an application to the court for an order under this section.[53] Per Section 224(2), upon such application, if the court is of the opinion that the affairs of the company are being conducted in a manner oppressive to any shareholder or shareholders, the court with the view of remedying the matters complained thereof, may make such order as it thinks fit.[54] Per Section 224(3), pending the making of a final order, the court upon application by any

---

49 ibid.

50 Avindra Rodrigo and Aruna de Silva, 'Minority Suits: Action to Prevent Oppression and Mismanagement in Companies', [2020] 1 RIC Law Journal 32.

51 ibid.

52 [2002] 1 Sri LR 409.

53 Companies Act 2007, s 224(1).

54 ibid s 224(2).

party to the proceedings, may make an interim order that it thinks is necessary for regulating the conduct of the company's affairs, upon such terms as appear to it to be just and equitable.[55]

Section 225(1) provides that any shareholder or shareholders having a complaint that the affairs of the company are being conducted in a manner prejudicial to the interests of the company or that a material change has taken place in the management or control of the company, whether by an alteration of its board of directors or of its agent or secretary or in the constitution or control of the firm or body corporate acting as its agent or secretary or in the ownership of the shares of the company or in any other manner whatsoever, and by reason of such change it is likely that the affairs of the company may be conducted in a manner prejudicial to the interests of the company, may make an application to the court under this section.[56] Per Section 225(2), upon such application, if the court is satisfied of the matters complained of therein, the court may make such order as it thinks fit.[57] Under Section 225(3), the court is also empowered to make such an interim order upon application by a party to the proceedings under such terms as appear to it as just and equitable for regulating the conduct of the affairs of the company.[58]

While not exactly similar, Sections 224 and 225 of the Companies Act of 2007 are substantially similar to those of Sections 994 and 996 of the United Kingdom Companies Act of 2006, Section 241 of the Canada Business Corporations Act of 1985 and Section 174 of the New Zealand Companies Act of 1994.[59]

3. CAN DERIVATIVE CLAIMS PROCEED VIA OPPRESSION REMEDY?

While no reported case in Sri Lanka considers the question 'can derivative claims proceed via oppression remedy?', the above-mentioned question constitutes a contentious debate in other common law jurisdictions such as United Kingdom and Canada. Therefore, it is useful to analyse the legal literature of those countries to answer the above-mentioned question, as Sri Lanka's statutory framework in relation to derivative action and oppression remedy substantially mirrors those countries, specially of Canada as the Companies Act of 2007 is modelled after Canadian and New Zealand company legislation as seen earlier. It should be noted that Canadian provincial statutes mentioned below, such as the British Columbia Companies Act of 1973 and the Ontario

55 ibid s 224(3).
56 ibid s 225(1).
57 Companies Act 2007, s 225(2).
58 ibid s 225(3).
59 United Kingdom Companies Act 2006 s 994(1) & s 996(1), Canada Business Corporations Act 1985 s 241 and New Zealand Companies Act 1993 s 174.

Business Corporation Act of 1982 are themselves mirrored predecessors of the Canada Business Corporations Act of 1985.

A prima facie examination of Sections 224 and 225 of the Companies Act of 2007 reveals that the above provisions embrace all forms of personal action from a shareholder, i.e. where the alleged wrong is done by the company. However, further examination of the provisions reveals that some actions of derivative character may be commenced under the prevention of oppression and mismanagement provisions.

The Dickerson committee report, which formed the basis of the Canada Business Corporations Act, describes the relationship between the derivative action and oppression remedy as follows:

> *Section 19.02 [now section 239 of the Canada Business Corporations Act providing for the derivative action] is broadly permissive terms, but always subject to court supervision, legitimates the shareholder's derivative action that is brought in the name of the corporation to enforce a right of the corporation, e.g. where the directors divert to themselves the profits from a transaction that they had a duty to effect in the name and on behalf of the corporation. The object of section 19.02 is to remedy a wrong done to the corporation…Section 19.04 [now section 241 of the Canada Business Corporations Act providing for the oppression remedy] …its usual object is to remedy any wrong done to minority shareholders. Examples of such cases are commonplace. The most frequent cases are mentioned in the Jenkins report: e.g. where dominant shareholders appoint themselves to paid offices of the corporation, absorbing any profits that might otherwise be available for dividends, the issue of shares to dominant shareholders on advantageous terms or the repeated passing of dividends on shares held by a minority group…scrutiny of these examples show that there is no clear dividing line between the cases.*
>
> *Diversion of corporate profits is clearly a wrong to a corporation that normally would be remedied by a derivative action under section 19.02. A refusal to declare dividends in order to squeeze out the minority shareholders would call for an application under section 19.04. But payment of excessive salaries to dominant shareholders who appoint themselves to office is a borderline case: it may constitute a wrong to the corporation and at the same time, may have as its specific goal the squeezing out of minority shareholders whose investment is no longer required. In such a case the aggrieved person may select the remedy*

> *that will best resolve his problem…In sum we think that the courts should have very broad discretion, applying general standards of fairness, to decide these cases on their merits*.[60]

The case law in Canada also reflects the uncertainty created by the drafting of the Canada Business Corporations Act. The case law can be divided into two major categories in relation to the relationship between derivative action and the oppression remedy: cases holding that an action of a derivative character may not be commenced under the oppression provision and cases holding that an action of a derivative character may be commenced under the oppression provision.[61]

Re Goldstream Resources Ltd[62] is one of the cases falling under the first category mentioned above. The British Columbia Supreme Court categorically denied the assertion that an action with a derivative character may be commenced under the oppression provision. Spence J commented as follows:

> *Any injury caused to a shareholder is indirect. It may decrease the market value of his shares…but the real injury, if any, is done to the company itself. If the company is injured, and if the directors refuse to take action on behalf of the company, then a derivative action may be sought [with] leave…there is no means in British Columbia of commencing any derivative action other than under the provisions of section. [section 225 of British Columbia Companies Act of 1973 which allows for a statuary derivative action]*.[63]

On the other hand, the Ontario Supreme Court in *Ontario Securities Commission v McLaughlin*[64] adopted the view that cases holding that an action of a derivative character may be commenced under the oppression provision. Henry J commented as follows:

> *There is nothing in the scheme of new Act [Ontario Business Corporations Act of 1982] that in my opinion makes section 245 [provision allowing for derivative action] an exhaustive remedy merely because the plaintiffs are minority shareholders rely on the conduct of defendants that in the first instance caused harm to the company. I have no doubt that they could have invoked section 245…Instead they rely on Section 247 (2) [provision allowing for oppression remedy] which embraces conduct of the corporation, its controlling mind or its directors, that is oppressive or unfairly prejudicial to them as*

60 Robert W V Dickerson Et al., 'Proposals for a New Business Corporations Law for Canada' (1971).
61 Jeffrey G MacIntosh, 'The Oppression Remedy: Personal or Derivative' (1991) 70 Canadian Bar Review 29.
62 [1986] 2 BCLR (2nd) 244 (BCSC).
63 ibid (Spence J).
64 [1988] 11 OSCB 443 (Ont. SC).

> *minority shareholders. The language of section 247 (2) is quite capable of embracing conduct that is also prejudicial to the corporation and so may overlap [with] section 245.*[65]

The above paragraphs reflect the unsettled nature of law in relation to derivative action and oppression remedy in Canada, which is also in the same state in the United Kingdom. Sri Lanka's Companies Act of 2007 also provides for both remedies, substantively similar to those of other common law countries and may result in a confusing state with regard to the question, 'can derivative claims proceed via oppression remedy?' in the future with the proliferation of company suits.

4. CONCLUSION

Election between a derivative action and an oppression remedy has important implications for the claimants in relation to standing, procedure, cost rules, standard of liability and available relief. Firstly, having regard to standing, Section 231 of the Companies Act of 2007 allows any shareholder or director to make an application to obtain a derivative action.[66] Section 226 limits the availability of action against oppression and mismanagement to a shareholder or shareholders who, at any time during the six months prior to the making of the application, constituted less than five per centum of the total number of shareholders or held shares which together carried not less than five per centum of the voting rights at a general meeting of the company.[67] Secondly, having regard to procedure, derivative action under Section 231 of the Companies Act of 2007 imposes a leave requirement on the claimant, while action against oppression and mismanagement may be commenced without leave of court.[68] Thirdly, having regards to cost rules, Section 235 of the Companies Act of 2007 provides that costs in a derivative action shall be borne by the company, whilst action against oppression and mismanagement contains no such rule.[69] Fourthly, having regards to substantive standard of liability, there is no substantive standard of liability in a derivative action, while the oppression remedy imposes liability when there is conduct which is oppressive to any shareholder, prejudicial to the interests of the company or likely to be prejudicial to the interests of the company. Finally, having regard to available relief, the oppression remedy provides wide discretion to the court while providing illustrations in Section 228 of the Companies

65 ibid (Henry J).
66 Companies Act 2007, s 231.
67 ibid s 226.
68 ibid s 231.
69 ibid s 235.

Act of 2007 as to the orders which may be made.[70] Meanwhile, derivative action is limited by the common law of fiduciary remedies.[71]

In this backdrop, it is beneficial to combine the derivative and oppression provisions into unified derivative and oppression provision, which will grant relief with regard to both derivative and personal wrongs.[72] However, actions with a derivative character seeking to be commenced must be funnelled through the leave procedure and cost rules at the direction of the court, as both serve an important function of excluding frivolous actions, while actions with a personal character are funnelled without leave and cost rules. Such a provision is also expected to allow the court to determine whether an action involves a claim of a derivative nature. Furthermore, such a unified provision must conform to a uniform standard of liability and a broad range of relief options currently available for the oppression remedy.[73] This will allow the court to grant a wide range of relief in actions involving derivative wrongs.

70 ibid s 228.
71 Jeffrey G MacIntosh, 'The Oppression Remedy: Personal or Derivative', (1991) 70 Canadian Bar Review 29.
72 ibid.
73 MacIntosh (n 72).

CAN SECTION 172 OF THE UNITED KINGDOM'S COMPANIES ACT 2006 MOVE FROM A NO MAN'S LAND TO EVERYONE'S LAND?

Shenaz Rumana Hajireen

ABSTRACT

Directors legally owe a duty to the company, namely the shareholders, in which they hold a position of trust on behalf of the shareholders to ensure maximized returns for their investments and the best performance of the company. Legislatively, this position is predicated by the Companies Act 2006, specifically within sections 171 to 177. However, this article aims to discuss the legal implications effected in S172 particularly, as it rose to popularity for its controversial nature that necessitates a change in the law. The article will begin by observing the history of S172, i.e. the law prior to 2009, and the reason for the birth of S172 under the Companies Act 2006. Thereafter, the author considers in detail the subsequent issues that the new law has posed for directors who are bound to the shareholders, as well as the stakeholders that may be affected by the activities of the directors and the company. The author also considers what reforms have been introduced to rectify the problems caused by S172 wherein it entails a detailed discussion of recommendations made by the Financial Reporting Council, the proposed Better Business Act drafted by a pressure group – the 'Better Business Act' Coalition,[1] as well as the concept of CSR in creating a positive impact for the stakeholders.

1. INTRODUCTION

Directors of a company are viewed as agents of this company, the company being the shareholders.[2] They are placed in a capacity of power to act on behalf of the company in its best interest. This stance has been supported by the popular view of Lord Cranworth LC:

> *A corporate body can only act by agents, and it is … the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal.*[3]

In general, a Board of Directors is burdened with the tasks of defining and observing the goals of a company, conducting the daily affairs and management of the company and being representatives

[1] Better Business Act, <https://betterbusinessact.org/> accessed 04 July 2023.
[2] 'The Responsibilities and Duties of a company director' (Burges Salmon, 2022) <https://www.burges-salmon.com/news-and-insight/publications/the-responsibilities-and-duties-of-a-company-director#:~:text=The%20directors%20are%20effectively%20the,a%20committee%20of%20the%20board.> accessed 20 July 2023.
[3] Aberdeen Rly Co v Blaikie Bros (1854)1UKHL Macq 461.

of the company.[4] When the term 'company' is mentioned, one must keep in mind that it is mostly the shareholders that are being referred to. In the United States of America, a similar approach is taken where the duty of directors is categorized as a duty of loyalty and duty of care. Under a duty of loyalty, directors are expected to hold the interests of the company (i.e. the shareholders) above their own personal interests at all times, including ensuring all personal opportunities that may affect the company and the use of confidential information.[5] A duty of care requires a director to reach decisions in line with the interests of the company having full knowledge and good faith.[6] This proves that a director, regardless of being at the top of the management's hierarchy, will still be subjected to the demands of the shareholders, and directors are not in a boundless capacity to make decisions as they please.

Having established that directors are required to prioritize the interests of the shareholders at any and all times, this coherent yet narrow perception has caused obstructions to the application of certain provisions within the parameters of S171 to S177 of the Companies Act 2006, particularly S172 of the aforementioned Act. S172 brings in the element of 'good faith' to the picture wherein a director is required to conduct himself and his official work in good faith (as he considers so) in order to promote the success of the company so as to make better the returns on investments by the shareholders. At first glance, there may not be any noticeable issues as it is simply furthering the appreciation of shareholders' interests. However, this section proceeds to require the directors to, while promoting the success of the company, 'have regard to' the following factors:

> *(a) the likely consequences of any decision in the long term,*
>
> *(b) the interests of the company's employees,*
>
> *(c) the need to foster the company's business relationships with suppliers, customers and others,*
>
> *(d) the impact of the company's operations on the community and the environment,*
>
> *(e) the desirability of the company maintaining a reputation for high standards of business conduct, and*
>
> *(f) the need to act fairly as between members of the company*.[7]

[4] Directors' duties and responsibilities (Institute of Directors, 13 Sep 2021) <https://www.cooleygo.com/director-fiduciary-duties/> accessed 04 July 2023.
[5] Mike Lincoln, 'Your Duties as a Director: The Basics' (CooleyGo, 14 June 2023) <https://www.cooleygo.com/directorfiduciaryduties/#:~:text=Directors%20have%20fiduciary%20duties%20of,the%20Company%20and%20evaluating%20opportunities> accessed 07 July 2023.
[6] ibid.
[7] Companies Act 2006 (UK), s172 (1).

The words 'have regard to' has been further elaborated upon by the former Minister of State of Industry and Regions to say that it simply means 'think about' the factors and not necessarily to 'tick the boxes.'[8] In other words, it means that directors need not ensure that each factor is crossed out when making the decision but rather reflect on these factors and come to a conclusion about a particular course of action that the director believes is best for the company.

Holistically, the law prescribes a director to primarily focus on the promotion of the success of the companies or rather the return for the investors, and while doing so to secondarily consider the interests of stakeholders that may be affected by the decisions. It must be noted that these are simply considerations and not mandatorily binding, and this in fact will be the cynosure of this article.

2. THE BIRTH OF S172

The principle of shareholder primacy, which is a 'shareholder-centric form of corporate governance'[9], emphasizes critically the maximization of shareholder's wealth rather than the effect on other stakeholders such as employees and the community. Thus, great concerns have been levelled against the effective application of S172 as this rule of primacy is seldom allowed to be set aside for the benefit of third-party stakeholders.

In this light, Shareholder Wealth Maximisation (SWM) was the primary focus of directors back in the day when it was regarded that the capital invested by shareholders was to be protected and thereafter their returns to be ensured.[10] Therefore, directors would decide on business ventures that were harmonious with the maximisation of investors' returns. This is plausible as investors bring in large amounts of capital in hopes of a viable return and since they do not make part of the management of the company, they create a group of trustees for the purpose of ensuring a profitable return upon their investments. In terms of the prospects for the company, this principle can support long-term goals, as the management of the company is aware of what courses of action it needs to take to ensure longevity in the industry and continuous service provided to its customers.

However, it would be incorrect to say that such principles cause no damage to third-party stakeholders. When the directors are stringently required to give importance to shareholders' wealth maximisation at all times, the impact of such business decisions on stakeholders would be most likely overlooked. It is easy to encourage decisions to be made with societal conditions in mind but who is to enforce this upon directors? Who is to be held responsible for the damage done to the

[8] HC Deb 17 October 2006, vol 450, col 789 in 'A Dignam and J Lowry', 'Company Law' (11th edn, OUP 2020).
[9] CFI Team, 'What is Shareholder Primacy?' (Corporate Finance Institute, 7 July 2023) <https://corporatefinanceinstitute.com/resources/equities/what-is-shareholder-primacy/> accessed 9 July 2023.
[10] Duane Windsor, 'Shareholder Wealth Maximisation' in John R. Boatright, 'Finance Ethics: Critical Issues in Theory and Practice' (Wiley, 2010) 439.

environment from increased business activity? Who is to be held responsible for the health problems caused to employees in their work environments?[11]

By the 1990s, it was duly recognized that reform was needed. The Company Law Review Steering Group brought forward their reform proposal - Modern Company Law for a competitive economy – the Final Report, which identified the gaps in the law and the dire necessity for change which would otherwise severely discourage business activity in the UK, hence causing the birth of Companies Act 2006 and therein S172 of the Act.[12] The reformed law took an 'enlightened shareholder value' (ESV) perspective. The most significant transition was from an ideal of maximising the returns of shareholders to doing so while giving consideration to the effect on stakeholders so it is not just the shareholders that benefit from profits but also the stakeholders such as customers, employees, creditors, neighbouring communities who are unaffected by business operations.[13] The shareholder is then benefitted by this course of action in the long run where the company gains admiration for its good practices and therefore feeds the longevity of the business.[14]

3. HOW IS S172 BETTER THAN ITS PREDECESSOR – S309 COMPANIES ACT 1985?

Prior to the creation of S172 in line with Enlightened Shareholder Value, S309 of the 1985 Act[15] (this section has now been repealed) gave a vague indication of who else the directors must consider in their decision-making process, and this provision only focused on employees as a stakeholder group in general, where the directors were required to consider their (employees) interests as well as those of the shareholders in their conduct. There was no indication of a duty owed to any other group of stakeholders so it can be assumed that the scope of directors' duties was limited to the interests of employees and members (shareholders).

In this light, having a broader perspective under S172 of the 2006 Act may be viewed as a positive step towards inclusivity. The new Act requires consideration of the interests of employees, customers, creditors, the environment and fairness amongst members as well. This most certainly can be counted as a reform to the 1985 Act as, regardless of the actual practices of directors and their conduct in considering non-shareholders' interests, there is scope for inclusivity in the sense

[11] Adams v Cape Industries plc [1990] 1 Ch 433.
[12] Company Law Review Steering Group, 'Modern Company Law for a competitive economy – the Final Report' DTI (2001).
[13] N Grier, 'Enlightened Shareholder Value: Did Directors Deliver?' (2014, 2) The Judicial Review 95-111 <https://rke.abertay.ac.uk/ws/portalfiles/portal/15514770/Grier_EnlightenedShareholder_Accepted_2014.pdf> accessed 10 July 2023.
[14] ibid.
[15] Companies Act 1985, 'PART IX A Company's Management; Directors and Secretaries; their Qualifications, Duties and Responsibilities' <https://www.legislation.gov.uk/ukpga/1985/6/contents/enacted> accessed 11 July 2023.

that directors are expected to consider their actions and the impact of these on parties other than members who would have otherwise been marginalized under the 1985 provisions.

In addition to the extension of the list of stakeholders, the provision also necessitates a focus on the success of the company. While some may read this as the success of 'shareholders' and while this view is reasonable, one can also argue that the success of the company is dependent on its external relations with third parties. The better the repute of the company, the better it is for investors and the life of the company because customer satisfaction, employee retention and creditworthiness will grow alongside the image of the company. Thus, it may be accurate to assume that the success of the company indirectly depends on the likeability of the organization amongst non-shareholders which can include potential investors too.

Common law has also held a very clear perspective on this matter as courts will not consider any one stakeholder's interest but rather directors should take a collective approach, for instance, directors are not required to consider only the creditors' interest when reaching decisions,[16] similar to how no one shareholder's or one group of shareholders' interests will be considered as a more generic approach must be taken.[17]

4. THE DEMERITS OF S172

By now, it is evident that S172 of the 2006 Act has evolved through time overcoming many complications to reach a halfway point of giving consideration to stakeholders' interests. Yet, is this progress satisfactory? The primary purpose and point of this paper lie in the remainder of this article and must be carefully observed to understand the reality of this statutory provision.

As deliberated above, it is now clear that S172 has imposed a duty on directors to act in a way that they consider *bona fide* (putting all personal interests aside) so as to promote the success of the company and in doing so to have regard to multiple factors involving various stakeholder groups such as customers, creditors, employees, community and environment.[18] Simply reading this expression, it is possible for one to identify multiple lacunas that the statute has created. Each of these issues will be addressed below in detail.

4.1 Subjective interpretation of 'good faith'

The provision begins with a subjective element of looking at what the 'director considers as good faith' that renders problematic owing to the potential obstructions of proving good faith in the

[16] People's Department Stores v Wise (2004) 3 SCR 461.
[17] Lord Goldsmith, Lords Grand Committee 6 February 2006, col 256 in A Dignam and J Lowry, 'Company Law' (11th edn, OUP 2020).
[18] (n 5).

perspective of the respective director(s) in question. It becomes quite difficult to prove that a director has breached his duty of good faith as there is no gauge for good faith mentioned within the provision and perhaps is understandable since good faith arises in the genuineness of a person's actions and beliefs, which is whether he honestly believed his actions would bring about a positive result. In other words, a director can walk free of liability for a possible breach of duty so long as he can argue that he has acted *bona fide*. Generally, courts are reluctant to interfere with the internal dealings of organizations as well as with decisions taken by directors in good faith.[19] Courts appear to take a Wednesbury standard[20] wherein they believe that 'the decision maker is better qualified than the Court to make a judgment due to specialist knowledge…'[21] so they generally avoid 'second-guessing' the decisions of boards and the directors can take a subjective approach at interpreting S172 while the Judiciary looks to plausibility and rationality as their standard of review.[22]

This is not to say that no action can ever be brought under the requirement of good faith. Undoubtedly, where a director makes egregious choices for the company and it cannot be found that such a director would have acted in the best interests of the company in good faith, then these individuals cannot escape liability. This basis was supported in the recent case of *Re Marylebone Warwick*[23] where the directors of Marylebone Warwick Balfour Management Ltd entered into a tax avoidance scheme based on the advice of professional accountants whereby the Company avoided paying 'Pay As You Earn' income taxes (PAYE) and National Insurance Contributions (NIC). By avoiding these tax payments that should have been accounted to the HMRC, the directors were able to divert these excess amounts towards their remunerations. This was held as a breach of their duty under multiple sections, one of them being S172 as it was concluded by ICC Judge Prentis that generally, where there is a lack of proof to defend the director in line with good faith, the test becomes objective to see 'namely whether an intelligent and honest man in the position of a director

[19] Re Smith v Fawcett Ltd (1942) Ch 304, CA – where Lord Greene stated that directors 'must exercise their discretion bona fide in that they consider – not what a court may consider – is in the interests of the company' in A Dignam and J Lowry, 'Company Law' (11th edn, OUP 2020).
[20] Ernest Lim, 'Judicial Intervention in Directors' Decision-Making Process: Section 172 of the Companies Act 2006' (Oxford Business Law Blog, 22 Feb 2018) <https://blogs.law.ox.ac.uk/business-law-blog/blog/2018/02/judicial-intervention-directors-decision-making-process-section-172> accessed 13 July 2023.
[21] Government Legal Department, 'The Judge Over Your Shoulder – A Guide to Good Decision Making' (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf> accessed 13 July 2023.
[22] E Lim (n 18).
[23] [2022] EWHC 784 (Ch); see also Antuzis v DJ Houghton Catching Services Ltd (2019) EWHC 843 (QB).

of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company.'[24]

4.2 Success of the company

Directors are expected to act in good faith to promote the success of the company but what is the benchmark for success of the company? Is it the financial success of the company? Is it the growth of the brand? Is it the overall performance of the company? Or is it a collective indication of how the company has grown from its inauguration? Lord Goldsmith has attempted to fill the gap created by the statute to say that the success of the company 'means what the members collectively want the company to achieve. For a commercial company, success will usually mean a long-term increase in value.'[25] Most directors would be under the perception that shareholders expect immediate financial returns for their investors (also known as short-termism)[26] but it must be understood that this is not what the CLRSG meant. By suggesting an ESV approach to be taken, what the group emphasized on was the collective success of the company, and increased shareholder returns by thinking in the long term, and giving importance to 'relationships, impact and reputation.'[27]

Regardless of this guideline, it is this author's view that this wording be taken with a grain of salt especially if we are considering non-investor stakeholders. The company is its shareholders, and it is these shareholders that set goals for the management to achieve so the accomplishment or failure to promote the success of the company is in fact the ability or disability to work towards these shareholder goals, and this may be perceived as the yardstick for success, but unfortunately there is no prescription for such indications in the statute. If the directors fail to meet any of these objectives of the shareholders but have been cautious of the impact of their decisions on

[24] Holly Ransley, 'Re Marylebone Warwick – breach of duty claims, the good faith defence and s172 Companies Act 2006' (Ashfords, 21 October 2022) < https://www.ashfords.co.uk/insights/articles/re-marylebone-warwick-breach-of-duty-claims-the-good-faith-defence-and-s172-companies-act-2006> accessed 12 July 2023.

[25] Lords Grand Committee 6 February 2006, column 255 cited in L Cerioni, 'The success of the company in s172(1) of the UK companies act 2006: Towards an 'enlightened directors' primacy'?' [2008] 4(1) OLR <https://www.researchgate.net/publication/49400339_The_success_of_the_company_in_s172(1)_of_the_UK_companies_act_2006_Towards_an_'enlightened_directors'_primacy'> accessed 12 July 2023.

[26] Short-termism is defined as the exaggerated attention on achieving short-term success as opposed to long-term achievements. See 'Short-termism' (CFA Institute) <https://www.cfainstitute.org/en/advocacy/issues/short-termism#sort=%40pubbrowsedate%20descending> accessed 20 July 2023.

[27] John Parkinson, 'Inclusive Company Law' in J. de Lacy (ed), 'The Reform of United Kingdom Company Law' (Cavendish, 2002), 54 cited in L Cerioni, 'The success of the company in s172(1) of the UK companies act 2006: Towards an 'enlightened directors' primacy'?' [2008] 4(1) OLR. <https://www.researchgate.net/publication/49400339_The_success_of_the_company_in_s172(1)_of_the_UK_companies_act_2006_Towards_an_'enlightened_directors'_primacy'> accessed 12 July 2023.

stakeholders, then it can only be concluded that action will be taken against the directors for failure to promote the success of the company.

Furthermore, we must return to the question of what possibly could these goals be. Is it maximised profits? Could it be to increase the business's market share? Or if the company is experiencing a slump in earning profits, then perhaps loss reduction? Would any of these goals include the welfare of communities that may be affected by the business's activities, for instance, improvement of working conditions for employees, increasing employment benefits, and passing on the benefit of any reduced costs to the customers? This takes us back to square one where the stakeholders are stranded with no hope for relief or accountability.

4.3 Enforceability and Accountability of S172

The most prevalent issues faced concerning S172 are two-fold whereby S172 meets with the hindrances of enforceability and accountability which in some sense consolidates the issues addressed in 4.1 and 4.2 above.

The actuality of enforcing S172 is undoubtedly dubious. To those versed in company law, it is a common fact that it is the shareholders of the company who can bring action against directors whether it is removal, statutory derivative actions or any other forms of remedies. Nevertheless, when we speak of shareholders it must be kept in mind that we refer to shareholders in general and not individually so to bring about a statutory derivative action against a director or to remove a director on the basis that they did not promote the success of the company, there must be a majority consensus between shareholders.[28] Even if there was a possibility of a derivative claim to be given permission to proceed following the two-stage procedures for permission to pursue,[29] there is the additional burden of passing through the mandatory and discretionary grounds for refusal.[30] Within these two sections stands the 'Hypothetical Director Test' that requires Courts to consider whether a supposed person who seeks to promote the success of the company would proceed with such claims, and in doing so would have to keep in mind a number of factors like litigation costs, disruption to management and reputational damage.[31] Given how courts are unenthusiastic to interfere with the internal affairs of a business and the decisions of boards, it is uncertain whether they would seek a positive result from such a test.

[28] Foss v Harbottle (1843) 67 ER 189.
[29] Iesini v Westrip Holdings Ltd [2009] EWHC 2526 (Ch).
[30] Mandatory Grounds – s263(2) Companies Act 2006; Discretionary Grounds – s263(3) Companies Act 2006.
[31] Williams J in Franbar Holdings v Patel [2008] EWHC 1534 (Ch); see also Mission Capital v Sinclair [2008] EWHC 1339 (Ch).

Assuming that shareholders can in one way or another seek relief for any breaches of duty by the directors under S172, how then can third-party stakeholders seek relief for injustices caused to them by decisions of the Board? Injunctive relief, even if allowed, may be merely a mirage where directors are allowed to hide behind the veil of 'good faith' and honest belief that they were acting for the betterment of the company.[32] This immunity for the directors goes to the extent of statutory relief under S1157 of the Companies Act 2006 in which it is stated that if the directors cause a breach of their duty, but it can be deduced by the courts that he has acted honestly and reasonably, such individuals may be relieved from their liabilities partially or wholly. Therefore, it leaves stakeholders with next to no relief for whatever harm that is caused by the director to them. For the same reasons, S172 has been called a 'toothless tiger' which is reasonable because it (S172) only implies an advisory guideline for directors to consider and not a serious implication so during any litigation, directors have a greater chance to defend their decisions by simply showing that they did consider the impact on stakeholders, however since it would have negatively affected members as a whole, they decided to pursue the relevant course of action to protect the members' interests.[33]

Problems of enforceability further expand into problems of accountability.[34] This is so because directors are expected by law to be held accountable for their decisions and actions, and S172 imposes such a duty on a director prescribing a particular course of action and certain considerations to be taken into account in their decision-making process. However, when this section so evidently faces obstacles for enforceability, it then gives rise to the question of whether directors can be held accountable for their actions since they are most likely not going to be held liable under S172.

5. IMPROVEMENT FOR S172 – PRESENT AND POSSIBLE FUTURE?

Many parties have attempted to rectify the problems posed by S172. One such rare appearance and consideration of the factors mentioned in S172(1) was the occurrence of conducting judicial review on a government institution in the case of *R (People & Planet) v HM Treasury.*[35] This case specifically brought under the spotlight the purported stakeholder considerations specified under S172(1)(a) to (e). Here, permission to conduct judicial review was sought since it was found that

[32] Amita Chohan, 'Is Section 172 of the Companies Act 2006 Capable of Delivering for All Stakeholders?' (31 August 2012) <https://ssrn.com/abstract=2139528> accessed 14 July 2023.
[33] James Compton, 'Directors' Duties and the Environment' (Comptons LLP, 16 April 2021) <https://comptons.co.uk/directors-duties-and-the-environment/> accessed 16 July 2023.
[34] Georgina Tsagas, 'Section 172 of the Companies Act 2006: Desperate times call for soft law measures' in N Boeger & C Villiers (Eds.), 'Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity' (Hart Publishing, 2018) 131-150 <https://researchinformation.bris.ac.uk/ws/portalfiles/portal/134298690/09_Chapter_7_Tsagas.PURE.pdf> accessed 16 July 2023.
[35] (2009) EWHC 3020 (Admin).

the HM Treasury which held 70% shares in the Royal Bank of Scotland (RBS), failed to push RBS towards adopting a more environmentally friendly approach that also protects human rights, both of which are stakeholder interests.[36] However, it was found that while the policy specified in the 'Green Book Exercise'[37] by officials for consideration of social and environmental conditions was done accurately, directors could not be asked to create their own policies for the protection of these factors and it would have opposed their duties as directors to protect the members' interests as a whole.[38] This then simply becomes another one of the ordinary cases where stakeholder interests are merely considerations and not enforceable legal implications in actuality.

5.1 UK's Corporate Governance Code and FRC

Nevertheless, it is evident by now that the statutory provision requires reform or at least better guidance on how best to implement S172 of the 2006 Act to benefit shareholders and stakeholders and the way towards reform has already begun to be paved. One such aspect is the introduction of mandatory reporting with regard to S172 from January 2019 onwards. This regulation was introduced in line with the UK's Corporate Governance Code and The Companies (Miscellaneous Reporting) Regulations 2018 which now requires Boards to include a statement in their annual reports on how the organization is functioning in compliance with S172 of the Companies Act 2006.[39] Specific guidelines have been prescribed on how such reporting must take place:

- *Qualifying companies will be required to include a Section 172 statement within their annual Strategic Report. The Statement must be clearly identifiable and separate from the main report body.*
- *The Section 172 statement must be available online…*
- *The Section 172 statement should include an "appropriate" level of detail sufficient to show which stakeholders featured in the board's decision making, and how the interests of those stakeholders were treated during board deliberations. (This is the demonstrating "regard" part).*

[36] G Tsagas (n 34).
[37] HM Treasury, 'The Green Book' Appraisal and Evaluation in Central Government (3rd edn, 2022) <www.gov.uk/government/publications/the-green-book-appraisal-and-evaluation-incentral-governent> accessed 16 July 2023.
[38] ibid.
[39] One Advisory, 's172 Reporting And The Purpose Of The Company' (One Advisory, 6 January 2022) <https://www.oneadvisory.london/one-advisory-publications/s172-reporting-and-the-purpose-of-the-company#:~:text=The%20Companies%20(Miscellaneous%20Reporting)%20Regulations,or%20after%201%20January%202019.> accessed 17 July 2023.

- *Companies with more than 250 UK employees will be required to include a statement as part of their directors' report summarizing how the directors have engaged with employees, how they have had regard to employee interests and the effect of that regard, including on the principal decisions taken by the company in the financial year.*[40]

This specific necessity for reporting compliance with S172 has been statutorily supported by way of amendments to the Companies Act 2006. Accordingly, under S414C (1) the need for a strategic report has been mandated by requesting boards to 'inform members of the company and help them assess how the directors have performed their duty under section 172 (duty to promote the success of the company).' Boards must demonstrate 'a fair review of the company's business' and … 'a description of the principal risks and uncertainties facing the company' within this strategic report.[41] More specifically, the statute has made it obligatory for directors to 'include a statement' that clearly shows how directors have had regard to the factors laid down in S172(1)(a)-(e)[42] so this paints a better picture for the application of S172 wherein it is now mandatorily necessary for directors to HAVE regard to the stakeholders' interests.

What truly matters now is the actual imposition of these provisions and for shareholders to pay close attention to the activities of the directors in order to monitor the development and performance of the company having regard to the interests of employees, customers, the environment and other relevant stakeholders. It would still prove inoperable where directors take minimum steps to consider the impact of their actions on stakeholders, and where members also do not actively proceed to rectify such harm and ensure that directors do not conduct themselves outside the law.

Strategic reporting took a rather unsteady start as the Financial Reporting Council[43] was not satisfied with the way in which directors lacked reporting on feedback received by the stakeholders on engagement and what was done for the purpose of engagement, even though they reported on the ways in which they engaged with stakeholders.[44] This identification arose in the wake of the Covid-19 pandemic when the need to engage more actively with stakeholders was greater than

[40] 'Corporate governance reporting under Section 172 of the Companies Act 2006' (Institute of Directors, 315 June 2018) <https://www.iod.com/news/governance/corporate-governance-reporting-under-section-172-of-the-companies-act-2006/> accessed 17 July 2023.
[41] s414C (2) Companies Act 2006.
[42] s414CZA (1) Companies Act 2006.
[43] The Financial Reporting Council (FRC) is an independent regulator responsible for regulating auditors, accountants, actuaries and is responsible for laying out the UK Corporate Governance and Stewardship Code. See <https://www.frc.org.uk/about-the-frc> accessed 17 July 2023.
[44] One Advisory (n 39).

before, and the performance of companies and their future success was to be more closely monitored with changing economies.[45]

Due to the lack of proper reporting standards, the FRC took steps to lay down tips on how companies can successfully build their strategic report effectively. It has recommended that directors deviate from the typical 'box-ticking' exercise of simply cruising through the list of factors to recognize if all have been considered to actually discussing how the directors met with the specifications, the results of such actions and look further into what the future may hold for the company.[46] It has also been recognized that being honest as to the repercussions of such considerations whether positive or negative must be disclosed to the members while staying close to the strategy of the company including its business model and the relevance of stakeholders in such activities.[47] The FRC Lab has also laid down other tips on aspects such as consistency and reflection of the board's oversight which are all aimed at better reporting standards for the development of annual strategic reports. To a great extent, since 2018, the Corporate Governance Code and amendments to the Act alongside independent guidelines from organisations such as the FRC, have all functioned hand-in-hand to better implement the otherwise controversial S172 that seemed inapplicable at its inception.

5.2 Better Business Act

With this in mind, we can also now explore another suggested reform to the law that has been advocated in the 'Better Business Act' (BBA) drafted and proposed by the Better Business Act Coalition group.[48] This reform proposal, as will be proved below, is destined to play a pivotal role in the eradication of marginalisation and the removal of the spotlight from shareholder primacy effected by S172 and is shining a light towards better business practices for organizations that will include social and environmental impacts in discussions of boards, that is if it is passed in the Parliament as an Act. The BBA coalition is a non-political group that was founded by a non-profit organization and the primary objective of drafting such a reform proposal was to amend S172 in a way that imposes a legal duty on businesses to pursue a future that benefits stakeholders while also achieving profit goals for the company.[49] Research carried out by the group demonstrates that consumers all over the UK desire to see businesses do better in terms of their engagement with

[45] ibid.
[46] Financial Reporting Council, Section 172 statements - How to make them more useful (FRC Lab, 2020) <https://www.frc.org.uk/getattachment/dda7a2e4-fd50-4710-8ed6-860867aebf24/FRC-Lab-Tips-on-s172-Oct-20201.pdf> accessed 17 July 2023.
[47] ibid.
[48] (n 1).
[49] ibid.

stakeholders and this means potentially adopting a 'People, Planet, Profit' approach that gives equal importance to the interests of shareholders as well as stakeholders.[50]

Accordingly, the proposed amendments do not include a major change to subsection (1) of S172 as it still suggests that directors should act in good faith and have regard to the factors listed in S172(1)(a)-(e). However, amendments are suggested in subsection (2) where the group suggests that the purpose of the company be in benefit of the members, whilst also benefitting:

(a) …wider society and the environment in a manner commensurate with the size of the company and the nature of its operations; and

(b) reduces harms the company creates or costs it imposes on wider society or the environment, with the goal of eliminating any such harm or costs.[51]

Subsection (3) of the Draft proposal suggests that companies precisely express this attitude through the company's purpose in the Articles in order to demonstrate how the purpose is beneficial not only to the members but also to society as a whole. Hence, this would allow outsiders, including potential investors, to identify whether the company's culture and management of the company are combined collectively to achieve long-term success in not just profit-making but also improving and upholding relationships, performance and positive impact.[52]

Further changes are suggested to the existing amendments in the Companies Act 2006, whereby it is recommended that as per S414CZA, directors go beyond stating how they have had regard to S172(1)(a) - (f), and must affirm how they have 'advanced the purpose of the company'[53] which directs to the proposed subsection (3) as discussed above wherein it is recommended that the purpose of the company extends to showing the business's actions towards benefitting its stakeholders.

A closer look at this recommendation would assert that in the wake of climate change, the Covid-19 pandemic and the rising social complications arising from business activities, there is a popular understanding of the public's position which is that businesses must do better at considering the impact of their operations on people and the environment so it no longer is a mere choice to give equal standing to the interests of stakeholders as they do shareholders, regardless of the company's size.[54] This would potentially ease the burden on directors who would have found S172 confusing

[50] ibid.
[51] Draft Better Business Act 2021 <https://betterbusinessact.org/wp-content/uploads/2021/04/The-Better-Business-Act-2021.pdf> accessed 18 July 2023.
[52] ibid.
[53] ibid.
[54] The Story (n 1).

with the various implications and would create a clearer path for them to align their decisions knowing that they now MUST give importance to non-shareholder interests, hence allowing directors to truly work for the long-term success of the company rather than focusing on short-termism.[55]

On the flip side, one of the criticisms levelled against the Better Business Act is how it differs in terms of enforceability compared to S172. The answer would practically be simply 'not much of a difference'. This is so because the amendments still do not create a pathway for outside stakeholders to enforce the statute against directors as they are not privy to the internal affairs of the company. Therefore, stakeholders can only depend on the shareholders, if at all, to bring a derivative claim against the directors for breach of duty.[56] However, it cannot be denied that directors will always primarily owe a duty to the company regardless of how their decisions impact society, even if it is argued that such decisions must benefit society.[57]

5.3 Corporate Social Responsibility

It is also this author's view that the concept of 'Corporate Social Responsibility' holds great value in ensuring a positive impact of their business activities on the society and environment. To precisely define CSR, it would require consideration of who is trying to define it, as various groups of people would look at it through different lenses. From a company's perspective, it may appear as a marketing strategy to paint a perfect picture of the company's reputation, but from a legal perspective, one may view it as a replication of the directors' duties laid down in S172.[58] Regardless of the motive behind engaging in CSR, it largely focuses on stakeholders so companies engage in charitable actions such as educational advancement, diversity and equality for employees, social welfare through charitable foundations, and even ethical, environmentally-friendly practices such as 'zero emission' standards practised within the organization. In a more strategic sense, CSR can be read as a way of increasing shareholder returns in the long run and where such benefit is not obtained, companies will not engage in CSR.[59] However, from a legal standpoint, introducing such activities may benefit the stakeholders as their interests would be given prominence even if companies are motivated to achieve long-term success, and would be a two-way road for benefitting both stakeholders and shareholders. Nevertheless, it cannot be denied that such a benefit

[55] BBA Coalition group, 'Better Business Act Campaign Overview' <https://betterbusinessact.org/wp-content/uploads/2022/04/Better-Business-Act-Campaign-Overview.pdf> accessed 18 July 2023.
[56] 'The Better Business Act – a business lobby for change' (Mishcon de Reya, 3 June 2021) <https://www.mishcon.com/news/the-better-business-act-a-business-lobby-for-change> accessed 18 July 2023.
[57] ibid.
[58] Christi Perou, 'Corporate social responsibility and directors' duty to act for the success of the company' (Lancaster University Law School, 30 May 2022) <https://www.lancaster.ac.uk/law/blog/corporate-social-responsibility-and-directors-duty-to-act-for-the-success-of-the-company> accessed 19 July 2023.
[59] ibid.

is somehow dependent on whether or not such a course of action profits the shareholders in the end.[60]

6. CONCLUSION

Readers may now apprehend the difficulties faced by directors and stakeholders to implement and fulfil the duty laid out in S172 of the 2006 Act given its vagueness and enforceability issues. This article began by discussing the history of S172 alongside shareholder primacy, and the evolution leading up to the concept of 'Enlightened Shareholder Value'. Thereafter, the issues of the new law, i.e., S172 were considered in depth including detailed discussions on enforceability and subjectiveness of the section. Following this conversation, an account of how improvements have been made to rectify the problems in S172 through concepts such as CSR, the Better Business Act and the UK's Corporate Governance Code was observed. It is finally this author's view that while S172 carries much potential to hold companies, especially directors responsible for their decisions and actions, the problems caused by its vagueness and lack of enforceability can be rectified by the shareholders themselves. It is the shareholders' return that directors are mandatorily required to give first and utmost preference to at all times (largely by following the 'shareholder primacy' doctrine), and in doing so it would be unfair for them to blame the directors for not furthering the interests of stakeholders. Therefore, this author believes that shareholders must collectively decide on how they wish for directors to pursue the interests of stakeholders alongside the members' interests. For this, directors can provide reports on their engagement with society and the environment and what is expected of them from third-party stakeholders. This would help directors have clarity as to what is expected of them and their duties, stakeholders would finally find some relief in upholding their interests, and shareholders can maintain the reputation of the company which will ultimately increase their returns.

[60] ibid.

CONFLICT OF LAWS

SHOULD 'RENVOI' BE RETAINED OR SET ASIDE IN CONFLICT OF LAWS?

Kaveen Saparamadu

ABSTRACT

The concept of 'renvoi' is a concept inherent to Conflict of Laws. The aim of this concept is to consider what 'law' is to apply in resolving disputes which deal with a cross-border element. The concept of 'renvoi' has been a part of English Conflict of Laws. As Schreiber J provides, the doctrine has "troubled the courts for nearly two hundred years" for the purpose of considering any foreign law that may be applicable.

However, as Schreiber J too notes, the application of this doctrine has sparked much attention in the field of Private International Law, resulting in much academic debate as to whether the concept should be retained or set aside. Hence, the writer aims to consider judicial precedence established in relation to the concept together with academic views in order to assess whether the concept should be retained or set aside.

1. INTRODUCTION

The term 'renvoi' is said to be of French origin, meaning "send back" or "return unopened."[1] Considering the meaning of the term, in a Conflict of Laws perspective, the Oxford Dictionary of Law states, it could be noted that it is "The doctrine whereby the courts of one country in certain circumstances apply the law of another country in resolving a legal dispute."[2] Considering an alternative definition, it could be stated that it "is the process by which the Court adopts the rules of a foreign jurisdiction with respect to any conflict of laws that arises. The idea behind this doctrine is to prevent forum shopping…"[3]

1.1 Approaches to Renvoi

Traditionally, in an English Conflict of Laws perspective, it should be noted that the application of the doctrine is threefold: rejecting renvoi, accepting renvoi and total renvoi.

1.1.1 Rejecting Renvoi

[1] Anulekha Medisetti, 'The Doctrine of Renvoi in Private International Law' (*IPleaders*, 8 February 2020) <https://blog.ipleaders.in/doctrine-of-renvoi/ > accessed 31 July 2023.
[2] *Oxford Dictionary of Law* (Edited by Jonathan Law, 9th edn, Oxford University Press, 2018).
[3] Anulekha (n 1).

If the courts of the country giving effect to the law adopt rejecting renvoi, it is understood that they aim to use the domestic laws of that country. The application of the concept could be illustrated based on the example adopted by Clarkson and Hill. It is stated that if an individual dies intestate in Mexico, the English Law requires the distribution of movable property based on Mexican Law, as the individual was domiciled in Mexico. Thus, in such an event, based on the doctrine of 'accepting renvoi' it should be noted that the Mexican domestic law which includes statutes and the common law would be the applicable law based on 'Rejecting renvoi.'[4]

1.1.2 Accepting Renvoi

The concept of accepting renvoi is also known as 'partial renvoi'. This approach to the doctrine considers 'law' to include the domestic laws as well as the conflict of law rules. In order to explain the application of the concept of 'accepting renvoi', the illustration adopted by Clarkson and Hill may be considered. If an individual domiciled in Mexico dies intestate in Mexico but is a citizen of the United Kingdom, as per English Law, the succession of the moveable property would be governed by the Law of the country where he would be domiciled- Mexico. Assuming that Mexican choice of Law rules require the intestate succession to be governed by the deceased individual's nationality, it would be the English law that is to govern the issue. Thus, the English courts accepting to give effect to their law would be an example following partial/ accepting renvoi.[5]

1.1.3 Total Renvoi

The concept of total renvoi is also known as 'double renvoi'. As per Clarkson and Hill "The English judge has to 'don the mantle' of the foreign judge and try to decide the case exactly as the foreign judge would decide."[6] England adopts the doctrine of total renvoi; *Re Annesley*.[7]

The case of *Re Annesley* illustrates the application of the doctrine of total renvoi. In this case, the testator was a British national domiciled in France. He died in France with moveable assets in England. The English courts had to decide who was entitled to the property and whether the Will was valid. In order to assess the validity of the Will, the law of the country of domicile was to be considered, in this case, France. As England applies 'total renvoi', 'French law' was considered to include the domestic law, conflict of law rules and renvoi rules of France, as if the French courts were interpreting the issue.

2. JUSTIFYING THE RETENTION OF RENVOI

[4] Clarkson and Hill, Conflict of Laws (5th edition, Oxford University Press 2016) 35.
[5] Clarkson and Hill (n 4) 36.
[6] ibid.
[7] *Re Annesley* [1926] Ch 692.

In assessing the justifications put forward for retaining the concept of renvoi, as Anton, in Private International Law contends, it should be noted that the use of the doctrine of renvoi would assist in protecting the reasonable expectations of the parties to the dispute. The view put forward by Anton could be justified further based on the example adopted by Brigg's statement in 'In Praise of and Defence of Renvoi',[8] where he takes a contractual dispute as an example. It is stated that if the parties to a contract decide that Turkish Law is to be the applicable law, based on the contract, considering the understanding of the parties, Turkish Law is to be applicable. Thus, in order to give effect to the contractual agreements of parties and protect their reasonable expectation, it should be noted that the concept of renvoi should be retained in English Conflict of Law rules.

Moreover, Harris in 'Does Choice of Law make any Sense?'[9] identifies reasons for forum shopping. He asserts that individuals would forum shop to obtain better results of the substance of the law or in order to seek other procedural advantages based on the operation of the legal system. Considering the possibility of forum shopping in relation to disputes that would concern two countries, Brigg's noted that the adoption of the doctrine of renvoi may be a 'deterrent to forum shopping' as the English courts may be able to give effect to the more appropriate foreign law.[10] Therefore, in an effort to avert forum shopping it, may be asserted that the doctrine of 'Renvoi' remains favourable in Conflict of Laws and should be retained.

In addition, as emphasised by Clarkson and Hill, the use of the doctrine of renvoi could be justified in cases concerning the title to immovable property situated overseas. Traditionally, considering title to moveable property, it should be noted that the immovable property would be governed by the '*lex situs'* (the law of the place where the immovable property is situated) as this would be the 'appropriate law' to govern the property and also because the property would be under the control of the authorities of the situs. Though this may remain straightforward in application, as Clarkson and Hill emphasise, there may be some ambiguity if the courts are administering an estate as there is property in England and also property overseas. Thus, in such a situation the doctrine on 'renvoi' could assist in the English courts being able to determine the succession of the property similar to the manner the courts of the situs may determine the issue.[11] Hence, considering the academic justification put forward by Clarkson and Hill, it could be asserted that the retention of the doctrine of 'renvoi' is essential in Conflict of Laws, even though its application may be with its inherent flaws.

[8] Adrian Briggs, 'In Praise and Defence of Renvoi,' (1998) 47 ICLQ 877, 881 <https://www.jstor.org/stable/761549> accessed on 30 September 2023
[9] Harris, Does Choice of Law Make any Sense? (2204) 57 CLP 305, 352.
[10] Briggs (n 8)
[11] Clarkson and Hill (n 4) 39-40.

On the flipside, though renvoi could be considered favourable as discussed above, as Dicey, Morris and Collins in 'The Conflict of Laws'[12] suggest, the *'lex situs'* rule in relation to intestate succession has been set aside in most civil law countries. Furthermore, the EU Succession Regulation does not use the lex situs rule. Thus, considering these developments, the need to retain the doctrine of renvoi could be questioned.

The doctrine of 'Renvoi' could be considered an instrument that would avert undesirable results to litigants, enabling them receive justice. In justifying this point the case facts of *Collier v Rivaz*[13] could be considered. This case concerned the formal validity of a Will as six codicils had been entered. The testator was a British national domiciled in Belgium. Thus, the Will should be governed by the law of the domicile at the time of the death, which was the law of Belgium. Two codicils complied with Belgian law. However, four codicils did not comply with Belgian law. Sir Herbert Jenner referred the matter to English law and found the remaining codicils to be valid. This was an application of the doctrine of renvoi. If the Belgian courts had abstained from considering the position of English Law, the four codicils would have been found to be invalid and the testator's intentions would have been defeated. Hence, in order to ensure that the testator's expectations in the Will are given effect to and as undesirable consequences may be averted, it could be suggested that the doctrine of renvoi, is useful and should be retained in English conflict of Law rules. It may also be noted that a similar approach was adopted *Taczanowska v Taczanowski*,[14] in determining the validity of a marriage.

3. RENVOI IN DISGUISE?

It has been argued that the use of the doctrine of renvoi could lead to uniformity being achieved; *Re Annesley*[15] and *Re Ross*.[16] Furthermore, Recital 57 of EU Regulation No. 650/2012 provides that renvoi could be permitted in certain cases to 'ensure international consistency'. Despite such an approach being adopted in praise of renvoi, the extent to which renvoi would result in international harmony has been severely questioned by the courts as well as luminaries. In the case of *Macmillan Inc v Bishopgate Investment Trust (No.3)*[17] the courts stated that "this [uniformity] cannot be achieved by judicial mental gymnastics but only by international conventions." Through this statement, the courts compare the doctrine of 'renvoi' to 'judicial mental gymnastics' and suggest that it would not necessarily provide logical solutions. Therefore, considering the Court of

[12] Dicey, Morris & Collins, *The Conflict of Law*s (15th edn, 2012) 1417.
[13] *Collier v Rivaz* [1841] 2 Curt 855 (United Kingdom).
[14] *Taczanowska v Taczanowska* [1957] P 301.
[15] *Re Annesley* [1926] Ch 692.
[16] *Re Ross* [1930] 1 Ch 377.
[17] *Macmillan Inc v Bishopgate Investment Trust (No.3)* [1996] WLR 387.

Appeal's perspective on the doctrine of renvoi, one may ponder whether the doctrine should actually be retained.

In addition, commenting on whether 'renvoi' could help achieve uniformity Hughes in his article 'The Insolubility of Renvoi and Its Consequences' asserts that based on a Mathematical theorem, the application of the doctrine of renvoi is "logically insoluble."[18] Furthermore, Schreiber J too opines that 'renvoi' would not assist in achieving uniformity.

Moreover, public policy has been recognised as a reason a country could abstain from giving effect to foreign law. Even though the courts aim to ensure 'judicial comity', in certain instances there could be situations of 'judicial chauvinism' via the adoption of public policy as a reason to deter giving effect to the foreign law. Considering the loopholes that are applicable to such situations, it could be questioned further as to whether the doctrine of renvoi would actually lead to achieving uniformity.

Furthermore, though England adopts the doctrine of 'total renvoi'; *Re Annesley*, there remain situations in which countries abstain from giving effect to the doctrine of renvoi. For example, Greece, the United States of America and Denmark do not accept double renvoi.[19] In such a situation, though the English Conflict of Law rules would have the doctrine enshrined, it may not be given effect to in Private International Law disputes arising between England and countries that do not give effect to double renvoi. Therefore, the need to retain the doctrine of 'renvoi' in English Conflict of Law rules could be questioned.

Throughout history, in countries across the world there has been devolution of power resulting in one country having 'more than one law district'.[20] For example, England and Wales would have one legal system where as Scotland's legal system would differ. The United States of America and Australia having federal legal systems may result in some confusion as to what Conflict of Law rules are to apply, in the event that the States have different approaches to renvoi. Thus, it could be seen that though theoretically the doctrine of renvoi seems a wholistic concept, in practical application in the 21st century it is flawed and should be reformed or set aside.

However, prima facie, though there may be implications in giving effect to the concept of renvoi, it could be seen that in fact there has been recognition accorded to the doctrine of renvoi in the Commonwealth. This was seen in the Australian case of *Neilson v Overseas Project Corporation*

[18] Hughes, *The Insolubility of Renvoi and Its Consequences*, 6 Journal of Private International Law 195 (2010).
[19] M Anulekha, 'The Doctrine of Renvoi in Private International Law', (*IPleaders*, 8 February 2020) <https://blog.ipleaders.in/doctrine-of-renvoi/> accessed 31 July 2023.
[20] Clarkson and Hill (n 4).

of Victoria,[21] where the High Court of Victoria recognised the doctrine of renvoi and expanded its scope to cover cases of tort. Therefore, despite the criticism levelled against the doctrine the expansion of the doctrines scope and recognition provided in the Commonwealth may render one to question whether the doctrine is actually doomed to fail.

In addition, Clarkson and Hill commenting on the cases of *Re Annesley*[22] and *Re Duke of Wellington*[23] suggest that in a situation 'the question is unsettled in a foreign country itself', there would be ambiguity in relation to the applicability of the concept.[24] As there could be countries which do not give effect to renvoi and those that do not necessarily know their stance in relation to the concept, it could be questioned whether the application of the doctrine of renvoi should be retained in English Conflict of Law rules as its practical application may be hindered significantly.

Moreover, commenting on the case of *Re O' Keefe*[25] there remains concern in relation to its application, as the concept could lead to 'absurd', 'unpredictable', and 'unrealistic' outcomes. Therefore, based on the practical implications, the necessity to retain the concept of renvoi could be undermined.

Considering the implications of giving effect to renvoi practically, as England has adopted 'total renvoi', as Clarkson and Hill point out the foreign country should either use 'rejecting renvoi' or 'accepting renvo'.[26] If both countries adopt 'total renvoi' it is said that the issue would be circumvented, resulting in the inability to reach a conclusive decision in relation to which law is applicable. The issue that would be circumvented has been compared to a situation of a 'stalemate' in a game of Chess, where there would be no winner or loser. This issue could be illustrated further based on the analogy suggested by Dean Griswold (as quoted by Larry Kramer), where he compares it to a "a game of 'lawn tennis',[27] where the ball would be hit back and forth." This would likely result in 'deadlock' as to how the issue is to be resolved; *Neilson v Overseas Project Corporation of Victoria.*[28] Based on this explanation it is evident that in reality if two countries adopt total renvoi it would be unworkable. Hence, should the doctrine be retained?

In an effort to remedy the circumvented issue discussed above, it should be noted that Hughes suggests the possibility of a 'secondary rule'.[29]

[21] *Neilson v Overseas Corporation of Victoria* [2005] HCA 54 (Australia).
[22] *Re Annesley* [1926] Ch 692.
[23] *Re Duke of Wellington* [1947] Ch 506.
[24] Clarkson and Hill (n 4) 41.
[25] *O'Keefe* [1940] Ch 124.
[26] Clarkson and Hill (n 4) 42.
[27] Larry Kramer, Return of the Renvoi, 66 NYLR 979 (1991).
[28] *Neilson v Overseas Project Corporation of Victoria* [2005] 223 CLR 331.
[29] Hughes, The Insolubility of Renvoi and Its Consequences, (2010) 6 Journal of Private International Law 195.

The UK being a member of the European Union (EU) from 1972 to 2020, saw an influx of EU legislation, influence England's domestic legislation, such as Article 20 of the Rome I Regulation[30] and Article 24 of the Rome II Regulation.[31] They aimed to exclude the application of renvoi in relation to contractual and non-contractual disputes which deal with Private International Law. Despite the doctrine being one that has been around for nearly 'two hundred years', the legislation that has been enacted subsequently, attempting to set aside the application of the doctrine of renvoi, results in one questioning whether the doctrine of renvoi should actually be retained in English Conflict of Law rules.

Though the doctrine of renvoi could be considered a doctrine with significant importance, in Conflict of Laws, it should be noted that, it would be applicable only when the parties to the dispute plead the application of the doctrine; *Blue Sky One Ltd & Ors v Mahan Air & Anor (Rev 1)*[32] and *Islamic Republic of Iran v Berend*.[33] Despite the above precedence the Court of Appeal of England and Wales did recognise the applicability of the doctrine even though the parties to the dispute did not plead its application; *Vervaeke v Smith*.[34] Therefore, it should be noted that view of the courts in relation to the application of the doctrine of renvoi remains divided.

In addition, in the recent past there seems to have been some turbulence in the recognition of the doctrine of renvoi. The Law Commission has chosen not to condemn the doctrine.[35] Furthermore, the British Parliament through the passage of Civil Partnership Act of 2004 has recognised the application, whilst the courts have also given effect to the doctrine.[36] However, the use of the doctrine has been condemned at European level in the Succession Regulation. Moreover, in recent judicial decisions the courts have been critical of giving effect to the doctrine,[37] where it may have previously been applicable. Therefore, considering the diverse views adopted, it could be questioned whether there would actually be a need to retain the concept.

Moreover, Larry Kramer stated: "The field of Conflict of Laws is filled with concepts that sound strange even to the ear of a trained lawyer. Among the strangest of these- if strangeness is measured by the tendency to end a conversation- is 'the renvoi'."[38] Through this rather colourful description,

[30] Regulation (EC) No 593/2008.
[31] Regulation (EC) No 864/2007.
[32] *Blue Sky One Ltd & Ors v Mahan Air & Anor (Rev 1)* [2010] EWHC 631 (Comm).
[33] *Islamic Republic of Iran v Berend* [2007] EWHC 132 (QB).
[34] *Vervaeke v Smith* [1981] 1 All ER 55 [87].
[35] Law Commission Working Paper No 89 *Private International Law: Choice of Law Rules in Marriage* (1985); Law Commission Report No 165 *Private International Law: Choice of Law Rules in Marriage* (1987).
[36] Clarkson and Hill (n 4) 42.
[37] *Blue Sky One Ltd & Ors v Mahan Air Anor (Rev 1)* [2010] EWHC 631 (Comm); *Islamic Republic of Iran v Berend* [2007] EWHC 132 (QB).
[38] Kramer (n 27).

Kramer aims to point out that the application of the doctrine of renvoi remains complexed and may be unworkable in certain situations, where the most competent lawyers may not be able to grasp such a concept. Hence, one may ponder the need to retain such an unworkable and complexed concept.

4. CONCLUSION

Having considered the issues relating to the doctrine of 'renvoi', it may be contended that practically giving effect to the doctrine may be impossible, especially in situations where countries' Conflict of Law rules do not entertain its application, and in situations where both countries would adopt 'Total renvoi', as the issue of the applicable law would go back and forth. In addition, as Kramer suggests the complexed nature of the application could also be a deterrent to its application. Even though theoretically, it may sound a viable doctrine, its practical application remains hindered to a great extent. Thus, should the doctrine of 'renvoi' be retained in English Conflict of Law rules?

CRIMINAL LAW

DRUG LAWS OF SRI LANKA: A COMPARATIVE ANALYSIS AND PROPOSALS FOR SYSTEMATIC REFORM

Sajani Jayasinghe | Isuri Kumbukage

ABSTRACT

The global war on drugs has only seen a stark rise in collateral damage over the years with statistics now attributing one in five deaths to be a direct or indirect cause of drugs[1]. Sri Lanka's overall framework for control has seen multiple allegations of human rights violations and with the latest development of enacting the Bureau of Rehabilitation Act, No. 2 of 2023, the record has further deteriorated[2]. The article looks into the context in which the discussion on drug laws is brought about, with regards to the primary harms such as deterioration of health and rise of criminal activity and secondary harms which includes vast networks of organised crime, endemic violence related to drug market, the corruption of law enforcement and governments causing rampant environment damage and food insecurity among others. [3] The competence of legislative provisos of Sri Lanka to effectively tackle the issue would be assessed to then present an extensive discussion on the particularly problematic areas. The authors propose an absolute decriminalization of drugs whereby proposals for reform are suggested to tackle drug control solely through public health policy and voluntary rehabilitation.

1. CONTEXTUAL ANALYSIS

Prior to delving into legislative concerns, it would be of value to present the context in which the issue at hand is discussed: the War on Drugs. Initiated in 1971, following the words of the United States president Richard Nixon, where he declared drugs to be "the public enemy number one", the so-called war on drugs was initiated whereby more stringent measures were taken to tackle drugs which included increased penalties, enforcement and mass incarceration and execution of drug offenders.[4] Over the years, the global war on drugs has seen many faces: ranging from Portugal's

[1]H Ritchie, P Arriagada and M Roser, 'Opioids, Cocaine, Cannabis and Other Illicit Drugs' (*Our World in Data*, 26 June 2022) <https://ourworldindata.org/illicit-drug-use> accessed 18 July 2023.
[2] 'Sri Lanka: Draft "rehabilitation" Law Would Spur Abuse' (*Human Rights Watch*, 17 October 2022) <https://www.hrw.org/news/2022/10/17/sri-lanka-draft-rehabilitation-law-would-spur-abuse> accessed 11 June 2023.
[3] S Rolles, 'After the War on Drugs?' (2010) 10 British Medical Journal 22.
[4] The Editors of Encyclopaedia Britannica, 'War on Drugs' (*Encyclopædia Britannica*, 13 July 2023) <https://www.britannica.com/topic/war-on-drugs> accessed 18 July 2023.

measures to decriminalize possession of all drugs to the mass executions of at least 8000 people in the Philippines following Roderigo Duterte's bloody war on drugs.[5]

The drug dilemma is ever so relevant at present given a multitude of concerns, the most prominent being the unprecedented rise of drug users, due to increased access by dint of globalization facilitating the movement of drugs world over whereby markets are expanded, and the production is increased multiple folds. The statistics are nothing short of deeply concerning, as per the findings of UNODC [6] 2020 report, around 284 million people between the ages of 15-64 were recorded to be using drugs which showed a startling 26% increase over the previous decade, with the youth composing the bulk of the aggregate.[7] In Sri Lanka, it is estimated that there are currently about 45,000 regular users of heroin and about 600,000 users of cannabis. It is estimated that between 1–2 % of heroin users are Injecting Drug Users.[8] The country also is a transhipment hub for heroin trafficked primarily through India. [9] [10] However, drug use in itself is not the cause of contention, as some drugs are in fact necessary, it is the health and social consequences of drug abuse that has initiated the extensive legal and policy measures. In this context, it is intriguing to see what Sri Lanka has done to tackle the issue.

2. LEGISLATIVE FRAMEWORK OF SRI LANKA

Sri Lanka's record in this regard has always been controversial. Arrests and detention procedures are primarily the jurisdiction of the Police Department in Sri Lanka, more particularly, the Police Narcotics Bureau (PNB) which is a specialized unit conducting investigations into drug cases. However, their authority is often found to be abused, for instance prisoners have reported the authorities planting drugs on them to base allegations, women have reported falling victim to invasive body cavity searches by female officers and being subjected to custodial torture inter alia.[11] The abuse of power is further exacerbated through the lack of accountability mechanisms which

[5] S Cousins, 'Five Thousand Dead and Counting: The Philippines' Bloody War on Drugs' [2016] BMJ i6177.
[6] United Nations Office on Drugs and Crime.
[7] 'World Drug Report 2020' (*United Nations: World Drug Report 2020*) <https://wdr.unodc.org/wdr2020/index2020.html> accessed 18 July 2023.
[8] (*South Asia Regional Profile 15 Sep 2005 - united nations office on ...*) <https://www.unodc.org/pdf/india/publications/south_Asia_Regional_Profile_Sept_2005/13_srilanka.pdf> accessed 18 July 2023.
[9] ibid.
[10] 'Ministry of Defence - Sri Lanka' (*Defense.lk*, 2020) <https://www.defence.lk/upload/ebooks/Handbook_Of_Drug_Abuse_2020.pdf> accessed 18 July 2023.
[11] (*Prison study by the Human Rights Commission of Sri Lanka - HRCSL*) <https://www.hrcsl.lk/wp-content/uploads/2020/01/Prison-Study-by-HRCSL_Concise-Version.pdf> accessed 18 July 2023.

has led to fabrications and alterations of allegations and the involvement of police officers within the PNB in drug trafficking.[12]

With regards to the legal provisions particularly, The Ordinance[13] is the central provision in this regard and S.54 (A) of The Ordinance criminalizes import, export, trafficking and possession of a wide variety of narcotic substances which includes inter alia, heroin, cannabis, and cocaine. As per The Ordinance, the maximum punishment for an offence under S.54 (A) could be death or life imprisonment and noteworthy is that bail cannot be obtained unless through the High Court under exceptional circumstances.[14] It must be noted that drugs involving methamphetamines are primarily under the jurisdiction of the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act (No. 1 of 2008). [15]

Prior to 2020, anyone arrested for possession of under 500 mg gross of heroin, as per S.78 (5)(a) of the Ordinance, the case would be presented to the magistrate by the police, and would be concluded on the same day where following the admission of guilt, a fine would be imposed, in the occasion they can't afford the fine, they will be imprisoned for a maximum duration of 6 months.[16] [17] Where the amount found is above the 500mg threshold, the facts of the case would be presented under S.54A of the Ordinance where the individual would be sent to remand prison as obtaining bail for offences under S.54 A isn't possible. The drugs would then be sent to the Government Analyst Department for a report on the purity of the substances which would then determine the charges pressed.[18]

However, following the pandemic, the government has taken measures to cut down on the prison population whereby a large number of personnel convicted for minor crimes were released on bail.[19] The Attorney General (AG) further issued guidelines to the Inspector General of the Police in November 2020 whereby cases with less than 2g of heroin or where the net weight is less than

[12] '18 Narcotic Bureau Officers Arrested so Far for Operating Drug Trafficking Ring' (*Newsfirst*, 8 July 2020) <https://www.newsfirst.lk/2020/07/08/18-narcotic-bureau-officers-arrested-so-far-for-operating-drug-trafficking-ring/> accessed 9 July 2023.
[13] Poisons, Opium And Dangerous Drugs (Amendment) Act, No. 41 of 2022.
[14] A Satkunanathan, 'A Broken System: Drug Control, Detention and Treatment of People Who Use Drugs in Sri Lanka' (*Harm Reduction Online*) <https://hri.global/files/2021/08/02/HRI_Briefing_Sri_Lanka_Drug_Control_Summary.pdf> accessed 9 July 2023.
[15] ibid.
[16] ibid.
[17] Code Of Criminal Procedure Act (No. 15 of 1979) - Sect 291.
[18] (n 14).
[19] 'AG Issues Fresh Guidelines to Reduce Prison Overcrowding' (*Ada Derana*) <https://www.adaderana.lk/news.php?nid=73998> accessed 9 July 2023.

1000 mg and there is no evidence of drug trafficking or prior offences and ongoing cases involving more than 1g of heroin the case is filed under S.78 (5)(a).[20] Further guidelines were issued to State Councils in January 2021 instructing they don't object to bail in cases that doesn't involve more than 10g gross heroin, the individual has been in remand for over six months, the investigations have been concluded and there are neither pending or previous cases nor drug/ money laundering allegations: later, awarding bail in drug related cases was restricted.[21]

Later in May of 2021, the AG introduced additional instructions whereby a new category of "between 2-4 g" concerning heroin was introduced which in turn increased the eligible threshold for bail. Accordingly, any person who was in remand for 3 months could get bail, whereby upon the payment of a fine the case would be concluded within the day.[22] The overall analysis of the legal framework is revealing of a lack of resources to cater to the contemporary issues which are contradictory and likely to result in arbitrary and disproportionate outcomes, which also undermines legal certainty and transparency.

Regarding procedures post-conviction, the Drug Dependent Persons (Treatment and Rehabilitation) Act (No. 54 of 2007) governs the area. S.10 (4) of the Act allows the Magistrate to send them to compulsory rehabilitation based on a medical assessment as a punishment for an offence under The Ordinance[23]. S. 10 allows the police to arrest without evidence and arbitrarily detain whereby the individual would be mandated drug rehabilitation.[24] It must be noted that such compulsory rehabilitation is contrary to human rights standards. How the latest legislative development in the area has failed to take into account these very concerns among others is quite alarming as discussed below.

2.1 Bureau of Rehabilitation Act No. 2 of 2023

Enforced intending to provide for the establishment of a bureau, known as the Bureau of Rehabilitation, The Act came into force on 24th of January 2023. Catering to the regulation and rehabilitation of 'drug dependent persons' along with an (albeit controversial) category of "other persons as may be identified in terms of any other law " as it is a "matter of national importance"

[20] A Satkunanathan, 'A Broken System: Drug Control, Detention and Treatment of People Who Use Drugs in Sri Lanka' (*Harm Reduction Online*) <https://hri.global/files/2021/08/02/HRI_Briefing_Sri_Lanka_Drug_Control_Summary.pdf> accessed 18 July 2023.
[21] ibid.
[22] ibid.
[23] ibid.
[24] ibid.

to rehabilitate those persons. [25] The Act has been condemned for its gross violation of human rights standards as discussed in the preceding paragraphs.

2.1.1 Lack of Legal Definitions

The original Bill stated that the proposed law would apply to the following groups of people; "ex-combatants", "members of violent extremist groups" ,"drug dependent persons" and "any other group of persons who require treatment and rehabilitation". However, the Bill did not seek to lay down any criteria which would define the aforementioned groups of people. Without such legal definitions, there was no objective criteria to determine for instance, a person who has "engaged in extreme or destructive acts".

Terms such as "terrorism" and "violent extremism" have no consensus in their legal definitions and have been used globally by States to justify arbitrary and abusive action.[26] Post-Easter attacks, the State used such terms to create uncodified, vague offences to justify arbitrary action by the State which led to human rights violations. Another example of these undefined terms being used by the Executive, bypassing due judicial process in order to arbitrarily deprive people of their liberty is demonstrated in recent history, following the end of the armed conflict in Sri Lanka. The then Rajapaksa Government, without adhering to the standards set out by international humanitarian law to define former combatants, used a much wider definition. This resulted in the arbitrary detention of thousands of people. Fourteen years since the end of the war, the Government of Sri Lanka has repeatedly claimed that approximately 12,000 people from the Liberation Tigers of Tamil Eelam (LTTE) were rehabilitated and reintegrated to the society.[27] If this is truly the case, the question arises as to why ex-combatants have been included in the proposed law.

Following the Supreme Court determination that the proposed Bill was unconstitutional in its entirety and the changes suggested by the Court, a newer version of the Bill was passed in parliament on 18th January 2023. This version of the Bill was in line with the Court's suggestions and had limited its scope to "drug dependent persons" and "other persons as provided for by the law". There are however, two problems with this amendment. First, the Drug Dependent Persons (Treatment and Rehabilitation) Act, No. 54 of 2007 already deals with drug dependent persons. Furthermore, the Community Based Corrections Act, No. 46 of 1999 provides for a community-

[25] Bureau of Rehabilitation Act, No. 2 of 2023.
[26] A Satkunanathan, 'Arbitrary Detention and Torture by Another Name: The Proposed Bureau of Rehabilitation' (*Groundviews*, 30 September 2022) <https://groundviews.org/2022/09/30/arbitrary-detention-and-torture-by-another-name-the-proposed-bureau-of-rehabilitation/> accessed 18 July 2023.
[27] 'Number of Reintegrated Ex Combatants' (*BUREAU OF COMMISSIONER GENERAL REHABILITATION*) <https://www.bcgr.gov.lk/reintegrated> accessed 16 July 2023.

based correction scheme that is supervised by a court.[28] The introduction of another legislative regime when two comprehensive ones already exist is unnecessary and will definitely lead to legal uncertainty.

Second, the amendment includes "other persons as provided for by the law". This is an unidentified and vague category. The parliament has not clarified whether "provided for by the law" meant a "judicial determination" or not.[29] This could result in the Government passing legislation in future, identifying "other persons". This could be any category of people that the Government wishes to persecute, including those that were removed following the suggestions of the Supreme Court. This provision enables the Government to create rehabilitation centres without knowledge of who will be sent to them.

2.1.2 Military Involvement

The proposed Bill establishes a Governing Council that consists of the Secretary to the Ministry of Defense and the Inspector General of Police. Furthermore, as per the proposed law, the Commissioner-General of Rehabilitation, who is the Chief Executive Officer, will be appointed based on the recommendation of the Minister of Defense. Involving the defense establishment in the process of rehabilitation when it has no expertise or mandate to be involved is quite problematic. The Bill does not seek to set out any criteria to determine the Commissioner-General of Rehabilitation. However, given the recent appointments of military officials to public positions and the fact that nearly every Commissioner-General has been a military or former military official[30], it is very likely that a military official will be appointed to this position.

The proposed law empowers the President to designate members of the tri-forces to exercise, perform and discharge the powers, duties and functions under this Act.[31] This provision legally enables the armed forces to be involved in the process of rehabilitation through a gazette issued by the President, without any checks on this power. The involvement of the military in the supposed rehabilitation of ex-combatants of the LTTE which was both informal and extra-legal[32] and their involvement in the compulsory rehabilitation process of drug dependent persons has led to many

[28] S Arulingam and P Jayasinghe, 'Why the Rehab Bill Is Dangerous Even after the SC Amendments' (*Latest in the News Sphere | The Morning*, 2023) <https://www.themorning.lk/articles/7rvIXsthhiKYNsdke5bZ> accessed 18 July 2023.
[29] S Gunadasa, 'Sri Lankan Parliament Passes Draconian "Rehabilitation" Law' (World Socialist Web Site, January 2023) <https://www.wsws.org/en/articles/2023/01/21/qphz-j21.pdf> accessed 7 July 2023.
[30] A Satkunanathan, 'Arbitrary Detention and Torture by Another Name: The Proposed Bureau of Rehabilitation' (*Groundviews*, 30 September 2022) <https://groundviews.org/2022/09/30/arbitrary-detention-and-torture-by-another-name-the-proposed-bureau-of-rehabilitation/> accessed 16 July 2023.
[31] Bureau of Rehabilitation Act 2023, S.17.
[32] (n 31).

human rights violations. A recent example is the death of an inmate at the Kandakadu Rehabilitation Center for which many military officers were arrested.[33]

Furthermore, the Bill does not seek to clarify whether the military officials involved are officers or employees of the Bureau and if so, whether the provisions of the Bill that apply to officers and employees shall apply to the members of the military. It is unclear whether the members of the military involved in the centers would be subject to the disciplinary procedures contained in the Army Act, Air Force Act and the Navy Act. During the Supreme Court hearings, the Deputy Solicitor General had stated that since the decision to involve the military in the process of rehabilitation was a policy matter, it was not within the purview of the Supreme Court. However, the Court found that the Bill was not in line with the policy objective set out in the Cabinet memorandum on the Bill as the memorandum did not mention the involvement of the military. It could be noted that by defending the involvement of the military in rehabilitation, the Government acknowledges that militarization is a government policy.[34]

2.1.3 Legalizing Torture

The "most egregious provision"[35] of the original Bill was that any employee of the Center who "without reasonable cause strikes, wounds, ill-treats or wilfully neglects any person under rehabilitation" commits an offense. Even though such acts would amount to torture under the CAT Act[36], there was no reference made to the Act. It could be inferred from this section that there can be a reasonable cause to wound or ill-treat an inmate. If the intention of this provision was to provide for the use of necessary force in self-defense, it should have been stated clearly. The manner in which this provision is crafted justifies the use of violence. The CAT Act states that the trial should be conducted in the High Court. However, the proposed law states that the matter could be disposed of at a summary trial in the Magistrates Court. The CAT Act prescribes imprisonment of not less than 7 years and not more than 10 years upon conviction. The proposed law however, provides for imprisonment of maximum 18 months. This discrepancy needs to be highlighted to demonstrate how the Government does not view violence in these Centers as serious.

---

[33] N Ariyawansha, 'Two Soldiers, Two Airmen Arrested over Kandakadu Death' (*Print Edition - The Sunday Times, Sri Lanka*, 3 July 2022) <https://www.sundaytimes.lk/220703/news/two-soldiers-two-airmen-arrested-over-kandakadu-death-487822.html> accessed 18 July 2023.

[34] 'Rehabilitation Bill: SC Determination Is Only a Temporary Reprieve' (*Latest in the News Sphere | The Morning*, November 2022) <https://www.themorning.lk/articles/223860> accessed 18 July 2023.

[35] (n 31).

[36] Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994.

A progressive point to note is that the Bill includes a once-a-month visit by the Magistrate to the Centers as a protection against torture. However, given the "everyday nature of violence" at military-run centers, a monthly visit will not do much to reduce abuse that is deeply entrenched in these centers. Even though the proposed Bill requires the Magistrate to refer alleged cases of torture to the Inspector General of Police (IGP) to commence an investigation, the historical failure to hold the police accountable for their actions result in doubts whether this protection will be adequate in practice. The Bill does not require the Magistrate to inquire into whether the use of force was justified, it simply requires the Magistrate to refer the cases to the IGP. This could be stated as evidence of the fact that the protections set out in the Bill are inadequate to hold those using violence accountable. The Supreme Court determination emphasizes that no derogation from the constitutionally protected right to be free from torture[37] is permitted. However, the Court allows for the provision permitting minimum force to discipline persons to remain unchanged. Furthermore, the Bill allows for "authorized" narcotics to be administered to the inmates and subjecting persons to forced labor. It could be stated that such practices are in blatant violation of international human rights standards.

2.1.4 Non-Disclosure Agreements

The Bill requires that the Commissioner-General of Rehabilitation and the employees sign non-disclosure agreements. Prima facie, even though it may seem like the purpose of these agreements is to safeguard the privacy of inmates, in the context of the documented number of rights violations that take place in centers, these agreements seem to be aimed at preventing whistleblowers from speaking about the violations. The Bill states that records of detainees shall only be released by a court order in relation to an investigation in respect of the commission of a serious offense in the Center. This provision is problematic as it may restrict the right of the Human Rights Commission of Sri Lanka to summon documents related to the investigations into the violation or imminent violation of a fundamental right.

2.1.5 Penalisation of Withdrawal Symptoms

The Bill makes it an offense to 'obstruct' the duties of employees at the Centers and the penalty for such an offense is a fine of rupees fifty thousand or up to six months imprisonment or both. Drug dependent persons go through withdrawal symptoms during the process of rehabilitation and these symptoms may lead to behavior which may amount to an offense within this section. Therefore, this section criminalizes certain aspects of the process of treatment.[38]

[37] Second Republican Constitution of 1978, Art. 11.
[38] A Satkunanathan, 'Rehabilitation Bill: SC Determination Is Only a Temporary Reprieve' (*Latest in the News Sphere | The Morning*) <https://www.themorning.lk/articles/223860> accessed 18 July 2023.

2.1.6 Compulsory Rehabilitation

One of the purposes of the Bureau of Rehabilitation Act is to provide rehabilitation and treatment to persons who require treatment by the Drug Dependents (Rehabilitation and Treatment) Act 2007. The 2007 Act allows the Police to produce a person to the Government Medical Office (GMO) forcibly, to be examined upon receiving information that the person habitually uses dangerous drugs and is a drug dependent person. Upon examination, the GMO will provide a report on whether the person is drug dependent and until then, the person will be detained. Thereafter, the person will be produced before a Magistrate who is empowered to send the person to compulsory rehabilitation. It is important to note that detention of the person until the GMO provides the report is arbitrary, because the person would have been detained without evidence of the person committing an offense or even reasonable suspicion of committing an offense.

As per international human rights standards, compulsory rehabilitation is a human rights violation as it violates the right against arbitrary detention, the right to be free from torture, cruel, inhuman or degrading treatment and punishment as well as the right to the highest attainable standard of healthcare and the right to be free from discrimination.[39]

The Cabinet memorandum on the Bill proposes (compulsory) rehabilitation for drug dependent persons instead of imprisonment. The Supreme Court accepted that there must be consent to rehabilitation without "duress, coercion, or undue influence" and not as an alternative to imprisonment. At the same time, the Court accepts that compulsory rehabilitation could be made possible through a court order. The Supreme Court does not also recognize the right of an inmate to leave treatment whenever they choose. The Court states that persons leaving without authorization must be apprehended. The Sri Lankan State claims that rehabilitation is not punitive. If this is the case, persons must be allowed to enter and leave rehabilitation voluntarily. If rehabilitation is voluntary, all that is required is for the Government to allocate resources to ensure functioning of the centers and ensure that the centers adhere to the human rights standards.[40]

Further, the Bill presents compulsory rehabilitation as a solution to overcrowding of prisons.[41] However, there are some unique issues we face in this regard: in Sri Lanka, there are both state-administered and private rehabilitation centers, and as for obtaining treatment, they could either be mandated or taken up voluntarily. As per a court order, individuals must obtain treatment at the National Dangerous Drugs Control Board center or at the Kandakadu Drug Treatment Center and

[39] (n 14).
[40] (n 39).
[41] ibid.

Senapura Vocational Training Center, it must be noted that the latter two were initially used to 'rehabilitate' alleged ex-combatants with the armed conflict coming to an end in 2009 and are under the control of the military. Furthermore, there is a lack of resources for treatment of women, evidence-based treatment programmes with harm reduction principles and inadequate attention to aftercare. [42]

Having accounted for the issues with the provision at hand, the article will now discuss potential systematic reform that the authors believe would facilitate a more sustainable approach to the drug dilemma.

3. DECRIMINALISING PERSONAL DRUG USE

The World Health Organization has stated that "*Countries should work towards developing policies and laws that decriminalize injection and other use of drugs and, thereby, reduce incarceration. Countries should work toward developing policies and laws that decriminalize the use of clean needles and syringes.... Countries should ban compulsory treatment for people who use and/or inject drugs.*"[43]

Drug prohibition has generally been portrayed as an immediate response to an imminent potential threat rather than an enforcement based on evidence from health or social policy.[44] Which has led to drug policies being largely immune from legitimate scrutiny. To cater to the rampant issue at hand, two trends have recently come up, harm reduction; primarily with regards to HIV patients and decriminalization; mainly to solve the issue of overburdening the criminal justice systems by reducing the pressure on resources.[45] Both measures have shown great success as many countries have adopted harm reduction policies and while Latin America has decriminalized all drugs[46], with Australia and the US having taken measures to decriminalize all cannabis[47]. If one is to assess the success of such decriminalization, the following statistics would be of interest. An

[42] A Satkunanathan, 'A Broken System: Drug Control, Detention and Treatment of People Who Use Drugs in Sri Lanka' (*Harm Reduction Online*) <https://hri.global/files/2021/08/02/HRI_Briefing_Sri_Lanka_Drug_Control_Summary.pdf> accessed 16 July 2023.
[43] World Health Organization, "Policy Brief: H.I.V. Prevention, Diagnosis, Treatment and Care for Key Populations: Consolidated Guidelines July 2014," (Geneva: World Health Organization, 2014), 91.
[44] (n 3).
[45] ibid.
[46] M Jelsma, 'Country Overview Drug Laws 2 - Transnational Institute' (*Transnational Institute*) <https://www.tni.org/files/article-downloads/country_overview_drug_laws_final.pdf> accessed 18 July 2023.
[47] 'Legalising Cannabis in Australia: How Would It Work and Is There a Catch?' (*The Guardian*, 10 April 2023) <https://www.theguardian.com/australia-news/2023/apr/10/legalising-cannabis-in-australia-how-would-it-work-and-is-there-a-catch> accessed 15 July 2023.

extensive World Health Organization study concluded that countries with stringent drug policies did not record lower rates of use compared to more liberal countries.[48] Moreover, US states that have decriminalized drug use do not show a marked difference from the states with more stringent provisions. Merits of decriminalization are as follows: it would evidently reduce the burden and costs borne on the criminal justice system by reducing the number of people arrested, incarcerated, and rehabilitated, whereby those resources could be invested on serious and violent crimes. In a more societal sense, it may well facilitate the minimization of social exclusion of those that do use drugs which may ease the process of seeking help and accessing treatment while reducing the incidence of HIV/AIDS, drug induced deaths, and likely a rise in the number of people receiving treatment.[49]

A critical development in this regard is the Argentinian Supreme Court ruling (the 'Arriola' verdict) holding the criminalization of drugs to be unconstitutional,[50] where it was ruled that such criminalization is in violation of the right to privacy and personal autonomy whereby reform was introduced in Congress to formalize the Court's ruling[51], it must be noted that the ruling was not absolute and was subjected to limitations on the basis of third-party rights. Quoting from the judgement, Judge Carmen Argibay was of the opinion that *"Drug possession for personal consumption on its own does not offer elements to affirm that the accused were involved in anything other than a private action that cannot be seen as offending public morality or the rights of others*". Moreover, Judge Raúl Eugenio Zaffaroni pointed out "*Prosecuting drug users (...) becomes an obstacle to the recuperation of the few people who are addicts, because it does nothing more than stigmatize them and reinforce their identification to the use of a toxic substance with a clear prejudice against the progress of any form of detoxification therapy or behaviour modification that proposes the inverse objective, which aims to remove this identification to try and establish self-esteem based on other values*"[52]

It is evident that not only is criminalisation unconstitutional but also unsustainable with regards to socio-political meters. In such light, the way to a well-rounded system of protection would be to

[48] 'Approaches to Decriminalizing Drug Use & Possession' (*United Nations Office on Drugs and Crime*, February 2015) <https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Approaches_to_Decriminalization_Feb2015_1.pdf> accessed 18 July 2023.
[49] ibid.
[50] G Touzé, 'Argentina: Reform on the Way? - Transnational Institute' (*Transnational Institute*, July 2010) <https://www.tni.org/files/download/dlr6.pdf> accessed 18 July 2023.
[51] ibid.
[52] G Touzé, 'Argentina: Reform on the Way? - Transnational Institute' (*Transnational Institute*, July 2010) <https://www.tni.org/files/download/dlr6.pdf> accessed 9 July 2023.

inculcate extensive harm reduction principles and treatment programs; how Portugal has approached decriminalization is of interest and will thereby be looked into.

3.1 Portugal

On the 1st of July 2001, the Portuguese move towards decriminalization was entered into force, and is regarded as one of the most comprehensive forms of decriminalization.[53] This is so, because the possession of *all* drugs (when deemed to be in possession for personal use)[54] is considered to be an administrative offense, rather than a criminal one. Decriminalization resulted in providing a more health-centered response which included referring drug dependent persons into treatment. This is in contrast to the decriminalization reforms in many other countries where reforms simply seek to avoid criminal penalties.

The move towards decriminalization came in a context where there was growing concern over the marginalization of drug dependent persons and it was the opinion of many sectors including law enforcement and health, that the criminalization of drug use was very much a part of the problem. The government-appointed expert commission viewed legislative reform and a new national drug strategy as critically linked,[55] whereby, while decriminalization sought to adopt a more humane legal framework, the new national drug strategy was to expand resources across the areas of prevention, harm reduction, treatment, social reintegration and supply reduction.[56] Thereby in May 1999, Portugal adopted both sets of recommendations almost in full and began rolling out the national strategy and expanded resources. In July 2001, decriminalization entered into force. Through decriminalization, the offenses were sanctioned through Commissions for the Dissuasion of Drug Addiction (CDTs).[57] The CDTs were regional panels that included lawyers, social workers and medical professionals. The process followed at the CDTs is as follows; once the alleged offender is referred to the CDT by the police, the panel discusses with the offender, the motivations for and the circumstances surrounding his commission of the offense. Thereafter, the panel provides a range of sanctions that include community service, fines, suspensions on professional licenses and bans on attending designated places.[58] The primary aim of CDTs is to dissuade the use of drugs and to encourage treatment for drug-dependent persons. For dependent persons, the CDT can recommend education programs or treatment facilities instead of imposing a sanction. For

[53] CE Hughes and Stevens A, 'What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?' (2010) 50 British Journal of Criminology 999.
[54] Possession for the purposes of supply is still a criminal offense.
[55] (n 54).
[56] ibid.
[57] ibid.
[58] ibid.

non-dependent persons, the CDT will order a sanction or attendance at a police station, psychological or educational service, or impose a fine. The central government agency on drugs in Portugal is the Institute for Drugs and Drug Addiction, and this agency supports the panel members of the CDTs. However, if the offender is found to be in possession of more than ten days-worth of illicit drugs, he will be charged and may face charges for trafficking or consumption.[59]

Since Portugal's decriminalization, the following changes have occurred[60]; reduced use of illicit drugs among problematic drug users and adolescents, reduced burden of drug offenders on the criminal justice system, increased uptake of drug treatment, reduction in opiate-related deaths and infectious diseases, increase in the amounts of drugs seized by authorities. The hypothesis that decriminalization inevitably leads to an increase in harmful forms of drug use is disproved by the aforementioned results. Even though small increases in drug use were reported by Portuguese adults, it is said that this trend was not solely a result of the 2001 decriminalization. The evidence of the Portuguese decriminalization suggests that a combination of the removal of criminal penalties with the introduction of alternative therapeutic responses to drug-dependent persons offer several advantages. It not only reduces problematic drug use, but also reduces the burden on the criminal justice system.[61]

While the framework of Portugal is formidable, one may opine that more stringent legislation would be of higher efficiency in tackling the issue of drug use. To make a judgement on the matter, the article will look into the merits and losses of the Philippine's Bloody War on Drugs.

3.2 The Philippines

The former president of the Philippines Roderigo Duterte against whom a formal investigation was approved by the International Criminal Court (ICC) in September of 2021[62], through his manifesto, promised drug control to his people. Drug control he did, although many would argue his methods to be heavily flawed.

Once elected to office, Duterte resorted to extra judicial killings of drug dependent persons with no set procedure. The modus operandi was an individual receiving a call or a visit in the form of a

[59] ibid.
[60] ibid.
[61] ibid.
[62] 'International Court Backs Probe into Philippines' "War on Drugs"' (*Reuters*, 15 September 2021) <https://www.reuters.com/world/asia-pacific/international-court-approves-investigation-into-philippines-war-drugs-2021-09-15/> accessed 12 July 2023.

threat from the barangay (the neighborhood) which informed them that they were on a drug 'watch list' upon which their identity was confirmed. The officials would turn up at the target's house with their faces covered, whereby without showing any warrant either murder the target immediately or soon after. This bloody war has led to the extrajudicial deaths of at least 8663 people as per the UNHCR.[63] In response to the allegations of the commission of crimes against humanity, the response of the government has been one of success stories, as according to government data, more than 24,000 villages of the 42,045 across the country have been cleared from illegal drugs since mid-2016.[64]

However, there are far reaching human rights implications in these killings: in 2017, Reuters reported that police were sending corpses to hospitals to destroy evidence at crime scenes to hide the execution of drug suspects, where doctors reported piles of bodies suffering unsurvivable shot wounds. Statistics examined by Reuters found that the proportion of patients pronounced dead on arrival increased from 13% to 85% in January of 2017.[65]

In addition, there have also been claims of police planting guns, spent ammunition and drug packets next to victims' bodies to bolster their claims whereby one may evidently arrive at the conclusion of these extra judicial killings being employed to fulfil ulterior and external motives.[6667] The president also encouraged the vigilantes among the general public to commit violence on drug users which evidently led to a state of anarchy and fear among the general public in addition to the flagrant human rights violations.[68]

Aside from these, his measures are also likely to have negative public health consequences as harsh drug enforcements can lead to drug users shying away from critical health services, which may then facilitate the transmission of HIV and Hepatitis C.[69] The wider social repercussions of these

[63] United Nations Office of the High Commissioner for Human Rights.
[64] CL Caliwan, 'Over 24k Villages "drug-Cleared" as of February: PDEA' (*Philippine News Agency*, 30 March 2022) <https://web.archive.org/web/20220331184448/https://www.pna.gov.ph/articles/1171001> accessed 18 July 2023.
[65] Reports S, 'Philippine Police Use Hospitals to Hide Drug War Killings' (*Reuters*, 29 June 2017) <https://www.reuters.com/investigates/special-report/philippines-duterta-doa/> accessed 18 July 2023.
[66] P Bouckaert, '"License to Kill"' (*Human Rights Watch*, 28 March 2023) <https://www.hrw.org/report/2017/03/02/license-kill/philippine-police-killings-dutertes-war-drugs> accessed 18 July 2023.
[67] V Felbab-Brown, LL Angelica Mangahas and N Curato, 'The Human Rights Consequences of the War on Drugs in the Philippines' (*Brookings*, 9 March 2022) <https://www.brookings.edu/articles/the-human-rights-consequences-of-the-war-on-drugs-in-the-philippines/> accessed 18 July 2023.
[68] (n 67).
[69] T Borden, 'Every 25 Seconds' (*Human Rights Watch*, 28 March 2023) <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states> accessed 13 July 2023.

too must be taken into consideration as a report done by HRW[70] found that children who lost their parents due to the war on drugs suffered much trauma and also negative reactions from society alongside drastic alterations of their way of life given the orthodox breadwinner losing their life.[71] [72]

Having unfolded a tail of sorrow with undertones of 'success', the question remains to be one of whether governments are justified in taking such radical measures that are evidently in violation of human rights to address any issue regardless of its threat to society. It is well arguable that public health policies are better equipped to tackle the issue.

4. HEALTH POLICY

Drug-dependency is a complex public health problem that needs to be addressed as such.[73] Decriminalizing the possession of drugs and drug-dependency, and diverting the State's resources towards treatment and harm reduction services provide major benefits for public health and safety.[74] These benefits include increasing the uptake into drug treatment, reducing the costs of the criminal justice system and redirecting the resources from the criminal justice system to the health system and minimizing the marginalization of people who use drugs, creating a climate where they seek and access treatment voluntarily.

Public health strategies that deal with drug dependency must focus on two aspects: harm reduction and the reduction of illegal drug use. These strategies must constitute effective treatment and education programs. Currently, availability of treatment is largely inaccessible to a greater part of the population and as a result, this group of people are more likely to face a punitive response by the State.[75] Therefore, it is important that more resources are diverted to establishing accessible treatment facilities. Furthermore, interventions must occur at all levels including families,

[70] Human Rights Watch.
[71] CH Conde, '"Our Happy Family Is Gone"' (*Human Rights Watch*, 28 March 2023) <https://www.hrw.org/report/2020/05/27/our-happy-family-gone/impact-war-drugs-children-philippines> accessed 13 July 2023.
[72] T Buenaventura and R Kishi, 'The Drug War Rages on in the Philippines: New Data on the Civilian Toll, State Responsibility, and Shifting Geographies of Violence' (*ACLED*, 6 December 2022) <https://acleddata.com/2021/11/18/the-drug-war-rages-on-in-the-philippines-new-acled-data-on-the-civilian-toll-state-responsibility-and-shifting-geographies-of-violence/> accessed 18 July 2023.
[73] JF Mosher and KL Yanagisako, 'Public Health, Not Social Warfare: A Public Health Approach to Illegal Drug Policy' (1991) 12 Journal of Public Health Policy 278.
[74] 'Approaches to Decriminalizing Drug Use & Possession' (*United Nations Office on Drugs and Crime*, February 2015) <https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Approaches_to_Decriminalization_Feb2015_1.pdf> accessed 11 July 2023.
[75] (n 74).

workplaces, peer groups, schools, etc. and these must be planned in a comprehensive manner.[76] More responsibility needs to be delegated to the community level, in planning programs to help drug dependent persons. This is because the risk factors in each community subjectively vary, and the program has to be sensitive to the characteristics, culture and historical experiences of each community. Furthermore, the public health field has to address the social, economic and political factors that affect the inner city and other low income[77] communities at high risk for drug-dependency issues. Another suggestion for reform is that, drug prevention efforts by the public health system must be linked with programs that provide employment opportunities, community support systems, adequate housing and other forces that marginalize the aforementioned communities from society. Lastly, research on drug-dependency and treatment must include studies of the environmental factors that lead to drug-dependency, and their interactions with each other.

Aforementioned is a public health agenda that would shift the focus of policy from a punitive to a health base. In **Robinson v California,**[78] the United States Supreme Court held that drug dependent persons have a constitutional right to be treated for their drug-dependency and not be penalized. The criminal justice system's primary focus must be on deterring and preventing crimes of violence and ensuring public safety. It is the public health system that is best equipped to deal with health issues such as drug dependency. Nearly two decades after Portugal decriminalized drug use, it has seen the rates of drug use reduce. Fewer people have been recorded to be incarcerated for drugs, the incidence of HIV is recorded to have reduced, with a significant increase in the number of people receiving treatment.[79]

"[C]ombining the removal of criminal penalties with the use of alternative therapeutic responses to dependent drug users… can reduce the burden of drug law enforcement on the criminal justice system, while also reducing problematic drug use… [and] may offer a model for other nations that wish to provide less punitive, more integrated and effective responses to drug use."[80]

Punitive laws relating to drug use need to be reformed and must be replaced with evidence-based policies that allow for accessible treatment methods to be available for drug-dependent persons.

4.1 Voluntary Rehabilitation

[76] ibid.
[77] ibid.
[78] (1962) 370 U.S. 660,
[79] See, for example, Hughes and Stevens, "What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?
[80] Hughes and Stevens, 'What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?' (2010) 50 British Journal of Criminology 999-1022.

Penologists have come up with various theories of punishment in order to prevent crimes being committed in society. Rehabilitation was introduced in correctional programs in the West during the latter part of the nineteenth century.[81] The retributive principle "*an eye for an eye*" was replaced by "*let the treatment fit the needs of the offender*".[82] Rehabilitation views the offender as someone who has been socially determined to take deviant roles.[83] In other words, the premise of rehabilitation is that criminal behaviour is determined by social pressures, psychological difficulties, and that it is not a rational choice. The purpose of rehabilitation is to prevent future crime by reforming the offender's behaviour.[84]

Before the evolution of the rehabilitative theory, three main theories of punishment existed. Namely, deterrence, retribution and incapacitation. The premise of the theory of deterrence is that the punishment of a crime must be able to deter both the individual criminal and society in general from committing the same crime.[85] However, the crime rates in most societies have been rising and this is evidence that punishment is not able to deter crime. Theory of retribution believes that the punishment for the offense must be proportionate to its degree of seriousness whereby focusing solely on inflicting punishment.[86] The theory of incapacitation seeks to physically prevent the offender from committing the crime. Removing criminals from society will not result in a crime-free society, the commission of crimes will continue despite the incapacitation of certain individuals. Both retribution and incapacitation thereby focus on the individual alone and not at society in general.

The success of rehabilitation programs with comprehensive drug treatment programs have been widely documented.[87] Drug dependent persons who have completed such programs show very low recidivism.[88] Furthermore, these programs are more cost-effective than incarcerating people and it is not just the individual that benefits from these programs, the society does too.[89] Research shows that community-based treatment for drug abuse can reduce drug-related criminal behaviour and

[81]ibid.
[82] J Robison and G Smith, 'The Effectiveness of Correctional Programmes', in Sentencing 118 (Hyman Gross a Von Hirsch eds., OUP, 1.
[83]Wahi, 'A Study of Rehabilitative Penology As An Alternative Theory of Punishment'(2002) 14 Student Bar Review 92-104.
[84] K.kiener-Manu, 'Crime Prevention & Criminal Justice Module 7 Key Issues: 2- Justifying Punishment in the Community' (*Crime Prevention & Criminal Justice Module 7 Key Issues: 2- Justifying punishment in the community*) <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-7/key-issues/2--justifying-punishment-in-the-community.html> accessed 18 July 2023.
[85] ibid.
[86] ibid.
[87] JM Sands, 'Is There a Role for Rehabilitation in Sentencing?' (1999) 12 Federal Sentencing Reporter 112.
[88] ibid.
[89] ibid.

drug use.[90] Community based drug rehabilitation is a process that includes prevention, health promotion, screening and assessment, drug treatment, community services and aftercare programs.[91] A meta-analysis of 78 comparison-group community-based treatment studies showed that the treatment was up to 1.8 times more effective in reducing drug use when compared to the usual alternatives.[92]

Despite rehabilitation being the most effective treatment method for drug-dependent persons, it is important to note that global evidence suggests that compulsory rehabilitation contravenes drug users' human rights and is counter-effective in treating addiction.[93] Compulsory rehabilitation is any form of drug treatment that is ordered, motivated, or supervised by the criminal justice system.[94] Detention in centers that provide for mandatory treatment often leads to inadequate provision of medical care.[95] Data from voluntary treatment on the other hand, show that the rates of recidivism are very low and encourage people to seek treatment as it is a very humane, evidence-based approach. Thereby, it could be said that the theory of rehabilitation is the most effective when it comes to treating drug dependent persons, but it must be noted that rehabilitation ought to be out of choice and not State mandated.

5. CONCLUSION

Sri Lanka has constantly been under the spotlight of human rights experts for its approach to drug control and treatment. This was re-emphasized by the UN High Commissioner for Human Rights in a recent report[96] that was presented at the 51st Session of the Human Rights Council. The report raised several concerns including the heavy militarization in the enforcement of drug laws and rehabilitation, and violence in drug rehabilitation centers. Instead of reforming its punitive approach to drug control which violates international human rights standards, the State has taken

[90] AJ Lurigio. Drug treatment availability and effectiveness—studies of the general and criminal justice populations. *Crim Justice Behav.* 2000;27(4):495–528.
[91] 'Community-Based Drug Rehabilitation in the Philippines Proving Successful and Cost-Effective' (*URC*, 5 December 2022) <https://www.urc-chs.com/news/community-based-drug-rehabilitation-in-the-philippines-proving-successful-and-cost-effective/> accessed 18 July 2023.
[92] RK Chandler, BW Fletcher and ND Volkow, 'Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety' (*JAMA*, 14 January 2009) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2681083/> accessed 18 July 2023.
[93] K Lunze and others, 'Mandatory Addiction Treatment for People Who Use Drugs: Global Health and Human Rights Analysis: Table' [2016] BMJ i2943.
[94] T McSweeney. Guidelines on the 'quasi compulsory' treatment of adult drug-dependent offenders. Results from a survey of Council of Europe Member States. 2008.
[95] (n 94).
[96] '51st Regular Session of the Human Rights Council: Reports' (*OHCHR*) <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session51/list-reports> accessed 18 July 2023.

steps to strengthen this approach by enacting the Bureau of Rehabilitation Act, No. 2 of 2023 which further enables the militarization of the treatment process. As was highlighted earlier, the new law facilitates acts of torture and makes rehabilitation compulsory, despite this being in violation of human rights standards and counterproductive. Compulsory rehabilitation violates the fundamental rights to bodily autonomy and health and may even amount to torture in certain situations. HRW called the passing of this Act an "*assault on fundamental rights*".[97]

Laws relating to drug control must ensure that evidence-based and human rights-centred health and harm reduction services[98] are readily accessible for drug-dependent persons and that such treatment is voluntary and community-based. Maria Sánchez-Moreno, former executive director of the Drug Policy Alliance at HRW states that the criminalization of the personal use and possession of drugs is in itself a violation of human rights as it goes against the basic principles of autonomy.[99] Countries that have decriminalized drug use and adopted humane, health-based policies for treatment show lower rates of drug use compared to countries with punitive drug control laws. Decriminalization of drug use and adopting a health-based approach not only benefits individuals, but also governments and society at large. The State is obliged to protect the rights of its citizens and abstain from enacting abusive laws that violate its commitments under international law. In keeping with these obligations, the government must take steps to reform Sri Lanka's current legislative framework on drug control and ensure all laws are in line with human rights standards.

[97] 'Sri Lanka: Draft "rehabilitation" Law Would Spur Abuse' (*Human Rights Watch*, 17 October 2022) <https://www.hrw.org/news/2022/10/17/sri-lanka-draft-rehabilitation-law-would-spur-abuse> accessed 18 July 2023.
[98] 'Sri Lanka: Reject the Bureau of Rehabilitation Bill: Open Letter to Members of Parliament in Sri Lanka' (*Amnesty International*, 17 January 2023) <https://www.amnesty.org/en/documents/asa37/6359/2023/en/> accessed 10 July 2023.
[99] Sanchez-Moreno 'Winding Down the War on Drugs: Reevaluating Global Drug Policy', (2015) 36 Harvard International Review 35-39.

DATA PROTECTION

DATA PRIVACY IN SRI LANKA: THE RIGHT TO PRIVACY IN AN EMERGING DIGITAL ECONOMY

Naika Gooneratne

ABSTRACT

This article focuses on the state of data privacy in Sri Lanka in light of the novel Personal Data Privacy Act, No. 22 of 2022 (hereinafter referred to as "PDPA"), being certified, and contemporarily, in 2023, gradually coming into effect. The article provides a normative overview of the importance of privacy for individuals, and then analyses the status of the right to privacy in other jurisdictions such as India, South Africa, and the United Kingdom, as well as in the European Court of Human Rights (ECtHR). In these jurisdictions, the right to privacy evolved from being protected under common law to being incorporated as a constitutional right in contrast to being preserved as a moral right. However, the article highlights that the right to data privacy is protected under the common law under *actio incuriam* in Sri Lanka but is thus a moral right which should be counterbalanced against the right to information. Accordingly, the article then analyzes the origins of the PDPA being modelled after the European General Data Protection Regulation (hereinafter referred to as "GDPR"), and breakdowns the provisions of the PDPA. Further, it probes into the pragmatic importance of such a legal framework in the health sector, public security, digital and cloud networks as well as its links to artificial intelligence to concretize the importance of personal data privacy.

1. INTRODUCTION

Data privacy is a pre-requisite for a citizen's enjoyment of a free and unshackled lifestyle, exempt from the surveillance of the State. Across jurisdictions, privacy has been recognized by the judiciary, and subsequently, by their constitutions, but in Sri Lanka, while the requirement of privacy for individuals has been recognized, constitutional recognition has been lacking, despite the sporadic growth of society, digital innovation, and development. Hence, while data protection has drawn parallels to being an "esoteric subject" [1] in 2014, during a parliamentary debate on the right to privacy, MP Wickramaratna alleged that telecommunication companies were passing on

[1]Rohan Samarajeewa (2022), 'Personal Data Protection Act passed: What will it mean?' <https://www.ft.lk/columns/Personal-Data-Protection-Act-passed-What-will-it-mean/4-732307> accessed 10 July 2023.

people's personal information to the Defence Ministry, which was in violation of international law.[2] Therefore, this emphasizes that the necessity of data protection isn't a hollow concern.

In the 18th century, the utilitarian philosopher Jeremy Bentham proposed the design, the 'Panopticon for the construction of a prison,' which was structured in a manner where inmates were aware that they were being watched but were unaware of when they were being watched. Michel Foucault, in his 1975 book 'Discipline and Punish: The Birth of the Prison,' highlighted that the Panopticon conjured a state of consciousness and permanent visibility that resulted in the inmates restraining themselves. He further argues that if a citizen is constrained from legally affirming their right to privacy, they would live in constant fear of both "overt and covert surveillance" by the State.[3] Thus, this article will first explore the position of data privacy in a global setting, and then, analyse its recognition within the Sri Lankan context.

2. INTERNATIONAL RECOGNITION OF DATA PRIVACY

The right to privacy originated through the common law, but argumentation has favored considering privacy as a moral right, with a moral basis, in contrast to a constitutional right,[4] where individual concerns must be balanced against the common good.[5] However, this position results in the risk of alternative judicial precedents triumphing over such privacy concerns, and hence, in common law jurisdictions, it has been observed that the right to privacy has evolved into a constitutional right. Such a transition can be observed in countries such as India. In India, courts have extended Article 21 of its Constitution which protects the right to protect personal liberty to include the 'right to be free from encroachments on his private life'[6] to the extent that under the same constitutional provision, it was recognized as a fundamental right by the Supreme Court in *Justice K.S. Puttaswamy (Retd) v Union of India*.[7] Hence, the existence of such a status quo prompts citizens to conform to self-censorship and anticipatory conformity to prevent their data being usurped. Similarly, such a transition can be observed in South Africa, and the United Kingdom, and similarly in the European Court of Human Rights (ECtHR).

---

[2] Kirinde, C., 'Govt. plays Peeping Tom with its proposed eNIC' The Sunday Times (Colombo) 24 August 2014 <https://www.sundaytimes.lk/140824/columns/govt-plays-peeping-tom-with-its-proposed-enic-114692.html> accessed 10 July 2023.

[3] Charya Samarakoon and Bhavani Fonseka, 'Right to Privacy in Sri Lanka' (2020), p. 8 <https://www.cpalanka.org/wp-content/uploads/2020/09/Discussion-Paper-Right-to-Privacy-updated-draft-4-1.pdf> accessed10 July 2023.

[4] M Alfino and G Mayes, 'Reconstructing the Right to Privacy' [2003] 29(1) Social Theory and Practice < https://www.jstor.org/stable/23559211> accessed 10 July 2023.

[5] D. E. Bambauer, 'Privacy versus Security' [2013] 103(3) Journal of Criminal Law and Criminology < https://www.jstor.org/stable/10.1086/658870?origin=JSTOR-pdf> accessed 10 July 2023.

[6] *Kharak Singh v The State of Uttar Pradesh and Others*, *AIR* 1963 (SC) 1295; *Rajagopal alias R.R. Gopal and another v State of T.N. and others*, *AIR* 1995 (SC) 264.

[7] Writ Petition (Civil) No 494 of 2012.

2.1 South Africa

The origin of the common law protection imposed on the right to privacy in South Africa stems from the Roman Dutch law '*actio iniruiarum*.' In *O'Keeffe v Argus Printing*,[8] the Cape Supreme Court ruled that using a person's photograph for advertising purposes without consent, constituted an aggression upon a person's dignity. Accordingly, the concept of privacy was affixed to numerous circumstances such as an individual's relationship with a celebrity,[9] and the HIV-positive status of a patient.[10] Similarly, recording personal conversations via private telephone conversations constituted an invasion of privacy that was actionable.[11] Further, in *Khumalo v Holomisa*,[12] the importance of privacy for maintaining human dignity was emphasized by stating that "no sharp lines" were to be drawn between the various facets of personal rights when evaluating the value of human dignity in the Constitution. Accordingly, the 1996 Constitution of the Republic of South Africa protects privacy under Section 14, including the privacy of the person and home, possessions, and communications. Therefore, South Africa provides both common law and constitutional protection for an individual's right to privacy.

2.2 United Kingdom

In *Douglas v Hello!*[13] privacy was recognized as a legal principle drawn from the fundamental value of personal autonomy. Such privacy was deemed to lie at the heart of liberty in a modern state,[14] so much so that it is was deemed to be a pre-requisite for the well-being and development of an individual.[15] However, the Supreme Court in *WM Morrison Supermarkets plc v Various Claimants*,[16] balanced this right with the autonomy of companies where data is leaked maliciously by rogue employees. In this case, a previous appellate court ruling was overturned, holding that Morrison was not responsible for rogue employees, who posted salary data of 100,000 other employees on the file-sharing website. Therefore, it is evident that while the right to data privacy was given prominence, its recognition was to be counterbalanced with other considerations such as the rights of the party it is being enforced against.

[8] *O'Keeffe v Argus Printing and Publishing Company Ltd* [1954] (3) SA 244 (C).
[9] *Mhlongo v Bailey* [1958] (1) SA 885 (E); *National Media Ltd v Jooste* [1996] (3) SA 262 (A).
[10] *Jansen van Vuuren No v Kruger* [1993] (4) SA 842 (A).
[11] *S v A* [1971] (2) SA 293 (T); *Financial Mail Pty Ltd v Sage Holdings (Pty) Ltd* [1993] (2) SA 451 (A).
[12] [2002] (5) SA 401 (CC) at para [27].
[13] *Douglas v Hello! Ltd* [2005] EWCA Civ 595.
[14] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.
[15] *Klass and ors v Federal Republic of Germany* [1978] ECHR 4.
[16] [2020] WLR(D) 204.

2.3.European Court of Human Rights

The ECtHR has shed light on the integral nature of the right to privacy in the context of governments collecting personal data as it opposes the "…menace of surveillance…" [17] which referred to an individual's freedom to communicate between themselves through postal and telecommunication services that would entrench on the right to respect for private and family life and such correspondence.[18] The ECtHR further stressed that even if the State did not subsequently utilize gathered data, the retention, and storage of such personal data by public authorities would directly impact the private-life interest of an individual concerned.[19] For in the *Danish Chromebook Case 4*, the Danish Data Protection Agency maintained a ban on the Municipality of Helsingør's usage of Google Chromebooks in its education activities at the elementary schools on the basis that Google, as both a hardware and software provider was unclear in their explanation on how Google utilizes personal information for their own purposes.[20] Therefore, the protection placed on the individual right to privacy was sufficient for European citizens to protect their privacy against state surveillance.

3. RIGHT TO DATA PRIVACY IN SRI LANKA

By 2017, 75% of the 6.2 million internet users in Sri Lanka were estimated to access the internet through smartphones.[21] Accordingly, data protection and privacy laws constitute a pressing requirement in contrast to a prospective concern. Hence, when contemplating the legal place hold of the individual right to data privacy, it is necessary to discuss as to whether it should be a moral right that is protected through judicial precedent or a constitutional right that should be incorporated under Chapter III of the 1978 Constitution of Sri Lanka. However, even if such incorporation takes place, it should be counterbalanced with other rights such as the right to information.

3.1. Individual Right to Data Privacy: A moral good or constitutional right?

The right to privacy has been protected as a delict within the notion of *actio iniuriarum*, which has been developed through the common law, where the notion of invasion of privacy has been discussed in cases such as *Nadarajah v Obeysekera*.[22] Accordingly, in *Hewamanna v Attorney*

[17] *Klass and ors v Federal Republic of Germany* [1978] ECHR 4.
[18] ibid.
[19] *S and Marper v United Kingdom* [2008] ECHR 1581.
[20] Corrales Compagnucci M, 'Danish Dpa Banned the Use of Google Chromebooks and Google Workspace in Schools in Helsingør Municipality' (SSRN, 29 September 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4189604> accessed 09 November 2023.
[21] Nuwanthi Senaratne (2020), 'The Growing Need for Privacy and Data Protection in Sri Lanka' <https://www.ips.lk/talkingeconomics/2020/01/13/the-growing-need-for-privacy-and-data-protection-in-sri-lanka/> accessed 23 July 2023.
[22] *Nadarajah v Obeysekera (1971) 52 NLR 76.*

General, [23] the importance of an individual's right to privacy was also discussed. As the fundamental core of an individual's right to privacy being based on judicial precedents and moral rights paves the way for other judicial precedents to trump such a right. However, scholars such as Pelsak,[24] Culnan and Armstron,[25] Allen,[26] and Gavison,[27] propagate the restricted access theory of privacy which is premised on an individual being unable to exercise complete control over all personal data. Thus, it enables certain parties access to such data, depending on the circumstance. Therefore, while the position of individual data privacy constitutes an uncertain position, which has left a lacuna in the Sri Lankan legal system, there is debate on its recognition as an enforceable right.

3.2. Balancing Rights: Right to Information vs. Right to Privacy

With the enactment of the RTI 2016, citizens were provided access to data found within corporations, which was a right that was similarly protected under Article 14A of the Sri Lankan Constitution.[28] Article 19 of the United Nations Universal Declaration of Human Rights 1948 states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Accordingly, in Sri Lanka, the Right to Information Act. No. 12 of 2016 was passed in Parliament, which came into from 03.02.2017 as per the regulations promulgated by the Minister under Section 41 (2) of the Right to Information Act, No. 12 of 2016. The RTI constituted an integral part of the Fundamental Rights chapter of the 19th Amendment of the Sri Lankan Constitution, which thereby enabled citizens to question the transparency and accountability of public authorities enabling them to be considered as active citizen rather being passive to the activities of the government.

However, under the RTI 2016, privacy is deemed to be an exemption under Section 5, where Section 5 (1) (a) reads: "the information relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the larger public interest justifies the disclosure of such information or the person concerned has consented in writing to such disclosure." While this does not constitute

[23] *Hewamanna v Attorney General (1999)* ICHRL 31.
[24] Pelsak A. (2005), 'An Ethical Exploration of Privacy and radio frequency Identification', Journal of Business Ethics, Vol. 59, no. 4, 327-345.
[25] Culnan J., and Armstrong P., 1999, 'Information privacy concerns, procedural fairness, and personal trust: An empirical investigation' Organization Science, vol.10, no.1, pp. 104–115.
[26] Allen A., 1988, Uneasy Access: Privacy for Women in a Free Society, Rowman and Littlefield.
[27] Gavison, 1980 'Privacy and the Limits of the Law', Yale Law Journal, vol. 89, pp. 421-471.
[28] Constitution of the Democratic Socialist Republic of Sri Lanka 1978, 19th Amendment, Article 14A.

an enforceable right, it establishes grounds to refuse disclosure of data, which the Right to Information Commission has utilized to prohibit the disclosure of data, if such data infringed the privacy of an individual. Accordingly, the PDPA bolsters this standpoint as its provisions ought to override other laws. Hence, it could be argued that the PDPA requiring an individual's data to be kept private, would clash with the right to information of an individual thereby resulting in instances of data being withheld under a façade of privacy. However, this is circumvented by Art. 5 PDPA read with Schedule II PDPA providing grounds for the acquisition of data thereby coinciding with the RTI rather than clashing with it.

Scholars such as Fried [29] and Rachel [30] argues in favour of a control theory of privacy where privacy, including health data privacy exists only when an individual possesses complete control over his personal data. For instance, as privacy of personal health data is integral to individuals, an absolute right to privacy over such data cannot be entertained as it violates another person's right to access such data. Accordingly, it was held in the case of *Md Majid Hussain S/O Hussain R/O v Md Aqueel S/O Md. Abbas R/O H* (Civil Revision Petition No.2129 Of 2014): "No person's privacy can be invaded much against the consent and will of that person. However, certain exceptions to this rigid principle are carved out to allow access to such data where larger public interest is involved." Therefore, balancing the right to personal data privacy with the right to information is an essential element, and hence, analyzing whether the right to individual data privacy has been provided protection under legislative enactments is necessary.

3.3. Legislative Protection of the Right to Privacy

The necessity of a legislative framework to legally protect the right to individual data privacy is integral, as, expecting government entities, with a large bargaining power, to self-regulate and use the data they possess in good faith is counter intuitive.[31] While legislations such as the Computer Crimes Act No. 24 of 2007, the Banking Act No. 30 of 1988, and the Telecommunications Act No. 25 of 1991 have emphasized the 'need' for privacy and confidentiality, they do not constitute a consolidated legal framework which individuals could utilize to protect their individual right to data privacy.

[29] Fried, C. (1968) 'Privacy', Yale Law Journal, vol. 77, pp. 475-93.
[30] Rachels, J., 1975, "Why Privacy is Important", Philosophy and Public Affairs, 4: 323–33.
[31] TJ Maji, 'Fourteen Reasons Privacy Matters: A Multidisciplinary Review of Scholarly Literature' [2011] 81(2) The Library Quarterly < https://www.jstor.org/stable/10.1086/658870?origin=JSTOR-pdf> accessed 23 August 2023.

The 19th Amendment to the Constitution provided for data privacy by restricting the right of information. Article 14A ensures that each citizen of Sri Lanka will be entitled the privilege to obtain data as accommodated by law, such as for the activity or protection of a citizen's right held by any governmental or local institution.[32] However, this right could be subject to limitations in light of concerns regarding regional decorum or public security. Therefore, the PDPA serves as a mechanism to oil the dry cogs of individual data privacy within the Sri Lankan legal framework. However, prior to analyzing the PDPA and its provisions, the GDPR ought to be given consideration, as its standards and provisions set the hallmark for Sri Lanka to enact the PDPA.

4. GLOBAL MEASURES TO PROTECT DATA PRIVACY: GENERAL DATA PROTECTION REGULATION

The GDPR, which was enacted in 2018, governed the manner in which individual data was utilized, irrespective of how the data was being handled. Accordingly, individuals in the EU were granted greater control over their personal data as they had access to the manner in which their data was being utilized and were granted control over the amount of data vested in organizations. Such control consequentially garnered the trust and confidence of citizens of the EU in companies and their websites when there was compliance with the GDPR.[33] This arguably inhibits the capacity of public security organization such as the police to access data required to track down proprietors of web resources such as websites.[34] However, legal enforcement authority may acquire such data as Art. 6(1)(c) GDPR recognized "vital interest" as a grounds to process personal data to protect the interest "essential to the life of" the data subject or another "natural person." Such includes crime prevention or humanitarian operations but this is an extremely narrow ground as this special category cannot be invoked if the data subject is capable of consent. [35]

Accordingly, the GDPR has been recognized as the "toughest privacy and security law in the world" as it imposes harsh sanctions on violations of its privacy and security standards with penalties in

[32] Constitution of the Democratic Socialist Republic of Sri Lanka 1978, 19th Amendment, Article 14A.
[33] 'GDPR – The Good, the Bad & the Ugly (*Insight Software*, 4 November 2018) <https://insightsoftware.com/blog/gdpr-the-good-the-bad-the-ugly/> accessed 14 July 2023.
[34] 'Sharing personal data with law enforcement authorities' (*Information Commissioner's Office*) https://ico.org.uk/for-organisatiosn/data-sharing-information-hub/sharing-personal-data-with-law-enforcement-authorities//> accessed 14 July 2023.
[35] TrueVault (*What are the grounds for processing personal data under GDPR?*) <https://www.truevault.com/resources/compliance/what-are-the-grounds-for-processing-personal-data-under-gdpr#:~:text=The%20processing%20is%20in%20the,necessary%20for%20public%20health%20purposes.> accessed 9 August 2023.

the tens of millions of euros.[36] Therefore, the GDPR constituted a strong framework of individual data privacy which was laced with certain practical drawbacks and rigor in its penalties, based on which, the PDPA was drafted in Sri Lanka.

5. THE PERSONAL DATA PROTECTION ACT, NO. 9 OF 2022

The Personal Data Protection Bill was first published as a draft bill in 2019. It was subject to several rounds of revisions, and subsequently was passed by the Parliament of Sri Lanka on 19 March 2022. The PDPA aims to manage the processing of personal data whilst establishing a Data Protection Authority which would safeguard the rights and privileges of the citizens and how their data will eventually be shared and disseminated.[37] The Preamble of the PDPA outlines that the aim is to safeguard data privacy and personal data protection rights of the individuals,[38] and hence, it is primarily aimed at protecting individuals in Sri Lanka's growing digital economy.[39]

5.1. Date of Operation

Despite the PDPA being certified on 19th March 2022, the PDPA has a phased approach to its implementation to provide a regulatory grace period for controllers and processors to adapt to its provisions. Part I – III of the PDPA would come into operation on a date that the Minister would appoint by Order published in the Gazette between 18 – 36 months from the date of certification,[40] which would be between 19th September 2023 to 19th March 2025. Part IV of the PDPA would come into operation between 24 – 48 months from the date of certification,[41] which would be between 19th March 2024 to 19th March 2026. Part V of the PDPA would come into operation on a date appointed by the Minister by Order published in the Gazette, which shall be a date not later than the date appointed by the Minister under S. 1(3) of the PDPA. This date, as denoted by the Minister of Technology, Ranil Wickramasinghe, is 17th of July 2023 onwards.[42] Therefore, the PDPA, as it stands, is a prospective novel Act that is gradually growing in its relevance.

---

[36] 'What Is GDPR, the EU's New Data Protection Law?' (GDPR.eu, 26 May 2022) < https://gdpr.eu/what-is-gdpr/> accessed 13 July 2023.
[37] Manjula Sirimanne, 'Sri Lanka: Proposed Bill on Personal Data Protection' (*OneTrustDataGuidance*, January 2020) https://www.dataguidance.com/opinion/sri-lanka-proposed-bill-peronal-data-protection) accessed 25 July 2023.
[38] Attorney General Department's Comments on Sri Lanka Personal Data Protection Bull (by letter dated 13 May 2020) and Sri Lanka Personal Data Protection Bill (03 October 2019).
[39] Chanaka Jayasinghe (2022), 'Sri Lanka to set up data protection authority' < https://economynext.com/sri-lanka-to-set-up-data-protection-authority-103008/> accessed 23 August 2023.
[40] Section 1(3) of the Personal Data Protection Act, No. 9 of 2022.
[41] Section 1(4) of the Personal Data Protection Act, No. 9 of 2022.
[42] 'Sri Lanka Data Protection Authority Comes into Operation' (EconomyNext) <https://economynext.com/sri-lanka-data-protection-authority-comes-into-operation-126698/&gt> accessed 27 July 2023.

5.2.Territorial Application

The PDPA governs the territorial scope within the borders of Sri Lanka, and thus, matters external to such borders are outside the scope of the PDPA. Hence, the PDPA would be applicable to organizations which process personal data, either wholly or partly within Sri Lanka, who is either domiciled or ordinarily resident in Sri Lanka.[43] Hence, this would include Google, as, for instance, the Google Maps app provides routing instructions and travel estimates based on processing travel patterns and the speed of travel of the individual utilizing the application.[44] Further, data controllers or processors, either incorporated/established under any written law of Sri Lanka, who offer goods/services to data subjects in Sri Lanka would also fall within the territorial ambit of the PDPA.[45] However, S. 26(4) PDPA permits the processing of personal data outside Sri Lanka if there aren't adequacy decision under S. 26 PDPA or necessary safeguard under S. 26(2) PDPA for the purpose of performing a contact between the data subject and controller or is required for implementing pre-contractual measures taken by the controller at the request of the data subject.[46] Therefore, the PDPA governs organizations such as banks, telecom operators, and hospitals which manage data of individuals.

5.3.Material Scope of Application

The material scope of the PDPA is applicable to processing of personal data but section 2(3) of the PDPA states that it is not applicable to data collected by an individual for personal, domestic, or house usage. Hence, a family's invite list to a wedding would not fall within the scope of the PDPA but if that same list was maintained by an event manager it would.[47] However, such data could be collected if it is meant for archiving purposes in the public interest, scientific research, historical research or statistical purposes.[48] It is noteworthy, that the wording "archiving purposes" may also cause ambiguity as to whether it refers to public interest, or specifically to, scientific research, with

[43] Personal Data Protection and Privacy Act No. 9 of 2022, Article 2 (b).
[44] Samarajiva R, 'Lessons India Can Draw from Sri Lanka's Efforts with Data Protection Legislation' (The Wire) <https://thewire.in/tech/lessons-india-can-draw-from-sri-lankas-efforts-with-data-protection-legislation> accessed 6 August 2023.
[45] Personal Data Protection and Privacy Act No. 9 of 2022, Article 2 (b) (ii).
[46] 'Sri Lanka - Data Protection Overview' (DataGuidance, 15 August 2023) <https://www.dataguidance.com/notes/sri-lanka-data-protection overview#:~:text=The%20PDPA%20further%20permits%20the,between%20the%20data%20subject%20and> accessed 9 November 2023.
[47] Rohan Samarajiva (2021), 'Is the Data Protection Bill right for Sri Lanka? <https://www.themorning.lk/articles/178743 > accessed 26 July 2023.
[48] S. 6(2) of the Personal Data Protection and Privacy Act, No. 9 of 2022.

the caveat that if there is a strict interpretation, then it would restrict further processing of data due to the presence of a particular threshold.[49]

However, the PDPA exempts its applicability where such data is required for matters such as, among others, national defense and security, impartiality, and independence of the judiciary, and execution of criminal penalties.[50] The Editors Guild of Sri Lanka had cautioned that the scope of the PDPA is problematic when reporting corruption stories as the PDPA protects personal data relating to offences, criminal proceedings, and convictions.[51] Therefore, the PDPA applies to a broad range of subjects but is subject to limitations when it overlaps with matters pertaining to the State such as national security.

5.4.Rights of Data Subjects

'Data Subjects' refer to the owners of the data governed under the PDPA,[52] on behalf of whom, the PDPA governs any processing of personal data that takes place in Sri Lanka as well as controllers or processors that are domiciled in, incorporated in, or offer goods or services to persons in Sri Lanka.[53] Such is required as bank and credit card information including passwords are sensitive personal data which are regularly stored in a government or company database, which, if extracted unlawfully by a third party, either through an accident or wilfully, and then sold on the dark web or utilized for extortion, would be consequential for data subjects.[54] Hence, the PDPA enables such data subjects to be granted further autonomy over the data collected by controllers and processors which includes withdrawing consent via a written request with regards to the processing of personal data. [55] Accordingly, data subjects may either request rectification of

[49] Isuru Samaratunga and Milindu Tissera, 'Evaluating Policy Influence with Process Tracing' (*LIRNEasia*, September 2022) <https://lirneasia.net/wp-content/uploads/2022/11/Comments-on-Data-Protection-Act-Sri-Lanka_v333.pdf> accessed 14 July 2023.
[50] Personal Data Protection and Privacy Act No. 9 of 2022, Article 17(2).
[51]'Sri Lanka's Personal Data Protection Bill Leads To Public Uproar' (Colombo Telegraph, 2020) <https://www.colombotelegraph.com/index.php/sri-lankas-personal-data-protection-bill-leads-to-public-uproar/> accessed 23 August 2023.
[52] Personal Data Protection and Privacy Act No. 9 of 2022, Article 56.
[53] Part I – III, Personal Data Protection and Privacy Act No. 9 of 2022.
[54] Rohan Samarajeewa (2022), 'Personal Data Protection Act passed: What will it mean?' https://www.ft.lk/columns/Personal-Data-Protection-Act-passed-What-will-it-mean/4-732307> accessed 23 August 2023.
[55] Personal Data Protection Act, No. 9 of 2022, Article 14; See also; Personal Data Protection Act, No. 9 of 2022, Schedule I & Schedule II.

mistakes in the personal data incorporated,[56] or the erasure of such data if the data controller contravenes Sections 5, 6, 7, 8, 9, 10, and 11 PDPA or consent is withdrawn.[57]

5.5.Obligations imposed on Controllers and Processors

Processing of personal data is carried out by a data controller/processor that specifically monitors the behavior of data subjects in Sri Lanka. Controllers are defined as "any natural or legal person, public authority, public corporation, nongovernmental organization, agency or any other body or entity which alone or jointly with others determines the purposes and means of the processing of personal data." [58] Alternatively, processors refer to "a natural or legal person, public authority or other entity established by or under any written law, which processes personal data on behalf of the controller." [59] Such data controllers are required to ensure that the personal data is accurate and updated,[60] for the time frame consent was granted to obtain such personal data,[61] whilst affirming confidentiality and integrity.[62] Hence, data controllers are prohibited from handling sensitive personal data and sending spontaneous and unsolicited messages unless express consent was granted,[63] which includes political messaging via bulk SMS.[64]

If the handling of data runs a high risk to the rights of data subjects, a regulator is required to conduct a Personal Data Impact Assessment (PDIA) prior to such preparations. Such data controllers are required to execute core controls and systems known as a 'Data Protection Management Programme,' to exhibit how it carries out the data protection arrangements levied under the PDPA. Further, if there are breaches in the aforementioned obligations, among others, the penalties enforced will not surpass the amount of 10 million Rupees depending on the degree of the violation and its severity and effect on Data Subjects.[65] When allotting this punishment, the PDPA endorses evaluating the issue whilst enforcing a punishment, which considers the nature, gravity, and length of the negations, the level of liability of the Data Controller, the classification

[56] Personal Data Protection Act, No. 9 of 2022, Article 15.
[57] Personal Data Protection Act, No. 9 of 2022, Article 16; See also Personal Data Protection Act, No. 9 of 2022, Article 17.
[58] Personal Data Protection Act, No. 9 of 2022, Article 56.
[59] ibid.
[60] Personal Data Protection Act, No. 9 of 2022, Article 8.
[61] Personal Data Protection Act, No. 9 of 2022, Article 9.
[62] Personal Data Protection Act, No. 9 of 2022, Article 10.
[63] Manjula Sirimanne, 'Sri Lanka: Proposed Bill on Personal Data Protection' (*OneTrustDataGuidance*, January 2020) https://www.dataguidance.com/opinion/sri-lanka-proposed-bill-personal-data-protection/> accessed 14 July 2023.
[64] Samarajeewa R, 'Implications of Data Protection Bill for Individuals, Businesses and Innovation' (Daily FT, 7 December 2021) <https://www.ft.lk/columns/Implications-of-data-protection-bill-for-individuals-businesses-and-innovation/4-727069&gt> accessed 26 August 2023.
[65] Personal Data Protection Act, No. 9 of 2022, Article 38.

of individual data influenced by any contradiction, and any move that was made by the regulator or processor to alleviate the harm endured by Data Subjects.[66] Therefore, the obligation imposed on data controllers and process is rigid, but is counterbalanced when considering whether they uphold such obligations.

5.6.Data Protection Authority

The authority that regulates the protection of above-mentioned personal data is the Data Protection Agency (hereinafter referred to as "DPA"), regarding which, the powers and functions have been outlined under the PDPA.[67] While the PDPA provides an overall regulatory scheme, the details of such rules are to be decided by the DPA.[68] However, the practicalities of formulating this Authority is in question, as, if it is under-staffed, it is likely that the rules that are drafted would be uncertain and its quality would be of equal concern. Similarly, as its funding is provided through a consolidated fund,[69] it may result in the Authority being under-resourced. The New York Times reported that, except for Germany, Italy, and the UK, other DPAs' had annual budgets of less than £25 million. Hence, the minimum requirement of funding being £25 million suggests that the danger of the Sri Lankan DPA being under-resourced thereby leading to a deficit of skilled professionals or the underpayment of hired professionals is apparent.

Consequentially, this leads to the danger of bribery and underhand payments which could threaten the legitimacy and independence of the DPA which would be counterintuitive to the purpose of the PDPA. Further, a danger that arises is that the DPA is not independent as it falls under the purview of a Minister, and hence, considering the way it can escape political influence is an integral element. Therefore, it is noteworthy that upon perusing the above content, the PDPA has the scope to pass the EU's adequacy test, but despite this technical optimization, the drawback is the question of whether it is appropriate for local conditions, which could be evaluated based on its pragmatic implications to the Sri Lankan society.

6. THE PRAGMATIC SIGNIFICANCE OF DATA PRIVACY IN SRI LANKA

Beyond the theoretical or normative importance of data protection, it has a pragmatic significance in the domestic context in the private and public sectors. Often, these aspects are foregone due to the hustle and bustle of the daily lives of each individual, but such does not deter its consequential importance when such ignorance paves the way for lawsuits and extended judicial cases.

[66] Sirimanne, (n 52).
[67] Part IV – V, Personal Data Protection and Privacy Act, No. 9 of 2022.
[68] Personal Data Protection Act, No. 9 of 2022, Article 31.
[69] Personal Data Protection Act, No. 9 of 2022, Article 41(1)(d).

Traditionally, certain sectors are protected by legislative enactments such as the Banking Act of 1988, Intellectual Property Act 2003, Computer Crimes Act of 2007, Registration of Persons (Amendment) Act No. 8 of 2016 (Regulations 2017), but these are sectors specific and do not account for a general legislative framework within which citizens could enforce their individual right to privacy. Thus, while certain sectors, such as banking, and finance sectors, incorporate laws, and regulations, that protect confidentiality, the extension of such protection to other sectors such as the health sector, public security sector, digital and cloud network requires analysis.

6.1.Health Sector

Following the onslaught of the Covid-19 pandemic, the data collected by hospitals regarding patients has sporadically increased as Sri Lanka has been in the process digitizing both functional and foundational identity registries. Accordingly, there have been recent reforms in the digitization of patient records (Patient Health Number-PHN) linked to the national identity. Such personal health data is integral for patients, which has traditionally been kept confidential between the doctor and the patient under the Hippocratic oath: "I will not divulge anything of a private nature regarding people's personal lives that I see or hear, whether in the course of my professional activities or not, because I recognize the shamefulness of revealing such information."[70]

If there were to be a breach of such personal data, then strictly confidential data about an individual such as sexually transmitted diseases such as HIV, mental disorders, genetic disorders and similar types of highly sensitive data would be released into society. The ramification of such data being released is a consequence of marginalization in society and stigma. Further, if the health sector is not held accountable for the data they manage, then it could lead to dangerous outcomes such as the deletion of the database of the NMRA in 2021, which represented the mishandling of health data.[71] Therefore, protection of such personal health data is a pre-requisite for the safety of the both the patient and the sustenance of data collection by health authorities.

6.1.1. Public Security

In Sri Lanka public security ranges from the army to the police, and within this sector, while personal data is collected for various purposes, it may also be mishandled. For instance, a police

[70] Gostin, L. 2002 'Personal Privacy and Common Goods: A Framework for Balancing Under the National Health Information Privacy Rule' Minnesota Law Review, vol. 86, pp. 1439-1479.
[71] 'Deletion of Computer Database of NMRA Could Be an Act of Drug Mafia: AG - Breaking News: Daily Mirror' (Breaking News | Daily Mirror, 14 September 2021) <https://www.dailymirror.lk/latest_news/Deletion-of-computer-database-of-NMRA-could-be-an-act-of-drug-mafia-AG/342-220310&gt> accessed 25 July 2023.

officer investigating a suspect may extract the records connected to a person including his family members and then save the data on an unsecured personal computer or leave the printouts on a desk.[72] Such negligence could lead to consequences such as receiving death threats. Hence, a legal framework such as the PDPA confers a duty to be responsible when handling such data, whilst equipping citizens with a mechanism to enforce such responsibility. However, it is further noteworthy that negligence is a danger that citizens would desire to avoid, but the responsible usage of personal data by the police is required to blockade malicious attempts to use such data in a wrongful manner.

In 2001, the National Database Registration Authority (NADRA) was created in Pakistan to computerize all citizens data, and thus a multi-biometric system was introduced. Subsequently NADRA had issued around 91 million computer generated cards by 2019. However, the state had to re-register the IDs in 2016 due to identity theft, which consequently, enabled the development of mass surveillance of citizens. Hence, the Pakistani police were capacitated to use GPS or RFID technology to create a virtual geographic boundary, enabling software to trigger a response when a mobile device enters or leaves a particular area. Thus, police were able to acquire the mobile numbers of people, which was accessible on the database. Therefore, this case study is evidence that personal data being misused by public security is a danger that Sri Lanka could face, which the PDPA aims to sidestep.

6.1.2. Digital and Cloud Networks

Social media platforms and cloud communication platforms for email and calendar manager, such as Google mail and calendar, constitute the primary means of communication for individuals. As such, these platforms collect large amounts of data daily, and then target advertisements based on the data collected. Often, while the sharing of such data is deemed to be a subpar consideration in terms of risk, the outsourcing of such data does pose a risk to individual privacy concerns. Further, the usage of Virtual Private Networks (VPN) also brings in data security concerns. In certain cases, applications providing this service for free, sell consumer internet activity data to advertisement targeting agencies. Such data being sold is detrimental as the data captured includes unencrypted messaging services, location, contact information and application usage.

[72]Ratnasabapathy R, 'Dangerous data' Daily News (Colombo) 18 September 2017 <http://www.dailynews.lk/2017/09/18/features/128484/dangerous-data> accessed 10 July 2023.

7. ARTIFICIAL INTELLIGENCE

Machine learning or deep learning, commonly described as artificial intelligence (AI), is a prominent and common development in the contemporary era. Accordingly, while ChatGpT is an AI that pops into mind, the usage of AI extends to constructive research that could be hampered by the PDPA. LIRNEasia has researched the geographical incidence of poverty and the manner in which formerly residential areas in the City of Colombo have been gradually turning into business-dominated areas, but such policy-relevant data analytics research activities were undertaken via pseudonymized call detail records and related data kept by providers of mobile services. However, after the enactment of the PDPA, the rigid form of data protection, which required purpose specification and informed consent,[73] would be inimical to developing AI and data analytics in Sri Lanka.

Nevertheless, the rise of AI does impose certain dangers. Thomson Reuters, in May 2020, had filed a lawsuit against ROSS intelligence alleging that ROSS Intelligence had engaged in "wholesale theft" of Westlaw's copyrighted attorney-authored legal texts in partnership with a third-party data retrieval company.[74] The claim highlighted that ROSS had utilized this content to adapt its AI algorithms to build a legal research platform which infringed on Thomson Reuters' copyright.[75] ROSS intelligence had argued that they utilized data that was available to the public domain, but was unable to continue their claim due to the lack of financial resources. Despite such an outcome, the risks associated with intellectual property and the rights of publishers, is evidently a risk associated with the rise of AI, and thus, the PDPA serves as a mechanism to monitor such developments.

8. CONCLUSION

In conclusion, the individual right to data privacy can be theoretically construed to be important for citizens to escape the overarching eye of state surveillance and sidestep the ramifications of data theft by corporations. While its existence as an enforceable right has been notable in common

[73] Section 6(2) of the Personal Data Protection Act, No. 9 of 2022; Schedule I & Schedule II of the Personal Data Protection No. 9 of 2022.
[74] HJ Patrick Hughes, 'Thomson Reuters, ROSS Intelligence duel over fair use of legal headnotes for training AI | Secondary Sources | National | Westlaw Today' (*Westlaw Today*, 28 February 2023). <https://today.westlaw.com/Document/I720ff0cab79911ed8636e1a02dc72ff6/View/FullText.html?transitionType=CategoryPageItem&contextData=(sc.Default)&firstPage=true> accessed 14 July 2023.
[75] Elizabeth Raymer, 'Thomson Reuters v. ROSS case will test limits on protections for subscription-based database: lawyer' (2021) <https://www.canadianlawyermag.com/practice-areas/intellectual-property/thomson-reuters-v-ross-case-will-test-limits-on-protections-for-subscription-based-database-lawyer/337328> accessed 14 July 2023.

law countries such as India and South Africa, due its affirmation as constitutional right, Sri Lanka's protection of data privacy is restricted to common law protection, which is counterbalanced against the RTI 2016. Hence, the PDPA, which is based on the GDPA, serves as a novel initiative to protect data privacy, which is pragmatically intuitive as it is a necessary element in sectors such as the health sector, public security sector, and digital and cloud network, as well as with regards to the rise of AI. While the protection of individual data privacy is not the primary concern due to Sri Lanka's economic crisis, the existence of a legal framework within which citizens could enforce their rights is a legally intuitive initiative, but its success depends on the manner in which it is practically enforced.

THE IMPACT OF THE GDPR ON DATA PRIVACY AND ITS SIGNIFICANCE IN THE DIGITAL AGE: A COMPREHENSIVE ANALYSIS

Sanduni N.H Kotigala

ABSTRACT

The General Data Protection Regulation represents a significant milestone in global data protection legislation, which essentially provides guidance with regard to collecting and processing personal data of data subjects. This research delves into the key provisions of the GDPR, exploring its fundamental principles, the rights of data subjects, the obligations of data controllers and processors, and the mechanisms for enforcement and compliance. Furthermore, this article investigates the implications of the GDPR on businesses and cross-border data transfers. This study presents a thorough examination of the GDPR's legal framework, its significance, and its contribution to safeguarding data privacy in the digital age.

1. INTRODUCTION

We have seen just the tip of the iceberg when it comes to personal data, how it may be processed, used and more importantly how it would be misused. When speaking of data privacy, many of us think that it only concerns data shared on social media. This is clearly a misjudgment because there is a risk to one's personal data when dealing with banks, hospitals, insurance companies, marketing companies etc. For instance, organisations, especially those larger in scale such as JPMorgan Chase or China Construction Banks, have millions of customers and store data on each and every one of them. Although most of us may be aware of the dangers to personal data, some of us seem to blindly accept the terms and conditions applicable to the services we receive. Thus, carelessly, our personal data is put at great risk. In time to come, technology will be a force to be reckoned with, hence, more stringent laws and regulations would be required.

According to Grant and Watts, data privacy regimes in the global arena are divided into 'comprehensive' (the EU approach) and 'sectoral' (the US approach).[1] As Lisa Sotto and Simpson notes the US approach "resembles a patchwork quilt" since it has no single data protection law "but instead regulates privacy primarily by industry, on a sector-by-sector basis," e.g. Video Privacy and

[1] Hazel Grant and Mark Watts, 'Data privacy: data transfers, offshoring and the cloud' and Rita Esen, 'Corporate information risk management' in Stuart Weinstein and Charles Wild (eds), *Legal Risk Management, Governance & Compliance - Interdisciplinary Case Studies from Leading Experts* (Globe Law and Business 2016).

the Fair Credit Reporting Act.[2]

Conversely, the EU comprehensive approach sets out principles which organisations must take into account when processing personal data and, in doing so, provide certain rights to the data subjects. Article 4 of the GDPR defines personal data as "... any information relating to an identified or identifiable natural person ('data subject')..." As Miller correctly notes "We live in an information world; and with ever-reducing costs of storing, analysing, and retrieving information, the amount of information available for use is increasing at dizzying rates".[3] Thus, clearly, a discussion on data protection and privacy is essential and timely.

2. GDPR: FUNDAMENTAL PRINCIPLES AND SCOPE

2.1.Evolution of Data Protection Laws in the EU

According to the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union, "everyone has the right to the protection of personal data concerning him or her."[4]

The Data Protection Directive officially known as Directive 96/46/EC was adopted in 1995 by the EU which essentially regulates how personal data is collected and processed in the EU. The Directive was built on seven principles by the OECD's recommendations of the Council as to the Guidelines Governing the Protection of Privacy and Trans-Border Flows of Personal Data (1980), i.e. notice, purpose, consent, security, disclosure, access, and accountability. As this paper progresses, one would recognise, that much of the same principles are still reflected in the GDPR.

Subsequently, in 2012, the European Commission announced its plan to develop the GDPR which also aimed to facilitate cross-border cooperation in terms of the fight against crime and terrorism. Consequently, the EU-US Privacy shield replaced the International Safe Harbour Privacy Principles. GDPR text was subsequently approved by the EU Parliament and finalised on April 2016.[5] GDPR then came into effect in all its glory in May 2018.

Privacy issues existed and were dealt with even prior to GDPR or the Data Protection Directive, for instance, Article 8 of the European Convention on Human Rights 1953, provides for 'the right to respect for private and family life'. However, in comparison, GDPR addresses data privacy in a more microscopic manner and is in that sense more efficient.

---

[2] Weinstein and Wild (n 1).
[3] Geoffrey P. Miller, *The Law of Governance, Risk Management, and Compliance* (2nd edn, Aspen Publishing 2017).
[4] Charter of Fundamental Rights of the European Union, Art.8.
[5]Nate Lord and Brook C, 'What Is the Data Protection Directive? The Predecessor to the GDPR' <https://www.digitalguardian.com/blog/what-data-protection-directive-predecessor-gdpr> accessed 1 June 2023.

It is noteworthy, that one of the key cases that highlighted the issue of data privacy was the *Cambridge Analytica Data Scandal* whereby Facebook had used personal data of its users and utilised that data to target and promote political campaigns in favour of Donald Trump. The case was recently concluded holding Facebook liable for misusing personal data.[6]

Grant and Watts noted that "Over the past 10 years or so, data privacy (or data protection, as it is usually referred to in Europe) has become one of the most important compliance issues for multinational companies".[7] GDPR is important, especially since it enhances people's ability to access their personal data and places limits on how organisations use and manipulate data. It is highlighted that GDPR is in fact "...a law which has significantly overhauled Europe's data protection rules at a time when information systems and digital business underpin human life".[8] The author urges the readers to keep this in mind as this article progress.

2.2.Territorial Scope of the Regulation

The GDPR contains 99 Articles, under which Article 3 provides that the regulation applies not only to organisations located within the EU, but also to organisations located outside the EU 'if they offer goods or services to, or monitor the behaviour of, EU data subjects.' Article 3(2) of the GDPR further emphasises this extra-territorial effect of GDPR.[9]

In *Google LLC v CNIL* (2019), the European Court of Justice (ECJ) ruled that the "right to be forgotten" applies only in the EU, and not globally. The case arose after CNIL ordered Google to remove search results not just from its European sites but from all versions of Google worldwide. The ECJ ruled that EU law does not require a search engine operator to carry out de-referencing on all versions of its search engine, but only on those versions corresponding to EU member states.[10]

It is noteworthy, that while the GDPR addresses issues on data protection and privacy in relation to digital services and online activities, the GDPR also recognizes that individuals' personal data can also be collected and misused offline, such as through CCTV cameras, loyalty programs, credit reporting agencies etc.

3. RIGHTS OF DATA SUBJECTS UNDER THE GDPR

[6] General Data Protection Regulation (GDPR), Art. 3.
[7] Weinstein and Wild (n 1).
[8] Bird & Bird, 'Guide to the General Data Protection Regulation' (May 2020) <https://www.twobirds.com/-/media/pdfs/gdpr-pdfs/bird--bird--guide-to-the-general-data-protection-regulation.pdf> accessed 30 September 2023.
[9] GDPR, Art. 3.
[10] Mary Samonte, 'Google v. CNIL: The Territorial Scope of the Right to Be Forgotten under EU Law' (European Papers, 27 January 2020) <https://www.europeanpapers.eu/en/europeanforum/google-v-cnil-territorial-scope-of-right-to-be-forgotten-under-eu-law-> accessed 16 June 2023.

In order to better comprehend this section of the paper, one must understand who a data subject is. According to Article 4 of the GDPR, a data subject is "...one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".[11] The wide range of rights afforded to data subjects are contained under Chapter 3 of the GDPR.

3.1 Right to Information and Access

Under the GDPR, data subjects have the right to find out what information any organisation stores about them. These include the right to be informed about how personal data is being used (relating to data collected from the data subject and/or otherwise)[12] and the communication of such information shall be transparent.[13]

Further, data subjects have the right to access personal data, which allows them to have the right to obtain confirmation from the controller as to whether or not personal data are being processed, and be able to access data concerning for instance; "the purposes of the processing; the categories of personal data concerned; where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period; the right to lodge a complaint with a supervisory authority" etc.[14]

However, this right comes with the exception of personal data that is legally privileged or where providing access would require an organisation to expend a disproportionate amount of effort.

3.2 Right to Rectification, Erasure, and Restriction

The data subjects have the right to get incorrect data rectified and get incomplete data completed.[15] They shall even have their personal data erased. This is given for instance; if "the personal data is no longer necessary to the purposes for which it was collected or otherwise processed; where the personal data has been unlawfully processed" etc.[16]

Additionally, Data subjects shall stop or restrict the processing of their personal data, if, "the accuracy of the personal data is contested by the data subject; unlawful processing; the controller no longer needs the personal data for the purposes of the processing, but they are required by the data subject for the establishment, exercise or defence of legal claims and the data subject has

[11] GDPR, Art. 4.
[12] ibid Art. 13.
[13] ibid Art. 12.
[14] ibid Art. 15.
[15] ibid Art. 16.
[16] ibid Art. 17.

objected to processing".[17] Subsequently, data subjects have a right to get notified of such rectification, erasure or restriction.[18]

Big tech companies such as Google, WhatsApp, Amazon, Meta and many more are all regulated by GDPR, and they must provide data subjects with these rights, depicting the significant impact of GDPR on data privacy.

3.3 Right to Data Portability and to Object

Right to data portability is also given to the data subjects which, allows them to get and reuse their personal data for different services, by having such data transmitted "to another controller without hindrance from the controller to which the personal data have been provided".[19] Data subjects have a right to object to how their data is processed in certain circumstances, such as when personal data are processed for direct marketing purposes.[20]

3.4 Automated Decision-Making and Profiling.

Interestingly, data subjects have rights when an organisation is using their personal data for automated decision-making processes[21] (e.g. when companies use an AI tool to filter out employees during the recruitment process). This includes instances where personal data is used for profiling (e.g. to predict your behaviour or interests). Further, this includes "the data subject's performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements..." illustrating how it covers a wide range of activities.[22]

4. OBLIGATIONS OF DATA CONTROLLERS AND PROCESSORS

4.1 Definitions and Responsibilities

Data controllers can be a "legal or natural person, an agency, a public authority, or any other body who, alone or when joined with others that would determine the purpose for which personal data is collected and the means by which such data is processed."[23] Data Controllers are required to actively demonstrate full compliance with all data protection principles.[24] Data processors are those entities that process the data for the Controller. They are required to only process personal data

[17] ibid Art. 18.
[18] ibid Art. 19.
[19] ibid Art. 20.
[20] ibid Art. 21.
[21] ibid, Art. 22.
[22] ibid Recital 71.
[23] European Commission, 'What Is a Data Controller or a Data Processor?' <https://commission.europa.eu/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/controllerprocessor/what-data-controller-or-data-processor_en> accessed 22 June 2023.
[24] GDPR, Art. 24.

according to the data controller's instructions unless required to do so by law.[25] In order to avoid any penalties and fines, and to help secure the rights of data subjects, organisations have to comply with the seven common data protection principles pursuant to Article 5 of GDPR.

4.2 Lawfulness of Data Processing

This includes data to be processed lawfully, fairly and transparently,[26] i.e. companies need a legal basis under the GDPR to collect and use personal data and use it in a way that is not excessively detrimental or misleading to the data subjects (e.g. direct marketing has a legitimate interest[27]). They should be honest with the data subjects from the beginning as to how the personal data will be used and must at least inform the identity of the organisation.[28]

4.3 Consent and Alternative Legal Grounds

As per Article 6(1) of the GDPR, the six bases for processing personal data are "consent, contract, legal obligations, vital interests of the data subject, public interest and legitimate interest". Personal data may be lawfully processed based on the consent of the data subject. Consent must be free, informed, specific and unambiguous, i.e. "consent must be clear and distinguishable from other matters and provided in an intelligible and easily accessible form, using clear and plain language. It must be as easy to withdraw consent as it is to give it".[29]

The case of *Fashion ID* (2019) involved a German fashion retailer that embedded Facebook's "Like" button on its website. The ECJ ruled that both the website operator and Facebook were jointly responsible for the data collected through the Like button and that the website operator must obtain the user's consent before embedding such a social media plugin.[30]

According to a 2019 Article, "Since the adoption of the General Data Protection Regulation (GDPR) in May 2018 more than 60 % of popular websites in Europe display cookie consent notices to their visitors".[31] This is exactly why data subjects almost habitually click yes, without reading the terms and conditions. Interestingly, one would ponder if 'consent' which is a safeguard for the data subjects, is used for the benefit of those who misuse personal data, would it then present a

[25] ibid Art. 29.
[26] ibid Art. 6.
[27] ibid Recital 47.
[28] Case C-154/21 *RW v Österreichische Post AG* [2023].
[29] GDPR, Art. 7.
[30] Natascha Gerlach, Andrea Mantovani and Eva Reggiani, 'CJEU Judgment in the Fashion ID Case: The Role as Controller under EU Data Protection Law of the Website Operator That Features a Facebook "like" Button' (*Cleary Cybersecurity and Privacy Watch*, 2 August 2019) <https://www.clearycyberwatch.com/2019/08/cjeu-judgment-in-the-fashion-id-case-the-role-as-controller-under-eu-data-protection-law-of-the-website-operator-that-features-a-facebook-like-button/> accessed 29 June 2023.
[31] Christine Utz, Martin Degeling, Sascha Fahl, Florian Schaub, and Thorsten Holz, '(Un)informed Consent: Studying GDPR Consent Notices in the Field' (ACM SIGSAC Conference on Computer and Communications Security, November 2019) 973.

'right without a remedy'? Hence, for consent to be effective, not only regulation as to it but also clear guidance as to how consent may be obtained should be present.

4.4 'Purpose Limitation'

Hereby, the data must be used for specified, explicit, and legitimate purposes. Companies need to be clear about their purpose for processing personal data from the beginning, and they should not use data for any other purpose.[32] However, where they have obtained consent from the data subject or have a clear obligation set out in law, that presents an exception. For example, in one of the most commonly used Applications; Uber Eats, the address and contact number of the customer is taken to deliver food, not to give it to a telemarketing company.

4.5 'Proportionality' and 'Data minimisation'

Further, Data must be processed in a way that is adequate, relevant and limited to only the purpose for which it was collected.[33] Hereby, companies should collect enough data relevant for that purpose. For Example, my political or religious beliefs are not data that is necessary for UberEats to deliver food.

4.6 'Accuracy'

Personal data must be accurate and, where necessary, kept up to date in order to ensure data quality.[34] Hereby, companies should ensure that the personal data they hold isn't incorrect or misleading, and if it is, then take necessary measures to either erase or rectify that. The quality of personal data needs to be verified before it is processed, and the information used to verify it should be documented, in order to further ensure transparency in processing personal data.

4.7 'Storage limitation' or 'Data Retention'

Data should not be kept for longer than necessary unless there is a legitimate reason, such as "...public interest archiving, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to the implementation of the appropriate technical and organisational measures".[35] In fact, GDPR's Article 30 states that most organisations need to keep records of their data processing, how data is shared, stored and descriptions of technical security measures in place.[36]

4.8 'Data Security' and 'Integrity and Confidentiality'

[32] GDPR, Art.5(1)(b).
[33] ibid, Art.5(1)(c).
[34] ibid Art.5(1)(d).
[35] ibid Art.5(1)(e).
[36] ibid Art.30.

Personal data should be handled in a way that ensures appropriate security whereby personal data is processed using appropriate technical or organisational measures, including protection against unauthorised or unlawful processing and against accidental loss or damage of personal data.[37] This in turn is necessary to ensure individual confidentiality and integrity through for instance encryption.[38] However, the duty of confidentiality does not extend to situations where the data comes to the knowledge of a person in his private capacity and not as an employee/agent of a data controller or processor.

Further, Data security can be ensured through 'anonymisation' and 'pseudonymisation'.[39] While anonymisation is a technical mechanism through which personal data is made anonymous (by using code for instance), pseudonymisation is a similar process but it's possible under this mechanism to reverse it at some point and identify the personal data.

Pseudonymisation

PERSONAL INFORMATION-------->KEY--------> PSEUDONYMISED DATA
E.g., Sanduni Kotigala---------->KEY----------> SK001 w1_

Anonymisation
PERSONAL INFORMATION-------->KEY--------> ANONYMISED DATA
E.g., Sanduni Kotigala---------->KEY--------->********

4.9 'Accountability'

As per the accountability principle, the data controller is responsible for being able to demonstrate compliance with all the aforementioned principles, and processors must also keep a record of processing operations by appointing a Data Protection Officer to ensure such compliance.[40]

It is noteworthy, that the legal protection for more sensitive data is stronger. Sensitive data includes; "race, ethnic background, political opinions, religious beliefs, trade union membership, genetics, biometrics, health and sex life or orientation".[41] Miller presents a list of examples as to non-public

[37] ibid Art.32.
[38] ibid Recital 83.
[39] GDPR, Art.4(5).
[40] ibid Art.5(2).
[41] *S. and Marper v the United Kingdom* App no.30562/04, 30566/04 (ECHR, 4 December 2008); *Ciubotaru v. Moldova* App no.27138/04 (ECHR, 27 April 2010); *Aycaguer v. France* App no. 8806/12 (ECHR, 22 June 2017); *Dragan Petrović v. Serbia* App no. 75229/10 (ECHR, 14 April 2020); *Catt v. the United Kingdom* App

information which comes with varying degrees of sensitivity such as a "person's net assets, a person's Social Security number, the secret formula for Coca-Cola TM syrup, the fact a company is about to make a takeover bid" etc.[42] There are separate safeguards for personal data relating to criminal convictions and offences.[43]

4.10 Data Protection Impact Assessment (DPIA)

DPIA is a process that organisations undertake to identify and assess the potential risks and impacts on individuals' privacy rights when processing personal data. It is a proactive measure to ensure compliance with the GDPR. This essentially helps organisations to identify and implement appropriate measures to mitigate risks to data privacy and uphold data protection principles.

4.11 Data Protection Officers (DPO)

The DPO is an important GDPR cornerstone. As mentioned under 4.9, a DPO supports an organisation's compliance with the GDPR and acts as an intermediary between the organisation, supervisory authorities, data subjects, etc. It is noteworthy that not every company needs a DPO. DPOs have wide-ranging responsibilities,[44] and their position is shielded from potential interference from the organisation such as other employees. DPOs are under a duty of confidentiality in the performance of their tasks[45] and are required to only report directly to the highest level of management of the company in question. If any data breaches are found, a Data Protection Authority(/Supervisory Authority) will impose a fine according to the degree of responsibility of the processor and the controller, taking into account all of the technical and organisational measures implemented by the controllers and processors.[46]

5. DATA BREACH NOTIFICATION AND SECURITY MEASURES

5.1 Obligation to Notify Data Breaches

As Bird & Bird notes data controllers and data processors are subject to a general personal data breach notification regime, whereby, "The processor shall notify the controller without undue delay after becoming aware of a personal data breach", not later than 72 hours (Article 33 GDPR).[47] However, there are certain limits on it whereby, the EU and Council of Europe impose a notification

no. 43514/15 (ECHR, 24 January 2019); *M.D. and Others v. Spain* App no.36584/17 (ECHR, 28 June 2022); *Frâncu v. Romania* App no. 69356/13 (ECHR, 13 October 2020); *P.T. v. Republic of Moldova* App no.1122/12 (ECHR, 26 May 2020); *J.L. v. Italy* App no.5671/16 (ECHR, 27 May 2021).

[42] Miller (n 3).

[43] *Suprunenko v. Russia* App no. 8630/11 (ECHR, 3 July 2019); *M.L. and W.W. v. Germany* App no.60798/10 and 65599/10 (ECHR, 28 June 2018).

[44] GDPR, Art.38.

[45] ibid Art.39.

[46] ibid Art.83.

[47] Bird & Bird (n 8).

requirement on controllers in certain circumstances.[48]

5.2 Security Measures and Data Protection by Design

Further protection is provided under Article 25, i.e. data protection by design and by default, which requires to be characterised by proactive measures, to implement the highest privacy settings by default, to ensure that privacy is embedded into the design and architecture, to ensure full functionality by accommodating all legitimate interests and objectives in a positive sum win-win manner, have end-to-end security, to remain visible and transparent to the users and providers alike, and to respect privacy by keeping the design user-centric. These principles require businesses to consider data protection aspects throughout the entire life cycle of data processing activities to ensure high-level of data protection.

6. CROSS-BORDER DATA TRANSFERS

GDPR provides further protection by having certain rules on transfers "of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation [...].Such data flows are only allowed if they comply with the rules set out in Chapter V of the GDPR".[49] Grant and Watts give an example, whereby a "server storing a company's human resources information is located in an EU member state but access to it is provided to the parent company in US, there is a data transfer of the personal data".[50]

In 2020 *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems II,* the ECJ invalidated the EU–US Privacy Shield, a data transfer agreement between the EU and the US, on the grounds that it did not provide adequate protection for EU citizens' data.[51] Stewart Baker opined that "The CJEU's act of "solipsistic Europocrisy meets judicial imperialism"[52] invalidated the data transfer framework, upon which over 5,000 U.S. and EU companies currently rely, leaving no discernible alternative — and substantial uncertainty — in its place".[53]

6.1 Adequacy Decisions

"Adequacy decisions" essentially refer to providing protections for individuals' privacy aligned with those under the GDPR. For instance, if one is a citizen of Iceland, that individual's personal

[48] GDPR, Recital 87,88.
[49] ibid Art..44.
[50] Grant and Watts (n 1); Weinstein and Wild (n 1).
[51] Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems* [2021] OJEU C 15/176.
[52] Stewart Baker, 'The Cyberlaw Podcast: Solipsistic Europocrisy Meets Judicial Imperialism,' (*Law Fare Media*, 20 August 2023) <https://www.lawfaremedia.org/article/cyberlaw-podcast-solipsistic-europocrisy-meets-judicial-imperialism> accessed 23 June 2023.
[53] Adam Satariano, 'E.U. Court Strikes Down Trans-Atlantic Data Transfer Pact,' (*The New York Times*, 2020), <https://nyti.ms/393VklG> accessed 23 June 2023.

data should not be transferred outside of Iceland. However, organisations such as "Meta operate on a global scale. Considering users' nationality and residential status are often changing, managing their data can be challenging."[54] In fact, BBC reports how Meta was fined £1 billion in May 2023 after an Irish court ruled that it violated GDPR laws related to data transfers between the E.U. and the U.S.[55]

6.2 Standard Contractual Clauses (SCCs) and Binding Corporate Rules (BCRs)

SCCs and BCRs are two mechanisms provided by the GDPR to ensure the lawful transfer of personal data outside the European Economic Area (EEA) while maintaining data privacy and protection.

SCCs are "standardised and pre-approved model data protection clauses that allow controllers and processors to comply with their obligations under EU data protection law."[56] SCCs can be used between a data exporter and a data importer. They contain provisions that protect the rights of data subjects and allow for effective enforcement and legal remedies in compliance with GDPR requirements. Organisations using SCCs must ensure that the clauses are included in the relevant contracts, and the transfer of personal data adheres to the specific SCCs approved by the European Commission for the relevant transfer.

Whereas BCRs "are data protection policies adhered to by companies established in the EU for transfers of personal data outside the EU within a group of undertakings or enterprises."[57] BCRs require approval from the relevant data protection authority in the EU member state where the organisation's leading entity is located. They establish a set of binding rules and principles that govern the organisation's data protection practices, including the transfer of personal data across borders. BCRs demonstrate a commitment to robust data protection standards and require ongoing monitoring and enforcement mechanisms to ensure compliance, along with some flexibility.

---

[54] Paul Haskell-Dowland, 'Professor of Cyber Security Practice,' (*The Conversation*, 24 May 2023) <https://theconversation.com/meta-just-copped-a-a-1-9bn-fine-for-keeping-eu-data-in-the-us-but-why-should-users-care-where-data-are-stored-206186> accessed 12 June 2023.

[55] Shiona McCallum, 'Meta: Facebook Owner Fined €1.2bn for Mishandling Data' (*The BBC*, 22 May 2023) <https://www.bbc.com/news/technology-65669839#:~:text=Facebook%27s%20owner%2C%20Meta%2C%20has%20been,Europe%20and%20the%20United%20States.> accessed 29 June 2023.

[56] European Commission, 'New Standard Contractual Clauses - Questions and Answers Overview', <https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/new-standard-contractual-clauses-questions-and-answers-overview_en#:~:text=What%20are%20Standard%20Contractual%20Clauses,and%20processors%20into%20their%20contractual> accessed 16 June 2023.

[57] European Commission, 'Binding Corporate Rules (BCR)' <https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/binding-corporate-rules-bcr_en#:~:text=Relevant%20documents-,What%20are%20binding%20corporate%20rules%3F,group%20of%20undertakings%20or%20enterprises.> accessed 16 June 2023.

6.3 Derogations and Supplementary Measures

These two concepts relating to cross-border data transfers under the GDPR come into play when transferring personal data from the EEA to a third country that does not ensure an adequate level of data protection.

Derogations are exceptions that allow the transfer of personal data to a third country without the need for specific safeguards. The GDPR specifies a few derogations that can be relied upon when no other adequate safeguard mechanisms are in place. These derogations include (Article 49(1)(a)-(d));[58]

a. If the data subject has given explicit consent to the transfer after being informed of the potential risks involved, the transfer may be permitted.

b. If the data transfer is necessary for the performance of a contract between the data subject and the data controller or for pre-contractual measures, the transfer may be allowed.

c. If the transfer is necessary for the establishment, exercise, or defence of legal claims, it may be permitted.

d. If the transfer is necessary to protect the vital interests of the data subject or other individuals, it may be allowed.

Derogations should be interpreted restrictively and should only be relied on when other transfer mechanisms are not feasible or applicable. Further, a thorough assessment of the specific circumstances should be conducted and the justification for relying on it should be documented.

Supplementary Measures are additional safeguards implemented by organisations to ensure an adequate level of protection when transferring personal data to third countries. These may include technical, organisational, or contractual measures aimed at enhancing the protection of personal data. They should be assessed on a case-by-case basis.

The European Data Protection Board has provided guidance on supplementary measures in its Recommendations 01/2020 on measures that supplement transfer tools. The guidance emphasises the importance of assessing the effectiveness of the measures and conducting a thorough analysis of the laws and practices of the destination country that may impact the protection of personal

[58] European Data Protection Board, 'Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679' (25 May 2018) <https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf> accessed 31 September 2023.

data.[59]

Supplementary measures are intended to address potential risks and ensure that the transferred data receives a level of protection essentially equivalent to that provided by the GDPR within the EEA. However, the validity and adequacy of derogations and supplementary measures would depend on the specific circumstances of each transfer and the evolving interpretations of data protection authorities and courts.

7. ENFORCEMENT, COMPLIANCE, AND SANCTIONS

7.1 Regulatory Authorities and Supervision

GDPR emphasises the importance of compliance with data protection principles and imposes significant sanctions for violations, with the view that organisations are expected to take data privacy seriously.

Specific interpretation and enforcement of the GDPR may vary across EU member states, as supervisory authorities have some discretion in their enforcement activities. They are independent public bodies established in each EU member state under the GDPR whose primary responsibility is to regulate and enforce data protections within their own jurisdictions. They are granted significant powers and responsibilities including; investigating complaints, auditing and inspecting to assess an organisation's compliance with the GDPR by reviewing data processing procedures, data security measures, and adherence to data subject rights, providing guidance and recommendations to organisations and individuals on data protection matters, impose administrative fines and corrective measures on organisations that violate the GDPR etc.

It is noteworthy that the effectiveness of regulatory authorities may evolve over time as they gain more experience in enforcing the GDPR. While challenges may exist, regulatory authorities and supervision are integral components of the GDPR framework, promoting accountability, transparency, and the protection of individuals' rights with regard to their personal data.

A few examples of regulatory authorities across different EU member states include, Information Commissioner's Office (ICO) - United Kingdom, Commission Nationale de l'Informatique et des Libertés (CNIL) - France, Datatilsynet- Denmark, etc. Each authority has its own specific jurisdiction, powers, and responsibilities, but all work towards ensuring compliance with the GDPR

[59] European Data Protection Board, 'Recommendations 01/2020 on Measures That Supplement Transfer Tools to Ensure Compliance with the EU Level of Protection of Personal Data' (18 June 2021) <https://edpb.europa.eu/our-work-tools/our-documents/recommendations/recommendations-012020-measures-supplement-transfer_en> accessed 16 June 2023.

and protecting individuals' data privacy rights.[60]

7.2 Administrative Fines and Penalties

This is one of the key enforcements of GDPR the conditions for which are laid out in Article 83.[61] The GDPR provides for substantial administrative fines that can be imposed on organisations for non-compliance, and distinguishes between two tiers of administrative fines;

Up to €10 million or 2% of global annual turnover (whichever is higher) for lower-level infringements. These typically include violations of record-keeping obligations, failure to appoint a Data Protection Officer (where required), or failure to cooperate with supervisory authorities.

Up to €20 million or 4% of global annual turnover (whichever is higher) for more serious infringements. These can be imposed for violations of data subject rights, inadequate security measures, lack of valid legal basis for processing, or non-compliance with cross-border data transfer requirements. Some examples have been considered herein below.

Google (France, 2021); The French data protection authority, CNIL, imposed a fine of €220m on Google for lack of transparency, insufficient information provided to users, and inadequate consent mechanisms related to personalised advertising.[62]

British Airways (UK, 2020); ICO in the UK issued a fine of £20 million to British Airways for a cyber-attack that compromised the personal data of more than 400,000 customers due to inadequate security measures.[63]

In *Marriott International* (2020), the UK Information Commissioner's Office fined Marriott £18.4m for a data breach that exposed the personal information of 5.2 million of its customers. The ICO found that Marriott had failed to undertake sufficient due diligence when it acquired Starwood Hotels, which had already been the victim of a cyber-attack.[64]

Moreover, case law of the European Court of Human Rights also depicts the gravity of data privacy issues that exist in today's highly digital world. For instance in *Y.G. v. Russia 2022 ,* an HIV patient alleged that his personal health data was unlawfully disclosed through a database being sold in a market. The Investigative Committee of the Russian Federation had failed to protect the applicant's

[60] European Commission, 'Data Protection Authorities' <https://ec.europa.eu/justice/article-29/structure/data-protection-authorities/index_en.htm> accessed 29 June 2023.
[61] GDPR, Art.83.
[62] Simon Read, 'Google Fined €220m in France over Advertising Abuse' (*The BBC*, 7 June 2021) <https://www.bbc.com/news/business-57383867> accessed 29 June 2023.
[63] Joe Tidy, 'British Airways Fined £20M over Data Breach' (*The BBC*, 16 October 2020) <https://www.bbc.com/news/technology-54568784> accessed 29 June 2023.
[64] Information Commissioner's Office, 'Penalty Notice: Section 155 Data Protection Act 2018' (2020) <https://ico.org.uk/media/action-weve-taken/mpns/2618524/marriott-international-inc-mpn-20201030.pdf> accessed 23 June 2023.

right. ECtHR found a violation of Article 8, i,e right to respect for his private life and awarded EUR 7,500 in respect of non-pecuniary damages.[65]

In addition to fines, supervisory authorities can also issue warnings, reprimands, temporary or permanent bans on data processing, and orders to rectify or erase personal data. The severity of sanctions depends on various factors, including the nature, gravity, and duration of the infringement, the intentional or negligent character of the infringement, and the measures taken to mitigate the damage suffered by data subjects.

8. CHALLENGES AND OPPORTUNITIES FOR BUSINESSES

Adapting to the GDPR requirements requires businesses to review and update their policies, processes, and systems to align with the new data protection framework.

One successful cyber-attack is all it takes to ruin an organisation's reputation. The estimated cost to the Australian economy in 2021 was $42 Billion.[66] Undoubtedly, most companies nowadays have an online trading platform, a website or a social media page. Thus, they are at the risk of cyber-attacks.

In order to address losses suffered by businesses as result of cyber-attacks, there is a system of cyber insurance. “The global cyber-insurance market is now worth an estimated US$9 billion. It is tipped to grow to US$22 Billion by 2025”.[67] However, this sector is still in its infancy and it is yet to be seen how far a mix of accountants, insurance professionals and cyber security experts will take it, and whether this together with GDPR can help protect businesses from cyber-attacks and losses suffered therein. It is important to keep in mind that data privacy is an ongoing effort, hence businesses especially with an online presence should remain vigilant and be able to adapt to changing threats and technologies.

9. FUTURE PERSPECTIVES AND CHALLENGES

9.1 Technological Advancements and Emerging Data Privacy Issues

There is concern and controversy over TikTok and its use of personal data. There have been many claims that TikTok is sharing user data with the Chinese government. Governments around the globe have responded by trying to ban TikTok such as Australia. “Montana’s new law will make downloading TikTok within state lines illegal from January 1, 2024. The law imposes fines of up to US$10,000 per day for entities offering access to or downloads of the app within the state. Users

[65] Case law of the European Court of Human Rights Concerning the Protection of Personal Data <https://rm.coe.int/caselaw-march-24-april/1680ab0b7e> accessed 2 November 2023

[66] Jongkil Jay Jeong and Robin Doss, ‘Just 25% of Businesses Are Insured against Cyber Attacks. Here’s Why’ (*The Conversation*, 8 November 2022) <https://theconversation.com/just-25-of-businesses-are-insured-against-cyber-attacks-heres-why-193533> accessed 13 June 2023.

[67] ibid.

themselves will not incur penalties."[68]

In March 2023, Italy was the first western country to block the advanced chatbot known as ChatGPT. The Italian data protection authority, Garante, states that ChatGPT collects data in a manner incompatible with GDPR, especially claiming that it puts the protection of children at risk.[69] In fact, within two months of its release, it reached 100 million active users, making it the fastest-growing consumer application ever launched. ChatGPT collects information about users' browsing activities over time and across websites, and OpenAI states it may share such data with third parties, without informing them in advance, to meet their business objectives.[70] This is a clear violation of data privacy and tech companies seem to be benefiting off of this.[71]

Moreover, Adam Satariano in a New York Times article argues that "the response to Covid-19 is raising new questions about the role of privacy safeguards..." with more use of "digital tools for tracking health and location information".[72] This is true as, especially since Covid-19, the entire globe has become more and more reliant on technology, so having certain safeguards and stricter enforcement would be necessary for GDPR to be fully effective.

The GDPR was drafted with the aim that it would remain relevant even as technology evolves but technological advancements present new challenges to data protection and privacy that were not envisaged when the GDPR was drafted. It is evident that while much of these technological advancements such as ChatGPT or health data collection through smart watches and digital assistants could be an effective and beneficial tool if used properly, if misused can be a data-privacy nightmare.

9.2 Global Data Protection Standards.

9.2.1 Sri Lanka

Sri Lanka is the first South Asian country to pass comprehensive privacy legislation, which is the Personal Data Protection Act No.9 of 2022 (PDPA). PDPA is modelled on the GDPR among other laws and frameworks, and establishes principles for data protection, including the lawful processing

[68] Milovan Savic, 'A Tiktok Ban Isn't a Data Security Solution. It Will Be Difficult to Enforce – and Could End up Hurting Users' (2023) <https://theconversation.com/a-tiktok-ban-isnt-a-data-security-solution-it-will-be-difficult-to-enforce-and-could-end-up-hurting-users-202732> accessed 12 June 2023.
[69] Oreste Pollicino and Giovanni De Gregorio, 'ChatGPT: Lessons Learned from Italy's Temporary Ban of the AI Chatbot' (*The Conversation*, 22 May 2023) <https://theconversation.com/chatgpt-lessons-learned-from-italys-temporary-ban-of-the-ai-chatbot-203206> accessed 12 June 2023.
[70] Open AI Privacy Policy, updated June 23,2023 <https://openai.com/policies/privacy-policy>accessed 29 October 2023
[71] Uri Gal; 'CHATGPT Is a Data Privacy Nightmare. If You've Ever Posted Online, You Ought to Be Concerned' (*The Conversation*, 8 February 2023) <https://theconversation.com/chatgpt-is-a-data-privacy-nightmare-if-youve-ever-posted-online-you-ought-to-be-concerned-199283> accessed 12 June 2023.
[72] Adam Satariano, 'Europe's Privacy Law Hasn't Shown Its Teeth, Frustrating Advocates' (2020) <https://www.nytimes.com/2020/04/27/technology/GDPR-privacy-law-europe.html> accessed 23 June 2023.

of personal data, consent requirements, and the rights of data subjects. It also sets out obligations for data controllers and data processors and outlines the enforcement mechanisms and penalties for non-compliance. In addition to the PDPA, Sri Lanka also has other legislation that may touch upon data privacy, such as the Computer Crimes Act.

It is noteworthy that Sri Lanka has faced some challenges in implementing data protection and privacy measures in practice. For example, there have been concerns about the use of biometric data, such as fingerprints and facial recognition by government agencies, and about the lack of transparency around data sharing agreements with foreign countries. Unlike the GDPR, there is no global turnover-based penalty in the PDPA.[73] Since this is new, we are yet to see how and to what extent it would be effective in protecting individuals' privacy rights in Sri Lanka. Nonetheless, it must be recognised that it is in fact step in the right direction.

9.2.2 The United Kingdom

In the UK, data protection and privacy are governed by the Data Protection Act 2018 and the UKGDPR, which provide comprehensive protections for individuals' personal data, including requirements for obtaining consent, implementing security measures, and providing individuals with access to their data. The UK has also implemented the EU ePrivacy Directive into national law, which regulates the use of electronic communications data. In addition to these laws, the UK has a dedicated data protection authority, the Information Commissioner's Office, which is responsible for enforcing data protection regulations and investigating data breaches.

9.2.3 The United States of America

In the United States, data protection and privacy are governed by a patchwork of federal and state laws, including the Health Insurance Portability and Accountability Act (HIPAA), which regulates the use of medical information, and the California Consumer Privacy Act (CCPA), which provides California residents with enhanced privacy rights. “These laws uphold informational self-determination by increasing transparency requirements for companies’ data collection practices and strengthening individuals’ rights regarding their personal data.”[74] The US also has several data protection and privacy authorities, including the Federal Trade Commission (FTC), which is responsible for enforcing privacy and data protection laws, and the Department of Health and Human Services, which enforces HIPAA regulations.

[73] Jayantha Fernando and Sanduni Wickramasinghe, ‘Sri Lanka Personal Data Protection Legislation – An Overview’ (2022) < https://dx.doi.org/10.2139/ssrn.4246818> accessed 31 September 2023.

[74] Christine Utz, Martin Degeling, Sascha Fahl, Florian Schaub, and Thorsten Holz, ‘(Un)informed Consent: Studying GDPR Consent Notices in the Field.’ (ACM SIGSAC Conference on Computer and Communications Security, November 2019).

10. SUMMARY OF FINDINGS

All these principles and individual rights depict that GDPR enhances how people can access information about them and places limits on what organisations can do with personal data. GDPR's omnibus law approach has proved to be popular as it now serves as a model for new privacy rules in Brazil, Japan, India, Korea and other jurisdictions. It is believed that the "free flow of data remains an important aspect for fostering innovation, prosperity and well-being of the EU".[75] Thus, future developments (if any) to GDPR should factor this in. The GDPR is definitely much more advanced than many other approaches to data protection and privacy. Having regard to the ever-evolving digital economy, GDPR could even be a harbinger of the future.

In terms of the global reaction to data privacy, like with any other area of law, there are certain loopholes, in fact, it is difficult to keep up with the frequently advancing technology. It is apparent that in 2022 alone tech giants like Apple, Meta, Twitter, and Samsung all disclosed data breaches of sensitive user information, and these threats only continue to escalate.[76] Thus, the common theme appears to be 'proactive' rather than 'reactive' in order to effectively mitigate data privacy issues. In fact, today "75% of all countries have implemented some form of data localisation rules".[77]

11. IMPLICATIONS AND RECOMMENDATIONS

It is clear that there is a need for a multifaceted approach that involves a combination of legal, technical, and ethical measures. This in turn could include, enhancing the GDPR's provisions to address emerging technologies and expanding its scope to cover evolving technological advancements, while ensuring high standards of compliance. Strengthening enforcement mechanisms, including providing more resources to data protection authorities, could help improve compliance and deter violations.

Further, data protection becomes an issue when personal data has been outsourced to a cloud service provider (CSP) and if in that process personal data would be protected. A CSP, much like a utility provider, is essentially a third party company that offers services ranging from providing a platform, storage and other computing resources. Although cloud storage is an effective mechanism to protect

[75] German Insurance Association, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' (21 December 2020) <https://edpb.europa.eu/sites/default/files/webform/public_consultation_reply/gdv-comment_on_edpb_recommendations_01_2020.pdf > accessed 31 September 2023.
[76] Gary Drenik, 'Data Security & Privacy Trends for 2023' (*Forbes*, 2 February 2023) <https://www.forbes.com/sites/garydrenik/2023/02/02/data-security--privacy-trends-for-2023/?sh=145158a66462> accessed 23 June 2023.
[77] Satyajit Parekh, Stephen Reddin, Kayvaun Rowshankish, Henning Soller, and Malin Strandell-Jansson, 'Localization of Data Privacy Regulations Creates Competitive Opportunities' (*McKinsey & Company*, 30 June 2022) <https://www.mckinsey.com/capabilities/risk-and-resilience/our-insights/localization-of-data-privacy-regulations-creates-competitive-opportunities> accessed 23 June 2023.

data, transferring personal data to a third-party cloud provider can have detrimental effects on data privacy, e.g. In Sri Lanka, Article 26 of the PDPA provides that if you are a government entity, you can't store information in a 'third-country'.[78] Webber notes that under the GDPR, CSP can no longer hide since "processors are no longer outside of the ambit of the rules".[79] The GDPR requires data processors, including CSP processors, to develop and implement a number of internal procedures and practices to protect personal data, through 'code of conduct, certification mechanisms, cloud contracts, documentation, DPO, breach notifications and accommodating the needs of the controller'.[80] Thus, the cloud provider may be required to comply with the code of conduct or certification mechanism provided as assurance, this might at times even require on-site inspection.

Moreover, many individuals are not fully aware of the extent to which their personal data is being collected and used by companies, and there is a lack of accountability for data breaches. Increasing transparency and accountability, for example, by improving the disclosure requirements and breach reporting provided under the GDPR, could help address these issues.

Evidently, much of the success of GDPR would depend on compliance on the part of the data controllers, processors and subjects. Compliance on part of the data subjects would essentially require them to be responsible when it comes to their digital footprint, and ensure that they are aware of the rights afforded to them under the GDPR, for instance inquiring into why certain personal information is being collected and for what purpose it may be used. It is recommended that data subjects use unique, complex passwords for all accounts, including a combination of letters, numbers, and special characters. Enabling two-factor authentication is also recommended as it gives added verification and security. Keeping the operating system, applications, and antivirus software up to date can also be vital. Further, using encryption to protect sensitive data both at rest and in transit ensures that even if someone gains unauthorised access to your data, they won't be able to decipher it. If a public Wi-Fi is used, perhaps use a VPN to encrypt internet traffic. Being vigilant about phishing attacks via emails, messages, or phone calls is also important. Moreover, performing regular backups of data and storing it securely would help mitigate the impact of data breaches, ransomware attacks, or hardware failures. More importantly, always staying informed, and being mindful is necessary on part of the data subjects.

The invalidation of the EU-US Privacy Shield has highlighted the challenges of transferring data between jurisdictions with different privacy regimes. Developing new frameworks for international

[78] <https://www.parliament.lk/uploads/acts/gbills/english/6242.pdf> access on 29 October 2023
[79] Mark Webber, 'The GDPR's impact on the cloud service provider as a processor' (2016) 16(4) Privacy & Data Protection <https://res.cloudinary.com/fieldfisher/image/upload/v1574426190/PDF-Files/PDFs%20from%20old%20website/the-gdprs-impact-on-the-cloud-service-provider-as-a-processor-mark-webber-privacy-data-protection_o6o3dn.pdf> accessed 31 September 2023 11.
[80] GDPR, Art.42.

data transfers that are compatible with various data protection laws and provide sufficient safeguards for individuals' privacy rights could help address these. Further, promoting privacy by design principles by building privacy protections into products and services from the outset, rather than retroactively adding them and incentivising companies to prioritise privacy could help improve data protection and privacy.

12. CONCLUSION

In conclusion, the privacy afforded under the GDPR is necessary, and significant especially with the growing digital economy with algorithms, increased use of AI, blockchain, CCTV, facial recognition technology etc. The future of the law on data protection and privacy cannot be predicted since the digital arena is incredibly dynamic. We are yet to see how data protection will evolve, only with the hope that the world does not see another Cambridge Analytica Scandal or another mass government surveillance which was exposed by Edward Snowden.

A question that still does not have a clear cut answer to is, if in the instance the personal data collected is lost/damaged, can one lose a privilege that he would've otherwise been entitled to? It appears that the only way forward is for society to first understand and appreciate the value of data as well as the dangers that can be posed to their personal data, and be in a position to say enough is enough when certain lines are crossed. This is vital since the society is becoming increasingly data centric.

Thus, clearly, GDPR cannot operate by itself because it won't be fully effective if the data controllers, data processors and data subjects don't practice compliance and take some responsibility. GDPR places obligations on 'controllers, processors and data subjects' and the penalty is post the breach. Controllers are required to have effective data management programs in place to ensure that the processor can comply with GDPR. While the processor is required to carry out the purpose only in accordance with the controller's instructions. Perhaps, making privacy a competitive differentiator would help achieve these objectives more effectively. Data subjects should be reading the terms and conditions of user agreements more closely and readily delete any apps and services that threaten their privacy. These are important to ensure that privacy is fully protected.

While many commend GDPR for its direct impact on data privacy and security standards, while also indirectly encouraging organisations to develop and improve their data security measures, limiting the risks of any potential data breach, it seems to be stroked with many criticisms as to its enforcement. This the author believes will mature with time.

Hence, the author observes that, while some praise the GDPR as a groundbreaking regulation that

has significantly strengthened data protection and privacy rights for individuals, others have criticised it for being too complex and burdensome for companies and for not going far enough in protecting privacy. Nevertheless, one thing that both these schools of thought would have to appreciate is that GDPR has forced a much-needed debate about data use and that GDPR is the Magna Carta of data protection.[81]

[81] Michal Gal and Oshrit Aviv, 'The Competitive Effects of the GDPR,' (2020) 16(3) Journal of Competition Law and Economics 349.

DATA PROTECTION AND PRIVACY CONCERNS IN THE METAVERSE

Thanuki Natasha Goonesinghe[1]

"They can build buildings, parks, signs, as well as things that do not exist in Reality, such as vast hovering overhead light shows, special neighbourhoods where the rules of three-dimensional spacetime are ignored, and free-combat zones where people can go to hunt and kill each other. The only difference is that since the Street does not really exist - it's just a computer graphics protocol written down on a piece of paper somewhere - none of these things are physically built. They are, rather, pieces of software, made available to the public over the worldwide fibre-optics network."
- Neal Stephenson, Snow Crash (1992)[2]

ABSTRACT

The metaverse, which is essentially accepted by and large as the next iteration of the internet, has no standard definition. However, there is an understanding that it is an emerging three-dimensional digital space, in which users can fully immerse themselves by relying on technologies such as virtual reality, augmented reality, extended reality, artificial intelligence, 5G and blockchain, allowing them to have the agency to control and shape their personal and business experiences online. By this, it has the potential to extend an individual's physical world, allowing opportunities to play, work, shop, and engage in various pursuits using avatars, holograms and other digital representations. As such, the metaverse as a concept would mean different things to different people, and I opine in this article that it is a larger-than-life concept that has no boundaries. In light of this context of a boundless, seamless, vast virtual world, the article specifically explores the aspects of data protection and privacy within the Metaverse. By juxtaposing privacy with data usage in a highly immersive and interconnected digital landscape that is the metaverse, the article identifies several key concerns that arise out of it for individual users, regulators, companies, service providers, and governments. The article concludes by presenting potential strategies to address the concerns and challenges associated therewith.

Keywords: Metaverse, Data Protection, Privacy, Regulations, Security

[1] LL.B (Hons) (Colombo); Attorney-at-Law.
[2] Neal Stephenson, *Snow Crash* (first published 1992, Penguin Books 1993) 23.

1. INTRODUCTION

The phrase 'Metaverse' was first mentioned in the 1992 science fiction book *Snow Crash*, where author Neal Stephenson wrote about a digital world, fuelled by and also only limited by one's imagination. Here, people explored using digital avatars, in highly immersive and interconnected digital environments. Having read the book myself, I would describe it as a four-hundred-and-forty-page description of an escape from reality.

There is vast ambiguity surrounding what the Metaverse is, as the concept is still emerging and evolving. With Facebook's rebrand to Meta in late 2021, the conversation on the Metaverse has become rejuvenated. Virtual video games such as Fortnite and Second Life contain features of the Metaverse. There are alternative 3D virtual world platforms such as Sandbox, Roblox and Decentraland already in operation. While these applications and platforms are not the Metaverse, they provide a good idea as to what we can expect the Metaverse to be. Meta released their Instagram-connected app - Threads, while I was writing this article. Users were alarmed to find the significant number of data points Meta would have access to by their signing up for it. However, the interconnectedness and interoperability between these applications are only a precursor to what the Metaverse is expected to be. It is in this context that I pen this article, with the intention of shedding light on the data protection and privacy concerns presented by the Metaverse to come and the Metaverse-like platforms that are already available.

The article spans five sections. The first presents an overview of the Metaverse. The second examines the history of data protection and privacy dialogue. In the third section, I delve into the use cases of the Metaverse. Thereafter in the fourth section, the potential points for concern in the context of data protection and privacy specific to the Metaverse are explored. In the last section, I offer recommendations to address the data protection and privacy challenges identified while recognizing the need to adapt since the complete absence of virtual worlds in the future is not an option.

2. AN OVERVIEW OF THE METAVERSE

By combining the prefix "meta" which implies transcendence, with the word "universe", the term metaverse describes a simulated reality that is linked to the world as we know it but transcends it

in many ways.[3] The metaverse has the potential to transform work, leisure, education, healthcare, access to justice, and governance. Damar, taking from Alang describes the metaverse as the 'layer between you and reality.'[4]

At its core, is a vision of a highly immersive, unified, persistent, shared realm of the internet, which is essentially to be the next iteration of the internet supported by virtual reality, augmented reality, extended reality, spatial computing, 5G, AI, holographic technology, haptic technology (3D touch) and other such emerging technologies alike.[5] One also notes the role of blockchain technology to foster the development of its own economy, connected to the real-world economy. Petrànyi et. al observes accurately that the theme and the built world aspects of the metaverse depend on the provider and their vision for what the Metaverse is expected to achieve, while the technology behind it could vary.[6] One might suggest that there are ample opportunities to bring in unique features to the Metaverse that have not been seen or explored before, including data protection and privacy features catered to this unique situation, if you are determined to.

Park and Kim have observed four significant points of divergence between the older Second Life metaverse and the current evolving version of it.[7] The first point of difference is that, unlike its older counterpart, the new metaverse models offer a more natural immersive experience and high recognition performance supported by the rapid development of deep learning.[8] The second is that the current metaverse is mobile-based, and not PC-based, which increases accessibility and continuity, drastically.[9] The use of technologies such as blockchain and virtual currencies has improved the economic efficiency and stability of metaverse services. This third point of difference was unseen in the older version.[10] The fourth takes cognizance of the steep rise of interest in the virtual world owing to the general limitations of offline social activities, triggered by events such as the COVID-19 pandemic.[11] Park and Kim are able to capture the essence of the connection between reality and the metaverse in their definition; "There is a realistic environment that

[3] Lee et al., 'All One Needs to Know about Metaverse: A Complete Survey on Technological Singularity, Virtual Ecosystem, and Research Agenda' (2021) Journal of Latex Class Files <https://arxiv.org/pdf/2110.05352.pdf> accessed on 5 June 2023.
[4] Muhammed Damar, 'Metaverse Shape of Your Life for Future: A bibliometric snapshot' (2021) Journal of Metaverse <https://dergipark.org.tr/en/download/article-file/2167665> accessed 5 June 2023.
[5](n 2).
[6]Petrànyi et al, 'Legal Issues in the Metaverse' (CMS, n.d.) <https://cms.law/en/int/publication/legal-issues-in-the-metaverse/part-1-what-is-the-metaverse> accessed 5 June 2023.
[7] Dwivedi et al, 'Metaverse beyond the hype: Multidisciplinary perspectives on emerging challenges, opportunities, and agenda for research, practice and policy' (2022) International Journal of Information Management 66 <https://www.sciencedirect.com/science/article/pii/S0268401222000767#bib278> accessed 5 June 2023.
[8]ibid.
[9] ibid.
[10] ibid.
[11]ibid.

faithfully reflects realistic constraints and an unrealistic environment that gives many degrees of freedom without realistic constraints. "[12]

Meta Platforms showcased their vision of how the metaverse could potentially shape work and socialising experiences for users by their launch of Horizon Worlds in 2021.[13] With this launch emerged debates and dialogues headed by academics and real-world practitioners as to the potential for the myriad societal implications globally.[14]

Interoperability is a prominent trait of the metaverse. The European Commission defines interoperability as the capability of two or more functional units to process data cooperatively.[15] This essentially means that a user can relocate their avatar and digital assets across programs, sites, or platforms without losing the identity or functionality of these items. Whether the applications across which a user transfers their assets are under common ownership is of no consequence here.[16] One could argue that it is a game-changing feature, which makes using the metaverse a convenient and attractive venture. Moreover, blockchain technology may be employed to retain user identity and ownership over their digital assets in the metaverse.[17] Gordon et. al. observe that this brings about a metaverse-specific property interest.[18]

One could argue that the metaverse is no longer viewed as a collection of technologies, but rather as a new business model in which many companies are seen to be investing significant sums of money to understand and exploit better.[19] Complete shifts are evident in the mindsets of users and businesses alike on the expectations of the metaverse.[20] A recent example of an organisation adopting the metaverse was seen in Italy's AC Milan's clash with Fiorentina screening within the Nemesis metaverse, facilitated also by league sponsor TIM technology and blockchain technology firm ConsenSys.[21] Lega Serie A CEO Luigi De Siervo said - "We want to be as close as possible

[12]ibid.
[13]ibid.
[14]C. B. Fernandez and P. Hui, 'Life, the Metaverse and Everything: An Overview of Privacy, Ethics, and Governance in Metaverse' (*2022) IEEE 42nd International Conference on Distributed Computing Systems Workshops (ICDCSW)* <https://ieeexplore.ieee.org/abstract/document/9951378> accessed 6 June 2023. ; See also (n 6).
[15] European Commission, 'Interoperability and Portability' (2021) <https://joinup.ec.europa.eu/collection/ict-standards-procurement/interoperability-and-portability> accessed 5 June 2023.
[16]Clifford Chance, 'Metaverse: What are the Legal Implications' (2022) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/02/the-metaverse-what-are-the-legal-implications.pdf> accessed 5 June 2023.
[17] ibid.
[18] ibid.
[19] (n 5).
[20] (n 5).
[21] Reuters, 'Italy's Serie A enters the Metaverse to showcase new way to watch soccer' *Reuters* (2022) <https://www.reuters.com/lifestyle/sports/italys-serie-enters-metaverse-showcase-new-way-watch-soccer-2022-04-30/> accessed 5 June 2023.

to our users: young people spend their time in the metaverse."[22] There is also an element of tokenization and sale of NFTs associated with this league as a part of the metaverse package.

Another unique case in the metaverse dialogue is 'Decentraland' which is a 3D virtual platform built on a blockchain where users can own, develop and build structures on virtual land plots, trade digital assets, and engage in various socio-economic activities.[23] This platform which is very similar to the metaverse attracts users and investors, and as such raises questions about ownership rights, money laundering, and the application of investment law across jurisdictions associated with its interoperability.

Increased unregulated activities on metaverse-like platforms have indicated significant concerns on ethics, data security, safety, psychological impact on minors and vulnerable users, cyberbullying, sexual harassment by the sexualisation of avatars, unregulated gambling, fraud, identity theft, exposure to pornography, racism, violence, and grooming of minors.[24] With more taking place in the virtual worlds than ever before, it calls for new government regulations to address its unique aspects; new company policies; terms and conditions; internal governance processes etc.

3. HISTORY OF THE DATA PROTECTION AND PRIVACY DIALOGUE

The Internet was designed to be an independent, accessible and progressive network, accompanied by limited government oversight.[25] This provided companies with the opportunity to thrive on data-driven business models by selling user data to advertising agencies with ease.[26]

Taking the example of Facebook, which is an application that has had a significant impact on the lives of users the world over, as early as 2006, two years after Facebook's launch, was the first instance of public awareness of their privacy being compromised by the company. This was at the point of introducing the Facebook News Feed. The News Feed, which is a central curated stream that allows users to view the happenings and changes of their friends' profiles without having to individually click and search them, was met with opposition by over one million users at the time

[22] Ledger Insights 'Italian Serie A football broadcasts game in the metaverse' (6 May 2022), <https://www.ledgerinsights.com/italian-serie-a-football-broadcasts-game-in-the-metaverse/> accessed 5 June 2023.
[23] Ayushi Abrol, 'Decentraland Metaverse | A Complete Guide' (Blockchain Council, 20 March 2023) < https://www.blockchain-council.org/metaverse/decentraland-metaverse/> accessed 5 June 2023.
[24] (n 6).
[25] GlobalData Thematic Intelligence, 'Data privacy concerns will be amplified by the metaverse' (Verdict, 20 January 2023) <https://www.verdict.co.uk/data-privacy-metaverse-challenge/> accessed 5 June 2023.
[26] ibid.

for being intrusive.[27] While Facebook stayed the course, this incident commenced a ripple effect of consumer awareness of privacy in the applications they use.

In November of 2011, Facebook became liable to a penalty of USD $16,000 per day for each count of settlement with the Free Trade Commission for their infringement of privacy by allowing private user information to be made public without notice, or user consent. Facebook also had to agree to independent privacy evaluations every other year for the next 20 years, in light of this violation.[28]

Thereafter, it was exposed in March of 2018, that around 87 million Facebook user profiles were harvested by third-party apps for Cambridge Analytica in 2014, in what is considered to be one of the largest data privacy breaches in history.[29] Facebook owner Meta agreed in December of 2022 to pay $725 million to settle legal action over this data breach.[30]

These incidents and others that are not limited to Facebook, increased public awareness of data privacy issues, which resulted in more pressure being exerted on governments to enact stringent data protection and privacy laws. The most notable data privacy regulation that came to be is the European Union's General Data Protection Regulation (GDPR) of 2018, which inspired Sri Lanka to also pass comprehensive privacy legislation, the Personal Data Protection Act of 2022 (PDPA), becoming the first South Asian Country to do so.[31] Both regulations promote a 'privacy by design' approach, whereby organisations are encouraged to infuse data protection and privacy as core internal features of their data processing systems and practices. Fines for failing to do so are significant and remain a big slap on the wrists of the major technology companies. European regulators who are spearheading the dialogue on regulating data privacy have indicated that the GDPR applies to the Metaverse and similar platforms operating within the EU.[32] Needless to say, enforcing these regulations and ensuring their compliance in the Metaverse which is inter-connected, interoperable and multi-sensory by nature, will be an incredibly demanding task for the parties involved.

---

[27] Alyssa Newcomb, 'A timeline of Facebook's privacy issues — and its responses' (NBC News, 24 March 2018)<https://www.nbcnews.com/tech/social-media/timeline-facebook-s-privacy-issues-its-responses-n859651 > accessed 5 June 2023.

[28] ibid.

[29] Sam Meredith, 'Facebook-Cambridge Analytica: A timeline of the data hijacking scandal' (CNBC, 10 April 2018) <https://www.cnbc.com/2018/04/10/facebook-cambridge-analytica-a-timeline-of-the-data-hijacking-scandal.html> accessed 5 June 2023.

[30] Shiona McCallum, 'Meta settles Cambridge Analytica scandal case for $725m' (BBC News, 23 December 2022) < https://www.bbc.com/news/technology-64075067 > accessed 6 June 2023.

[31] Kirk J. Nahra et al., 'Sri Lanka Becomes The First South Asian Country To Pass Comprehensive Privacy Legislation' (Mondaq, 1 April 2022) <https://www.mondaq.com/privacy-protection/1178558/sri-lanka-becomes-the-first-south-asian-country-to-pass-comprehensive-privacy-legislation > accessed on 6 June 2023.

[32] (n 24).

Another recent development relevant to this area, which may have an impact on the metaverse and interactions on it, is the proposed EU AI Act. For instance, the Act classifies certain AI systems as high risk and consequently, this prompts a possible classification of the metaverse as high risk on the basis of the use of biometrics; usage in education and training; usage in healthcare; and usage in employment.[33] Such a classification would trigger the need to fulfil a number of requirements such as implementing a risk management system, the proper maintenance of documents and records and also ensuring human oversight.[34] There are also regulations pertaining to ensuring the user is made aware of their interactions with AI; and protecting users against deep fakes, which by themselves are complicated and tedious tasks. It can be asserted that the AI Act adds yet another layer of protective compliance measures that cannot be ignored by developers and regulators alike going forward.

4. PRACTICAL USE CASES OF THE METAVERSE

The metaverse has the potential to complement various aspects of the real world. This section will focus on three practical use cases of the metaverse.

The first delves into the metaverse in the workplace. Workrooms by Meta and Microsoft Mesh, for instance, enable organisations to create immersive virtual offices and provide new ways to meet, connect and engage with employees and clients. Features such as avatars and spatial audio used in these virtual world office spaces go beyond the limitations of the physical world and bring users together for a shared, engaging, and natural experience, accessible from anywhere in the world. This essentially means that employees and businesses can expand their services across borders.

Another notable application of the metaverse is in the field of education. Traditional education can be revolutionised by the use of realistic simulations, and interactive, collaborative environments. An example of this would be the opportunity for students to explore historical sites first hand like Metatut, which is the first Egyptian city in the Metaverse, without having to visit in person.[35] Contemplate the enhanced learning possibilities such as learning human anatomy by wearing a mixed reality headset and being transported inside the body during a science class, or learning about gravity and its differences on Earth compared with Mars, Venus, or the Moon as you are made to feel and experience the effects of it.

[33] Petrànyi et. al, 'Part 4 - Expected impact of the EU Artificial Intelligence Regulation, the metaverse as a workplace' (CMS, n.d.) <https://cms.law/en/int/publication/legal-issues-in-the-metaverse/part-4-expected-impact-of-the-eu-artificial-intelligence-regulation-the-metaverse-as-a-workplace> accessed 5 June 2023.
[34] ibid.
[35] World Economic Forum, 'METATUT- the First Egyptian City in the Metaverse' (2023) <https://www.weforum.org/videos/metatut-first-egyptian-city-in-the-metaverse> accessed on 15 June 2023.

While the metaverse can drastically improve already existing telemedicine services for patients, an application of it that elicits significantly more interest is its use for conducting surgeries or preparing for them, in the medical field. The metaverse can offer surgical teams opportunities to practise and prepare ahead for the countless possibilities of time-consuming, complicated surgeries before they take place. Augmented Reality ('AR') which is a key technological component of the metaverse can and has assisted surgeons during procedures. Recent examples of this have been reported at Johns Hopkins, where AR surgeries have been performed successfully on living patients, ranging from spinal fusion surgeries to the removal of cancerous tumours on the spine.[36]

5. DATA PROTECTION AND PRIVACY CHALLENGES ASSOCIATED WITH THE METAVERSE

While the challenges associated with a new and evolving concept such as the metaverse are many, this paper hones on the data protection and privacy challenges, identifying them to be posing the most significant legal issues facing platform users and owners at any given point in time. With the metaverse integrating multiple technologies that collect, store, and use data on platforms that are connected to a myriad of aspects of users' lives, the data in the metaverse is the new gold to platform owners and those waiting to transgress existing laws, regulations and norms. It brings about new dimensions to the data protection and privacy discourse such as the need to explore beyond the scope of physical user data to a second layer of data generated by avatars within an interoperable environment; to expand the examination of protection within a single jurisdiction to that of multiple jurisdictions being at play at the same time, as avatars interact in a boundless digital space; and to recognise that unlike in the physical world, eye and facial expressions, the way you move, the way your gait is, are all in fact, involuntary data points in the metaverse at this juncture. As such, there is a notable strain on regulators to match and address the sophistication of this technology and the evolving concept itself.[37] Some of the data protection and privacy challenges in the metaverse are presented in this section.

5.1 The Issue of Complicated Roles in a Decentralised Virtual World

At the outset, the metaverse is seen to complicate the roles and responsibilities set out in data protection regulations. It blurs the lines by nature; it is the culmination of numerous parties from many different jurisdictions acting in one space. Where the metaverse model is decentralised, data agreements become far more challenging than in a centralised model of the same, where there are

[36]Johns Hopkins Medicine, 'Johns Hopkins Performs Its First Augmented Reality Surgeries in Patients' (Hopkins Medicine, 16 February 2021) <https://www.hopkinsmedicine.org/news/articles/johns-hopkins-performs-its-first-augmented-reality-surgeries-in-patients> accessed on 6 June 2023.
[37] (n 24).

multiple entities processing data at different points of the metaverse.[38] Coupled together with copious amounts of data generated in the metaverse, it makes for a gruelling environment where there is ambiguity as to who is responsible for processing, storing and safeguarding data, and ensuring compliance with laws and regulations as well.[39] One could argue that the absence of clarity is a key concern for ensuring data protection and privacy rights are protected in the metaverse.

5.2 Portability and the Issue of Jurisdictional Responsibility

A unique facet of the metaverse is the nature of digital representations created by users on it. In the metaverse, the user is connected to their avatar, their digital assets and other digital representations. Consider this in conjunction with the portability of users, their data and assets between metaverses and platforms. I opine that this results in a substantial issue of determining jurisdiction for the purpose of establishing responsibility. Ghaffar raises three valid questions in this regard.[40] The first question is based on how jurisdiction is to be determined, where the question is whether it is based on the location of the actual user, that of the avatar, or of the servers.[41] The second concern raised is regarding additional contractual requirements of some States and how these add-ons are catered to in the metaverse.[42] The third is on the extraterritorial reach of regulations such as the GDPR, and the applicability of this concept within the metaverse.[43] It can be posited here that Ghaffar's questions identify the core concern of how to safeguard rights on a platform where there is so much ambiguity and confusion over determining and ensuring accountability. Furthermore, where jurisdictional responsibility cannot be pinpointed, access to justice for violations on such platforms naturally becomes very limited.

5.3 Lack of Resources to Enforce Data Protection and Privacy Laws in Highly Immersive Contexts

The metaverse by nature has many points at which data is collected, differing from the physical world where individuals and companies deal with clearly identifiable sources of data collection.[44] This essentially means that users are increasingly sharing a greater amount of personal information

[38]Hedaia-T-Allah Nabil Abd Al Ghaffar, 'Data Protection in the Metaverse: Concerns and Implications' (2023) Global Journal of Human Social Science <https://globaljournals.org/GJHSS_Volume23/2-Data-Protection.pdf> accessed 10 June 2023.
[39]ibid
[40](n 37).
[41]ibid.
[42]ibid.
[43]ibid.
[44]ibid.

on these platforms. Whether they know the extent of what they are sharing is a matter that raises a serious data privacy concern.

The metaverse and other similar virtual world models will continue to introduce newer data repositories over time, making it progressively more difficult to acquire users' consent.[45] As such, proactively creating information asset inventories and preparing data flow maps to track data lifecycles in the metaverse by companies venturing into it, must be undertaken as a basic requirement. I opine here that the enforcement of data privacy laws as it is at present requires a gamut of resources, both in terms of staff and finances.[46] This is already insufficient. The obscurity associated with 'how' and 'to what extent data is being collected' in a highly immersive virtual environment will only exacerbate the issue of ongoing resource limitations. There also arises the need to provide guidance and support skills development resources working on these areas.

5.4 The Issue of Mass Profiling

While accessing the metaverse happens via familiar tools such as screens, goggles, lenses, VR headsets, haptic gloves, webcams and microphones, the overall significance of this in data privacy terms should not be dismissed. Moreover, while there is some understanding of the use of simple motion data of individuals to determine their personal attributes, there is limited insight as to how the same can be used to uniquely identify users on a virtual world platform.[47]

A recent Berkeley study has shown that head and motion data in relation to virtual objects across multiple sessions can be used to uniquely and credibly identify a single user amongst a pool as large as 50,000+ users with 94.33% accuracy from 100 seconds of motion being recorded.[48] The accuracy drops to 73.20% from 10 seconds of motion, which still accounts for a noteworthy percentage.[49] This raises the concern as to whether anonymity and privacy are possible in the metaverse at all. I opine here that it is not, as do many actively engaged in this dialogue.

The tools that a user utilises to interact with the metaverse use multiple sensors to capture data about the user and generate information about them while creating the stimuli needed to offer the user an immersive experience.[50] The three most basic data points in virtual world systems that are

[45]ibid.
[46]European Data Protection Board, 'Lack of resources puts enforcement of individuals' data protection rights at risk' (EDPB, 13 September 2022) <https://edpb.europa.eu/news/news/2022/lack-resources-puts-enforcement-individuals-data-protection-rights-risk_en> accessed 7 June 2023.
[47]Vivek Nair et al., 'Unique Identification of 50,000+ Virtual Reality Users from Head & Hand Motion Data' (2023) <https://arxiv.org/pdf/2302.08927.pdf> accessed 5 June 2023
[48]ibid.
[49]ibid.
[50]ibid.

used to track data lie in the user's head, and one in each hand.[51] This implies that each time a user wears any device for the purpose of interacting on, working, or playing on the metaverse, they are leaving behind a trail of digital fingerprints, which they may or may not know about. What is more worrisome is that simple motion data such as swinging a cricket bat or even gazing at an advertisement can accurately infer personal traits of the user such as their height, gender, handedness and preferences.[52] The Berkeley study cited above suggests that motion data may be more unique than a user's actual real-world fingerprint data for the purposes of identification.[53]

In a recent statement to the Wall Street Journal, Kavya Pearlman, the founder of the XR Safety Initiative, stated that at any given time, the way you move, the way your gait is, the way you are gazing, your pupil dilation, is giving away information to developers, giving companies greater ability to deduce users' traits, defying current notions of privacy and security and straining corporate policies to protect them. For instance, she said, an insurance company might obtain information that suggests a user has a health problem before the person noticed any physical changes or saw a doctor.[54] The more alarming part of her statement is when she said, "Now, the data is in inferences." I assert that this indicates a classic case of mass profiling, where sensitive data can be used to advertise and influence people's decisions. Contemplate the potential implications for individuals' freedom when considering the presence of governments on the metaverse and similar virtual world platforms, and their use for state surveillance.

Additionally relevant to this subtopic is the recent case of *Glukhin v Russia*, where the European Court of Human Rights found that the use of facial recognition technology to process the applicant's personal data, locate and arrest the applicant who was a protestor, has violated his right to privacy and freedom of expression.[55] This case contributes a direct application of human rights law to the use of Artificial Intelligence, along with a legal precedent on the misuse of facial recognition technologies to target specific individuals and groups. Given that this is not a novel occurrence within the metaverse, in that there is unique identification and targeting of users, developers must take into consideration the implicit consequences of this case.

5.5 Data Security Risks

[51] Louis Rosenberg, 'New research suggests that privacy in the metaverse might be impossible' (Venture Beat, 20 February 2023) <https://venturebeat.com/virtual/new-research-suggests-that-privacy-in-the-metaverse-might-be-impossible/> accessed 7 June 2023.
[52](n 46).
[53] (n 50).
[54]David Uberti, 'Come the Metaverse, Can Privacy Exist?' (WSJ, 4 January 2022) <https://www.wsj.com/articles/come-the-metaverse-can-privacy-exist-11641292206?reflink=desktopwebshare_permalink> accessed 10 June 2023.
[55]*Glukhin v Russia* (2023) 11519/20.

In the preceding section, we examined the trace of digital information that is being generated by users while interacting with the virtual world. This could range from personal information that is required to enjoy the services on these platforms, to biometric information, and confidential information such as corporate secrets and strategies.[56] Undoubtedly, the vast availability of data and information inherently exposes it to security vulnerabilities such as hacks, leaks and forging. Interactivity being a fundamental feature of the metaverse requires and accepts user inputs, which provides hackers with the opportunity to steal this data by way of injection attacks. In an injection attack, a hacker feeds a programme with a suspicious input, which is in turn processed by an interpreter as a part of a command or query effectively modifying how that software is run.[57] I opine here that the implications of this could be far worse in an immersive environment such as the metaverse. Another security risk that could occur is man-in-the-middle attacks which eavesdrop on or intercept and modify the communication that takes place between a user of the metaverse and the server.[58] The consequence of this is the compromise of confidentiality and integrity of the metaverse.[59] There are also very clear possibilities of avatar hacks, forging of avatars and their abuse, and biometric leakages in authentication systems in the metaverse. All this is supported by the fact that services on the metaverse are complex and share information in real-time. The dynamism of the metaverse poses significant challenges for comprehensive evaluation, regulation, protection measures, and management policies.[60]

5.6 Loss of Right to Erasure and Rectification

The GDPR recognises an individual's right to rectification of personal data concerning them, as well as the right to erasure (i.e., the right to be forgotten) under certain circumstances.[61] These rights are recognised under Sri Lanka's Personal Data Protection Act as well.[62] As mentioned earlier, the metaverse and similar competitor virtual world platforms rely heavily on blockchain technology which by its nature is immutable, making data that is entered onto it, irreversible.[63] This holds particular relevance for NFTs that play an integral role in the economy of the metaverse. The

[56] (n 6).
[57]Soumalya Bhattacharyya, 'What are Injection Attacks? Types and How to Prevent Them' (2022) <https://www.analyticssteps.com/blogs/what-are-injection-attacks-types-and-how-prevent-them> accessed 7 June 2023.
[58] Yan Huang et al., 'Security and Privacy in Metaverse: A Comprehensive Survey' *Big Data Mining and Analytics*, 2023, 6(2) <https://www.sciopen.com/article/10.26599/BDMA.2022.9020047> accessed 7 June 2023.
[59]ibid.
[60](n 6).
[61] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation) Article 16, 17.
[62]Personal Data Protection Act No. 9 of 2022 <https://www.parliament.lk/uploads/acts/gbills/english/6242.pdf> accessed 5 June 2023 Section 15, 16.
[63]Adam Hayes, 'Blockchain Facts: What Is It, How It Works, and How It Can Be Used' Investopedia <https://www.investopedia.com/terms/b/blockchain.asp> accessed 10 June 2023.

right to rectification and the right to be forgotten are fundamental aspects of the GDPR and other privacy legislation that has followed it. These cannot be fully respected and complied with in light of this technology.

Additionally, one acknowledges that the entirety of the metaverse is not powered by blockchain. However, I opine here that addressing user requests for erasure and rectification in areas that are not blockchain-based in an environment as immersive and inter-connected as the metaverse are tall orders to meet.

5.7 Cyberbullying, Harassment and Safety Risks

One of the aspects of the metaverse is that it allows you to embody any identity or appearance of your choice. At the outset, this makes it difficult for the average user to determine the true nature of other avatars they are interacting with. As such, the key concerns that arise under this subtopic are, how the metaverse can regulate illegal and harmful content that is generated on it, and how accountability can be created.

A recent research paper highlights that Roblox, a representative metaverse, was attacked by hackers who had exposed sensational images and racist messages and caused the game characters to engage in obscene acts.[64] The same paper highlights an inherent risk to safety, where augmented reality used in real-world environments such as in the medical field, which has come under malware attacks, that could blind a user or leave them immobilised.[65] This serves as evidence that the negative implications of the metaverse extend well beyond the virtual world, into the real world as well.

Consider the potential for cyberbullying, sexual advances, sexual harassment, and even rape on the metaverse, which may feel very real to the victim, without any of the usual legal consequences for perpetrators. In 2021, Meta revealed that a beta tester of its virtual world platform 'Horizon Worlds' was virtually groped several times.[66] "Sexual harassment has never had to be a physical thing. It can be verbal, and yes, it can be a virtual experience as well," says Jesse Fox, an associate professor at Ohio State University who makes a valid observation in this regard.[67] Broadening the scope of harassment and bullying to include virtual experiences can prove to be a meaningful first step towards addressing the concerns associated with regulation and accountability.

---

[64] (n 6).
[65] ibid.
[66] Tanya Basu, 'The metaverse has a groping problem already' (*MIT Technology Review*, 16 December 2021) <https://www.technologyreview.com/2021/12/16/1042516/the-metaverse-has-a-groping-problem/> accessed 7 June 2023.
[67] ibid.

5.8 Child Safety at Risk

With children and youth constituting tens of millions of users of virtual environments and game spaces such as Roblox, Fortnight, and Minecraft, the safety of young users, especially children should be of significant importance in the metaverse dialogue.[68] At the outset, it can be challenging to track or gauge the ages of participants on the virtual world platforms. As early as the year 2007, there were reports of players posing as children, and others offering child pornography for sale on the 'Second Life' virtual world gaming platform. German prosecutors had launched an investigation into anonymous participants on Second Life who were reportedly buying sex with such players and child pornography products on this platform.[69] This heightened their awareness regarding the potential risks to child safety.

Reed and Joseff categorise the safety concerns for young people on the metaverse into five categories, namely, physiological dangers, psychological risks, privacy violations, false information and manipulation, and sexual content and abuse, out of which the latter three are most relevant to the scope of this article.[70]

In terms of privacy violations, virtual world platforms bank on the fact that children and young people are impressionable. These platforms collect simple motion and non-verbal data such as facial and eye movements, as well as sensitive data such as biometrics and emotions, which are then sold to ad firms for commercial gain.[71]

Next on false information and manipulation, the metaverse and similar virtual worlds are equipped with bots with the potential of being deceptive, consisting of deep fakes, and AR-altered realities, all of which make it difficult for children to discern between what is real and what is not.[72] One notes here that not all individuals, including both adults and young people that use these platforms, possess a high level of vigilance and perceptibility. This creates a significant possibility for manipulation to occur.

---

[68]Steven Vosloo, 'What happens to children when the physical and virtual worlds merge?' (UNICEF, 1 May 2023) <https://www.unicef.org/globalinsight/stories/metaverse-and-children> accessed 10 June 2023.
[69] Kate Connolly, 'Germany investigates Second Life child pornography' (The Guardian, 8 May 2007). <https://www.theguardian.com/technology/2007/may/08/secondlife.web20> accessed 15 June 2023.
[70]Nelson Reed and Katie Joseff, 'Kids and the Metaverse:
What Parents, Policymakers, and Companies Need to Know' (Common Sense Media, 23 March 2022). <https://www.commonsensemedia.org/kids-action/articles/what-are-kids-doing-in-the-metaverse> accessed 15 June 2023.
[71]ibid.
[72]ibid.

On sexual content and abuse, Reed and Joseff highlight the existence of virtual strip clubs, sexual grooming, and simulated sexual acts on these platforms.[73] In a recent incident, a BBC researcher assumed the identity of a 13-year-old within VRChat. She reported that her identity was never checked and while she was there, she had witnessed instances of simulated sexual activities, grooming, and racist remarks, all of which occurred where children may have been present.[74] Another instance of this was on Roblox, where minors have been found offering virtual dances, sexual acts and nude photographs off the platform to adults in exchange for Robux which is the virtual currency used on the virtual world platform, convertible into real money.[75]

Children and young persons being able to disguise themselves and dress their avatars in different skins would make for easier access to these forums on one level and would be enticing as 'forbidden fruit' on another. Something that should not be underestimated in this context is the potential for sexual harassment, rape threats and forms of abuse that is traumatic to the victim, given that with Virtual Reality, a user immerses their whole body in the experience at hand.

Additionally, there are risks to the information security of children such as virtual identity theft, followed by the duplication or forging of avatars that are then used for fraud and other cybercrimes.[76] Children and young persons are easier targets to be used in such crimes as they are often easily misled.

6. THE WAY FORWARD: RECOMMENDATIONS

In consideration of the preceding discussion, this section endeavours to present several recommendations.

The first step towards a safer future where virtual worlds will deliver more benefits than disadvantages for its users is that governments and private entities should allocate additional time and resources to research and development focused on comprehending the potential of the metaverse, more specifically its potential risks and adverse outcomes. Furthermore, the results of such research and development should inform policy-making, regulation drafting, technology

[73] ibid.
[74]Angus Crawford and Tony Smith, 'Metaverse app allows kids into virtual strip clubs' (BBC News, 23 February 2022) <https://www.bbc.com/news/technology-60415317> accessed 15 June 2023.
[75]EJ Dickson, 'Inside the Underground Strip-Club Scene on Kid-Friendly Gaming Site Roblox' (Rolling Stone, 12 September 2021) <https://www.rollingstone.com/culture/culture-features/roblox-virtual-strip-clubs-condo-games-sex-1197237/ > accessed 15 June 2023.
[76](n 66).

design and implementation processes, in order to anticipate and mitigate the potential harms, especially for children and young people.[77]

Secondly, where the scope of privacy regulations is widened to include the metaverse and similar virtual world platforms, its functionality will be challenged. For instance, how does an avatar on the metaverse function smoothly by mimicking the real user without capturing the biometric data it needs to do so?[78] Would this mean that privacy notices and consent popups should appear at each point of your initial interactions on parts of the metaverse, impeding a smooth user experience? While there is no definite answer to these questions, it could be recommended that developers must engage in collaborative efforts with governmental entities when designing the metaverse with a strong emphasis on data privacy regulations.[79] Similarly, it would be useful to keep abreast of the adoption of the EU's AI Act when planning AI systems which would be used in the metaverse and other similar platforms.[80]

Emerging technologies that complement and enhance the metaverse are increasingly invasive in their ability to capture sensitive biometric data. In such situations, it could be recommended that regulators be urged to draft dynamic legal frameworks with robust compliance processes considering the nature of emerging technologies.[81]

Moreover, data protection, privacy and cybersecurity impact assessments associated with the use of the metaverse must be conducted, and users should be provided transparent access to information on how their data is being processed and used to drive these systems forward.[82]

There needs to also be a re-evaluation of what privacy by design and security by design should mean within immersive interconnected environments such as the metaverse. This would mean taking steps such as strong enforcement of regulations and penalties for false and misleading advertising and targeting of users in the metaverse, behavioural manipulation, unrestricted tracking, use of anonymised data, unrestricted sharing, unconsented sale of user data, and the unconsented transfer of user data.[83]

---

[77] ibid.
[78] (n 24).
[79] ibid.
[80] (n 32).
[81] (n 24).
[82] Petrànyi et. al, 'Part 3 - Data protection challenges, the importance of cybersecurity, advertising regulation in the metaverse' (CMS, n.d.) <https://cms.law/en/int/publication/legal-issues-in-the-metaverse/part-3-data-protection-challenges-the-importance-of-cybersecurity-advertising-regulation-in-the-metaverse> accessed 5 June 2023.
[83]Girard Kelly et al., 'Privacy of Virtual Reality: Our Future in the Metaverse and Beyond' (2022) Common Sense Media.

Finally, there needs to be industry-wide consensus and standards for the use of the metaverse. This can begin at a national level and progress across borders over time.

7. CONCLUSION

In this article, an effort was made to discuss the concept of the metaverse and some of its use cases. A larger portion of this piece was dedicated to investigating the existing data protection and privacy concerns of the metaverse, expanding to connected aspects such as security concerns, sexual harassment and safety risks.

While the foregoing discussion highlighted the multitude of opportunities of the metaverse, the risks and potential harms associated with it appear to outweigh the benefits. The question that arises then is whether the metaverse should be abandoned entirely. Based on my evaluation, I am inclined to disagree.

I suggest here instead that security and privacy should not be optional but rather the fundamental building blocks of the metaverse. This coupled together with robust legal frameworks that are broad enough to tackle the evolving nature of the metaverse could potentially enable users and companies to fully leverage the benefits that the metaverse has to offer.

INTERNATIONAL LAW

FOREIGN CYBER INTERFERENCE IN ELECTIONS:

A NEW PARADIGM OF NON-INTERVENTION

Shabnam Mohamed

ABSTRACT

In recent years, cyber interference has risen as a threat to international order. New challenges emerge as cyber activities become weaponized by states, aiming to interfere with domestic affairs of foreign states, which historically could only be achieved through military measures largely prohibited by international laws.[1] Russia's interference in the 2016 U.S. presidential election (a multi-pronged operation that involved hacking/leaking stolen emails, as well as spreading disinformation on social media) exposed the ways in which cyber activities have scrambled traditional international law.[2] In fact, election interference by foreign States rises to the level of an "internationally wrongful act" when two elements are present. First, the act must be legally attributable to the State. Second, that act must breach an international obligation to the target State.[3] The burden of attribution must be resolved on a case-by-case basis.[4] And there are various substantive obligations that election interference is most likely to breach—the prohibition of intervention, the duty to respect the sovereignty of other States, and the obligation to respect human rights etc.[5] Nevertheless, the possible breach that has drawn the most attention in the cyber context is the prohibition of intervention.[6] As a result, this article will focus on rule of non-intervention.

A study indicates that both the U.S. and Russia have 'intervened in about 1 of every 9 competitive national-level executive elections' between 1946 and 2000.[7] Yet, Russia's influence campaign into U.S. cyber infrastructure in 2016 marked a significant escalation in election interference. As in 2016, the 2020 U.S. presidential election was riddled with allegations of Russian state authorized

[1] François Delerue, *Cyber Operations, and International Law* (Cambridge University Press 2020).
[2] Harriet Moynihan, 'The Application of International Law to State Cyberattacks: Sovereignty and Non-Intervention' (2019) Chatham House Research Paper 34 <https://www.chathamhouse.org/sites/default/files/publications/research/2019-11-29-Intl-Law-Cyberattacks.pdf > accessed 18 May 2022.
[3] Articles on State Responsibility for Internationally Wrongful Acts Article 2 UNGA Res 56/83, UN GAOR 56th Sess., Annex, Agenda Item 162, [2001] UN Doc A/RES/56/83 [hereinafter ARSIWA].
[4] Annachiaro Rotondo and Pierluigi Salvati, *Fake News, (Dis)information, and the Principle of Nonintervention*, Cyber Defense Rev. 209, 213 (2019).
[5] Christopher Whyte, A. Trevor Thrall, and Brian M Mazanec, *Information Warfare In The Age Of Cyber Conflict* (1st edn, Routledge 2020).
[6] Micheal N. Schmitt, 'Virtual" Disenfranchisement: Cyber Election Meddling In The Grey Zones Of International Law' (2018) 19 Chicago Journal of International Law.
[7] Levin D, 'Partisan Electoral Interventions by the Great Powers: Introducing the PEIG Dataset' (36 Conflict Management and Peace Science 88, 2 and 7 2016)<https://journals.sagepub.com/doi/full/10.1177/0738894216661190> accessed 19 May 2022.

influence operations which undermined public confidence in the electoral process and exacerbated socio-political divisions.[8] Consequently, there is broad consensus that many cyber operations lie within a 'grey zone' of legal uncertainty[9] particularly with respect to the applicability of the rule of non-intervention.[10] There are discussions among states, academics and private-sector bodies about the feasibility of creating an international mechanism, perhaps under the auspices of the UN, with responsibility for attribution of state-sponsored cyber operations that interfere in another state.[11] This raises a host of questions on the relevancy and limited flexibility of the rule in relation to hazards emanating from cyberspace. This article focuses exclusively on cyber election interference, excluding broader cyber-attacks associated with armed conflict or general misinformation. Thus, this article analyses the possibility of cyber election interference as a violation of international law with reference to their strengths, weaknesses, and their contemporary significance will also be analysed. Part I, is an examination of the attribution element. Part II, is an assessment of the rule of non-intervention in the cyber context followed by a conclusion.

1. INTERFERENCE AS A VIOLATION OF INTERNATIONAL LAW

1.1 ATTRIBUTION

According to the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) if an act is conducted by an organ of a State, the act is legally attributable to that State.[12] An organ of a State can be de jure or de facto.[13] A de jure organ exercises legislative, executive, judicial, or any other function central to the State government.[14] A de facto organ is an entity that is so closely integrated with the State that its actions are attributed to the State even though it is not a de jure organ.[15] The International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. U.S.*) has held that for the actions of a de facto organ to be

[8] 'Foreign Threats To The 2020 US Federal Elections' (2021) <https://www.dni.gov/files/ODNI/documents/assessments/ICA-declass-16MAR21.pdf> accessed 16 May 2022.
[9] Schmitt, (n 6).
[10] Ido Kilovaty, 'Doxfare: Politically Motivated Leaks and the Future of the Norm on Non-Intervention in the Era of Weaponized Information' (2018) 9 Harv Nat'l Sec J 146.
[11] The Federmann Cyber Security Center at the Hebrew University of Jerusalem is running a project on 'The Prospects for an International Attribution Mechanism for Cyber Operations' <https://csrcl.huji.ac.il/book/prospects-international-attribution-mechanism-cyber-operations> accessed 24 May 2022; RAND and Microsoft have proposed a Global Consortium for Cyber Attribution, 'A Global Cyber-Attribution Organization – Thinking it through, Internet Governance Project' <https://www.internetgovernance.org/2017/06/04/a-global-cyber-attribution-org/> accessed 24 May 2022.
[12] Art. 4, ARSIWA.
[13] Nicholas Tsagourias, 'Cyber Attacks, Self-Defence and the Problem of Attribution' (2012) 17 Journal of Conflict & Sec. L.
[14] Art. 4(1), ARSIWA.
[15] Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28 European J. Int'l L.

attributed to a State, there must be a relationship of complete dependence and control over the activities of that entity.[16] So long as there is some 'qualified, but real, margin of independence' between an entity and the State, there is no legal attribution of the entity's acts to the State.[17]

When non-State actors conduct cyber operations, the most likely basis for attribution is that they acted 'on the instructions of, or under the direction or control' of the State.[18] However, the International Law Commission (ILC) and legal scholars have not described the difference between the three terms with certainty.[19] This failure results in a definitional grey zone which is its major weakness.

For example, heavy funding of a group is not enough to establish the requisite degree of control for attribution.[20] In *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. U.S.*), the U.S. did not have the level of control required for attribution of the contras' actions, even though the U.S. financed, organized, trained, supplied and equipped the contras; selected the military and paramilitary targets of the contras; and planned the entire operation.[21] However, States are responsible for the actions of private groups, when actions result from their instructions, or occur under their 'effective' control.[22] Regarding instructions, it must be proven that the actions would not have transpired, if not for the State's instructions to conduct them.[23] In *Nicaragua*, U.S.' mere assistance in strategy-making did not show that the contras acted on its specific instruction. To prove 'effective' control, control over specific operations must be shown, such that the State's involvement was 'crucial' to these operations.[24] In *Nicaragua*, financial or logistical support could only show a 'general' potential for control, rather than actual control over specific acts[25] (such as indiscriminate killing of civilians/enforcement each specific operation of the contras) .

Yet, the standard used in *Nicaragua* (instruction, direction, and control) is ambiguous in the 'cyberspace' as many forms of relationship to a State could exist.[26] For instance, in 2020, Russia's

[16] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. U.S.*) Merits, 1986 ICJ Rep. 14 at 109, 111[hereinafter *Nicaragua*]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosn. & Herz. v. Serb. & Montenegro*) Judgement 2007 ICJ 43, at 390, 391 [hereinafter *Bosnian Genocide*].
[17] *Bosnian Genocide*, 206.
[18] Article 8, ARSIWA.
[19] Kubo Mačák, 'Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors' (2016) Journal of Conflict and Security Law.
[20] *Nicaragua* at 109, 115.
[21] ladyslav Lanovoy, The Use of Force by Non-State Actors and the Limits of Attribution of Conduct, 28 European J. Int'l L. 563, 575 (2017).
[22] Article 8, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. Doc. A/56/10 (Supp) Ch IV.E. (2001) ["ARSIWA Commentary"].
[23] *Bosnian Genocide*, at 397.
[24] *Nicaragua* at 110,111; *Bosnian Genocide* at 394.
[25] *Nicaragua* at 110.
[26] William Ossoff, 'Hacking The Domaine Reserve: The Rule Of Non-Intervention And Political Interference In Cyberspace' (2021) Harvard Int' L Journal.

intelligence services, Ukraine-linked individuals with ties to Russian intelligence and their networks, and Russian state media, trolls, and online proxies engaged in activities targeting the U.S. elections.[27] Some cases are discernible. When there is a contractual relationship between the State and a private company like a marketing agency/social media consultancy that conducts the election interference, there is attribution. When hackers carry out operations sans State involvement, there is no attribution.[28] In most cases, whether the relationship between the non-State actor and the State amounts to instructions, direction, or control is not straightforward due to lack of evidence to assess the relationship.[29] The lack of evidence may preclude States from being held liable.

It cannot be denied that attribution is difficult to prove. Nevertheless, if it can be established that the cyber operations were conducted from the territory of a particular State, the possibility that the territorial State may be in breach of its due diligence obligation arises.[30] This is a welcome alternative. The principle of due diligence obligates States to ensure that their territory is not used as a location from which serious adverse consequences for the target State are launched are ingrained in the *Tallinn Manual 2.0,*[31] *Corfu Channel*[32] and *Lotus*[33] cases. The *Tallinn Manual* experts have agreed that this principle is applicable in cyberspace. Yet, they have framed strict limitations[34] on its application thereby allowing States to identify and exploit loopholes in the law. Even if attribution is proven as discussed above (apart from the due diligence obligation), it must then be proven that a State's actions breached an obligation owed in international law to the other State.[35] In that regard, this article will discuss the rule of non- intervention.

[27] ibid.
[28] Schmitt, (n 8).
[29] ibid.
[30] Michael N. Schmitt, 'In Defense of Due Diligence in Cyberspace' (2015) Yale L.J.F.
[31] *Tallinn Manual 2.0.*
[32] *United Kingdom of Great Britain v. Albania* 1949 ICJ Rep.
[33] S.S. Lotus (*Fr. v. Turk.*), Judgment, 1927 PCIJ (separate opinion by Moore, J.).
[34] 43 – 46, *Tallinn Manual 2.0*.
[35] Art. 2, ARSIWA.

1.2.NON-INTERVENTION

The ancient rule[36] of non-intervention is the corollary of every state's right to sovereignty, territorial integrity and political independence[37] and is set out in many international law sources.[38] Oppenheim's treatise states that intervention is, as a rule, forbidden by international law there is no doubt.[39] The ILC's Draft Declaration on Rights and Duties of States includes the statement that every state has the duty to refrain from intervention in the internal or external affairs of any other State.[40] The Montevideo Convention goes even further, stating that [n]o state has the right to intervene in the internal or external affairs of another.[41] The UN Charter however does not expressly concern the rule of non-intervention applicable to states. However, Article 2(7) of the Charter prohibits all organs of the UN 'to 'intervene' in matters which are essentially within the domestic jurisdiction of any State.[42] Further, the applicability of this customary international law[43] rule in the cyber context was confirmed in the 2015 UN Group of Governmental Experts (GGE) report that the General Assembly subsequently endorsed.[44] Thus, the rule is well established.

The ICJ's articulation of the elements of the rule in *Nicaragua* is cited frequently. Accordingly, a prohibited act of intervention must relate to matters that involve the internal or external affairs of the target State, that is, its *domaine réservé*; and be coercive in nature.[45] Both must be satisfied before a breach exists. The ICJ only defined aspects of the rule which 'appear to be relevant to the

[36] Most experts attribute the principle's first explicit articulation to Emmerich de Vattel, who noted in Book I, Chapter III of his treatise that: In short, all these affairs being solely a national concern, no foreign power has a right to interfere in them, nor ought to intermeddle with them otherwise by its good offices, unless requested to do it, or induced by particular reasons. If any intrude into the domestic concerns of another nation and attempt to put a constraint on its deliberations they do it an injury.

[37] L Oppenheim, R. Y Jennings and Arthur Watts, *Oppenheim's International Law* (Longman 1996).

[38] The principle is included in the constituent instruments of regional organizations, as well as in other multilateral and bilateral treaties. It is reflected in Article 3, Charter of the Organization of American States; Article III (2), Charter of Organization of African Unity; Article 2 (2)(e) and (f), Charter of ASEAN, among others. It has also been reflected in numerous declarations adopted by international organizations and conferences including resolutions of the General Assembly from the mid-1960s to 1980s, during which there was disagreement between states over the scope of the principle. The Final Act of the Conference on Security and Co-operation in Europe (the Helsinki Final Act, 1 August 1975) includes a detailed statement of the principle (Principle VI). The non-intervention principle has been frequently promoted in documents by non-Western states, including the Bandung Principles (agreed between 29 countries from Asia and Africa in 1955 at the Bandung Conference), and China's Five Principles of Peaceful Co-Existence.

[39](n 36)

[40] Article 3, ILC's Draft Declaration on Rights and Duties of States.

[41] Article 8, Montevideo Convention.

[42] Article 2(7), U.N. Charter.

[43] UNGA, The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, U.N.Doc. A/Res/2625(XXV) (1970), ["Friendly Relations Declaration"]; *Nicaragua*, at 264; *Armed Activities on the Territory of the Congo* (*D.R.C. v. Uganda*), Judgment, 2005 I.C.J. Rep. 168 at 162.

[44] 'Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security' (UN Secretary-General 2015).

[45] Micheal Schmitt*, Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* §66(6) (Cambridge Univ. Press, 2d ed., 2017) [hereinafter *Tallinn Manual*].; *Nicaragua* at 205.

resolution of the dispute'.[46] The dispute in question was forcible intervention. Hence the court did not opine on how intervention/coercion might be defined outside the context of forcible intervention. Accordingly, the ICJ's dicta on the rule should not be read prescriptively. As a result, variations in the way that states define the elements of the rule exist. Scholars contend the rule is vague and elusive[47] and much depends on context and relationships between the states concerned.[48] Ultimately, this conceptual debate about the scope of the customary rule of non-intervention can only be resolved by looking to state practice and *opinio juris.*[49]

Traditionally, non-intervention concerned territorial integrity, while non-interference concerned broader political independence; however, scholars now refer to each interchangeably.[50] For example, China's Five Principles of Peaceful Co-Existence include 'mutual respect for sovereignty and territorial integrity' and 'non-interference in each other's internal affairs'.[51] Under either conception, financial support to non-violent political and civil society organizations does not, on its own, constitute unlawful intervention.[52]

Elections represent a paradigm in the *domaine réservé* as it's the State's 'choice of political system',[53] and involve rights like the freedom of expression, the right to privacy, and the right to vote. Indeed, international law generally does not restrict States' foreign financial contributions to entities in other States[54] and allows States to regulate their own campaign contribution laws.[55] Whereas some countries have banned foreign political contributions, others have not. A foreign State may provide secure online communications access to individuals whose right to political expression is impeded by their own State during an election. This would not 'interfere' into the latter's *domaine réservé*. The operation might violate other obligations owed to the latter, but not rule of non-intervention.[56]

---

[46] *Nicaragua*, at 205.
[47] V. Lowe, *International Law* (Oxford University Press 2007) 104.
[48] Jamnejad and Wood (2009), 'The Principle of Non-intervention', at 367.
[49] Nicholas Tsagourias, 'Electoral Cyber Interference, Self-Determination And The Principle Of Non-Intervention In Cyberspace' (2019) SSRN Electronic Journal.
[50] Niki Aloupi, 'The Right to Non-intervention and Non-interference' (2015,) Cambridge J. Int'l Comp. L.; Ricardo J. Alfaro, 'The Rights and Duties of States' (1959) RCAD.
[51] D Raynova, 'Towards A Common Understanding Of The Non-Intervention Principle', European Leadership Network (2017).
[52]Maziar Jamnejad and Michael Wood 'The Principle of Non-intervention' (2009) Leiden J. Int'l L.
[53] *Nicaragua.*
[54] 'Strengthening International Law to Support Democratic Governance' Democracy Reporting International (2012).
[55] Article 7, Comm. Ministers, Recommendation on Common Rules Against Corruption in the Funding of Political Parties and Electoral Campaigns, Rec. 2003; European Comm'n for Democracy Through Rule of Law, Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources, CDL-AD (2006) 014, 5-9 (Mar. 31, 2006).
[56] Schmitt, (n 29).

To complicate it further, the second element of coercion forms the 'very essence' of the rule non-intervention.[57] It refers to an affirmative act designed to deprive another State of its freedom of choice, that is, to force that State to act in an involuntary manner or involuntarily refrain from acting in a particular way.[58] A coercive act requires actual intervention into the affairs of the State. Mere influence or interference, however, is permitted and is not coercive intervention.[59] The factor differentiating influence from coercive intervention is that coercion requires a State to compel the target State to engage in a course of action that it would not otherwise.[60] Intent is vital to show that the spread of information in cyberspace is a coercive act.[61] To constitute coercion, the operation must alter the actions of the target State through false information, rather than merely influence the opinions of voters.[62] In fact, the dissemination of false/distorted information have been particularly recognized as interference against internal political and social interests,[63] since it infringes the protected rights of States and people to fully develop and use their information system through mass media.[64]

Therefore, the challenge is to identify the point at which permitted influence becomes prohibited coercion. One approach to the issue is to distinguish election-related cyber activities that affect the State's ability to conduct an election (direct) from those that target voter attitudes (indirect). Foreign States could directly tamper with the vote count, disable election machinery/cause malfunction, block e-voting etc.[65] Foreign States can indirectly disrupt elections by engaging in activities directed at voters. For example, false tweets during the 2016 U.S. elections to claim voters could cast their vote for Hillary Clinton through text messaging. [66] Moreover, various other factors could determine whether a foreign information campaigns (including disinformation) during an election is considered coercive. An operation that targets vulnerabilities of the State, such as ethnic/religious/social divisions, would be more prone to being seen as coercive.[67] Particularly, the Russian cyber disinformation campaign exploited racial divisions in the U.S. to undermine public

[57] *Nicaragua.*
[58] 66(18), *Tallinn Manual*.
[59] Nicholas Tsagourias, 'Electoral Cyber Interference, Self-Determination, And The Principle Of Non-Intervention In Cyberspace', *Governing Cyberspace, Behavior, Power, and Diplomacy,* (2020) 44, 55.
[60] Tomoko Nagasako, 'Global Disinformation Campaigns and Legal Challenges' (2020) Int. Cyber Security Law Review.
[61] Tsagourias, (n 46).
[62] ibid.
[63] UNGA, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, U.N.Doc. A/RES/36/103 (1981), I(c), II(c) ["Internal Affairs Declaration (1981)"]; 'A Multi-Dimensional Approach to Disinformation: Report of the Independent High Level Group on Fake News and Online Disinformation' European Commission (2018).
[64] Tsagourias, (n 46).
[65] Ossoff (n 23).
[66] ibid.
[67] Darin E. W. Johnson, 'Russian Election Interference and Race-Baiting' (2019) Colum J Race & L.

confidence in the electoral processes and institutions, revealing how those divisions can be weaponized. The campaign fed on racial divisions arising from institutionalized state practices that have a disparate discriminatory effect on racial minorities.[68]

However, another layer of complexity arises when 'true' information is pushed to the electorate by a foreign State. One might ask if disseminating true material can be considered coercion. Scholars have struggled to find a coercive aspect to the Russian intervention during the 2016 presidential election.[69] Russian hackers stole and leaked sensitive personal emails sent by Hillary Clinton's campaign chairman John Podesta, a practice known as 'doxing'.[70] Steve Barela argued that this act skilfully influenced voters to view something (a candidate in this case) in a certain manner.[71] The fact that the material was shopped to different outlets and released piecemeal for maximum effect certainly speaks to the intent to manipulate. Nonetheless, the basic structure of the alleged coercion is still very hard to elucidate. This raises critical questions of international law, as more success has been achieved by influencing the way voters think, rather than tampering with actual vote tallies. In fact, once again in 2020 Russia did not, attempt to alter any technical aspect of the voting process, including voter registration, ballot casting, vote tabulation, or reporting results.[72] Instead, its online influence actors sought to affect U.S. public perceptions of the candidates, as well as advance Moscow's longstanding goals of undermining confidence in U.S. election processes and increasing socio-political divisions among the American people.[73] Thus, as it stands, the law is not clear about whether, and if so when, information operations can qualify as coercive.

2. CONCLUSION

This article concludes that non-intervention is a norm that states universally recognize but is the subject of broad ambiguity as to its applicability in the cyberspace. The ambiguity allows States to not only capitalize but avoid consensus condemnation of their cyber operations as violations of binding international legal norms. This demands persistent action by the states to clarify rules so as to respond to new threats that emerge in the cyberspace. Thus, states that are interested in applying the rule of non-intervention to cyberspace must seek to close the gaps in conceptions of the rule's scope. There is a need for the adoption of *sui generis* legislation to serve as a deterrent to cyber election interference in other countries' political systems.

[68] ibid.
[69] ibid.
[70] Wenqing Zhao, 'Cyber Disinformation Operations (CDOs) and a New Paradigm of Non-Intervention' (2020) 27 UC Davis J Int'l L & Pol'y 35.
[71] Steven J. Barela, 'Cross-Border Cyber Ops to Erode Legitimacy: An Act of Coercion' (2017) Just Security.
[72] (n 8) at 1.
[73] ibid at 3.

Given the scarcity of *opinio juris* on the applicability of non-intervention to cyber operations, additional statements and additional states are needed to help fill in these gaps and determine which definition of the rule of non-intervention ultimately prevails. Further a binding Security Council resolution, or soft law instruments such as a General Assembly resolution or report from the UN Group of Governmental Experts (GGE) would have a clearer basis for claiming violations of international law. Thus, States will feel empowered to respond to cyber interventions with a range of countermeasures, including non-cyber measures like freezing assets or suspending trade agreements that could deter the intervening state from conducting operations in the future.

A CRITIQUE OF THE EFFECTIVENESS OF THE INTERNATIONAL LEGAL REGIME IN RESPONDING TO THE RUSSIA-UKRAINE CONFLICT, WITH REFERENCE TO THE SOURCES OF INTERNATIONAL LAW

Thishmi Wanigasooriya

ABSTRACT

The conflict between Russia and Ukraine has shaken the core principles of public international law threatening the world peace and security. The effect of the war between Russia and Ukraine has not been confined to the said two countries but also has impacted the world community, directly or indirectly. The purpose of this paper is to address how the world community could respond to aggression of Russia upon Ukraine in light of the courses of action available in international law. In order to do this, an extensive study is made on the sources of international law. The paper discusses to what extent the traditional sources of international law are effective in the context of Ukraine-Russia conflict, exploring their strengths, weaknesses and contemporary significance while addressing the need to reformulate key sources of international law responding to the changes that has been taking place in the international plane.

The research methodology adopted in this article is doctrinal and based on black-letter law. Desk research will be used to review existing literature on the subject until 2023.

1. INTRODUCTION

The ongoing dispute between Russia and Ukraine is not a new crisis in the international arena but a conflict that has been developing for past eight years since Russia's annexation of Crimea.[1] The separatist movements by pro-Russian groups in the Donbas region further deteriorated the relationship between the two countries as they were alleged to have been backed by Russian government.[2] In this context, on 1 February 2022 President Putin signed two decrees recognizing the independence of the two areas of Donbas region; Donetsk and Luhansk unilaterally, following which he issued an order for armed forces amassing at the borders of Ukraine to carry out peace

[1] Jonathan Masters, Ukraine: Conflict at The Crossroads of Europe and Russia (Council on Foreign Relations, 14 February 2023) <http://www.cfr.org/backgrounder/ukraine-conflict-crossroads-europe-and-russia> accessed 17 June 2022.

[2] Russia, Ukraine & International Law Occupation Armed Conflict and Human Rights (Human Rights Watch, 4 March 2022) <http://www.hrw.org/news/2022/02/23/russia-ukraine-international-law-occupation-armed-conflict-and-human-rights> accessed 3 May 2022.

keeping operation in the self-proclaimed Donetsk People's Republic and Luhansk People's Republic.[3]

The focus of this paper is to analyze rules relating to use of force by one state over another state under current international law and the way those rules operate in the context of Ukraine-Russia conflict. Here I would also look into the justifications put forward by Russia for the use of force such as self-defense and unilateral humanitarian intervention only insofar as they may shed light upon the legality of the issue in question to keep the analysis within sizeable bounds.

2. SOURCES OF INTERNATIONAL LAW AND THEIR APPLICABILITY ON UKRAINE-RUSSIA CONFLICT

Despite the absence of legislature to create laws that are binding upon everyone, international law does exist and is ascertainable.[4] Sources of international law provides for rules of international law and if a particular rule is attested by one or more of the recognized sources, then it may be accepted as a part of international legal system.[5]

International law governing the use of force (*jus ad bellum*) is a fundamental aspect of the international legal system as it necessarily impacts on conditions of people, states and international society.[6] The international law and order has been greatly shaken with the invasion of Ukraine by Russia in the name of a "special military operation" because territorial sovereignty is an essential foundation of international relations as pointed out by ICJ in *Corfu channel case*.[7]

Here I would assess the legality of Russian military entering the territory of Ukraine in light of selected key sources of international law by organizing them under two headings: traditional mainstream sources of international law and new sources of international law, a classification of sources of international law which I employed from Cardenas.[8]

2.1 Applicability of Traditional Mainstream Sources of International Law

Article 38(1) of the Statute of International Court of Justice (hereinafter 'ICJ Statute') identifies treaties, customs and general principles of international law as primary sources of international law whereas judicial decisions and writings of highly qualified publicists are identified as subsidiary

[3] ibid.
[4] Malcolm Shaw, International Law (8th edn, CUP 2017) 51-53.
[5] ibid.
[6] Michael Wood, International Law and The Use of Force: What Happens in Practice? (2013) 53 IJIL 345.
[7] [1949] ICJ Rep 244.
[8] Fabian Cardenas, A Call for Rethinking the Sources of International Law; Soft Law and The Other Side of The Coin (2013) 8 Mexican Yearbook of International Law 355.

sources of law. In this section I would only discuss aforesaid primary sources of international law as they all based on the idea that rules of international law come into being through international consent and the intent to be bound by such which can be construed explicitly or impliedly.[9]

2.1.1 Treaties

The reference to "international conventions" in Art 38(1)(a) of the ICJ statute refers to both bilateral and multilateral treaties.[10] The significant feature of treaties lies in the fact that rules established and rights and obligations to which they give rise are only binding upon the parties to such treaties.[11] This aspect is highlighted in *North Sea continental shelf case*[12] which involves a dispute between Germany against Holland and Denmark over delimitation of the continental shelf. The Court expressly stated that Germany was under no obligation to comply with the terms of the relevant convention as they have not ratified it.

Treaties could also be identified under three categories: law making treaties that are intended to have a universal application, treaty contracts which are applicable to two or small number of states and constitutive treaties that attempt to establish a 'regime' which will also extend to nonparties such as UN charter.[13]

The general prohibition of use of force in international disputes is enshrined in Article 2(4) of UN Charter provides that member states should refrain from threat or use of force against the territorial integrity or political independence of any state whereas Article 2(3) provides that states should settle dispute through peaceful means. It is also evident in the Charter that not all uses of force amount to aggression and there are certain exceptions that has been provided in the Charter itself. Article 51 permits individual and collective self-defense, whereas Articles 39 and 42 provide for the Security Council's right to authorize force to restore international peace in the face of a "threat to the peace, breach of the peace or act of aggression."[14]

Mikanagi has put forward the argument that the unilateral stationing of armed forces in a disputed area runs contrary to Article 2(4) of the UN Charter as there is an obligation to pursue settlement

[9] ibid.
[10] James Crawford, Brownlie's Principles of Public International Law (8th edn, OUP 2013) 21-32.
[11] Robert Jennings and Arthur Watts, Oppenheim's International Law (9th edn, OUP 1996) 33.
[12] [1969] ICJ Rep 3.
[13] Shaw (n 4) 69-72.
[14] Mary O'Connell and Mirakmal Niyazmatov, What Is Aggression?; Comparing The Jus Ad Bellum And The ICC Statute (2012) 10 J. Int'l Crim. Just. 189.

via peaceful means.[15] He relies on the ICJ's Advisory Opinion on the *Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory*[16] to argue that the construction of a wall in the disputed territory contravened the principle of the inadmissibility of the acquisition of territory by force enshrined in Article 2(4) of the UN Charter.[17] On this note, it could be said that none of the justifications offered by President Putin for the invasion of Ukraine could conceivably be understood as falling within any of the exceptions provided under said treaty.

Ukraine has filed an action against Russia in International Criminal Court (hereinafter 'ICC') on the ground that Russia misinterpreted the Genocide Convention to justify the invasion of Ukraine.[18] However, Russia is not a party to Rome statute. This highlights the inability of international law to create rules binding upon every state, since they are legally binding only upon the states that have consented to be bound by its provisions.[19] The effect of this is that protection offered by treaty is weakened. However, in this case, although Russia is not a party to the Rome Statute, which established the ICC, Ukraine has accepted the ICC's jurisdiction for offenses that have occurred on its territory since 2013.[20] On this basis on 17 March 2023 ICC issued an arrest warrant against two individuals: President Putin for (i) for having committed the acts directly, jointly with others and/or through others (Article 25(3)(a) of the Rome Statute) and (ii) for his failure to exercise control properly over civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control, pursuant to superior responsibility (Article 28(b) of the Rome Statute), and Maria Lvova-Belova for allegedly being responsible for responsible for the war crime of the unlawful deportation of population (children) and that of the unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute).[21]

[15] Constantinos Yiallourides, Markus Gehring and Jean-Pierre Gauci, The Use of Force in Relation to Sovereignty Disputes over Land Territory(The British Institute of International and Comparative Law 2018) 44-45.
[16] [2004] ICJ Rep 136.
[17] Yiallourides, Gehring and Gauci (n 15) 44-45.
[18] John Bellinger, How Russia's Invasion of Ukraine Violates International Law (Council on Foreign Relations, 28 February 2022) <http://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law> accessed 7 June 2022.
[19] Andrew Guzman, The Consent Problem in International Law (2010) Berkeley Program in Law and Economics Working Paper Series <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1887&context=law_faculty_scholarship> accessed 16 August 2023 4-5.
[20] Bellinger (n 18).
[21] International Criminal Court; Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (2023) < www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> accessed 25 March 2023.

There are other legal obligations that provide for prohibition of the use of force such as the Pact of Paris. The Pact of Paris which contains provisions prohibiting the use of force by state parties in the conduct of their foreign affairs was ratified by the Soviet Union, and as successor states to this entity both Russia and Ukraine could said to be bound by it. [22] The conflict between Ukraine and Russia shows that consent of a state to a treaty does not ensure its compliance and the fact that even when a state consents to a rule and is willing to comply, its position may change over time.[23]

2.1.2 Customary International Law

Customary international law has been recognized as a primary source of international law under Article 38(1)(b) of the ICJ statute. Customary international law could be determined according to actual behaviour of the state and subjective belief that such behaviour is law.[24] The importance of both actual practice and opinion juris in ascertaining customary international law has been emphasized in the *Libya/ Malta case*.[25]

In *Brownlie* it is contended that establishing opinion juris is difficult and it would depend heavily on the circumstances of the each case.[26] Shaw poses the question as to where to draw line between actions adopted by state that reflect a rule and an act prompted by some other reason.[27] Some writers deny that custom can be significant today as a source of law, noting that it is too clumsy and slow-moving to accommodate the evolution of international law, while others declare that it is a dynamic process of law creation and more important than treaties since it is of universal application.[28] However, to avoid customary international law rule, states can become a persistent objector before practice become solidifies as a customary international law rule.[29] The *Anglo-Norwegian Fisheries case*,[30] which relates to dispute between UK and Norway on recognition of baselines from which to measure the territorial sea, suggests that where a state acts contrary to an established customary rule, and other states acquiesce to this, then that state is to be treated as not bound by the original rule.[31]

[22] Curtis Doebbler, Russia's Use of Force Against Ukraine: An International Law Perspective (Jurist, 2 March 2022) <http://www.jurist.org/commentary/2022/03/curtis-doebbler-russia-use-of-force-against-ukraine/> accessed 6 June 2022.
[23] Guzman (n 19) 9.
[24] Shaw (n 4) 53-55.
[25] [1985] ICJ Rep 13, 29.
[26] Jennings and Watts (n 11) 23-28.
[27] Shaw (n 4) 54.
[28] ibid.
[29] TL Stein, The Approach Of The Different Drummer; The Principle Of The Persistent Objector In International Law. (1985) 26 Harv Intl LJ 457 -482.
[30] [1951] ICJ Rep 116.
[31] Shaw (n 4) 66-69.

Sometimes international organizations may be instrumental in creating customary rules.[32] Resolutions passed by United Nations General Assembly and the United Nations Security Council in reaction to specific incidents involving the practice of states are important in identifying and interpreting rules of customary international law. The widespread condemnation of certain action or activity by the majority of states is strong evidence of its illegality.[33] United Nations Security Council Resolutions adopted by majority vote in response to the Israeli-Palestinian conflict calling for the "withdrawal of Israel armed forces from territories occupied in the conflict" and "termination of all claims or states of belligerency" shows that the rule on the non-use of force applies to territorial disputes is also supported by state practice.[34]Similarly the United Nations General Assembly emergency special session having come to a head on 2 March 2022 included a draft resolution condemning Russian aggression against Ukraine which was passed with 141 affirmative votes, cementing international solidarity in condemnation of the invasion.[35]

Thus, it could be said that use of force or act of aggression is against customary international law rules and Russia's act of invading Ukraine may amount to breach of a jus cogent norm as well.

2.1.3 Jus Cogent Norms and Erga Omnes Obligations

Article 53 of Vienna Convention on the Law of Treaties 1969 views *jus cogent* as a norm accepted and recognized by the international community and from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. The International Law Commission (ILC) during its work on the codification of the law of treaties states that "The law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in [international law] having the character of jus cogens."[36]

There is a wide consensus to the effect that the prohibition of the use of force is an obligation *erga omnes*, i.e. an obligation owed to international community as a whole and therefore finding that a state has been the victim of a use of force might open the door for third party countermeasures.[37] Accordingly, several sanctions were imposed by European Council, USA and a number of other countries against Russia for annexing Crimea in 2014 as well as against military operation launched by Russia in Ukraine in 2022. However, the problem with *jus cogent* norms is that it lacks the scope

[32] ibid 61.
[33] Yiallourides, Gehring and Gauci (n 15) 15-17.
[34] ibid 24.
[35] Kieran O'Meara, Understanding the Illegality of Russia's Invasion of Ukraine (E-International Relations, 13 March 2022) <http://www.e-ir.info/2022/03/13/understanding-the-illegality-of-russias-invasion-of-ukraine/> accessed 2 June 2022.
[36] ILC, Draft Articles on the Law of Treaties with Commentaries (18 July 1966) UN Doc A/9309/Rev.1.
[37] Yiallourides, Gehring and Gauci (n 15) 30.

or flexibility to be a useful tool for states seeking to address global problems as equally evident in Russia – Ukraine conflict.[38]

2.1.4 General Principles of Law Recognized by Civilized Nations

The third type of source of international law under ICJ Statute are the "general principles of law" recognized by "civilized nations." One of the main problems associated with general principles of law are that locating such principles and lack of clarity as to what they are.[39]

The ILC's special Rapporteur Marcelo Vázquez-Bermúdez in his first report observes that there are two types of general principles in the sense of Article 38(1)(c) of the ICJ Statute which can either be derived from national legal systems or formed within the international legal system.[40] General principles of international law mainly perform a gap filling function in international legal system as international courts and tribunals have always borrowed concepts from domestic law if they can be applied to relations between states.[41] Prohibition of abusing a dominant position is within the scope of the first category, but there is also evidence of this principle in the international legal system.[42]This principle was reiterated in *Wimbledon case*[43] where it was expressed that Germany cannot abuse its dominant position to prevent access to Kiel Canal.[44] Similarly Russia cannot abuse its dominant position to intervene with the domestic affairs of Ukraine.

Russia has undertaken several obligations upon itself to commit to peace and security under 1994 Budapest Memorandum where Russia reaffirmed its commitment "to respect the independence and sovereignty and the existing borders of Ukraine" and the "obligation to refrain from the threat or use of force against Ukraine."[45] According to *pacta sunt servanda*, which is one of the crucial principles of international law, Russia is bound by the agreements which it has undertaken.

Overall, it is clear that mainstream sources of law under current international law are still controlled by states, and are often used to further their specific interests and thus inadequate to deal with challenges of the modern world.[46] Hence, despite the illegality of Russia's conduct in commencing

[38] Guzman (n 19) 39.
[39] International Law Research Resources; (Law.gwu.libguides.com, 2022) <https://law.gwu.libguides.com/c.php?g=515695&p=3525705#s-lg-box-11013605> accessed 12 June 2022.
[40] Moritz von Rochow, The Prohibition of Abusing a Dominant Position as a General Principle of International Law; Russia's Biggest Honeypot In Ukraine (*OpinioJuris*, 13 May 2022) < http://opiniojuris.org/2022/05/13/the-prohibition-of-abusing-a-dominant-position-as-a-general-principle-of-international-law-russias-biggest-honeypot-in-ukraine/> accessed 7 June 2022.
[41] Jennings and Watts (n 11) 40.
[42] ibid.
[43] SS **Wimbledon** (Britain v Germany) [1923] PCIJ Series A01.
[44] Moritz von Rochow (n 40).
[45] India Trummer, Ukraine v. Russia; The Question of Jurisdiction and the Legal Implications of Russia's Actions in Ukraine (2021) 29 Tul J Int'l & Comp L 175, 175-76.
[46] Cardenas (n 8).

special military operation in Ukraine, the mainstream sources of international law have been unable to create an adequate international response to the rapid devastation that is occurring.

2.2 Applicability of New Sources of International Law

The emergence of alternative ways of law ascertainment has not been arbitrary but rather a response to a particular characteristics of growing fields of international law.[47] Birnie and Redgwell argue that soft law, although not contained in Article 38 of the ICJ Statute, has legal authority as "they are carefully negotiated, and carefully drafted statements, which are in many cases intended to have normative significance."[48] In this section I would analyse the importance of works of international bodies such as ILC, resolutions passed by United Nations General Assembly and United Nations Security Council and other soft law instruments in the context of Russia-Ukraine conflict.

The United Nations Security Council and United Nations General Assembly resolutions, when adopted by consensus, are generally considered as statements of customary international law or authoritative interpretations of the UN Charter and other rules and principles of international law.[49] Russia's invasion of Ukraine breaks international law by violating United Nations Security Council Resolution 2202 and thereby violating Article 25 of UN charter which states that United Nations Security Council resolutions are legally binding. Moreover, the draft resolution calling for Russian aggression in Ukraine to be brought to an end was vetoed by Russia which was viewed as usurpation of not only the function of the Council but also that of the UN broadly as set out in Article 1(i), and the equally contravened the final section of Article 27(iii), which states that "a party to a dispute shall abstain from voting," to seriously abuse the UN system undermining its efficacy as a mechanism of international justice.[50] Hence it could be said that international legal system remains blocked when attempting to address violations done by greater powers and their allies due to having veto power within the security council.[51]

In such circumstances Rebecca Barber contends that United Nations General Assembly could play in line with the Uniting for Peace Resolution (UPR) which was introduced in the backdrop of the Korean war, aimed at circumventing the Security Council's permanent members' veto.[52] The

[47] ibid.
[48] Alan Boyle and Catherine Redgwell, Birnie, Boyle, and Redgwell's International Law and the Environment (2nd edn, OUP 2002) 25.
[49] Yiallourides, Gehring and Gauci (n 15) 17.
[50] O'Meara (n 35).
[51] Milena Sterio, Russia v. Ukraine: The Limits of International Law (INTLAWGRRLS, 28 February 2022) <https://ilg2.org/2022/02/28/russia-v-ukraine-the-limits-of-international-law/> accessed 8 June 2022.
[52] Atul Alexander, Russia-Ukraine Conflict: Has International Law Failed? (The Leaflet, 28 February 2022) <https://theleaflet.in/russia-ukraine-conflict-has-international-law-failed/> accessed 22 June 2022.

invocation of UPR implies that if the Security Council fails to discharge its primary function of maintaining international peace and security, the United Nations General Assembly can intervene and recommend collective measure[53] as expressed in *Kosovo Advisory Opinion*.[54] However, it is important to note that unlike United Nations Security Council resolutions, United Nations General Assembly resolutions are not legally binding.

The United Nations General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States provides that states have a duty to refrain from the threat or use of force to violate the existing international boundaries of another state or as a means of solving international disputes.[55] In the *Nicaragua case*,[56] ICJ has observed that this declaration's adoption by the majority of states "affords an indication of their opinio juris as to [customary international law] on the prohibition of use of force."[57]

The work of the ILC play an important role in the codification and progressive development of international law whereas its drafts are often referred to in the judgments of the ICJ.[58] Article 21 of the ILC Articles on State Responsibility states that "wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations." However, in this instance Ukraine neither committed nor threatened to commit an armed attack against Russia or any other UN member state. Even if Russia could show that Ukraine had committed or planned to commit attacks on Russian allies in the Ukrainian regions of Donetsk and Luhansk, Article 51 of UN Charter would not be applicable as Donetsk and Luhansk are not UN member states.[59] Russia cannot justify its act on the grounds of unilateral humanitarian intervention either even under Genocide convention as it does not authorize convention parties to use force to remedy acts of genocide or serious human rights abuses.[60] Thus, it could be said that conduct of Russia cannot be taken within the purview of Article 21 of the ILC Articles on State Responsibility in order to escape from its liability.

[53] ibid.
[54] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) [2010] ICJ 14.
[55] UNGA, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (24 October 1970) 25th Session (1970) UN DOC A/RES/2625(XXV).
[56] [1989] ICJ 14.
[57] ibid.
[58] Yiallourides, Gehring and Gauci (n 15).
[59] Bellinger (n 18).
[60] ibid.

3. CONCLUSION

In a nutshell, it could be said that this paper has attempted to assess the effectiveness of the sources of international law in determining legality of invasion of Ukraine by Russia. Though this action of Russia has given rise to many issues in international law, I have only looked into how the act of Russian military forces entering to Ukraine territory on 24 February 2022 reflects on international law.

When analyzing different sources of international law, it is quite clear that despite the justifications put forward by Russia to justify its action, the actions of Russia constitute illegal use of force and seems to be qualified as an act of aggression against another state. However, being a super-power in international arena, sanctions imposed to condemn the acts of Russia have not been effective to the extent they would have been with other countries. Unless considerable intervention is made by international community, Ukraine-Russia conflict is likely to continue for quite some time threatening the world peace and order.

LEGAL IMPLICATIONS WITH REGARDS TO THE USE OF OUTER SPACE FOR STRATEGIC AND COMMERCIAL PURPOSES IN THE 21ST CENTURY

Udam Wickremasinghe

ABSTRACT

This paper explores the evolving legal landscape surrounding strategic and commercial activities in outer space during the 21st century. It delves into international treaties like the Outer Space Treaty and national space laws, highlighting key principles such as the prohibition of nuclear weapons and non-appropriation of celestial bodies. Challenges, including property rights in space resources and the lack of a clear definition of "peaceful use", are examined. The paper underscores the need for updated regulations, especially in the context of private space enterprises, space debris management, and resource allocation. It emphasizes international cooperation and collaboration as crucial for responsible and sustainable outer space utilization in the modern era.

1. THE CURRENT GLOBAL SPACE GOVERNANCE FRAMEWORK

The fundamental principles of space law, however, are very different than other international regulatory laws. They were established by the Legal Subcommittee of the UN Committee for the Peaceful Use of Outer Space (UNCOPUOS),[1] and they are as follows: prohibition of national appropriation of space and celestial bodies; equality of rights for all States to the free use of space throughout its continuity; freedom of space research; preservation of sovereign rights of States over the space objects left in their hands.

Two preambular paragraphs of the Outer Space Treaty[2] should be remembered in particular because they clearly state the reasons for its conclusion: the desire "to contribute to broad international cooperation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes" and the conviction "that such cooperation will contribute to the development of mutual understanding and goodwill among States and People".[3] Both accurately capture the historical context of the Outer Space Treaty's inception, which not only addressed the

[1] 'COPUOS' <https://www.unoosa.org/oosa/en/ourwork/copuos/index.html> accessed 11 June 2023.
[2] 'The Outer Space Treaty' <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html> accessed 5 June 2023.
[3] 'Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies' <https://legal.un.org/avl/ha/tos/tos.html> accessed 11 June 2023.

scientific and technological demands of the time but also made a significant contribution to a détente in the Cold War.[4]

International law refers to the binding agreements that control state space operations. The 1967 Outer Space Treaty (OST), which lays out the fundamental rules for the exploration and use of space, including freedom of entry, non-appropriation, peaceful objectives, liability, and cooperation, is the cornerstone of international space law.[5] This treaty forbids the placement of weapons of mass destruction in space, forbids military operations on celestial bodies, and lays out legally binding guidelines for the peaceful exploration and use of space. It also binds all parties to use outer space only for peaceful purposes. Irrespective of the nation's level of technological or economic development, the treaty guarantees that space will be used for the benefit of all people.[6] It could be claimed that the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, provides a general legal foundation for the peaceful uses of space and a framework for the evolving law of space.[7] It is possible to say that the four additional accords deal directly with some of the ideas contained in the 1967 Treaty. Many nations have ratified the space treaties, and numerous others uphold their fundamental concepts.

The "International policy" refers to non-binding agreements that offer suggestions or recommendations for state space activity. These include decisions made by the United Nations General Assembly (UNGA) such as the 2013 UNGA resolution on transparency and confidence-building measures in space activities, which urges nations to exchange information and hold talks about their space plans.[8] Another illustration is the UNGA resolution 2019 on decreasing space risks through norms, regulations, and principles of responsible behaviours, which calls on governments to create and carry out voluntary steps to improve the safety, security, and sustainability of space.[9] The Inter-Agency Space Debris Coordination Committee (IADC)[10],

[4] Vladimír Kopal, 'Treaty on Principles Governing the Activities of States in the Exploration and Use Of Outer Space, Including The Moon And Other Celestial Bodies, United Nations Audiovisual Library of International Law <www.un.org/law/avl> accessed 11 June 2023.
[5] 'The Outer Space Treaty' (n 2).
[6] 'OUTER SPACE TREATY: OBJECTIVES AND IMPORTANCE — Ylcube' <https://ylcube.com/c/blogs/outer-space-treaty-objectives-and-importance/> accessed 5 June 2023.
[7] UN Secretary-General, 'International Cooperation in Space Activities for Enhancing Security in the Post-Cold-War Era :: Report of the Secretary-General.' (UN, 1 July 1993) <https://digitallibrary.un.org/record/170538> accessed 5 June 2023.
[8] The General Assembly, United Nations and Other Celestial, 'General Assembly' (2010) 610 A Concise Encyclopedia of the United Nations 189.
[9] ibid.
[10] IADC, 'Inter-Agency Space Debris Coordination Committee, Space Debris Mitigation Guidelines' 1 <http://www.iadc-online.org/Documents/IADC-2002-01, IADC Space Debris Guidelines, Revision 1.pdf>.

which offers technical advice for avoiding the formation of space debris, is one example of a multilateral body that develops rules for international policy.

International standards are the technical guidelines or industry-based practices created by international organisations or business organisations to promote compatibility and interoperability between various systems or services in space. These are guidelines published by the International Organisation for Standardisation (ISO),[11] which addresses a number of engineering, management, operations, and quality assurance issues related to space systems. Another guideline is the Consultative Committee for Space Data Systems (CCSDS),[12] which creates specifications for data formats and communication protocols for space. International standards are typically voluntary, although they can be incorporated into regulatory frameworks or contractual responsibilities by states or operators. Industry practices are the self-regulation or coordination methods that the private sector actors have created to guarantee ethical and responsible behaviour in space. For example, the Space Safety Coalition (SSC),[13] which advocates a set of principles and guidelines for improving safety-of-flight in orbit, has produced a set of codes of conduct or best practices for the industry. Another illustration is the Space Data Association (SDA),[14] which offers a platform for members to exchange orbital data and conduct conjunction analysis. Industry practices can also include agreements between operators that are bilateral or multilateral in nature, such as the Geostationary Earth Orbit (GEO) Code of Conduct or the Lunar Coordination Group, which are designed to coordinate their activities in particular domains or areas of space.[15]

2. THE LEGAL IMPLICATIONS OF EMERGING DUAL-USE AND ASAT CAPABILITIES

Space has grown to be increasingly congested, competitive, and contested. Satellites are being launched by an increasing number of nations and commercial companies for a variety of uses, including communication, navigation, observation, and exploration. For instance, there were roughly 750 satellites orbiting the planet in 1976; as of 5th January 2022, there were 12,480, and

[11] 'ISO 24113:2019 - Space Systems — Space Debris Mitigation Requirements' <https://www.iso.org/standard/72383.html> accessed 11 June 2023.
[12] 'CCSDS.Org - The Consultative Committee for Space Data Systems (CCSDS)' <https://public.ccsds.org/default.aspx> accessed 11 June 2023.
[13] '"Best Practices for the Sustainability of Space Operations"'.
[14] Space Data Association (SDA), "About SDA"<https://www.space-data.org/sda/about-sda/>accessed 22 August 2023.
[15] Alain De Neve, 'Crowded and Dangerous Orbits: European Space Governance at a Time of Potentially Saturating Programs'.

many more are predicted to be launched in the years to come.[16] As part of its mega constellation plans, SpaceX alone has been granted permission to launch 12,000 more Starlink satellites over the course of the following five years.[17] Amazon's aims to launch over 3,000 satellites[18] and China's plans to launch nearly 13,000 satellites[19] are among other businesses and nations. Some of these technologies can, however, be employed both for peaceful and hostile objectives due to their "dual-use" character.

Anti-satellite (ASAT) capabilities, which are intended to interfere with or destroy other satellites in orbit, are one example of such dual-use technologies. Technologies that have both civilian and military uses are referred to be dual-use. Weapons with anti-satellite (ASAT) capabilities are those that aim to disable or destroy satellites.[20] On-orbit servicing, debris removal, jamming, dazzling, cyberattacks, and kinetic weapons are a few examples of existing and future technologies.[21] The capacity to maintain or refuel satellites while they are in orbit is known as on-orbit servicing.[22] The capacity to eliminate orbital debris is known as debris removal. Satellite communications can be interfered with by jamming, and their sensors can be damaged or rendered inoperable by dazzling. Attacks on satellite control systems or ground stations are known as cyberattacks. It is possible to destroy satellites with kinetic weapons.

The development and testing of anti-satellite (ASAT) weapons that are intended to restrict or impair the enemy's access to space. ASAT weapons can be ground-based or space-based, kinetic or non-kinetic. They can aim for satellites in various orbits and inflict damage ranging from brief interruption to total destruction.[23] ASAT weapons have the potential to seriously affect both the safety and sustainability of space activities as well as the security and stability of space. They may

[16] David C Hardesty, 'SPACE-BASED WEAPONS: Long-Term Strategic Implications and Alternatives' (2005) 58 Naval War College Review 45 <http://search.proquest.com/docview/205930935?accountid=41560 LA - English>.
[17] 'SpaceX Submits Paperwork for 30,000 More Starlink Satellites - SpaceNews' <https://spacenews.com/spacex-submits-paperwork-for-30000-more-starlink-satellites/> accessed 13 July 2023.
[18] Amazon targets 2024 launch of first Kuiper internet satellites | Reuters <https://www.reuters.com/lifestyle/science/amazon-targets-2024-launch-first-kuiper-internet-satellites-2023-03-14/> accessed 13 July 2023
[19] 'China's military aims to launch 13,000 satellites to rival Elon Musk's Starlink – Washington Post' < https://www.washingtonpost.com/national-security/2023/04/06/elon-musk-china-starlink-pla/> accessed 13 July 2023
[20] 'Strategic and Legal Implications of Emerging Dual-Use ASAT Systems | RAND' <https://www.rand.org/pubs/external_publications/EP68801.html> accessed 5 July 2023.
[21] 'Anti-Satellite Weapons and the Emerging Space Arms Race' <https://hir.harvard.edu/anti-satellite-weapons-and-the-emerging-space-arms-race/> accessed 5 July 2023.
[22] 'Strategic and Legal Implications of Emerging Dual-Use ASAT Systems | RAND' (n 20).
[23] ibid.

also produce a significant amount of space debris, which could endanger nearby satellites and spacecraft.[24]

Emerging dual-use and ASAT capabilities have complicated and unknowable legal ramifications. There is no comprehensive and legally enforceable regime to control dual-use or ASAT capabilities, nor is there a precise definition or classification of what comprises one. Although the existing international treaties and principles on space law offer some overarching direction, they are insufficient to meet the unique difficulties and dangers these capabilities bring. Furthermore, it is challenging to confirm the intents and activities of space players because there is a lack of transparency and confidence-inspiring measures among them. Weapons of mass destruction (WMD) are forbidden in orbit under the 1967 Outer Space Treaty. On the other hand, "it is difficult to distinguish space-based WMD from space-based non-WMD."[25] Inspection of the contents of ammunition dispensers in orbit becomes nearly difficult once space-based weapons are widely used. Even if they were stopped by air defences inside the stratosphere, submunitions containing biological payloads, would still be extremely lethal.[26] Space-based weapons, like all space systems, are predictable and fragile, but if used before they are destroyed, they represent enormous fighting power, providing a strong incentive to employ these weapons in advance, or "use them or lose them".[27] By focusing on locations like nuclear containment structures and missile silos, kinetic energy weapons may increase the amount of destruction. A future with space-based weapons may be quite unpleasant indeed, given present efforts to create a missile defence system.[28]

In order to establish standards and guidelines for responsible behaviour in space, there is a need for more communication and collaboration among the relevant parties, including nations, international organisations, businesses, and civil society. These standards and regulations should work to stop the spread and use of dual-use and ASAT capabilities that could jeopardise the interests of all space entities. Additionally, they ought to support humankind's peaceful exploration and usage of space.

3. THE LEGAL IMPLICATIONS OF CELESTIAL RESOURCE USE AND OTHER COMMERCIAL ACTIVITIES IN OUTER SPACE

3.1 The legal implications of celestial resource use

Exploration, extraction, and use of natural resources discovered in outer space, such as on the Moon, asteroids, and other celestial bodies, are referred to as celestial resource use. Significant

[24] 'Strategic and Legal Implications of Emerging Dual-Use ASAT Systems | RAND' (n 20).
[25] Robert Preston and others, 'Space Weapons Earth Wars' <www.rand.org> accessed 5 July 2023.
[26] Hardesty (n 16).
[27] ibid.
[28] ibid.

consequences for space sovereignty, property rights, and environmental protection result from these activities. The 1967 Outer Space Treaty (OST), which has been ratified by 110 countries, including all of the major spacefaring states, is the primary source of international law controlling space. The Outer Space Treaty lays out some fundamental guidelines for exploration and utilisation.

According to Article I of the Outer Space Treaty,[29] it is free to explore and utilise space, including the Moon and other celestial bodies. Article II, on the other hand, places restrictions on use by saying that no national appropriation may be made of space, including the Moon and other celestial bodies. Therefore, while space is available for use by States and their citizens, it cannot be the object of territorial or property claims. The Outer Space Treaty does not, however, outline any detailed guidelines for the utilisation of celestial resources.[30] It does not describe how to evaluate the "benefit" or "interests" of all nations and humanity, for example, nor does it define what "national appropriation" or "harmful contamination" are. Additionally, it does not address the problems of resource extraction property rights, or planetary environmental conservation.

The private sector has shown a great deal of interest in exploring space as well, despite governmental organisations striving to make space rules stronger. National Aeronautics and Space Administration (NASA) and International Lunar Research Station (ILRS) are examples of governmental organisations, while Space X (Elon Musk's), Space Team (Morgan Stanley's), Caterpillar Inc., Moon Express Inc., and Blue Origin Inc. are examples of private businesses. For the resources to be used peacefully, safe space mining requires clear, effective, and sufficient space laws and regulations.[31] Producing supplies for space missions and space settlements is the primary goal of space resource extraction activities.[32] These consumables include life support gases, reactants for energy production, rocket propellants, materials for making replacement parts, and raw materials for constructing planetary surface infrastructure. Volatile resources[33] like hydrogen, helium, and aqueous oxygen are currently the main resources being concentrated on. Minerals and other locally available resources[34] may also be the subject of resource extraction in a broader sense.

[29] 'The Outer Space Treaty' (n 2).
[30] 'The Global Legal Landscape of Space: Who Writes the Rules on the Final Frontier? | Wilson Center' <https://www.wilsoncenter.org/article/global-legal-landscape-space-who-writes-rules-final-frontier> accessed 3 June 2023.
[31] Ben McKeown, Andrew G Dempster and Serkan Saydam, 'Artemis Accords: Are Safety Zones Practical for Long Term Commercial Lunar Resource Utilisation?' (2022) 62 Space Policy.
[32] ibid.
[33] A Colaprete and others, 'An Overview of the Volatiles Investigating Polar Exploration Rover (VIPER) Mission' (2019) 2019 AGUFM P34B <https://ui.adsabs.harvard.edu/abs/2019AGUFM.P34B..03C/abstract> accessed 13 July 2023.
[34] M Ralphs and others, 'Water Extraction on Mars for an Expanding Human Colony' (2015) 7 Life sciences in space research 57 <https://pubmed.ncbi.nlm.nih.gov/26553638/> accessed 13 July 2023.

Utilising resources in space would allow missions to be launched from Earth with substantially less volume, which would save a significant amount of money. Notably, it is currently not commercially feasible to collect materials from space and return them to Earth.[35]

State parties must "carry out activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law," according to Article III of the Outer Space Treaty.[36] As a result, there is no legal void and states are not free to engage in resource exploitation without taking into account international law. It is unquestionably essential that governments (and their respective civic and commercial entities) adhere to the language and spirit of the Outer Space Treaty when engaging in such activities.[37] It has been stated that this strategy is especially important to prevent situations like the "tragedy of the commons" in connection to resource extraction operations, which would happen when people (or states) opt to behave in their own interests with regard to resource extraction.[38] The authorisation and ongoing oversight of resource extraction activities are the two main guiding concepts. These are outlined in the Outer Space Treaty's Article VI,[39] which states that States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried out by governmental agencies or by non-governmental entities, and for ensuring that such activities are carried out in compliance with the provisions outlined in the present Treaty.[40]

The Moon Agreement imposes extra responsibilities on the 18 signatory states, notably in relation to space resource activity. The moon and its natural resources are considered to be the common legacy of [hu]mankind, according to Article 11(1) of the Moon Agreement.[41] Notably, Article 11(3) of this treaty states that neither the surface nor the subsurface of the moon, nor any part of it, nor any natural resources already in place, shall become the property of any State, international intergovernmental organisation, national organisation, non-governmental entity, or of any natural

[35] Melissa de Zwart, Stacey Henderson and Michelle Neumann, 'Space Resource Activities and the Evolution of International Space Law' (2023) 211 Acta Astronautica 155.
[36] 'The Outer Space Treaty' (n 2).
[37] de Zwart, Henderson and Neumann (n 35).
[38] ibid.
[39] 'The Outer Space Treaty' (n 2).
[40] V Kopal, 'Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies' (1966) 1966 Yearbook of Air and Space Law <https://heinonline.org/HOL/Page?handle=hein.journals/yairspcl1966&id=485&div=&collection=> accessed 13 July 2023.
[41] V Kopal, 'Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies' (1966) 1966 Yearbook of Air and Space Law <https://heinonline.org/HOL/Page?handle=hein.journals/yairspcl1966&id=485&div=&collection=> accessed 13 July 2023.

person.[42] 'Executive Order on Encouraging International Support for the Recovery and Use of Space Resources' issued by the US government in 2020[43] states, "[T]he United States does not consider the Moon Agreement to be an effective or necessary instrument to guide nation states regarding the promotion of commercial participation in the long-term exploration, scientific discovery, and use of the Moon, Mars, or other celestial bodies", it was explicitly stated. Therefore, the Moon Agreement shall not be construed as reflecting or otherwise expressing customary international law, and the Secretary of State shall object to any such attempt by any other state or international body.[44]

Despite the significant governmental and commercial sector interests in space exploration and mining, there are a number of shortcomings that hinder expansion. These include the advantages of space mining for all States as well as the significant problem with ensuring proper resource sharing brought on by the lack of a common framework for space law regulations. Due to their technological behind, a number of nations including the United States,[45] Luxembourg (2017),[46] the United Arab Emirates[47] (UAE, 2019), and Japan (2021) are forced to rely on the more knowledgeable, developed, and technically sound states. The States' inadequate exploration levels are a result of varying levels of technological proficiency. It may be necessary to go to extra-terrestrial entities like asteroids, the Moon, and Mars to replenish our depleting supplies if humanity wants to provide resources for future generations. This is because many resources on Earth are becoming increasingly rare. It is crucial to take into account the social, socioeconomic, and environmental effects of such an endeavour in addition to the technological and economic factors that must be taken into account in order to make resource extraction in space a reality.[48] The current international space legal framework has to change in order to stay up to date with industry's rapid development, as it has gaps with regard to space resource activities. Any international legal framework for such activities must make sure that a proper balance is achieved between economic interests, space domain security, and the preservation of space for all of humanity.[49]

In conclusion, the commercial use of celestial resources is an area that is fast developing and promising and has important legal ramifications for environmental protection, property rights, and space sovereignty. Existing international law offers some broad guidelines for space exploration

[42] ibid.
[43] ibid.
[44] de Zwart, Henderson and Neumann (n 35).
[45] US Commercial Space Launch Competitiveness Act, Pub L No 114–190, 129 Stat 704.
[46] 2017 sur l'exploration et l'utilisation des ressources de l'espace
[47] 'ON THE REGULATION OF THE SPACE SECTOR'.
[48] JA Dallas and others, 'Mining beyond Earth for Sustainable Development: Will Humanity Benefit from Resource Extraction in Outer Space?' (2020) 167 Acta Astronautica 181.
[49] de Zwart, Henderson and Neumann (n 35).

and utilization, but it doesn't offer specific or thorough standards for the use of celestial resources. Adopting a new international treaty, depending on pre-existing international law, or creating a hybrid of the two are all potential solutions to the legal ambiguities and disputes. Each alternative includes pros and cons that should be properly considered and balanced. The ultimate goal of the legal framework for the use of celestial resources should be to support the peaceful, useful, and sustainable use of space by all nations and the human race.

3.2 Legal implications in commercial activities within outer space

Commercial entities now have space access alongside governments, providing services to public and private clients. Legal challenges in commercial space activities, hindered by national interests, lead to reliance on soft laws at the international level. Encouraging states to develop national space legislation offers guidance, considering the complexities of universally binding standards. In the near future, national space legislation and the creation of soft laws are anticipated to dominate regulatory efforts in the space sector, particularly for commercial space activities.[50] There are varieties of commercial activities conducted in Outer Space. Entrepreneurs have long been drawn to the abundant natural resources because of the potential for profit. Space launch activities, satellite direct broadcasting, remote sensing, telecommunications, space tourism,[51] space mining, small satellites, and the digitisation of space are just a few examples of the diverse commercial space activities that can be developed thanks to the special characteristics of outer space.

Space Tourism and the launch of communication satellites into space are major commercial activities conducted in Outer Space. Space tourism, according to the definition by the ESA,[52] is "suborbital flights by privately funded and/or privately operated vehicles and the associated technology development driven by the space tourism market". Space tourism is already a reality thanks to Dennis Tito's successful visit to the International Space Station,[53] which served as a precursor to human space travel for leisure. With a new re-entry mechanism, Virgin Galactic's SpaceShipTwo has completed its first test flight safely, opening the door for commercial space

[50] Yun Zhao, 'Space Commercialization and the Development of Space Law' [2018] Oxford Research Encyclopedia of Planetary Science <https://oxfordre.com/planetaryscience/display/10.1093/acrefore/9780190647926.001.0001/acrefore-9780190647926-e-42> accessed 13 July 2023.

[51] Steven Freeland, 'The Impact of Space Tourism on the International Law of Outer Space' (American Institute of Aeronautics and Astronautics Inc (AIAA), 2005) 6956 <https://research.bond.edu.au/en/publications/the-impact-of-space-tourism-on-the-international-law-of-outer-spa> accessed 14 July 2023.

[52] 'ESA - ESA and Space Tourism' <https://www.esa.int/Enabling_Support/Preparing_for_the_Future/Discovery_and_Preparation/ESA_and_space_tourism> accessed 14 July 2023.

[53] 'First Space Tourist Dennis Tito Plans Return Trip to Moon | Time' <https://time.com/6222212/dennis-tito-moon-space-tourism/> accessed 14 July 2023.

travel.[54] In addition, the successful reuse of the New Shepard booster and the trouble-free return of a passenger compartment carried out by the US company Blue Origin[55] also demonstrated that going to space for regular people would soon become a reality. By recovering and reusing the core stage of its Falcon 9 launch vehicles, Space Exploration Technologies Corporation (SpaceX) demonstrated its reusable launch vehicle technology. Reusable launch vehicles, in the opinion of SpaceX, will make it possible to colonize Mars.

The regulation of the launch and re-entry of spacecraft carrying people is one of the major legal challenges associated with space tourism. States are responsible for allowing and overseeing the activities of their citizens in outer space, as well as being liable for any harm caused by their space objects, according to the Outer Space Treaty of 1967, which serves as the cornerstone of international space law. Therefore, states that permit space tourism activities on their soil or by their citizens need to set up a clear and consistent legal framework that spells out the rights and responsibilities of the operators, travellers, and third parties. Licensing procedures, safety regulations, insurance specifications, liability guidelines, environmental protection policies, and dispute resolution procedures should all be part of this framework. Astronauts are referred to as "envoys of mankind" in Article V of the Outer Space Treaty, which requires states to give them "all possible assistance in the event of accident, distress, or emergency landing on the territory of another State party or on the high seas". Should an emergency landing occur, the astronauts must be transported back to the spacecraft's state of registry safely and without delay. Article V imposes a larger duty on astronauts by requiring them to give "all possible assistance to each other" - that is, in any location and under all circumstances - in contrast to this qualified duty of nations.[56] However, it is unlikely that the definitions of "astronaut" and "space personnel" in the Rescue Agreement also apply to space tourists as neither of these terms is (officially) specified in any international agreement or local legislation. Space tourism had not yet been conceptualised when the outer space treaties were drafted, and the treaties were created particularly with astronauts' interests in mind.[57] Space tourism is a potential but complex phenomenon that needs thorough legal control on both a national and international scale. States can promote the growth of this business

[54] 'Virgin Galactic's SpaceShipTwo Makes 1st Test Flight of Revamped Re-Entry System | Space' <https://www.space.com/36679-virgin-galactic-spaceshiptwo-unity-feather-system-test-flight.html> accessed 14 July 2023.

[55] Blue Origin aces 6th space tourism mission | Space < https://www.space.com/blue-origin-ns-22-space-tourist-flight-success> accessed 14 July 2023

[56] Anel Ferreira-Snyman, 'Legal Challenges Relating to the Commercial Use of Outer Space, with Specific Reference to Space Tourism' (2014) 17 Potchefstroom Electronic Law Journal 1.

[57] International Institute of Space Law., 'Proceedings of the International Institute of Space Law 2011. Monograph.' 599.

while assuring its safety, security, and sustainability for the benefit of all interested parties by resolving the legal issues it raises.

The best example of how space commercialisation has evolved is the usage of satellites, which were initially developed for public and military uses. Satellites are primarily used for three purposes: communication, remote sensing, and navigation. The first commercial worldwide satellite communications system was launched in 1965 by the International Telecommunication Satellite Organization (INTELSAT),[58] which was initially founded as an intergovernmental organisation. Telecommunications services have thus been commercialized for more than 50 years.[59] In 2001, the INTELSAT underwent additional restructuring before becoming a private organisation. As a result, the growth of both space commercialisation and privatisation can be examined quite well via the lens of telecommunications services.[60]

The commercialisation of space is developing far more quickly than predicted. These commercial operations have grown quickly and successfully over the past two decades, and there is now a considerably wider spectrum of competitors, including small businesses and entrepreneurs, which necessitates the creation of regulations to control these commercial activities and organisations.[61] The licensing of small satellites owned by private entities, the regulation of radio frequencies and orbits, international and national registration of satellites, and problems with apportioning responsibility and liability between public and private entities are just a few of the new legal issues that have surfaced without ready and simple solutions.[62] The earliest phase of the formation of space law was significantly influenced by the UN[63] The five space treaties generally govern the public side of space operations;[64] but, as space commercialisation gained importance, it became

[58] 'INTELSAT 1, the First Commercial Communications Satellite, Is Placed in Geosynchronous Orbit : History of Information' <https://historyofinformation.com/detail.php?entryid=3595> accessed 14 July 2023.
[59] Delbert Smith, 'The Legal Ordering of Satellite Telecommunication: Problems and Alternatives' (1969) 44 44 Indiana Law Journal 337 (1969) <https://www.repository.law.indiana.edu/ilj/vol44/iss3/1> accessed 14 July 2023.
[60] 'International Space Law and Satellite Telecommunications | Oxford Research Encyclopedia of Planetary Science' <https://oxfordre.com/planetaryscience/display/10.1093/acrefore/9780190647926.001.0001/acrefore-9780190647926-e-75;jsessionid=7352A09ED8E92B6FA8FC66B8A1CAE526?rskey=hUYTCg> accessed 14 July 2023.
[61] Scott Atkins, 'The Commercialisation of Outer Space: How an International Securities Framework Can Be the Launching Pad for a Global Space Economy' (2022) 19 International Corporate Rescue.
[62] Paul Stephen Dempsey, 'National Laws Governing Commercial Space Activities: Legislation, Regulation, & Enforcement Recommended Citation National Laws Governing Commercial Space Activities: Legislation, Regulation, & Enforcement' (2016) 36 School of Law Printed in U.S.A. Northwestern Journal of International Law & Business <http://www.icao.int/Meetings/SPACE2015/Presentations/6 - P. Dempsey -> accessed 14 July 2023.
[63] Francis Lyall and Paul B Larsen, 'Space Law: A Treatise: 2nd Edition' [2017] Space Law: A Treatise: 2nd Edition 1 <https://www.taylorfrancis.com/books/mono/10.4324/9781315610139/space-law-francis-lyall-paul-larsen> accessed 14 July 2023.
[64] ibid.

vital to create regulations governing the private and business side of space activities.[65] Obviously, the UN is not the best organisation to fill this position.[66] Other organisations have stepped in to fill the void in this situation. It is expected that the commercial space sector will continue to grow and that private space entities' market share will keep rising over the next five to ten years. It is clear that these regulations are insufficient to address new legal issues arising from space commercialisation and privatisation. The UN space treaties adopted in the last century, when states were the only players in the space field, contributed to the establishment of a legal framework for the smooth and orderly development of space activities.

In these conditions, the process of developing space law is more complex and heavily dependent on the ongoing commercialisation of space. Considering the legal implications of commercial space activities, national legislation is another crucial factor. National legislation comes up as another feasible avenue for the regulation of space operations in light of the UN's stagnant space policy. Building space law capability was identified by the UNCOPUOS[67] as a key goal for the new era.[68] This incorporates two components of the work: enticing additional nations to join the five existing space treaties and helping the treaty participants carry out their commitments under the five treaties through national space law.[69] The UNCOPUOS encouraged countries to begin their own national space laws in the interim. Recommendations on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space was the title of a resolution that the UNGA adopted in 2013 based on a document created by the UNCOPUOS to assist members in creating a national space legislation.[70] A Model Law on National Space Law had been adopted by the International Law Association (ILA) the year before. This demonstrates that the need for national space legislation has been agreed upon by the world society as a whole, not just by UNCOPUOS alone.[71] States are in charge of approving and regulating their non-profit organisations that carry out space activities, as was already indicated. In other words, governments have the authority and responsibility to create national laws and rules that cover their commercial space actors. Various aspects of commercial space activities, including licensing, safety, security, insurance, export control, intellectual property rights, taxation, environmental protection, etc., may be covered by these laws

[65] ibid.
[66] ibid.
[67] 'Responses to the Set of Questions Provided by the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space Note by the Secretariat'.
[68] 'A/AC.105/C.2/2017/CRP.6 - Responses to the Set of Questions Provided by the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space: Austria and Germany' <https://www.unoosa.org/oosa/oosadoc/data/documents/2017/aac.105c.22017crp/aac.105c.22017crp.6_0.html> accessed 14 July 2023.
[69] ibid.
[70] Eng Teong See, 'Commercialization of Space Activities— The Laws and Implications' (2017) 82 Journal of Air Law and Commerce 145.
[71] Mark J Sundahl and V Gopalakrishnan, 'New Perspectives on Space Law' [2011] Young Scholar Session 1.

and regulations. The UN framework's discussions for new treaties are challenging as more and more governments grow into spacefaring nations. Other international organisations have stepped up to write regulations for specific aspects of commercial activities in Space.[72] The adoption of space regulations at other platforms, such as the WTO and the UNIDROIT, is not hindered by the UN's inability to negotiate new treaties. Nevertheless, the UN remains a pioneer in promoting the rule-making procedure through supporting national space legislation and soft laws through UNCOPUOS. Other organisations, like the ILA and the EU, have also joined in the debate as a result of the UNGA's adoption of multiple resolutions that have significant effects on various elements of space activities[73].

Commercial space activities present complex and evolving legal implications, requiring attention to international law compliance, environmental conservation, and collaboration. The existing legal system provides some direction but requires further dialogue and compromise among parties to establish clear and consistent governance for space commerce.

4. SPACE GOVERNANCE IN 21ST CENTURY AND BEYOND

The space age officially began in 1957[74] with the Soviet Union's launch of Sputnik-1, the first artificial satellite. After World War II, the Soviet Union and the United States began a space race. During the Cold War, the two superpowers controlled all space-related operations. Military initiatives were the forerunners of space programs. National security was the primary concern at the time, and state-oriented space programs predominated during the Cold War. Given the significant quantity of financial resources required for space missions, this was even more understandable. As a result, the space regulations developed within the framework of the United Nations primarily govern actions taken by governments and seek to actualize peaceful uses of space. Near-Earth space has been explored and used by humans for more than 60 years. More recently, the past two decades have seen the beginning of a New Space Era, marked by an increase in the number of spacefaring countries and businesses as well as a rising risk of collisions and conflict. However, the fundamental agreements and procedures that were developed 50 years ago to regulate space activity have barely changed.[75]

Space governance covers a wide range of subjects, including space traffic management, space debris reduction, space exploration and exploitation, situational awareness in space, space security and defence, space diplomacy and cooperation, and space law and policy. Each of these problems

[72] See (n 70).
[73] ibid.
[74] Bruce Mcclintock and others, 'Perspective EXPERT INSIGHTS ON A TIMELY POLICY ISSUE Preserving the Province of Humanity Contents' <www.rand.org/pubs/permissions.html.>.
[75] ibid.

poses different difficulties and necessitates an interdisciplinary and cooperative approach. The challenges facing space governance in the twenty-first century include: The complexity of space operations has increased along with the number of actors as a result of the swift expansion of space activities, notably in the commercial sector. the expansion of space debris, which endangers both the long-term viability of space activities and operational spacecraft. the likelihood of armed conflict and the militarisation of space, both of which could jeopardize peaceful uses of space and ignite a new arms race. the requirement to strike a balance between the duties and interests of various parties, including those involved in scientific research, commercial competition, environmental protection, and national security. the absence of a thorough and binding international legal framework for space governance, that leads to regulatory gaps and ambiguities.

The absence of an extensive and binding legal framework for space activities is the second issue. The concepts and treaties the United Nations established in the 1960s and 1970s, which reflect the Cold War environment and the interests of the two superpowers at the time, form the foundation of current international space law.[76] These instruments establish some fundamental guidelines and standards for space exploration and use, including the right of access to all heavenly bodies, the ban on deploying nuclear weapons in space or on planetary bodies, and the accountability of states for their national space programs. However, they don't handle many of the new problems and obstacles in space, like the control of commercial space travel, the protection of the space environment, the allocation of scarce resources, or the settlement of disputes. International space law does, however, have some restrictions and difficulties. The following are some of the major problems with international space law: the important space accords' limited applicability and universality due to the lack of worldwide ratification. gaps and ambiguities in the laws governing new and growing space operations, such as asteroid mining, commercial space travel, and satellite maintenance. the possibility of divergent interpretations and applications of space law by various nations and actors, which can result in disagreements and conflicts. the absence of a strong enforcement mechanism for space law, which is generally enforced through political and diplomatic pressure rather than through legal sanctions.

The primary concern is the escalating competition and congestion in space. Currently, there are approximately 27,000 officially catalogued objects in orbit, with the majority being at least 10 cm in size.[77] NASA employs statistical analysis to estimate the population of objects smaller than 4

[76] 'The Global Legal Landscape of Space: Who Writes the Rules on the Final Frontier? | Wilson Center' <https://www.wilsoncenter.org/article/global-legal-landscape-space-who-writes-rules-final-frontier> accessed 14 July 2023.

[77] Mark Garcia, 'Space Debris and Human Spacecraft' <http://www.nasa.gov/mission_pages/station/news/orbital_debris.html> accessed 14 July 2023.

inches (10 centimetres) using specialized ground-based sensors and examining retrieved satellites' surfaces. The remaining items consist of debris from rocket stages, exploded satellites, and collisions. This debris poses a significant risk to space activities, as it can potentially harm or destroy operational satellites and spacecraft. With more nations and private organizations launching satellites and providing space services, the number of space actors is increasing, leading to potential interference among users sharing the same orbital slots or frequency bands. While the United Nations Committee on the Peaceful Uses of Outer Space actively addresses space debris prevention through annual information exchanges and approved Space Debris Mitigation Guidelines in 2007,[78] the Legal Subcommittee is also engaged in discussions concerning legal aspects and scientific studies. Despite challenges such as funding and political will, it is crucial to explore ways in which legal measures can aid in reducing space debris threats, especially as awareness among the public and commercial entities grows.

The range and diversity of activities and actors in the space domain are expanding nowadays. The cooperation of several diverse stakeholder groups is necessary for the development of successful legal and policy regimes for these activities, as is the identification of improved methods for enhancing communication between the private sector and international space governance.[79] However, the technical and commercial variables influencing this expansion are also fraught with significant uncertainty. New activities necessitate new governance strategies, but those strategies must be suitable for the activities they are intended to control and must not inhibit innovation.[80]

The existing system of international space governance requires urgent strengthening and adaptation to address the pressing challenges in space activities. One approach is to establish new standards and guidelines that acknowledge the current and future realities of space endeavours. These should focus on reducing space debris, ensuring the sustainability of space activities, enhancing the registration and identification of space objects, and promoting interoperability among space technologies. The United Nations Report "Our Common Agenda Policy Brief 7 For All Humanity - the Future of Outer Space Governance," issued in May 2023, provides valuable recommendations to tackle these issues.[81] The Committee on the Peaceful Uses of Outer Space, in collaboration with relevant UN agencies, should develop a uniform framework for space sustainability. This framework would foster transparency, mutual trust, and interoperability in space operations,

[78] United Nations Office For Outer Space Affairs, 'UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space UNITED NATIONS'.
[79] Daniel L Oltrogge and Ian A Christensen, 'Space Governance in the New Space Era' (2020) 7 Journal of Space Safety Engineering 432.
[80] ibid.
[81] Our Common Agenda, 'Our Common Agenda Policy Brief 7'.

encompassing Earth orbit, the Moon, and other celestial bodies. Furthermore, the regime should involve more operational stakeholders to ensure a comprehensive approach. The report also suggests creating new governance frameworks to address specific aspects of space sustainability, such as space traffic management, space debris removal with legal and scientific considerations, and efficient exploration and exploitation of celestial resources. These frameworks can draw upon existing space treaties and peaceful international cooperation frameworks. With the growing involvement of non-governmental actors in space activities, it is crucial for Member States to consider facilitating the participation of commercial entities, civil society representatives, and other relevant actors in outer space-related intergovernmental processes[82].

Space governance necessitates a comprehensive approach, and international space law provides the essential framework for sustainable and ethical oversight of space activities. Nevertheless, challenges such as incomplete ratification, regulatory gaps, and differing interpretations must be addressed. Improved coordination and cooperation are vital to establishing new standards and monitoring mechanisms for emerging space activities.

5. CONCLUSION

This article has discussed the legal ramifications of utilising space in the twenty-first century for commercial and strategic objectives. It has been suggested that the current legal system, which is based on the 1967 Outer Space Treaty and other agreements of a similar nature, is unable to manage the new difficulties and opportunities brought about by the expanding activities and interests of many entities in space. In order to guarantee that space is utilized for the benefit of all humankind and in compliance with international law, it has been recommended that a novel strategy built on the tenets of cooperation, sustainability, and responsibility is necessary. Additionally, it has brought to light some of the most important problems and topics that need further academic discourse.

[82] ibid.

INTERNATIONAL HUMANITARIAN LAW

THE TURN AWAY FROM 'CONVENTIONAL' ARMED CONFLICT: THE IMPACT OF MILITANT NON-STATE ACTORS ON INTERNATIONAL HUMANITARIAN LAW IN THE 21ST CENTURY

Amisha De Alwis

ABSTRACT

This paper will explore the legal regimes and frameworks which govern instances of armed conflict in the 21st century, with a particular focus on the impact of militant non-state actors in Non-International Armed Conflicts. It will provide an overview of the establishment and development of key laws which make up international humanitarian law, particularly the 1949 Geneva Conventions, and the 1977 Additional Protocols. This paper will additionally delve into a detailed analysis of the concept of 'new wars', as theorised by Professor Mary Kaldor, while also taking into consideration other forms of non-conventional warfare. This paper will then analyse the effectiveness of IHL in the *status quo*, especially in light of the increased importance of non-state actors in such conflicts, structural changes among the parties themselves as well the departure from conventional modes of warfare. The paper will evaluate whether the existing international regimes on warfare are still fit for purpose in order to adequately address the emerging challenges of non-conventional conflict brought about by the move away from purely state involvement in warfare. This analysis will also encompass how the international community has responded to the challenges brought about by non-state actor involvement and will include critical perspectives of experts in the field as well as solutions for the aforementioned challenges.

Keywords: *Armed conflict - Non-state actors - IHL - New wars - Conventional warfare*

1. INTRODUCTION

A fact which is uncontested is that the political and social climate of the world has changed at an exponential rate and continues to evolve. One of the main changes has been the development of new risks to both national and international security regimes, such as with the development of new modes of warfare and new terrorist tactics. The security challenges that have emerged in the 21st century are diverse; each area has increased in complexity and overall new challenges have emerged for the international community. Our world as we know it is decidedly different from the 20th century world, which had not seen many of today's major security threats. Many security threats, particularly from militant non-state actors, have not been significant until this century. As these non-state actors evolved and became more active participants in armed conflict, the very face

of armed conflict also changed. This gave rise to a new theory called 'new wars', which represents a departure from the traditional methods of armed conflict and warfare. This leads to a discussion about whether the currently existing legal regimes created to regulate armed conflict and military violence, commonly known as international humanitarian law (IHL), are fit for purpose given the changed nature of armed conflict. This article will comprehensively lay out the existing legal frameworks in place to govern armed conflict and will then go on to discuss if and how this framework has dealt with the increased involvement of non-state actors in the 21st century. This article will argue that new wars are now widespread at the international level because they illustrate the increasing importance of non-state actors in such conflicts. It will also look at the challenges being faced by the international community in terms of the non-compliance of non-state actors with international humanitarian law and will propose recommendations for these issues.

2. THE DEFINITION OF THE CONCEPTS OF 'WAR' AND 'ARMED CONFLICT' AND THEIR DEVELOPMENT THROUGH THE CENTURIES

The concepts of war and armed conflict are those which have been seen throughout history and the attempts to define it have been fruitful. 20th century theorists define war as "organised violence carried on by political units against each other",[1] creating the view that war is a political phenomenon. Another more conventionally accepted view is that the number of deaths culminated by the conflict must surpass 1,000, which allows for the inclusion of wars which take place within states, encompassing the idea of 'civil wars' which are increasingly more prevalent in the 21st century[2]. The 19th century military strategist Carl Von Clausewitz explains that while the innate nature of war, which is the use of violence by actors to pursue their political goals, has not changed, the forms in which armed conflict is carried out are constantly changing and will continue to change as society and technology develop[3]. This theory is increasingly proving to be true, in light of the modern developments of cyber and other forms of technological warfare. For instance, traditional forms of warfare, such as trench warfare, '*Blitzkrieg*' and mobile warfare[4], while still used to an extent in the modern context, are becoming increasingly secondary in terms of their impact in relation to other, more modern, forms, such as nuclear and cyber-warfare. However, the term 'war' is being replaced and the term 'armed conflict' is being used more regularly in order to better describe instances of state and non-state violence in the current context.

[1] Hedley Bull, *Justice in International Relations: 12-13 October 1983* (University of Waterloo Press 1984).
[2] Carl Von Clausewitz and Beatrice Heuser, *On War* (Oxford University Press 2008).
[3] ibid.
[4] Len Deighton, *Blitzkrieg* (Harper Collins 1994).

Armed conflict is comprehensively defined in the case of *Prosecutor v Dusko Tadic, No. IT-94-1-AR 72* heard by the International Criminal Tribunal for the Former Yugoslavia in 1995 as

> "...whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."[5]

Thus, the term 'armed conflict' seems to be a more relevant term and encompasses situations governed by such laws more so than the term 'warfare'. For purposes of simplicity, this paper will use the term 'armed conflict' to refer to instances of military violence henceforth.

3. ANALYSING THE CURRENT LEGAL FRAMEWORK GOVERNING CASES OF ARMED CONFLICT; THE PROVISIONS OF INTERNATIONAL HUMANITARIAN LAW AND THE CONTRIBUTIONS MADE BY THE 1949 GENEVA CONVENTIONS AND THEIR 1977 ADDITIONAL PROTOCOLS

An analysis must be conducted on whether these laws are fit for purpose in the instances of armed conflicts of the 21st century.

This creates a discussion about the current legal framework governing such cases, commonly known as international humanitarian law (IHL). This particular legislative package was created in the context of cases where numerous mass atrocities were committed by both state and non-state actors during armed conflicts, particularly during World War II. As a counterpart to international human rights law, international humanitarian law was created with the intention of protecting and upholding human dignity in the event of armed conflict. Created for humanitarian purposes, it aims to limit the effects of armed conflict and to protect those who are not participants in hostilities or who are no longer participants[6]. Also known as the law of war and armed conflict, international humanitarian law attempts to restrict the effects of armed conflict. Even after the end of World War II, armed conflict continues to persist and likely always will, reiterating the importance of the operation of mechanisms to ensure that such conflict takes place with minimal suffering and maximum respect for human lives, of both combatants as well as civilians, along with any other party which may be involved in the conflict in question. The legal framework in question currently governs all cases of armed conflict and many scholars have categorised instances of armed conflict based on their characteristics. In a legal sense, armed conflict can be categorised into two main

[5] *Prosecutor v Dusko Tadic, No IT-94-1-AR 72 (1995)* (UN International Criminal Tribunal for the former Yugoslavia).
[6] 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 20 June 2023.

areas, each of which is governed by a distinct set of rules, though these rules tend to converge a majority of the time. These two categories are that of international armed conflict, which would take place between two or more nation-states[7], and non-international conflict, which refers to conflict which takes place within the borders of a single state, usually with the involvement of governmental forces and other non-state actors[8]. The rising prevalence of non-international conflicts has seen an increase in the involvement of militant non-state actors in armed conflicts. Depending on the other characteristics of the conflict in question, certain legal frameworks may or may not apply.

The legal framework which governs the area of armed conflict is vast and is contributed to by a plethora of legal instruments. The primary set of legal instruments which are key in addressing the mass atrocities which have been and may be committed during armed conflict are the 4 Geneva Conventions of 1949 as well as the Additional Protocols of 1977[9]. Other older treaties, such as the 1899 and 1907 Hague Conventions, are also a part of this vast legal framework. The complex provisions of the Geneva Conventions represent the international community's attempt to strike a balance between understanding the need for military force and conquest and preserving the dignity of all injured and disabled combatants, as well as civilians affected by the conflict.

The Geneva Conventions, which were created in the aftermath of World War 2 with the intention of preventing such a devastating conflict from occurring again, aim to protect those who are not directly involved in the conflict or who are no longer involved. The first Geneva Convention, the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, is wide in its application and would apply in times of peace, as well as all cases of declared war and armed conflict[10]. The Convention places an obligation on parties to a conflict to collect, care for and protect the wounded and sick. It also ensures a high level of protection for medical staff and facilities which enables medical staff to provide care, unhindered. It introduced the use of insignia such as the Red Cross, used to identify medical units and to indicate to parties to the conflict that such units needed support and protection. It also governs the handling of the deceased and requires a high degree of respect and dignity, as well as proper identification and respectful treatment at burial or cremation. The Convention has a wide scope and was created with the understanding that a state of war is a technical matter. The result of this understanding is that the Convention also

[7] Marco Sassòli, *International Humanitarian Law* (Edward Elgar Publishing 2019).
[8] ibid.
[9] Jacques Meurant, 'International Humanitarian Law in the Contemporary World – from Traditional Humanitarian Law to Expanded Humanitarian Law' (1992) 32 International Review of the Red Cross 318;
[10] International Committee of the Red Cross, 'The Geneva Conventions of 1949 and Their Additional Protocols - ICRC' (*Icrc.org*2010) <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>;

applies in cases where a state of war is not recognized by one of the parties to the conflict. This also applies to instances when the territory of a signatory state has been partially or completely occupied, even if the occupier has encountered no resistance. Article 3, which is common to all 4 of the Geneva Conventions, sets the minimum standards which would apply to both the military personnel and civilians[11]. It is a *jus cogens*, and thus it cannot be derogated from, and represents a key principle of customary international law. The First Convention recognizes that conflict is inevitable, and because of this inevitability, acts of violence can only be used against those who themselves threaten violence, and not against those who are no longer active combatants, such as those who have been injured or have surrendered. The Convention also limits the use of force in armed conflict and seeks to strike a balance where there is no unnecessary destruction or loss of life when a military advantage cannot be conferred. However, it also takes into account military necessity and reaffirms the inevitability of armed conflict. The Second Convention, which is the Convention of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea takes into account the fact that most conflicts would have some involvement of the states' Naval Armed Forces and thus applies at sea[12]. It ensures the protection of the wounded, sick and shipwrecked as well as other accompanying personnel, such as medical personnel or chaplains. The second Convention sets out the procedures and protocols for transferring these parties to a neutral ship where they can receive medical treatment. Similar to the first convention, the importance of protecting medical and religious personnel is emphasised. It also sets out measures to be taken during search and rescue operations, and obliges parties to the conflict to exchange information on shipwrecked, wounded, and sick people, such as their location and medical needs. The Third Convention, referred to as the Geneva Convention Relative to the Treatment of Prisoners of War, governs the area of prisoners of war and provides a broad definition of prisoners of war (POWs), going on to regulate how POWs should be treated, touching on the process of repatriation and use of POWs for labour.[13] The definition of a prisoner of war is broad and includes any member of a party's armed forces who have fallen into enemy hands, such as those who surrendered and were captured during hostilities. The Convention requires prisoners of war to be treated humanely and does not permit any form of discrimination. Any form of torture, degrading or inhuman treatment, or disregard for the dignity or personal beliefs of a person is prohibited under the Convention.

[11] Jean S Pictet and International Committee Of The Red Cross (Icrc, The Geneva Conventions of 12 August 1949 : Commentary, Vol. I : Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Icrc 1995);

[12] International Committee of the Red Cross, 'The Geneva Conventions of 1949 and Their Additional Protocols - ICRC' (*Icrc.org*2010) <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>;

[13] American Forces Information Service, *Prisoner of War: Rights & Obligations under the Geneva Convention* (US Department of Defense 1987).

Prisoners of war must be able to access adequate medical care and are guaranteed a number of rights, such as the right to correspondence and a fair trial. The agreement also provides for the prompt repatriation of such personnel upon the cessation of active hostilities. It must be noted that there is no need for an actual declaration of war to exist for this Convention to apply.[14]

The Fourth Convention, widely known as the Geneva Convention Relative to the Protection of Civilian Persons in Time of War,[15] was created in regards to the protection of civilians in the time of armed conflict, and seeks to protect the civilian populations which would be adversely affected as a consequence of the military occupation of the territories in which they live[16]. It offers protection in armed conflicts at both an international and non-international level. Article 3[17] defines a civilian as a person not directly involved in hostilities and states that military operations should not be designed with the intention of implicating or harming civilians, emphasising the importance of non-discrimination and of ensuring the fundamental rights of civilians are preserved regardless of race, religion, nationality, or so on.. It provides for the preservation of the dignity and humanity of all civilians and prohibits any torture, degrading treatment or hostage-taking. Part 11 of the Convention goes beyond the basic need to preserve civilian's dignity and also provides for the preservation of infrastructure by prohibiting the destruction of essential infrastructure, cultural assets and civilian property. Article 15 also includes a provision in regards to humanitarian aid, allowing for the establishment of relief zones which would facilitate the prompt delivery of humanitarian aid and related services, such as to provide food and medical aid[18]. The Convention does not underestimate the impact of armed conflict on the lives of ordinary citizens and therefore seeks to enforce strict measures to ensure the protection of these groups of people.

While the Geneva Conventions were satisfactory for the time when they were originally created, as various developments to the methods of warfare took place, new laws had to be created in order to combat new atrocities which began to take place, particularly in terms of the processes of decolonization which took place after the creation of the Geneva Conventions in 1949. The provisions of the Geneva Conventions of 1949 were revisited in order to address the various 'wars of self-determination' which took place following the era of decolonisation, particularly instances of armed conflict which persisted against colonial domination, discriminatory and dictatorship-like

[14] *Commentary on the Third Geneva Convention* (Cambridge University Press 2021).
[15]International Committee of the Red Cross, 'The Geneva Conventions of 1949 and Their Additional Protocols - ICRC' (*Icrc.org*2010) <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>;
[16] ibid.
[17] United Nations, 'Geneva Convention Relative to the Protection of Civilian Persons in Time of War (2nd Part)' (*OHCHR*) <https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-protection-civilian-persons-time-war>;
[18]ibid;

regimes and alien occupation.[19] During the period of 1945 to 1965, the majority of the colonial territories of Asia and Africa gained independence, sovereignty and international recognition by way of membership to the United Nations.[20] Thus, the 1977 Additional Protocols were introduced as these once-colonial states gained unprecedented influence in the international playing field. The first of these Protocols related to the Protection of Victims of International Armed Conflicts[21] and the second of which related to the Protection of Victims of Non-International Armed Conflicts.[22] The first Protocol was more widely ratified and is a more widely recognised principle of customary international law[23] whereas the Second Protocol was less recognised in general.[24] However, both have been influential in developing a mechanism to prevent new gross atrocities which may take place in times of armed conflict. They strengthen the protection of victims of international and non-international conflict and place limits on the methods used to fight wars. For example, Article 35 of Protocol 1 prohibits the use of weapons which would "cause superfluous injury or unnecessary suffering" as well as means of warfare which "cause widespread, long-term, and severe damage to the natural environment", which takes into account new means of technological warfare which may be employed by parties to the conflict. Provisions have also been made in Articles 10 to 11, 13 to 14 and 16 in respect to prohibiting attacks on "objects indispensable to civilian survival", such as places of worship, irrigation systems, and sites of cultural significance. These Additional Protocols attempt to strengthen the legal framework of the Geneva Conventions of 1949 and have developed them to better deal with modern forms of warfare.

4. THE 21ST CENTURY CONCEPT OF 'NEW WARS' AND ITS CONNECTION TO MODERN CASES OF ARMED CONFLICT

We move on to the development of armed conflict in the 21st century. One of the characteristics of contemporary armed conflict is the increase in non-state actor involvement in such conflict. This

[19] Judith Gardam, 'Protocols Additional to the Geneva Conventions of 12 August 1949' (*legal.un.org*, March 2021) <https://legal.un.org/avl/ha/pagc/pagc.html> accessed 7 June 2023.
[20] ibid.
[21] International Committee of the Red Cross, '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) 1125 UNTS 3 <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and> accessed 2 July 2023.
[22] Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)' (*OHCHR*8 June 1977) <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and-0>.
[23] United Nations Treaty Collection, 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)' (*treaties.un.org*) <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800f3586>.
[24] United Nations Treaty Collection, 'Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)' (*treaties.un.org*) <https://treaties.un.org/pages/showDetails.aspx?objid=08000002800f3cb8> accessed 4 November 2023.

has led to a novel theory, in the study of international relations and the legal frameworks governing such relations, known simply as 'new wars'. Introduced by Professor Mary Kaldor, the concept refers to a form of post-Westphalian war which takes place around disintegrating states, with groups of opposed cultural and political ideologies struggling to impose their definition of identity on the rest of the political community[25]. New wars tend to stem from prolonged economic recession which causes the state to lose power over its territory and population, which results in the creation of power vacuums. This eventually leads to conflict between various identity groups, who are more often than not militant non-state actors, who grapple to obtain this power. New wars have become prevalent across international society, arguably replacing to an extent, the traditional interstate conflicts which used to take place.[26] The concept of new wars also places renewed emphasis on non-state actor involvement in conflicts, portraying a move away from the importance of direct state involvement. They are becoming more and more distinct from the traditional forms of armed conflict which were prevalent prior to the 21st century. One major distinction is the blurring of the line between active combatants and civilians, creating issues in terms of the application of the traditional facets of international humanitarian law such as the Geneva Conventions of 1949 and so on. The rise of new wars has also had a significant economic effect on the impacted regions, due to a rise in numerous transnational 'black' economies, ultimately creating a higher level of illegal activity in conflict-stricken regions.[27] Theorists have also expressed concern over the high humanitarian toll which such armed conflicts take on civilian populations. New wars have contributed to an increase in refugee flows, mass human rights violations and a breakdown of the rule of law, all of which are examples of issues which affect civilian populations the most.

However, while new wars are characterised by the importance of non-state actors in the course of the conflict, they are also a reflection of what is now commonly referred to as an era of 'new cold wars'.[28] A 'cold war' involves a rivalry between nations which is more restrictive than a typical 'hot war,' and is usually fought on political, economic and ideological fronts, with limited use of weaponry. The first Cold War, which took place between the former USSR and its allies and the United States and its allies, after the conclusion of the second World War, culminated in the creation of multiple proxy wars being fought to advance the ideological goals of each side and multiple other examples of instability being created on a global spectrum.[29] Though the Cold War

[25] Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Polity Press 1999).
[26] ibid.
[27] Summer Walker and Mariana Restrepo, 'Illicit Economies and Armed Conflict' (*Global Initiative Against Transnational Organized Crime,* January 2022) <https://globalinitiative.net/wp-content/uploads/2022/01/GMFA-Illicit-economies-28Jan-web.pdf> accessed 11 June 2023.
[28] Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Polity Press 1999).
[29] Martin J Medhurst and HW Brands, *Critical Reflections on the Cold War* (Texas A&M University Press 2000).

ended in 1991, discussions have taken place in recent years regarding the start of a new cold war, where battles against different ideologies in terms of economic, cultural and other such relations will begin anew. Scholars convey that this second cold war will likely culminate between the superpowers of the USA and either China or Russia or both. Evidence of the existence of a new cold war include disputes regarding reclamation of land in the South China sea and their varying policies in regards to the DPRK[30]. Tensions between Russia and the USA have also increased but have culminated in various instances of proxy fighting, for example, in the civil war in Syria.[31] In this case, Russia openly supported the Syrian government, led by Bashar al-Assad, including carrying out airstrikes by Russian aircrafts deployed to the Khmeimim base. The USA, on the other hand, backed the Syrian opposition, for example, by placing sanctions on the Assad regime in April of 2011 and other executive orders by then President Obama which targeted Assad and multiple other high-ranking officials.[32] This represents the heightened but more limited tensions between the two superpowers that may lead to the start of a new Cold War if it has not already begun. These heightened tensions between the global superpowers, but their reluctance to start conflicts directly among themselves, have led these powers to turn to new wars to expand their spheres of influence and accumulate more soft and hard power. Power, which is the ability of a state to bend another party to its will and pursue its political goals, is what a state must obtain in order for it to be able to survive in the international system.[33] New wars have become a way in which superpowers can support other actors who hold political agendas which the superpowers want to further and who are directly involved in the war, without the superpowers becoming directly involved in such conflicts.[34] For example, during the Cold War era, the USA and the USSR both backed groups in various conflicts that supported their political identity, such as the US support for the more liberal South Vietnam and the USSR support for the communist Viet Cong in the Vietnam War of 1955 to 1975.[35]

5. THE INCREASED PREVALENCE OF NON-STATE ACTOR INFLUENCE AND ACTIVITY ON ARMED CONFLICT

[30] Lee Lai To, 'China, the USA and the South China Sea Conflicts' (2003) 34 Security Dialogue 25.
[31] Carnegie Corporation of New York, 'U.S.-Russia Relations: Quest for Stability' (*usrussiarelations.org*) <https://usrussiarelations.org/3/geopolitics/map/syria> accessed 22 June 2023.
[32] Colin H Kahl, 'What Could Go Wrong for the U.S. In Syria? War with Russia' (*Washington Post*, 9 April 2017); <https://www.washingtonpost.com/posteverything/wp/2017/04/09/what-could-go-wrong-for-the-u-s-in-syria-war-with-russia/> accessed 22 June 2023.
[33] John Baylis and Steve Smith, *The Globalization of World Politics: An Introduction to International Relations* (Oxford University Press 2001).
[34] ibid.
[35] Heather Stur, 'Why the United States Went to War in Vietnam' (*Foreign Policy Research Institute*, 28 April 2017) <https://www.fpri.org/article/2017/04/united-states-went-war-vietnam/> accessed 25 June 2023.

Having established the growing importance and relevance of new wars in the 21st century, we turn to a discussion of the impact of non-state actors in terms of armed conflicts, one of the key characteristics of contemporary armed conflict. While it has traditionally been thought that states are the key actors in armed conflicts, a thorough examination of armed conflicts in the status quo illustrates this may not be the case. While the importance of states is not negligible, non-state actors have a much larger impact than traditionally thought, performing a wide variety of functions, interacting with states and among themselves, in many settings with varying levels of formality.[36] This emerging characteristic of armed conflict portrays that international humanitarian law is not an area of law exclusive to states but encompasses situations which deal with non-state actors as well.[37] The term 'non-state actor' can be defined as including a wide variety of parties, ranging from terrorist groups to private military companies. An important point to be noted is the distinction between non-state actors, which use force and violent measures as a strategy to spread specific beliefs and ideologies, and non-violent non-state actors, such as international organisations and NGOs.[38] For the sake of simplicity, this paper will use the term 'non-state actor' to describe the former.

The development of the internal workings of these groups is a key reason as to why the very face of armed conflict too has changed. For instance, before the turn of the 21st century, terrorist organisations constituted militia groups of non-state rebels who would carry out minor attacks and raids, mainly in South Asian or Middle Eastern countries, with little to no impact on the Western world.[39] However, following the establishment and consequent actions of numerous terrorist groups, such as ISIS and Al-Qaeda, the global perspective on terrorist and non-state actor participation in armed conflict changed. Especially after the 9/11 attacks and the declaration of a 'war on terror' by the United States of America during the Bush administration, the very face of terrorism changed[40]. Terrorist groups had new means and more power and became included in the complicated political game between states for power. The concept of 'lone wolf' terrorism, which consisted of terror attacks perpetrated without the operational involvement of terrorist organisations in initiating, planning or executing the attack, developed.[41] Such attacks were carried out by individual extremists to further their political ideals, focusing more on civilian and cultural targets.

[36] Ezequiel Heffes and Marcos D Kotlik, 'How Focusing on Non-State Actors Can Change the IHL Narrative' (*Opinio Juris*, 3 November 2020) <http://opiniojuris.org/2020/11/03/how-focusing-on-non-state-actors-can-change-the-ihl-narrative/> accessed 25 June 2023.
[37] ibid.
[38] 'Armed Non-State Actors: Current Trends & Future Challenges' (2015) DCAF HORIZON 2015 WORKING PAPER No. 5<https://www.files.ethz.ch/isn/144858/ANSA_Final.pdf> accessed 7 June 2023.
[39] Paul Wilkinson, *Political Terrorism* (Macmillan 1975).
[40] Benjamin Cole, *The Changing Face of Terrorism* (Bloomsbury Publishing 2010).
[41] Boaz Ganor, 'Understanding the Motivations of "Lone Wolf" Terrorists: The "Bathtub" Model' (2021) 15 Perspectives on Terrorism 23 <https://www.jstor.org/stable/27007294> accessed 20 May 2023.

Larger terrorist groups began openly spreading their ideologies but remained hard to identify as these groups were organised with high levels of professionalism, even rivalling state governments, due to an increase of funding and a lack of accountability. While no agreed upon definition exists in terms of such groups, terrorism is broadly defined as a method of coercion that utilises or threatens to utilise violence in order to spread fear and thereby attain political or ideological goals.[42] The popular 'triangular terrorist' concept emerged as well, referring to a scenario in which A attacks B, to convince or coerce C to change its position regarding some action or policy desired by A. The attack spreads fear as the violence is directed against innocent victims, which in turn puts pressure on third parties, such as governments, to change their policy or position.[43] Numerous other non-state actors are also of importance to armed conflicts and are distinct from terrorist groups. For instance, insurgent groups, also widely referred to as rebel groups, are highly involved in several armed conflicts and refer to groups which use physical violence against government targets with the aim of challenging the ruling government's authority, either through seizing control of the central government or some of its territory[44]. The influence and impact of such groups are present in numerous conflicts, such as that of the Fuerzas Armadas Revolucionarias de Colombia (FARC) ("Revolutionary Armed Forces of Columbia"), a rebel Marxist-Leninist group in the continuing Colombian conflict since 1964[45]. As much as war is thought to be a method of pushing political ideologies, it has nonetheless developed into an economic prospect as well. This is reflected in the rising prevalence of transnational criminal organisations who exploit the weak economic state of conflict-ridden areas for financial gain, often engaging in illegal activity such as arms smuggling and drug trafficking.[46] Private military and security groups are also seen repeatedly in cases of armed conflict and refer to private business entities that provide military or security services, with no set political ideology.[47] The use of such groups has widely increased over the last few years, with Private Military and Security Companies (PMSCs)[48] seen operating in Iraq, Afghanistan and Pakistan and are also being increasingly hired by western

[42] United Nations Office on Drugs and Crime, 'Introduction to International Terrorism' (2018) <https://www.unodc.org/documents/e4j/18-04932_CT_Mod_01_ebook_FINALpdf.pdf> accessed 7 June 2023.
[43] ibid.
[44] Janet Lewis, 'A Theory of Rebel Group Formation' (Janet Lewis (ed), Cambridge University Press 2020) 28 <https://www.cambridge.org/core/books/abs/how-insurgency-begins/theory-of-rebel-group-formation/22EAFE0DB749780ED503D5D8451A680E> accessed 27 June 2023.
[45] 'FARC' (*Encyclopaedia Britannica*) <https://www.britannica.com/topic/FARC> accessed 11 July 2023.
[46] Robert Muggah, 'Organized Crime in Armed Conflicts and Other Situations of Violence' [2023] International Review of the Red Cross 1.
[47] International Committee of the Red Cross, 'Private Military and Security Companies (PMSCs)' <https://casebook.icrc.org/a_to_z/glossary/private-military-and-security-companies-pmscs> accessed 9 July 2023.
[48] Global Policy Forum, 'Private Military & Security Companies (PMSCs)' <https://archive.globalpolicy.org/nations-a-states/private-military-a-security-companies.html> accessed 9 July 2023.

governments for domestic security purposes. Even certain IOs, such as the United Nations, have increased their use of PMSCs, hiring them for a wide range of 'security services'.[49]

6. IMPLICATIONS FOR OTHER MEMBERS OF THE INTERNATIONAL COMMUNITY IN THE CONTEXT OF ARMED CONFLICT

While it is clear that non-state actors, in a variety of capacities, are now a prevalent part of armed conflict, the relationship which they have with the rest of the international community is, at times, contentious. From customary laws to UNSC resolutions, the ways in which non-state actors interact with nation states and the various facets of international humanitarian law varies. Generally, however, the recurring theme which can be observed in the status quo is that non-state actors tend to not conform with the provisions of IHL and seem to have little to no regard for it. This non-compliance means that the increased involvement of non-state actors in armed conflict pose numerous challenges for the enforcement of IHL.

For instance, while certain larger groups of non-state actors have well-defined command and control structures with centralised power dynamics, newer groups tend to be more decentralised in their structure, operating with unconventional levels of fluidity and tend to operate outside the control of the state.[50] This makes it difficult for these actors to be held accountable under IHL and challenges arise in terms of ensuring compliance. From an alternative perspective, non-state actors face a number of issues when it comes to complying with IHL, making it more difficult for these actors to act in accordance with these rules. An outline of these challenges were highlighted in a working paper drafted by the Geneva Academy of International Humanitarian Law and Human Rights, which illustrated the main challenges faced in this regard.[51] The paper outlined that there were concerns non-state actors had in terms of military strategy, simply that these groups feel that compliance with international laws on conflict will deter their efforts to further their political ideals. Many actors also fear prosecution under the domestic laws of the states in which they operate. Many contemporary conflicts take place between a state and a non-state actor(s) thus creating a fear of prosecution in biased or corrupt judicial systems in the minds of the non-state actor.[52]

---

[49] ibid.

[50] International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (31 October 2015) <https://www.icrc.org/sites/default/files/document/file_list/challenges-report_ihl-and-non-state-armed-groups.pdf> accessed 20 June 2023.

[51] Geneva Academy of International Humanitarian Law and Human Rights, 'Rules of Engagement - Protecting Civilians through Dialogue with Armed Non-State Actors' (October 2011) <https://www.geneva-academy.ch/joomlatools-files/docman-files/Research%20documents/Rules-of-Engagement-EN.pdf> accessed 11 July 2023.

[52] ibid.

Further, some non-state actors use their political ideology as a cause for violence and many groups, namely terrorist groups, have extreme political beliefs and ideologies at their very core and their actions reflect these ideologies. One of the bigger issues is that non-state actors also tend to have a lack of knowledge about the intricate workings of international humanitarian law, as well as a lack of recognition under these provisions.

There is also generally a lack of consent on the part of non-state actors in terms of being bound by the provisions of IHL. The fact of the matter is that non-state actors are not voluntary parties to the treaties or convention which legally bind them. The theory referred to as the 'principle of legislative jurisdiction' is a majority view of the international community and conveys that such non-state actors are bound by IHL provisions merely due to their status of active engagement in hostilities on the territories of any Contracting States.[53] However, this creates a situation in which non-state actors are not involved in the law-making process by which they are bound.[54] This lack of participation and inclusion and, at times, the lack even of knowledge of these laws, means that it is difficult to expect compliance from these parties. Alongside contradictions between the laws on the treatment of non-state actors from a domestic standpoint as opposed to an international standpoint, the fact that non-state actors have no say in the international laws governing them results in non-compliance and a lack of accountability.[55] These challenges highlight the issues faced in terms of the application of IHL, especially in terms of non-state actors, in the context of contemporary conflicts. However, while some may argue that IHL is primarily based on treaty obligations and may not bind non-state actors, it is widely accepted as customary international law. Its universal applicability—which extends beyond particular treaty provisions—is highlighted by this recognition. In addition, the core tenets of IHL, which direct both state and non-state actors in their behaviour during armed conflicts, are the standards of humanity and the dictates of conscience. Therefore, to say that IHL is only a matter for ratifying nations does not absolve any party from its legally and morally obligatory responsibilities. IHL violations can result in war crimes prosecutions, which can hold offenders accountable for their deeds and make the world a safer and more equitable place in times of conflict.

[53] A State Party to the Geneva Conventions and/or its Additional Protocols.
[54] Morgan Kelley, 'Challenges to Compliance with International Humanitarian Law in the Context of Contemporary Warfare' (2013) <https://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2643&context=isp_collection> accessed 13 July 2023.
[55] ibid.

7. RECOMMENDATIONS FOR INCREASED COMPLIANCE AND INCLUSION BY NON-STATE ACTORS

Many recommendations can be made as to how IHL can be shaped and amended in order to solve the issues seen in terms of its application to armed conflicts in the status quo. While some critics of IHL have emphasised its lack of usefulness in the current context due to the fact that "treaty law may fall into desuetude when a change in the nature of conflict renders it ill-fitting in contemporary warfare",[56] in reality, challenges to just and fair warfare have always existed. It can be argued that the challenge lies not with the law itself but with the perceived relevance of it by the parties involved and consequently, their willingness to comply with it. Thus, the question which must be answered is not how IHL can be altered but rather what are the methods by which compliance can be better ensured.

One such way is by ensuring active and coherent engagement, which aims to incorporate non-state actors in the law-making procedures, creating a sense of accountability and recognition under IHL. Contrary to the beliefs of some states, research has shown that active engagement is necessary for compliance and many pathways for engagement exist. For instance, according to the Geneva Academy for International Humanitarian Law, "A variety of mechanisms exist for ANSAs [Armed non-State Actors] to commit to respecting international norms, such as unilateral declarations, special agreements, Memoranda of Understanding, 'Ground Rules', Action Plans, or deeds of commitment".[57] In light of increasing engagement with such groups, it must be acknowledged that new mechanisms must be put in place in order to ensure non-state actors are aware of their obligations under IHL, the issue here being the lengthy and overly-detailed nature of many of the key provisions of IHL. Many scholars have proposed solutions, such as the creation of a simple and short "code of conduct" which is specifically tailored for armed groups, creating a concise version of the more than 100 pages of treaty law. Simplifying the rules of IHL creates higher potential for such actors to perceive these laws to be advantageous and thus increases the chances of compliance.[58] In light of increasing non-state actors' knowledge of such provisions, an additional solution would be the provision of advisory services by neutral organisations, for instance, the ICRC. Such services are widely available to states and have thus been catered towards them, leaving out non-state actors, despite their importance in armed conflicts. By providing such services to non-state actors, there will be a development of higher levels of accountability and a more comprehensive feeling of responsibility within the groups.[59] When providing these services, the

[56] ibid.
[57] Geneva Academy (n 50).
[58] Sassòli (n 7).
[59] Geneva Academy (n 50).

importance of communication with the military leaders of these organizations is crucial. By communicating with military personnel rather than political representatives, we would be able to bypass the disconnect which often is seen between political relations and the realities of armed conflict[60]. Compliance can also be increased by engaging non-state actors in informal discussions, in order to create meaningful dialogue between impartial humanitarian groups and non-state actors which will bring to light the genuine concerns and issues of these parties.[61] Another important aspect of ensuring accountability under IHL is monitoring the levels of compliance. Most monitoring mechanisms are mostly geared towards addressing the conduct of states as non-state actors rarely are mentioned in the provisions of IHL and even if they are, the provisions are impractical when considering the realities of armed conflicts. This lack of provisions for regulating the monitoring, reporting, and verification (MRV) of non-State group behaviours must be changed in order to ensure greater compliance.

8. CONCLUDING REMARKS

In conclusion, the 21st century has faced many challenges in terms of the move away from conventional forms of warfare and the move towards 'new wars', which have seen a rise of non-state actor involvement in armed conflicts. These new security challenges have significantly impacted the compliance with and enforcement of IHL. While armed conflicts are an inherent part of human history, it is facing a number of developments and changes in the status quo. The governing legal regimes of war are arguably not fit for purpose, illustrated in the low levels of compliance by non-state actors, who are now identified to be key players in numerous conflicts globally. The decentralised and independent nature of the operations of non-state actors has made it difficult to ensure compliance with the provisions of IHL, as well as due to the lack of knowledge and recognition of IHL by these actors. Additionally, the lack of participation of non-state actors in the law-making process further creates a lack of compliance. In order to address these challenges, the active engagement of these parties is necessary; whether in the process of creating international legal frameworks or by creating solid communication methods between other impartial members of the international community and these actors. By actively including non-state actors in such processes, their perceptions of IHL can be changed and thus ensure higher levels of accountability and responsibility. This will allow the international community and the legal provisions in place to regulate instances of warfare to develop in order to better suit the armed conflicts present in the 21st century.

[60] ibid.
[61] ibid.

COUNTER-TERRORISM IN SRI LANKA: A HISTORY OF ABUSE AND THE NEED FOR DEMOCRATIC REFORM

Isuri Kumbukage | *Jaindee Jayarathne*

ABSTRACT

It is a well-known fact that Sri Lanka's counter-terrorism laws have been abusive and regressive, while simultaneously suppressing dissent. Such a taxing framework has resulted in criticism not only from a domestic audience, but also an international one. Despite such critiques and condemnation, these counter-terrorism laws have been used throughout the past 40 years; more specifically, since the conception of the Prevention of Terrorism Act (PTA). The newer amendments and proposed legislation brought forth within this span of time have not, to some extent, been equipped to effectively deal with the shortcomings of the PTA.

Amidst the recent upheavals that have arisen as a consequence of the continuous use of the PTA, despite the moratorium announced last year, the struggle for justice ensues. This article aims to support this struggle by focusing on a number of factors such as the introduction of said counter-terrorism legislation and the history revolving around it, along with a discussion of the current state of terrorism in order to answer the fundamental question of whether the State necessarily needs a specific counter-terror regime. The authors agree with the notion that Sri Lanka does indeed need counter-terrorism laws, insofar as democracy and effectiveness persist.

1. INTRODUCTION

The question of whether a country needs a counter-terrorism framework needs to be determined in the context of the rise in global terrorism and the possibility of enacting democratic legislation in dealing with armed militancy. For instance, on Easter Sunday of 2019, Sri Lanka was rocked by deadly bomb blasts which killed more than 300 people.[1] To date, justice has not been served and the State's response in the aftermath of the attacks led to the marginalization of the entire Muslim community in the country.[2] The abusive and racist response by the State was enabled by the repressive and undemocratic counter-terror laws in Sri Lanka.

[1] 'Latest Sri Lanka Easter Bombings News, Photos, Latest News Headlines about Sri Lanka Easter Bombings- the Hindu' <https://www.thehindu.com/topic/sri-lanka-easter-bombings/> accessed 15 July 2023.
[2] Saroor S and Bala M, 'Terrorising Minorities through "Counterterrorism"', Muslims in post-war Sri Lanka: Repression, resistance & reform (Alliance for Minorities 2021).

When confronted by the threat of terrorism, states face the dilemma of having to counter terrorism while safeguarding the rights of people. Being a signatory to treaties that build the capacity to combat terrorism and prevent violence, Sri Lanka is obliged to enact a counter-terrorism framework that is compatible with international human rights standards.[3] However, Sri Lanka's counter-terrorism framework has constantly been subjected to strong disapproval both domestically and internationally, and attempts at reform have failed to address the defects of the existing regime. In order to portray the gravity of the situation, the article will initially discuss the history of and the systemic abuse enabled by the existing counter-terror legislation in Sri Lanka.

2. A BACKDROP TO FORTY YEARS OF ABUSE

The Prevention Of Terrorism (Temporary Provisions) Act, No. 48 of 1979, hereinafter referred to as 'the PTA', was enacted in 1979 as a temporary emergency legislation, in response to the violence that was escalating between the State and separatist Tamil militant groups. It was said to respond to the danger caused by "*elements or groups of persons or associations that advocate the use of force or the commission of a crime as a means of, or as an aid in, accomplishing governmental change within Sri Lanka*".[4] Inspired by the Prevention of Terrorism Act in Britain, which dealt with the Irish Republican Army (IRA), a terrorist organization,[5] the PTA was introduced a year after the Second Republican Constitution was adopted. President J. R. Jayewardene's government, having secured a majority in Parliament, constituted an executive president with wide executive powers which largely went unchecked. The constitution did not provide for judicial review of post-enactment legislation and allowed the enactment of 'urgent bills', allowing an insufficient three-day window to invoke judicial review over the constitutionality of Bills. Thereby, the PTA which was presented to parliament as a temporary urgent Bill, was debated and passed within one day.[6] Even though the PTA was introduced as a temporary measure, it was made permanent in 1982[7] and continues to be in force today. At the time the PTA was enacted, the Public Security Ordinance of 1947 (PSO) and the Emergency Regulations enacted under the PSO were also in force. The PSO too, was passed as an 'urgent bill' in ninety minutes.[8] It is framed as a colonial piece of legislation

[3] Sri Lanka Common Country Analysis – United Nations Development Programme <https://www.undp.org/sites/g/files/zskgke326/files/2023-03/common_country_analysis_211221_-_sri_lanka.pdf> accessed 13 July 2023.
[4] Tegal E, Understanding Rule of Law, Human Security and Prevention of Terrorism in Sri Lanka (Law and Trust Society 2021).
[5] Bandarage A, The Separatist Conflict in Sri Lanka: Terrorism, Ethnicity, Political Economy (Routledge 2014).
[6] Wickramasinghe S, 'PTA Amendment Bill: A façade for Backdoor Human Right Violations?' (*Groundviews*, 20 May 2022) <https://groundviews.org/2022/05/20/pta-amendment-bill-a-facade-for-backdoor-human-right-violations/> accessed 11 July 2023.
[7] Prevention of Terrorism (Temporary Provisions) (Amendment) Act, No. 10 of 1982.
[8] Manoharan N, *C*ounterterrorism Legislation in Sri Lanka: Evaluating Efficacy (East-West Center Washington 2006).

that empowers the executive to enact emergency regulations when a state of emergency is declared.[9] The Emergency Regulations gazetted under the PSO and the PTA are the two most often critiqued pieces of legislation when it comes to human rights violations in Sri Lanka.[10]

The PTA drew immediate criticism from human rights bodies and activists (both national and international). Critics said that the PTA not only violated ICCPR[11] norms, but also violated international standards of criminal procedure with regard to prolonged detention, lack of access to lawyers and the admissibility of confessions obtained under duress. It confers far-reaching powers of detention, search and arrest without a warrant on the police and security forces in Sri Lanka. These provisions violate the constitutionally protected fundamental rights relating to liberty and security of persons. The PTA provides for detention of up to 3 months at a time (not exceeding an aggregate of 18 months)[12] without the individual being charged. Long periods of incarceration are experienced regularly even within the ordinary criminal justice system of Sri Lanka.[13] Under the PTA, persons being subject to long periods of detention without trial is an established practice. In instances where detainees were acquitted after a long period of detention, persons detained unjustifiably were not awarded compensation.[14] Furthermore, the PTA gives broad powers to the Minister of Defence, and this provision has led to the creation of regulations that enable abuse and human rights violations, the most recent being the De-radicalization Regulations.[15] These regulations allow for the administrative detention of individuals for up to two years without any legal proceedings being conducted in the courts. The PTA was labeled a "draconian piece of legislation"[16] which enabled violations of civil rights and liberties of the people of Sri Lanka and facilitated the crime of torture against detainees.

3. WEAPONIZATION OF THE PTA

The PTA has frequently been exploited to target perceived political opponents of the government of the day and members of minority communities. Successive governments have used the PTA

[9] Tegal E, Understanding Rule of Law, Human Security and Prevention of Terrorism in Sri Lanka (Law and Trust Society 2021).
[10] Nanayakkara C, Freedom from Torture: A Right without Borders (Sarasavi Publishers 2014).
[11] 'International Covenant on Civil and Political Rights' (*OHCHR*) <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> accessed 22 July 2023.
[12] Nanayakkara C, Freedom from Torture: A Right without Borders (Sarasavi Publishers 2014).
[13] Tegal E, Understanding Rule of Law, Human Security and Prevention of Terrorism in Sri Lanka (Law and Trust Society 2021).
[14] Thapa T, 'Locked up without Evidence' (*Human Rights Watch*, 28 March 2023) <https://www.hrw.org/report/2018/01/29/locked-without-evidence/abuses-under-sri-lankas-prevention-terrorism-act > accessed 17 July 2023.
[15] Prevention of Terrorism (De-radicalization from holding violent extremist religious ideology) Regulations No. 01 of 2021.
[16] Nanayakkara C, Freedom from Torture: A Right without Borders (Sarasavi Publishers 2014).

widely against the Tamils during and after the war ended in 2009. Furthermore, after the Janatha Vimukthi Peramuna (JVP) insurrection in 1989, the PTA was used to detain many Sinhalese youth. Recently, it was yet again used to detain hundreds of Muslims after the Easter Sunday attacks in 2019, and in 2022, the government targeted civil society activists during the Aragalaya protest movement by making arrests under the PTA.

3.1 Civil War

The most extensive use of the PTA was against those accused of involvement with Tamil militant groups, mainly the Liberation Tigers of Tamil Eelam (LTTE) and Tamil civilians. The story of Selvarathinam[17] is one of the many stories of people losing out on their lives after being arrested under the PTA. Arrested on the suspicion of having ties with the LTTE, he was detained under the PTA for 12 years during which the court case was deliberately postponed, at times by three months.[18] Selvarathinam was arrested when he was 58 years old, released when he was 71 and was not charged with an offence. Asia Watch argues that repressive measures such as the PTA, which provide for lengthy periods of detention without charge or meaningful judicial intervention, facilitate abuse by the armed forces.[19]

A study conducted by the Human Rights Commission of Sri Lanka (HRCSL) in 2020 reported that as of September 2018, at least 29 PTA prisoners had spent five to ten years in pre-trial detention, and 11 had spent ten to fifteen years on remand. The Commission also found that the longest period a person had been in pre-trial detention at the time was fifteen years, and that about 84 percent of PTA prisoners are tortured after arrest, while 90 percent of them are forced to sign documents in Sinhala, a language they do not understand.[20]

3.2 Easter Sunday

The aftermath of the 2019 Easter attacks saw mass arrests being made under the PTA. Overnight, the State branded the entire Muslim community of Sri Lanka as terrorists. It is reported that at least 500 Muslims were detained in the immediate aftermath.[21] The International Crisis Group places this figure at 1800.[22] In Kattankudy alone, 78 people including women and teenage boys were

[17] Rajasegar S, 'Released at 71: The Story of Selvarathinam' (*Groundviews*, 8 February 2023) <https://groundviews.org/2023/02/07/freedom-at-71-the-story-of-selvarathinam/> accessed 18 July 2023.
[18] ibid.
[19] Bandarage A, The Separatist Conflict in Sri Lanka: Terrorism, Ethnicity, Political Economy (Routledge 2014).
[20] HRCSL – Human Rights Commission Sri Lanka <https://www.hrcsl.lk/wp-content/uploads/2020/01/Prison-Report-Final-2.pdf> accessed 20 July 2023.
[21] De Silva M, PTA: Terrorising Sri Lanka for 42 Years (Law and Society Trust 2020).
[22] Saroor S and Bala M, 'Terrorising Minorities through "Counterterrorism"', Muslims in post-war Sri Lanka: Repression, resistance & reform (Alliance for Minorities 2021).

arrested under the PTA and were lumped under one investigation.[23] By doing so, the authorities have complicated the appeal process and derailed bail for those who are mistakenly held under custody.

In May 2020, Ahnaf Jazeem, a 26-year-old Muslim poet was arrested under the PTA for 'promoting terrorism' by publishing a photograph of a person in a Taliban-style dress beside one of his poems.[24] However, the poem itself *denounced* terrorism.[25] The police simply based his arrest on the picture he had published alongside the poem. Ahnaf was permitted to meet lawyers only 10 months after his arrest. Even then, CTID[26] officers listened to and recorded the privileged lawyer-client conversation.[27] During his detention, Ahnaf was handcuffed to a chair and handcuffed while sleeping. He was bitten by a rat and had also suffered from ureteral stones, a skin rash and psychological breakdowns.[28] This amounts to torture, cruel, inhumane and degrading treatment, and hence violates Ahnaf's fundamental right to be free from torture.[29] Even after being released on bail in December 2021, he was under surveillance by intelligence authorities.[30] The UN Working Group on Arbitrary Detention found that by imprisoning Ahnaf, the government had violated international human rights law.[31] The UN stated that the PTA "*is so broad that it could result in charges being brought against individuals who merely exercised their rights under international law.*"[32]

3.3 Aragalaya Protest Movement

The most recent weaponization of the PTA by the State was in 2022, with the arrests of three student leaders for their involvement in the Aragalaya protest movement. Wasantha Mudalige, convener of the Inter-University Students' Federation (IUSF); Galwewa Siridhamma Thera, convener of the Inter-University Bhikkhu Federation, and Hashan Jeewantha, member of the IUSF were all detained under the PTA.

[23] ibid.
[24] ibid.
[25] 'Poetic Injustice: Another Writer Languishes in Prison under PTA' (*Daily FT*, 14 December 2020) <https://www.ft.lk/news/Poetic-injustice-Another-writer-languishes-in-prison-under-PTA/56-710172> accessed 14 July 2023.
[26] Counter Terrorism Investigation Division.
[27] Rajasegar S, 'A Promising Poet Silenced by the PTA' (*Groundviews*, 2 March 2023) <https://groundviews.org/2023/03/02/a-promising-poet-silenced-by-the-pta/> accessed 15 July 2023.
[28] ibid.
[29] The Constitution of the Democratic Socialist Republic of Sri Lanka, Art. 11.
[30] Rajasegar S, 'A Promising Poet Silenced by the PTA' (*Groundviews*, 2 March 2023) <https://groundviews.org/2023/03/02/a-promising-poet-silenced-by-the-pta/> accessed 15 July 2023.
[31] ibid.
[32] ibid.

Even though Hashan and Siridhamma Thera were released after fifty days and nearly ninety days respectively, Wasantha Mudalige was kept in detention for over five months.[33] Despite having no evidence against Wasantha in relation to any involvement in "terrorism", the extraordinary powers under the PTA enabled the State to detain him for a prolonged period. It is reported that he was held in solitary confinement and in cramped cells without access to basic facilities including sunlight and sanitation,[34] violating the absolute prohibition on torture. After over 150 days of imprisonment, Wasantha was cleared of all terrorism charges under the PTA by the Colombo Magistrate's Court. The Colombo Chief Magistrate stated that the TID[35] had misused the PTA to detain Wasantha and that he had not committed any offences mentioned in the PTA.[36] The PTA has consistently been (ab)used to enable prolonged arbitrary detention, torture or other ill-treatment.

The manner in which the PTA has time and time again been weaponized by the State, against various communities in Sri Lanka, attests to the fact that Sri Lanka's abusive counter-terrorism laws enable systemic violence and suppression of the rights of people. Consequently, the PTA has received constant criticism,[37] and thus, there have been several attempts to amend, and at times, to repeal it.

4. ATTEMPTS AT REFORM AND REPEAL

The most recent amendment to the PTA, the Prevention of Terrorism (Temporary Provisions) (Amendment) Act, No. 12 of 2022 was gazetted on 27th January 2022. In its commentary on the amendment, the Centre for Policy Alternatives (CPA) notes that a minimalist approach is followed by this amendment,[38] whereby the reforms introduced are insufficient to address the issues of the PTA. It further states that many problematic aspects of the PTA that were highlighted by legal scholars, civil society actors and even the apex court of Sri Lanka, were not reformed through the amendment. Among other problematic aspects, what the amendments do not address include: the

[33] 'Sri Lankan Student Activist Wasantha Mudalige Released from Prison' (*Peoples Dispatch*, 2 February 2023) <https://peoplesdispatch.org/2023/02/02/sri-lankan-student-activist-wasantha-mudalige-released-from-prison/> accessed 19 July 2023.
[34] Morris BK, 'End Arbitrary Detention of Student Activist Wasantha Mudalige' (*Sri Lanka Campaign for Peace and Justice*, 16 January 2023) <https://www.srilankacampaign.org/end-arbitrary-detention-of-student-activist-wasantha-mudalige/> accessed 19 July 2023.
[35] Terrorism Investigation Division.
[36] 'IUSF's Wasantha Mudalige Granted Bail over 3 Cases' (*NewsWire*, 1 February 2023) <https://www.newswire.lk/2023/02/01/iusfs-wasantha-mudalige-granted-bail-over-3-cases/> accessed 18 July 2023.
[37] '"In a Legal Black Hole" Sri Lanka's Failure to Reform the Prevention of Terrorism Act' (*Human Rights Watch*, 28 March 2023) <https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act> accessed 16 July 2023.
[38] 'Commentary on Prevention of Terrorism (Temporary Provisions) (Amendment) Bill 2022' (*Centre for Policy Alternatives*, 4 March 2022) <https://www.cpalanka.org/commentary-on-prevention-of-terrorism-temporary-provisions-amendment-bill-2022/> accessed 22 July 2023.

admissibility of confessions under the PTA, the period of 72 hours after arrest that is said to facilitate torture, the lack of judicial oversight and the overly-broad definition of terrorism. The CPA goes on to say that the amendment is merely a token effort to address international pressure and not a genuine exercise to address the abuses and violations enabled by the PTA. Thus, it is evident that the PTA is a deeply problematic piece of legislation that the proposed amendments have failed to democratically reform. This is reflected in the International Commission of Jurists' (ICJ) Legal and Policy Director Ian Seiderman's comment: "*The fatally flawed PTA cannot be cured by these disingenuous reform attempts, but must be entirely repealed.*"[39]

The failure of successive Sri Lankan governments in reforming the PTA resulted in a number of domestic and international bodies including the United Nations (UN) and many governments calling for its repeal. In 2022, the HRCSL called for the PTA to be completely abolished, notwithstanding the amendments that were proposed by the government.[40] In the same year, the 'Justice for All' organization launched an island-wide signature campaign appealing to the Sri Lankan government to repeal the PTA. Parliamentarian M. A. Sumanthiran, convener of the organization, stated in a letter that the PTA has consistently been used to crush dissent against the government of the day.[41] Furthermore, civil society activists have continuously lobbied for the abolition of the PTA.[42] Seven UN Special Rapporteurs wrote to the Sri Lankan government on the 9th of December 2021, stating that the PTA goes against international human rights law, including certain provisions of the Universal Declaration of Human Rights and core international human rights treaties.[43] In 2021, the European Parliament adopted a resolution calling for the removal of GSP+ benefits from Sri Lanka if it continued to fail to meet its human rights obligations, particularly in relation to the PTA.[44] In January 2022, the ICJ stated that the "draconian Prevention of Terrorism Act" must be repealed.[45] Furthermore, in July 2022, while calling for the repeal of the

[39] Khattab A, 'Sri Lanka: The Prevention of Terrorism Act Cannot Be Reformed; It Must Be Repealed' (*International Commission of Jurists*, 1 February 2022) <https://www.icj.org/sri-lanka-the-prevention-of-terrorism-act-cannot-be-reformed-it-must-be-repealed/> accessed 20 July 2023.
[40] 'Human Rights Commission of Sri Lanka Wants PTA Abolished' (*Colombo Gazette*, 16 February 2022) <https://colombogazette.com/2022/02/16/human-rights-commission-of-sri-lanka-wants-pta-abolished/> accessed 19 July 2023.
[41] 'Islandwide Signature Campaign Underway to Call on Government to Repeal PTA ' (*Latest in the News Sphere | The Morning*) <https://www.themorning.lk/articles/189016> accessed 18 July 2023.
[42] 'Civil Society Statement on Govt. Proposals to Reform the Prevention of Terrorism Act' (*Daily FT*, 4 December 2021) <https://www.ft.lk/opinion/Civil-society-statement-on-Govt--proposals-to-reform-the-Prevention-of-Terrorism-Act/14-726946> accessed 21 July 2023.
[43] '"In a Legal Black Hole" Sri Lanka's Failure to Reform the Prevention of Terrorism Act' (*Human Rights Watch*, 28 March 2023) <https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act> accessed 16 July 2023.
[44] ibid.
[45] Khattab A, 'Sri Lanka: The Prevention of Terrorism Act Cannot Be Reformed; It Must Be Repealed' (*International Commission of Jurists*, 1 February 2022) <https://www.icj.org/sri-lanka-the-prevention-of-terrorism-act-cannot-be-reformed-it-must-be-repealed/> accessed 22 July 2023.

PTA before the UN Human Rights Council, the ICJ stated that the "*Government's refusal to repeal the PTA and the continued impunity for violations of international law are illustrative of the Sri Lankan Government's general unwillingness to engage in real accountability measures*".[46]

4.1 Counter-Terrorism Act 2018

In 2015, President Sirisena's government agreed to a resolution at the UN Human Rights Council to promote truth, justice and reparations, and take steps to protect rights, including repealing the PTA.[47] Subsequently, the government proposed a new counter-terrorism Bill, namely the Counter-Terror Act (CTA) which would replace the PTA. The public had not been consulted by the authorities before this Bill was placed in the Order Paper of Parliament.[48] Although certain groups supported this supposedly progressive alternative, there was resistance from others. Even though the CTA contained better safeguards against the admissibility of coerced confessions, it fell short in other ways. It did not address the provisions that allowed for prolonged detention without charge, the very condition that facilitated torture. Furthermore, it gave the military powers of arrest. However, this Bill was not enacted. Two months after President Gotabaya Rajapaksa came to power, his government decided to retain the PTA and approved a proposal to withdraw the proposed CTA.

4.2 Anti-Terrorism Act 2023

The Wickremesinghe government in March 2023, published the proposed Anti-Terrorism Act (ATA) as an alternative to the PTA. This is the most recent attempt by the government to respond to the criticisms of the PTA. Despite the ATA being portrayed as a law that will "*ensure just and fair application of the system for the administration of criminal justice against terrorism*",[49] lawyers and civil society activists have stated that it is in fact a more advanced version of the PTA which introduces newer and greater threats to the rights of citizens.[50] The ATA is a tool that governments could use to crush dissent, protests, political opposition and unleash disproportionate responses by the State. It does not meet two key demands from critics of the PTA: to stop using

[46] Massimo, 'Sri Lanka: ICJ Calls for Repeal of Prevention of Terrorism Act before UN Human Rights Council' (*International Commission of Jurists*, 7 March 2022) <https://www.icj.org/sri-lanka-icj-calls-for-repeal-of-prevention-of-terrorism-act-before-un-human-rights-council/> accessed 15 July 2023.
[47] '"In a Legal Black Hole" Sri Lanka's Failure to Reform the Prevention of Terrorism Act' (*Human Rights Watch*, 28 March 2023) <https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act> accessed 14 July 2023.
[48] Tegal E, Understanding Rule of Law, Human Security and Prevention of Terrorism in Sri Lanka (Law and Trust Society 2021).
[49] Tegal E, 'When Repeal Is Not Reform: An Anti-Terrorism Act Worse than the PTA' (*Groundviews*, 20 April 2023) <https://groundviews.org/2023/03/28/when-repeal-is-not-reform-an-anti-terrorism-act-worse-than-the-pta/> accessed 18 July 2023.
[50] ibid.

extraordinary executive powers, which are susceptible to abuse, and to refrain from casting ordinary criminal offenses as acts of terrorism.[51] Widespread criticisms and calls to withdraw the ATA were seen both domestically and internationally.[52] Recently, President Wickremesinghe stated that the Drafting Committee on the Anti-Terrorism Bill will review the proposals for reform suggested by the EU and that the Bill will be re-gazetted after appropriate action.[53]

Amidst calls for an immediate moratorium on the use of the PTA by seven United Nations Special Rapporteurs,[54] the Minister of Foreign Affairs Prof. G.L. Peiris, delivering Sri Lanka's statement at the 50th Session of the UN Human Rights Council in 2022, announced a de facto moratorium on the PTA.[55] Despite this, on 18th May 2023, four persons were arrested under the PTA in relation to the Easter attacks in 2019. Amnesty International has expressed concern via Twitter over the arrests, and urged the government to desist from using the PTA. The continuing use of the PTA despite the announcement of a moratorium on its use confirms the government's authoritarian approach to countering terrorism.

5. COMPARING EXISTING AND PROPOSED LEGISLATION

The provisions relating to the definition of terrorism, arrest, detention, and the admissibility of statements are key sections of counter-terrorism laws that determine the protection of people's liberties. For the purposes of understanding the Sri Lankan State's approach to reforming its counter-terrorism legislation, a comparative analysis of these provisions of the existing and proposed laws is presented below.

5.1 Definition of Terrorism

[51] ibid.
[52] Root R, 'Freedom of Expression: Sri Lanka's "Overbroad" Draft Terrorism Law Threatens Human Rights' (*International Bar Association*) <https://www.ibanet.org/Sri-Lanka-overbroad-draft-terrorism-law-threatens-human-rights> accessed 20 July 2023.
[53] 'President Meets Tamil MPs; Discusses Anti-Terror & Anti-Corruption Bills' (*Newsfirst*, 18 July 2023) <https://www.newsfirst.lk/2023/07/18/president-meets-tamil-mps-discusses-anti-terror-anti-corruption-bills/> accessed 17 July 2023.
[54] 'Sri Lanka: UN Experts Call for Swift Suspension of Prevention of Terrorism Act and Reform of Counter-Terrorism Law' (*OHCHR*, 2 March 2022) <https://www.ohchr.org/en/press-releases/2022/03/sri-lanka-un-experts-call-swift-suspension-prevention-terrorism-act-and> accessed 11 July 2023.
[55] *Sri Lanka has taken steps to amend PTA | Daily News* <https://archives1.dailynews.lk/2022/06/14/local/280819/sri-lanka-has-taken-steps-amend-pta> accessed 21 July 2023.

Despite the limited number of acts that constitute an offence under the PTA, the broad nature of these acts has caused much controversy in the country.[56] The PTA does not contain an adequate definition of terrorism.[57]

In comparison, the CTA included a higher number of acts that constitute the offence of terrorism.[58] This is provided the acts are committed with the mens rea specified. The list of mens rea is vague and is open to broad interpretation, thereby enabling the offenses to be exploited and, as a result, interfering with the constitutionally protected rights of the people. The CTA excluded acts done in '*lawful exercise of a fundamental right*' so long as it is done in '*good faith*'. If a restrictive approach is applied to the interpretation of 'good faith', it may interfere with people's liberties.

The proposed ATA also includes a long list of acts that could be interpreted broadly under the offence of terrorism.[59] The executive is granted wide latitude under this definition in deciding who can be accused of terrorism and subjected to arrest and detention. Critics of the ATA say that this broad definition could be used in circumstances that are far removed from acts of real terrorism, against minorities and human rights defenders in a discriminatory manner.[60]

5.2 Arrest

Under the PTA,[61] only police officers within a certain rank have powers of arrest. The CTA however, permits arrests without warrants by police officers *and* other officers, where the term "other officers" includes an officer or member of the armed forces or a coast guard.[62] The CTA does not indicate who an 'officer other than a police officer' would be,[63] thereby, this clause would

[56] 'Comparing the Proposed Counter Terrorism Bill to the Prevention of Terrorism Act' (*Centre for Policy Alternatives*, 17 October 2018) <https://www.cpalanka.org/comparing-the-proposed-counter-terrorism-bill-to-the-prevention-of-terrorism-act/> accessed 22 July 2023.
[57] Castle A, 'Prevention or Creation of Terrorism? The Sri Lankan Prevention of Terrorism Act: Immigration and Human Rights Law Review' (*Immigration and Human Rights Law Review | The Blog*, 17 January 2023) <https://lawblogs.uc.edu/ihrlr/2023/01/17/prevention-or-creation-of-terrorism-the-sri-lankan-prevention-of-terrorism-act/#post-409-footnote-ref-65> accessed 18 July 2023 see also '"In a Legal Black Hole" Sri Lanka's Failure to Reform the Prevention of Terrorism Act' (*Human Rights Watch*, 28 March 2023) <https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act> accessed 19 July 2023.
[58] 'Comparing the Proposed Counter Terrorism Bill to the Prevention of Terrorism Act' (*Centre for Policy Alternatives*, 17 October 2018) <https://www.cpalanka.org/comparing-the-proposed-counter-terrorism-bill-to-the-prevention-of-terrorism-act/> accessed 17 July 2023.
[59] 'Proposed Anti – Terrorism Act (ATA) – Key Concerns Centre for Policy Alternatives (CPA) May 2023' (*Centre for Policy Alternatives*, 20 June 2023) <https://www.cpalanka.org/proposed-anti-terrorism-act-ata-key-concerns-centre-for-policy-alternatives-cpa-may-2023/> accessed 17 July 2023.
[60] ibid.
[61] 'Comparing the Proposed Counter Terrorism Bill to the Prevention of Terrorism Act' (*Centre for Policy Alternatives*, 17 October 2018) <https://www.cpalanka.org/comparing-the-proposed-counter-terrorism-bill-to-the-prevention-of-terrorism-act/> accessed 18 July 2023.
[62] Counter Terrorism Act 2018, Clause 17.
[63] Counter Terrorism Act 2018, Clause 18.

have to be amended to enable accurate interpretation. Additionally, the clause has to mention the fact that Coast Guards would have powers to arrest only within the scope of their duty and not otherwise. The ATA consists of a similar provision on this area. [64]

In this regard, an issue arises in relation to the powers granted to the authorities. The CTA as opposed to the PTA widens the categories of persons who can arrest suspects.[65] Giving armed forces powers of arrest would have a serious impact on fundamental rights and would result in standardizing militarization to a greater extent.

Further, a question arises regarding armed forces assisting in arrests during times of peace. This provision must be amended to limit assistance to instances with exceptional circumstances. Similarly, according to provisions in the ATA, the power of the armed forces and coast guard to carry out arrests is not limited to situations of emergency. The armed forces and coast guard are also given similar powers of search and seizure.[66]

With regard to the procedure for arrest and remand, the CTA shows an improvement from the PTA. It reduced the number of hours a suspect could be kept in remand custody before being produced at a Magistrate's Court from 72 hours to 48 hours.[67] However, the CTA suggests that the suspect be produced before *any* Magistrate. This provision is both unjust and unnecessary. It is vital that the suspect is produced before the *nearest* Magistrate for an independent investigation.

5.3 Detention

As per the provisions for detention orders in the PTA, the Minister of Defence has broad powers to issue orders. The period of initial detention is three months, and there is no requirement for the detention order to include reasons.[68]

Compared to the PTA, provisions relating to detention under the CTA are progressive. The initial period of detention has been reduced to two weeks, and the CTA requires the detention order to

---

[64] 'Proposed Anti – Terrorism Act (ATA) – Key Concerns Centre for Policy Alternatives (CPA) May 2023' (*Centre for Policy Alternatives*, 20 June 2023) <https://www.cpalanka.org/proposed-anti-terrorism-act-ata-key-concerns-centre-for-policy-alternatives-cpa-may-2023/> accessed 19 July 2023.
[65] 'Comparing the Proposed Counter Terrorism Bill to the Prevention of Terrorism Act' (*Centre for Policy Alternatives*, 17 October 2018) <https://www.cpalanka.org/comparing-the-proposed-counter-terrorism-bill-to-the-prevention-of-terrorism-act/> accessed 14 July 2023.

[66] 'Proposed Anti – Terrorism Act (ATA) – Key Concerns Centre for Policy Alternatives (CPA) May 2023' (*Centre for Policy Alternatives*, 20 June 2023) <https://www.cpalanka.org/proposed-anti-terrorism-act-ata-key-concerns-centre-for-policy-alternatives-cpa-may-2023/> accessed 12 July 2023.
[67] 'Comparing the Proposed Counter Terrorism Bill to the Prevention of Terrorism Act' (*Centre for Policy Alternatives*, 17 October 2018) <https://www.cpalanka.org/comparing-the-proposed-counter-terrorism-bill-to-the-prevention-of-terrorism-act/> accessed 19 July 2023.
[68] ibid.

include reasons.[69] The CTA states that orders must be issued solely for the purposes set out in the clause and where necessary. This minimizes the possibility of abuse when issuing detention orders. Another progressive provision in the CTA is the proposal to consult the HRCSL when deciding the condition of detentions.

A major concern in the ATA are its provisions for detention orders.[70] Deputy Inspector Generals (DIGs) of police are given powers to make detention orders. This is quite problematic, compared to the PTA where only the Minister could issue orders. There is no judicial intervention when issuing the initial order and this gives DIGs wide discretionary powers. The ATA allows for initial detention of up to three months, to be extended up to one year with the approval of a Magistrate.[71] This is concerning as it could lead to the suppression of people's liberties.

5.4 Confessions

When examining the provisions of admissibility of statements under the PTA, it is evident that the process of obtaining a statement violates rights, as the lawyers of the suspect are not required to be present. Clearly, this process is very arbitrary. Further, there have been a number of reports of instances where methods of harassment, intimidation, ill-treatment, threats and torture were used to extract confessions from suspects and detainees.[72] One such instance is when confessions in Sinhalese are extracted from Tamil speakers although they have no knowledge of the Sinhalese language.[73]

The provisions governing confessions in the CTA are progressive as opposed to those of the PTA. Here, only confessions produced before a Magistrate will be admissible in court as evidence. Further, any statements made would be subject to s.24 of the Evidence Ordinance, which provides that confessions extracted by the use of inducement, threats or promises would be irrelevant. Furthermore, the CTA provides for positive provisions such as access and communication with lawyers. The CTA takes a different approach from the PTA, by providing that the burden of proving a confession that is voluntarily made would be on the prosecuting authority.

[69] Counter Terrorism Act 2018, Clause 31.
[70] 'Proposed Anti – Terrorism Act (ATA) – Key Concerns Centre for Policy Alternatives (CPA) May 2023' (*Centre for Policy Alternatives*, 20 June 2023) <https://www.cpalanka.org/proposed-anti-terrorism-act-ata-key-concerns-centre-for-policy-alternatives-cpa-may-2023/> accessed 20 July 2023.
[71] ibid.
[72] de Silva M, PTA: Terrorising Sri Lanka for 42 Years (Law and Society Trust 2020).
[73] Satkunanathan A, 'Living in Hell: The Plight of Prisoners Held under the PTA' (*Groundviews*, 11 October 2021) <https://groundviews.org/2021/01/27/living-in-hell-the-plight-of-prisoners-held-under-the-pta/> accessed 21 July 2023.

The ATA shows an improvement from the other two Acts, as confessions made to a police officer by suspects in detention would not be admissible as evidence. This is in contrast to the exception made in the PTA by allowing confessions to be obtained, which led to a culture of 'forced confessions' resulting in the violation of the rights of detainees.

5.5 Undemocratic additions by the ATA

As indicated earlier, the ATA is the latest attempt in reforming Sri Lanka's counter terrorism laws and it bestows greater powers on the authorities to limit people's rights by crushing dissent. The following are some of the problematic provisions the Wickremesinghe government introduced in its attempt to reform the already abusive PTA.

Under the ATA, the President is given powers to make 'Proscription Orders' against organizations[74] when the said organization is accused of an offense that amounts to terrorism, or when the President 'has reasonable grounds' to believe that the organization is acting in a manner that is 'prejudicial' to the national security of Sri Lanka or any other country. This provision is problematic as it may be used to crackdown on dissent in the country, thereby violating people's liberties.

The ATA expands powers in order to criminalize speech that is "*likely to be understood*" as inducement to commit terrorism, and the burden of proof is on the defendant to state that it was not their intention. Said offenses also apply to those who distribute, sell, publish or transmit "*terrorist publications.*" The problematic nature of this provision needs to be viewed in the context of the PTA being used to detain people who commemorate Tamil victims of the civil war on social media,[75] on the basis that they were "glorifying" terrorism, which would be an offense under the proposed ATA.

The penalty for the terrorism offense of murder under the ATA is the imposition of the death penalty, despite Sri Lanka having in place a moratorium on executions since 1976. Due to its inherent cruelty and finality, Human Rights Watch opposes the death penalty in all circumstances.[76]

---

[74] Castle A, 'Prevention or Creation of Terrorism? The Sri Lankan Prevention of Terrorism Act: Immigration and Human Rights Law Review' (*Immigration and Human Rights Law Review | The Blog*, 17 January 2023) <https://lawblogs.uc.edu/ihrlr/2023/01/17/prevention-or-creation-of-terrorism-the-sri-lankan-prevention-of-terrorism-act/#post-409-footnote-ref-65> accessed 17 July 2023.

[75] '"In a Legal Black Hole" Sri Lanka's Failure to Reform the Prevention of Terrorism Act' (*Human Rights Watch*, 28 March 2023) <https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act> accessed 18 July 2023.

[76] 'Sri Lanka: Reject New Counterterrorism Bill' (*Human Rights Watch*, 7 April 2023) <https://www.hrw.org/news/2023/04/07/sri-lanka-reject-new-counterterrorism-bill> accessed 15 July 2023.

The State must protect the right to life of citizens, and the death penalty goes against the State's responsibility to do so.

Experts have said that the establishment of the Independent Review Panel (IRP), a parallel institution to the HRCSL, whose function is to receive and inquire into complaints of alleged violations of fundamental rights that occur during the implementation of the proposed ATA, is an attempt to undermine the powers of the HRCSL. The Bill requires authorities to notify the HRCSL of the arrest within 72 hours. However, the Human Rights Commission Act[77] requires this notification to be done within 48 hours from the time of arrest. This discrepancy raises the question of which provision needs to be adhered to.

Evidently, consecutive governments have been extremely unsuccessful in democratically reforming Sri Lanka's counter-terrorism framework. The comparative analysis of the laws discussed above is a clear demonstration of the State not making a genuine attempt to protect the rights of its citizens by reforming the law. Instead, the State has repeatedly created tools of repression under the guise of countering terrorism. The challenge for any democratic government is to protect its citizens from arbitrary violence without adopting authoritarianism[78] in the process of combating terrorism.

6. DOES SRI LANKA NEED A COUNTER-TERRORISM FRAMEWORK?

There is support for the argument that States including Sri Lanka must do away with their existing counter-terror regimes and utilize the criminal justice system for a democratic response to terrorism. This is because democracies have well-developed systems, legislation and structures to deal with crime, and terrorism inevitably entails the commission of a crime.[79] In February 2022, the HRCSL called for the abolition of the PTA and stated that the offence of terrorism should be included in the Penal Code.[80] Former Commissioner of HRCSL Ambika Satkunanathan questions the need for additional counter-terrorism laws when Sri Lanka already "*criminalizes acts that have been declared terror offences under international legal instruments*". Dr. Gehan Gunatilleke, Commissioner of the HRCSL, argues that it is preferable to have one procedural regime that applies

[77] Human Rights Commission of Sri Lanka Act No. 21 of 1996.
[78] Manoharan N, *C*ounterterrorism Legislation in Sri Lanka: Evaluating Efficacy (East-West Center Washington 2006).
[79] ibid.
[80] 'Human Rights Commission of Sri Lanka Wants PTA Abolished' (*Colombo Gazette*, 16 February 2022) <https://colombogazette.com/2022/02/16/human-rights-commission-of-sri-lanka-wants-pta-abolished/> accessed 19 July 2023.

to all offences including terrorism.[81] He states that within that regime, there could be special offences that have additional elements such as the intention to intimidate a population. Dr. Gunatilleke proposes a clearly defined offence to be included in criminal law and for the same procedural regime to be applicable to those suspected of the offence. Supporters of addressing terrorism utilizing the criminal justice system believe that it is the best option for democratic governments.

However, it is commonly found[82] that existing criminal laws are inadequate to aid governments and security forces in dealing with the increasing sophistication of terrorism.[83]

The Easter Sunday attacks in 2019 which involved a number of suicide bombings targeting churches and hotels in Sri Lanka, illustrate the national security threat that persists due to the global rise in terrorism. The attacks were carried out in a calculated manner on Easter Sunday in 2019, which caused a large number of fatalities. On investigation, it was found that these hostile attacks were carried out by members of a local militant radical Islamist group named National Thowheeth Jama'ath. These members were influenced and inspired by the Islamic State (IS), and after the attacks, its leader Abu Bakr al-Baghdadi expressed his approval of these attacks while highlighting that IS would continue to inspire such attacks and reach their goals.[84]

Statistics related to global terrorism interestingly portray the very real threat States are faced with. The Islamic State remained the deadliest terror group globally, for the eighth consecutive year, recording the most attacks and deaths of any group in 2022, with eighteen countries having experienced a death resulting from terrorism caused by the IS. Currently, Sri Lanka holds the 29th position on the Global Terrorism Index of 2023 (GTI).[85] According to this index, in 2022, deaths resulting from terrorism fell by 9 percent which was due to a reduction in the number of incidents, with attacks declining by almost 28 percent from 5,463 in 2021 to 3,955 in 2022. Afghanistan remained the country most impacted by terrorism for the fourth consecutive year, despite attacks and deaths falling by 75 percent and 58 percent respectively. Furthermore, violent conflict remains the primary reason for terrorism, with over 88 percent of attacks and 98 percent of deaths resulting from terrorism in 2022 taking place in countries where conflict persists. All ten countries most

[81] 'The Case against Anti-Terrorism Laws' (*Verité Research*, 30 July 2018) <https://www.veriteresearch.org/2018/07/25/the-case-against-anti-terrorism-laws/> accessed 15 July 2023.
[82] Manoharan N, *C*ounterterrorism Legislation in Sri Lanka: Evaluating Efficacy (East-West Center Washington 2006).
[83] ibid.
[84] 'Sri Lanka Bombings: Islamic State Claims Responsibility for Attacks' (*The Guardian*, 23 April 2019) <https://www.theguardian.com/world/2019/apr/23/sri-lanka-bombings-first-burials-take-place-on-day-of-mourning > accessed 14 July 2023.
[85] 'Global Terrorism Index 2023 - World' (*ReliefWeb*, 14 March 2023) <https://reliefweb.int/report/world/global-terrorism-index-2023> accessed 12 July 2023.

impacted by terrorism in 2022 were also involved in an armed conflict and it was found that attacks in countries involved in conflict are seven times deadlier than attacks in countries that do not have an ongoing conflict. The South Asian region had the worst average GTI score in 2022 due to the record of 1,354 deaths resulting from terrorism that year. It is noteworthy that both Afghanistan and Pakistan remain amongst the ten countries most affected by terrorism in 2022, with deaths in Pakistan rising significantly to 643, a 120 percent increase from 292 deaths in 2021.

Therefore, in order to deal with the advancement of terrorism and the threat it poses to states, a special regime is in fact required to supplement the criminal laws that exist. It could be argued that it is not just law and order that is at stake, but the very existence of the State.[86] Counter-terrorism regimes introduce a prevention aspect to the prevailing deterrence strategies of the criminal justice system.[87] While advocating for states having special counter-terror regimes, it is quite important to note that these counter-terrorism measures must be balanced with democracy. The judiciary plays a vital role in ensuring counter-terrorism laws do not trample citizens' rights, and that governments and institutions observe the rule of law in enacting such legislation. It acts as a watchdog to prevent the abuse of counter-terrorism laws, especially by the law enforcement agencies. Thus, in order to ensure democracy is upheld in the exercise of countering terrorism, states must provide for maximum judicial intervention. While acknowledging the existing laws that deal with certain aspects of offences related to terrorism, the CPA argues that in order to address new and unforeseen terrorist threats, Sri Lanka needs a comprehensive counter-terrorism framework.[88]

7. INTERNATIONAL LEGAL STANDARDS

Sri Lanka must ensure that its counter-terrorism framework complies with its obligations under international law, and that the framework is in line with international standards. Some of the international standards which anti-terrorism laws must comply with are as follows. In 2021, seven UN Special Rapporteurs wrote to the Sri Lankan government regarding the repeated findings by their mandates and set out five prerequisites which must be followed in order to create counter-terrorism laws that are compliant with international law:[89]

1. Employ definitions of terrorism that comply with international norms.

[86] Manoharan N, *C*ounterterrorism Legislation in Sri Lanka: Evaluating Efficacy (East-West Center Washington 2006).
[87] ibid.
[88] *Questions & Answers Proposed Counter Terrorism Act Centre for Policy Alternatives April 2019* <https://www.cpalanka.org/wp-content/uploads/2019/04/CTA_QA.pdf> accessed 21 July 2023.
[89] 'Sri Lanka: UN Experts Call for Swift Suspension of Prevention of Terrorism Act and Reform of Counter-Terrorism Law' (*OHCHR*, 2 March 2022) <https://www.ohchr.org/en/press-releases/2022/03/sri-lanka-un-experts-call-swift-suspension-prevention-terrorism-act-and> accessed 21 July 2023.

2. Ensure precision and legal certainty, especially when this legislation may impact the rights of freedom of expression, opinion, association and religion or belief.
3. Institute provisions and measures to prevent and halt arbitrary deprivation of liberty.
4. Ensure preventive measures are in place to prevent torture and enforced disappearances, and adhere to their absolute prohibition.
5. Enable overarching due process and fair trial guarantees, including judicial oversight and access to legal counsel.

The report of the Special Rapporteurs stated that the PTA disregards Sri Lanka's obligations under international human rights law. It was further stated that the government was essentially introducing new methods to deny rights rather than introducing remedial measures. It is important to note that on a number of occasions, UN human rights experts along with the UN High Commissioner for Human Rights - Michelle Bachelet, have highlighted the issue of deteriorating rights in Sri Lanka, by highlighting the role played by the PTA in enabling abuses.

Furthermore, the ICCPR, which Sri Lanka is party to, plays a major role in guaranteeing a number of rights to those arrested and detained. For instance, Article 9 sets out a number of rights such as: those arrested are to be informed of the reason for arrest and any charges against them at the time of arrest; those arrested or detained on a criminal charge are to be brought directly to a judge and will have a right to trial within a reasonable time or to be released; in cases of unlawful detention, victims have a right to compensation; those deprived of liberty as a result of arrest or detention will have a right to judicial review on the legality of their detention; and, this right applies to all situations of detention. [90]

Additionally, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984[91] plays a major role in protecting the right to be free from torture. While noting that Sri Lanka is a party to this Convention, it is important to note that it is also the most authoritative and detailed Convention regarding the prohibition of torture. The prohibition of torture is considered to be absolute, non-derogable, and it is a *jus cogens* which essentially means that this prohibition is an important obligation that each State must fulfill, irrespective of whether they have signed the Convention. Incidents of torture cannot be justified by States in any

[90] 'International Covenant on Civil and Political Rights' (*OHCHR*) <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> accessed 22 July 2023.
[91] 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (*OHCHR*) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading> accessed 22 July 2023.

circumstance. The absolute prohibition of torture is also enshrined in a number of other treaties including the ICCPR,[92] European Convention on Human Rights,[93] etc.

The absolute prohibition of torture demonstrates the need for Sri Lanka to adopt counter-terrorism laws which do not have provisions that enable torture. As was discussed earlier, the counter-terrorism laws of Sri Lanka enable the authorities to resort to torture, thereby violating the aforementioned international human rights standards. Some countries have been successful in enacting counter-terrorism legislation that complies with international human rights standards. Selected provisions from these legislations will be discussed, for the purposes of understanding how Sri Lanka too could reform its counter-terrorism framework.

7.1 Canada

Inspired by the UK's Terrorism Act 2000, Canada brought in their first counter-terrorism legislation in December 2001. Compared to the UK Act, the Canadian Act was more democratic, considering it had a number of differences.[94] One such difference involved the following requirement: for an act to be considered a terrorist action, it had to be designed to "*compel*" governments or international organizations to perform or abstain from acting. As opposed to the definition in the UK Act which merely required the element of "*influence*" over governments to perform or abstain from doing any act, the Canadian provision is said to be comparatively democratic, since it requires a higher threshold for an act to constitute terrorism.

Similarly, in relation to property damage, the Canadian Act imposed a requirement stating that "politically or religiously motivated property damage" would constitute terrorism only if the risk of endangering life was involved. This should be studied with the Canadian exemption for protests and strikes that did not pose a threat to human life.[95] Thus the initial Bill, which had originally exempted only lawful protests and strikes, was amended to exempt all protests and strikes that did not pose a threat to life. This Act also included a clause that was open to interpretation, which held that the expression of political and religious belief would not amount to a terrorist activity.

It is evident that Canada was successful in adopting a comparatively democratic piece of legislation, by raising the threshold for actions to be considered terrorist. This is demonstrative of

[92] International Covenant on Civil and Political Rights, Art. 7.
[93] European Convention on Human Rights, Art. 3.
[94] Roach, K. (Ed.). (2015). *Comparative Counter-Terrorism Law*. Cambridge: Cambridge University Press. doi:10.1017/CBO9781107298002.
[95] ibid.

how a more lenient approach would assist governments to build counter-terrorism regimes that do not violate fundamental freedoms.

7.2 European Union (EU)

The following discussion is a brief comparison of the UK's Terrorism Act 2000 and the 2002 Framework Decision by the European Council. The definition of terrorism in Article 1 of the Framework Decision was democratic by being less broad compared to the one in the UK Act. The lenient approach taken by the Framework Decision was evident as it applied only when governments and international organizations were "*unduly compelled*" rather than merely "*influenced*" as per the UK legislation. Additionally, more light was shed on the freedom to strike and assemble, where reliance on proof of political or religious motive was not required to distinguish terrorism from other crimes. Moreover, damage to property and electronic systems needed to be of a magnitude so as to endanger human life, or result in "major economic loss".[96] Furthermore, the Preamble to the Framework Decision stated that armed conflicts would be governed by the relevant international laws and not be considered terrorism. Here too, it is apparent that taking a more tolerant approach by the use of higher thresholds is an essential aspect in creating democratic counterterrorism laws. This democratic approach led to the Framework Decision being adopted by many Member States of the EU, which resulted in uniformity in European counter-terrorism legislation.

The existence of comparatively democratic counter-terrorism laws is evidence that Sri Lanka too, is indeed capable of adopting an effective piece of counter-terrorism legislation which does not interfere with or violate an individual's fundamental rights.

8. CONCLUSION

Sri Lanka's counter-terrorism framework has essentially been characterized by the following traits: emphasis on protecting the State rather than its people, overreaction to the security threat posed and implementing measures that are overly drastic and disproportionate, hasty enactment without adequate judicial scrutiny and public debate, and insufficient safeguards to prevent the misuse of counter-terrorism laws.[97] This has led to a trail of tragic injustices and human suffering over the past 40 years. Despite domestic and international calls for reform, the State has failed to address the issues of the existing counter-terrorism regime through the proposed reforms. Consecutive

[96] ibid.
[97] Manoharan N, *C*ounterterrorism Legislation in Sri Lanka: Evaluating Efficacy (East-West Center Washington 2006).

attempts at reform are demonstrative of governments using the notion of counter-terrorism as an excuse to take part in authoritarian rule.

Even though a set of laws that deal with certain aspects of terrorism exist in Sri Lanka, the need for a special counter-terrorism regime is exacerbated by the growth of international terrorism and the unforeseen threat it poses. However, counter-terrorism measures must be balanced with democracy, so as to not infringe the rights and liberties of people. The government must take steps to enact provisions that are clear and unambiguous, and not give law enforcement discretionary powers. The use of armed forces, trained to wage war, should be avoided in maintaining law and order, and the maximum use of the police force must be considered. Moreover, proper safeguards and checks on powers should be built in to prevent misuse by authorities. During the process of drafting the new laws, meaningful and inclusive discussions with experts and civil society groups must be conducted,[98] and judicial scrutiny must take place. Thereby, until a comprehensive counter-terrorism legislation that values the liberties of people and complies with international standards are enacted, the government must impose a full moratorium on the use of the PTA. In the words of Grant Wardlaw: "*To believe that depriving citizens of their individual rights and suspending the democratic process is necessary to maintain 'order' is to put oneself on the same moral plane as the terrorists who believe the 'end justifies the means.*"[99]

[98] '"In a Legal Black Hole" Sri Lanka's Failure to Reform the Prevention of Terrorism Act' (*Human Rights Watch*, 28 March 2023) <https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act> accessed 21 July 2023.
[99] Wardlaw G, *Political Terrorism: Theory, Tactics and Counter-Measures* (Cambridge University Press 1989).

AN ANALYSIS ON THE SOUTH ASIAN TRANS-NATIONAL AND TRANS-CONTINENTAL MIGRATION DILEMMA

Omandee Samaratunge | Nisal Deelaka Pathiraja

ABSTRACT

Millions of people all throughout South Asia are impacted by the difficult migration situation, which is a complicated and a diverse issue. Numerous reasons, including job prospects, social networks, political unrest, environmental degradation, and natural disasters, have influenced migration in the region. The migrants themselves, their families, their communities, and their nations of origin and destination can all be affected by migration in a variety of ways, both positively and negatively. Cooperation between South Asian states have been established and promoted through regional intergovernmental organizations to combat the issues related to migration. However, decades have passed since the partition of India where the world witnessed one of the largest mass migrations in human history, and the independence of many South Asian nations. Yet, South Asia is still prone to forced migration, generational brain drain, and many cases of human rights violations. With an emphasis on the key laws relating to migration and the functioning of regional cooperation and integration, this research article attempts to offer an outline of the key trends, difficulties, and prospects of migration in South Asia. In addition, this research article examines various policy suggestions and best practices for maximizing the advantages, and minimizing the costs of migration for all parties concerned.

1. INTRODUCTION

The subcontinent of South Asia consists of eight nations, and is home to almost a quarter of the worlds' population. It is also one of the busiest and most diverse regions in terms of culture, religion, ethnicity, language, and economic growth. However, it is also a region that faces a number of challenges, such as poverty, inequality, violence, deteriorating environmental conditions, and violations of human rights. As a result of these problems, millions of people have left the region in search of better opportunities and security. Although migration is not a new phenomenon in South Asia, it has recently become increasingly complex and multifaceted as a result of globalization, urbanization, climate change, and political turmoil. Migration can also have positive or negative impacts on both the origin and destination countries, as well as on the migrants themselves. Many South Asian migrants face discrimination, exploitation, abuse, violence, and human rights violations in their host countries. They also face difficulties in accessing health care, education,

social protection, and legal assistance. Moreover, migration can have negative effects on the families and communities left behind in South Asia, such as brain drain, remittance dependency, social disruption, and environmental degradation. This study aims to comprehend the issue of South Asian trans-national and trans- continental migration by an analysis of the causes, patterns, effects, and policy responses of migration to, and from the region. It will also look at the effects on regional and international cooperation, as well as any potential benefits and challenges of migration for the development and fusion of the sub-continent. As a conclusion, this research article will provide recommendations to establish a new system, a more South Asian System to combat the issues relating to migration, protect and promote the rights of migrants as well as to offer migrant job opportunities with security and accountability.

2. MIGRATION IN SOUTH ASIA

Migration in the Indian Subcontinent has a long and convoluted history that has been influenced by factors such as colonialism, partitioning, ethnic warfare, economic opportunity, and natural disasters. According to the United Nations, South Asia is home to more than 1.94 billion people, including around 40 million foreign migrants and 80 million internal migrants.[1] The Gulf Cooperation Council (GCC) countries are the most popular destinations for South Asian migrants, allowing them to work in fields such as construction, domestic labor, and health care.[2] Remittances from these migrants contribute significantly to the economies of their destination countries, which include India, Pakistan, Bangladesh, Nepal, and Sri Lanka.[3]

Migration within South Asia is also impacted by historical and present circumstances such as the partition of the British Raj into India and Pakistan in 1947, the civil war in Sri Lanka from 1983 to 2009, ethnic violence in Myanmar since 2012 which affects both India and Bangladesh, and Afghanistan's continuous political instability.

These events have resulted in large-scale displacement and refugee migrations across the area, affecting millions of people. The Rohingya from Myanmar, the Afghans from Afghanistan, the Tamils from Sri Lanka, and the Tibetans from China are some of the largest refugee groups in South Asia. These refugees encounter several obstacles in gaining access to fundamental rights, and services such as education, health care, employment, and legal protection. Furthermore, they

[1] Migration Data Portal, 'Migration data in Southern Asia' <www.migrationdataportal.org/regional-data-overview/southern-asia> accessed 20 July 2023.
[2] S.V. Aarthi and M. Sahu, 'Migration Policy in the Gulf Cooperation Council (GCC) States: A Critical Analysis. Contemporary Review of the Middle East' 8(4) Sage Journals 410-434, <https://doi.org/10.1177/23477989211028748> accessed 20 July 2023.
[3] ibid.

frequently face hostility and prejudice from the host communities and governments. Therefore, in order to understand the migration dilemma within the Indian subcontinent, the history of migration in South Asia and the gradual development of migration issues in the post-colonial era need to be examined.

2.1 History on migration in South Asia

Migration in South Asia has a history extending all the way to the Paleolithic age, with the rise of the Indus Valley civilization. The advent of Indo-Aryan speakers from the northwest during the Vedic period (1500-500 BCE) helped to develop the Sanskrit language and a unique culture which survived to this day.[4] This region is the birthplace of Buddhism and Hinduism, and due to many foreign invasions religions, such as Islam and Christianity were introduced creating more diverse cultures.

During the colonial era (1757-1947), the British East India Company imported hundreds of Europeans for administrative and economic reasons to various regions of South Asia. The British also migrated millions of South Asians to other realms of their Empire.

One of the most painful episodes in South Asian history was the partition of India in 1947 into two sovereign states, India and Pakistan. As a result, millions of Hindus and Sikhs went from Pakistan to India, and millions of Muslims moved from India to Pakistan, resulting in one of the biggest mass movements in human history. This division prompted communal bloodshed on both sides of the border. The separation also presented new issues to newly established governments in terms of managing borders, minorities, refugees, and resources.[5]

2.2 Post-colonial migration of South Asia

The post-colonial period (1947-present) has witnessed further migration within and outside South Asia and has become a common ground for migration, both legal and illegal. Emphasis needs to be given on the more recent main drivers of post-colonial migration in South Asia which include internal conflicts, economic hardship, urbanization, globalization and climate change.[6]

2.2.1 Internal conflict

[4] ibid.
[5] Chowdry Pritika, 'Partition of India, 1947: An Overview and FAQ', <www.pritikachowdhry.com/post/partition-of-india-1947-an-overview-and-faq> accessed 20 July 2023.
[6] ibid.

The history of South Asia is marked by various forms of conflict, such as wars, insurgencies, ethnic violence, communal riots and terrorism. Conflict-induced migration has also contributed to the spread of radicalization, extremism and sectarianism among some groups of migrants.[7] Civil conflicts and tensions between various religions and cultures, which result in persecution of minorities by dominant groups, have been observed to encourage movement of the afflicted individuals. These conflicts have forced many people to flee their homes and seek refuge or asylum in other parts of the region or abroad.[8]

Many of South Asia's refugees and asylum seekers are victims of civil wars and/or sociopolitical upheavals. These include Sri Lankan refugees during the Sri Lankan civil war between the LTTE and government forces[9], as well as Rohingya refugees who escaped the conflict in Myanmar's Rakhine state. Religion is the primary reason for the deportation and ethnic persecution of Rohingya refugees who are being driven out of Myanmar.[10] The rise of the Taliban in Afghanistan in 1994, as well as the US invasion in 2001, were all major contributions for both external and internal displacement of the Afghan population.[11] Religious minorities had to migrate across national borders under the early Taliban government to avoid ethnic killings. In August 2021, when the Taliban took over during the US withdrawal, it sparked another wave of migrants from the region. Tensions between different Muslim sects and political groups in both Pakistan and Afghanistan caused some of the affected individuals to flee to safer areas.[12]

Struggles between the Sinhalese and Tamil populations in Sri Lanka, Maoist fighting in Nepal, and socio-economic difficulties in Baluchistan and Sindh are all causes of forced migration. People from the same ethnic groupings or communities are frequently observed spreading across provincial and international borders in South Asian countries.[13] This borderless spread exacerbates the tensions between the affected parties, the ongoing conflict between the Nagas in Manipur, North India, is an example.

[7] Robert G. Wirsing, Satu P. Limaye, and Mohan Malik, *Religious Radicalism and Security in South* Asia, (2004).
[8] ibid.
[9] Nithyani Anandakugan, 'The Sri Lankan Civil War And Its History, Revisited In 2020' (Harvard International Review) <https://hir.harvard.edu/sri-lankan-civil-war/> accessed 20 July 2023.
[10]Md Jobair Alam, 'The Rohingya Minority of Myanmar: Surveying Their Status and Protection in International Law' (2018) 25(2) International Journal on Minority and Group Rights 157-82, <www.jstor.org/stable/26557890> accessed 20 July 2023.
[11] Leila Jazayery, 'The Migration-Development Nexus: Afghanistan Case', (SI 2/2002) 40(5) International Migration, University of Oxford UK.
[12] Sanya Mansoor, 'Where Things Stand In Afghanistan One Year After The U.S. Withdrawal—And What Could Happen Next', (29 August 2022), <https://time.com/6209312/afghanistan-taliban-us-one-year-anniversary/> accessed 20 July 2023.
[13] David Rampton, 'Forced Migration Issues in South Asia: A General Survey in Europa World Yearbook', (Europa World Yearbook 2021).

2.2.2 Economic hardship

Agriculture employs and sustains a significant portion of the population in South Asia as a whole and plays an important part in the South Asian economy. The agricultural crisis serves as the epicenter of distress migration. For example, in Afghanistan, where agriculture employs more than 80% of the workforce, households with agricultural heads are more likely to be poor. Volatile agricultural prices are significant contributors to sabotaging the rural economy.[14] Many reasons contribute to the agricultural crisis, including a shortage of warehousing facilities, the absence of government price support measures, intense market rivalry from imported agricultural goods, and so on. Following each harvesting season, many marginal farmers in rural regions find it difficult to prosper.

In Sri Lanka, food shortages and the feasibility of agricultural enterprises in rural regions are driving people to metropolitan centers and even overseas destinations. The rising number of suicides among marginal farmers and agricultural laborers in South Asian nations is a powerful indicator of the growing rural despair.[15]

2.2.3 Urbanization and globalization

The rapid growth of urban areas in South Asia has attracted millions of rural migrants who seek better livelihoods, education, health care and social services. Urbanization has also created challenges such as overcrowding, pollution, inequality, crime and social exclusion. People from rural regions come to cities because of the availability of job possibilities and greater salaries.[16] As described in labor surplus theories and the Harris-Todaro model, predicted greater income is a crucial consideration for migrants when selecting to migrate to metropolitan areas.[17]

Every year throughout South Asia, thousands of people are forced to leave their homes owing to the loss of land and livelihoods caused by development projects such as dams, irrigation, roads, highways, canals, mines, power plants, and industrial development activities.[18] As metro cities and large towns expand into the suburbs, many farmers and agricultural laborers are eventually pushed

[14] Food and Agriculture Organization of the United Nations, FAOSTAT, <http://faostat3.fao.org/home/E> accessed 20 July 2023.
[15] P.B. Behere, 'Bhise MC. Farmers' suicide: Across culture', (Indian J Psychiatry, 2009 Oct-Dec).
[16] V.N. de Snyder, et *al*, 'Social conditions and urban health inequities: realities, challenges and opportunities to transform the urban landscape through research and action' (J Urban Health, December 2011).
[17] Jiong Chen, 'The Harris-Todaro model of labor migration and its commercial policy implications', (1994).
[18]Bogumil Terminski, 'Public International Law and Development-Induced Displacement: A Socio-Legal Analysis' (2013) 30 Revista Europea de Derecho de la Navegación Marítima y Aeronáutica.

out of their villages and join the pool of 'transit labor' and 'footloose labor,' who increasingly constitute major segments of migrant-labor in urban spaces.[19]

In Pakistan, the current Lahore Orange Line Metro Train project alone has resulted in the displacement of 10,000 households along the route.[20] Many development projects in Sri Lanka, including the Southern Transport Development Project, the Colombo Katunayake Expressway, and the Lunawe Environmental Improvement and Community Development Project, resulted in massive population displacement.[21]

In Sri Lanka, approximately 12,000 households were relocated during the Accelerated Mahaweli Development Project in the 1970s. Similarly, 1,200 hectares of land were leased out to encourage tourism, displacing roughly 5,000 fishermen.[22]

More than 3,000 people were displaced as a result of the construction of Nepal's first reservoir dam, the Kulekhani I. They were offered good monetary compensation rather than land. The rapid infusion of cash among the region's people caused the price of land to skyrocket.[23] Because of the rising cost of land, many found it impossible to obtain a plot of land for the compensation amount. Furthermore, compensation was only granted to individuals who were directly harmed. However, the river body had an indirect impact on individuals who lived downstream and relied on the river for water. These innocent people received no compensation for their loss.

When considering ‘Globalization’, the integration of South Asia into the global economy has opened up new opportunities and challenges for migration. On one hand, globalization has increased the demand for skilled and unskilled labor in various sectors such as information technology, manufacturing, construction, domestic work and entertainment. As a result, the amount of Foreign Direct Investment in South Asia has expanded dramatically, resulting in the growth of new sectors and the creation of new employment.[24]

[19] ibid.

[20] Najia Nasir, Hinna Hafeez and Tayyaba Khalil, ‘Study on Mega Infrastructure Projects in Lahore and its Impact on Traffic System in Lahore & Commute time’ 7(5) International Journal of Scientific and Research Publications.

[21] Sanjana Kuruppu and Varuni Ganepola , *Whose Right Of Way? Development Induced Displacement*, (2005).

[22] D.R.I.B. Werellagama, *et al* ‘Lessons Learned From Communities Displaced By The Mahaweli Multipurpose Development Project Sri Lanka’.

[23] Khimlal Gautam and Susheel Dangol, *Developing a Resettlement Plan for the People Displaced due to Budi Gandaki Hydroelectric Project*, (2015).

[24] Organisation for Economic Co-Operation and Development, *Foreign Direct Investment and Recovery in Southeast Asia*, (1999).

As a consequence of the introduction of new technologies and the greater availability of trained labor, South Asian nations have emerged as a center for the outsourcing of services such as Information Technology and business process outsourcing.[25]

On the other hand, globalization has also exposed migrants to exploitation, abuse, trafficking and human rights violations. Globalization has influenced the cultural and political identities of migrants, as they interact with diverse people and ideas through media, communication and travel.[26] The benefits of globalization have disproportionately benefited a small number of people, contributing to a rising economic disparity. As a result, social discontent and a bigger wealth disparity has been formed. Because of the impacts of globalization, many smaller firms have been forced to close, and their staff have been shifted to bigger, more productive organizations. As a result, there has been an upsurge in unemployment and social discontent, particularly in rural regions.[27]

2.2.4 Climate change

The effects of climate change on South Asia are becoming increasingly evident and severe, as the region faces rising temperatures, erratic rainfall patterns, melting glaciers, sea level rise, floods, droughts, cyclones and landslides.[28] These environmental changes have direct and indirect impacts on migration, as they affect the availability and quality of natural resources, agricultural productivity, food security, health and livelihoods.[29]

Climate change is now progressively manifesting itself in many regions of South Asia through unpleasant temperatures, extremely variable and unpredictable rain patterns, and an overall increase in pollution levels. In Bangladesh, coastal zone deterioration is an important concern. The Maldives' geographical position makes it vulnerable to natural calamities as well. Cyclones have

[25] Karar Ali Shah, 'The Impact of Globalization on the South Asian Economy', (2023) <https://moderndiplomacy.eu/2023/05/26/the-impact-of-globalization-on-the-south-asian-economy/> accessed 20 July 2023.

[26] Patrick A. Taran and Eduardo Gernimi, 'Perspectives on Labour Migration, 3E, Globalization, Labour and Migration: Protection is Paramount' (International Migration Programme, International Labour Office-Geneva).

[27] ibid.

[28] Guillaume Lacombe, Pennan Chinnasamy and Nicol Alan, 'Climate Risks and Solutions: Adaptation Frameworks for Water Resources Planning, Development and Management in South Asia Background Paper 1' (International Water Management Institute).

[29] ibid.

formed often in the Bay of Bengal region, becoming a key element in pushing migration in Sri Lanka, which is prone to cyclones and lengthy droughts.[30]

3. A GENERAL UNDERSTANDING ON THE IMPACTS OF MIGRATION

3.1 Positive impacts on South Asia due to migration

According to the World Bank's regional update, South Asia reels from the impacts of unprecedented economic shocks but migration can boost its recovery and support long-term development.[31] Positive impacts that arise due to consequences of migration can be categorized as economic, social and political impact.

3.1.1 Economic impact

Migration stimulates economic growth because it allows people to move to where they work more efficiently.[32] For example, international migrants from Bangladesh, Nepal, Pakistan and Sri Lanka working in Gulf countries earn up to five times what they would earn back home and help generate some important remittances.[33]

Immigrants in advanced economies increase output and productivity in the short and medium term. Native and migrant workers bring to the labor market a range of skills that complement each other and increase productivity.[34]

Most studies report positive impacts on the local economy due to migration, including labor demand, local wage growth, increased consumption and demand for services, invest in local industries, improved linkages, and creation of economic growth opportunities.[35]

Migrants can bring new ideas and innovations to South Asia and contribute to the global startup ecosystem. Human resource development for migrants may have skills and experiences not

[30] Rahman Sowmen and Ataur Rahman Mohammed, 'Climate extremes and challenges to infrastructure development in coastal cities in Bangladesh', (2015) 7 Weather and Climate Extremes.
[31] South Asia Economic Focus, *International Bank for Reconstruction and Development of The World Bank*, (Springer 2023).
[32] Florence Jaumotte, *et al* 'Migrants Bring Economic Benefits for Advanced Economies', (International Monetary Fund Blog, 2016) <www.imf.org/en/Blogs/Articles/2016/10/24/migrants-bring-economic-benefits-for-advanced-economies> accessed 20 July 2023.
[33] ibid.
[34] A. Edo, Ragot, *et al*, 'An introduction to the economics of immigration in OECD countries', (2020) Canadian Journal of Economics.
[35] Erhan Artuc, *et al*, *Exports to Jobs Boosting the Gains from Trade in South Asia*, (South Asia Development Forum).

available in South Asia and can provide opportunities for human resource development and capacity building. Likewise, many migrants send money home, which can be used to support families, fund education and health care, and boost the local economy.[36]

3.1.2 Social impact

Migration, due to the influence of sex relations, has an impact on the social structure of society. Overall, by offering people the opportunity to improve their living conditions, migration fundamentally affects the social structure of South Asian societies.[37] Migration also leads to gradual changes in communities, both in the country of origin and the country of destination. Migration creates opportunities for cultural exchange and diversity, which can lead to a better understanding of different cultures, promote peace and stability, and further contribute to development. Development of a multi-ethnic and heterogeneous society will also increase the tolerance and social inclusion of residents towards various aspects of society. This can contribute to the overall development of the Migration sector in general, having a positive impact on the households directly involved. Even for the poorest households participating in subsistence migration, there is evidence that it can prevent further loss of assets and can lead to improved quality of life.[38]

3.1.3 Political impact

Migration may also have a big impact on South Asian politics, since many migrants keep links to their home countries and can possibly influence elections through remittances and other types of support.[39] Many migrants send remittances back to their home countries in South Asia, which may be used to assist families, fund education and healthcare, and stimulate the local economy. Remittance is a major source of foreign income for South Asian countries. Migration could make the destination country the place of origin, promoting a holistic policy to foster integrated growth. It may compel the nation of origin to adjust to new changes and solve the problems that drove its population to migrate in the first place.[40]

3.2 The negative impact of migration in South Asia

[36] Asian Development Bank, 'Human Capital Development in South Asia: Achievements, Prospects, and Policy Challenges' (2017).
[37] Douglas S. Massey, 'Social Structure, Household Strategies, and the Cumulative Causation of Migration' (1990) 56(1) Population Index.
[38] ibid.
[39] Hoiok Jeong, 'Influence of Home and Host Country Factors on Immigrants' Political Engagement' (2020) 27(2) Journal of International and Area Studies.
[40] Piyasiri Wickramasekara, 'Labour migration in South Asia: A review of issues, policies and practices' (2011) (108) International Migration Programme, International Migration Paper.

3.2.1 Economic pressures

The influx of migrants can put pressure on the labor market and reduce wages for local workers. Skilled workers may migrate from their home countries in search of better and better-paid opportunities elsewhere. This can lead to a brain drain, causing countries to lose the most skilled workers, which can have a negative impact on the economy.[41] The challenges which migration may bring include unemployment, brain drain, lower wages, tax burdens and distortions of the market. Migration, may create competition between domestic and foreign workers, especially with regard to low skill jobs. It may also lead to the loss of skilled workers in their country of origin, which could have an effect on their prospects for development. The financial burdens of the destination countries such as health care, education and social protection services for migrants can also be caused by migration.[42]

3.2.2 Political and social instability

Mass migration may cause political instability and violence, particularly if migrants do not integrate well into their host nation. Large influxes of migrants can overburden local public services such as health care and housing. As a result, societal tensions and prejudice against migrants may arise.[43] Political instability, war, bloodshed, terrorism, and human trafficking can all be consequences of migration. Migration, can call into question the legitimacy or stability of political regimes in countries of origin, particularly if they are autocratic or weak.[44]

Migration can lead to social instability or violence among communities due to competing for resources, rights, or identities. Migration can potentially raise the danger of terrorism by instilling dissatisfaction, radicalizing, recruiting, or mobilizing migrants and non-migrants. Migration may additionally leave migrants more vulnerable to trafficking or exploitation by criminal networks.[45]Migration, can destabilize family ties and roles while also increasing the risk of abuse and exploitation for migratory women and children.[46]

---

[41] Julie Young, 'Brain Drain: Definition, Causes, Effects, and Examples', (Investopedia, 2023) <www.investopedia.com/terms/b/brain_drain.asp> accessed 20 July 2023.
[42] ibid.
[43] William B Wood, 'Forced Migration: Local Conflicts and International Dilemmas', (1994) 84(4) Annals of the Association of American Geographers.
[44] ibid.
[45] ibid.
[46] Bahira Sherif Trask, 'Migration, Urbanization, and the Family Dimension', (Department of Economic and Social Affairs, Division for Inclusive Social Development, 2022).

Migration also causes prejudice and hostility towards migrants who might face discrimination or exclusion in various aspects of their lives, such as education, employment, health care, housing and justice, which could diminish the sense of belonging and trust between migrants and their host communities.[47]

As a result, migrants may face difficulties learning or using new languages that could have an impact on their integration and opportunities. Tension or violence between religious groups or within religious communities over beliefs or practices can also occur.[48]

3.2.3 Environmental concerns

Environmental deterioration, pollution, deforestation, overcrowding, and vulnerability can all be caused by migration. Migration can raise demand for resources such as water, energy, land, and food in destination places, affecting their quality and availability. Migration may also generate trash and pollutants that damage the air, water, and soil in destination places, affecting people and other species' health and well-being.[49] This results in the degradation of forests or other natural habitats for agricultural purposes or settlement in destination regions, reducing biodiversity and ecosystem services. Migration can lead to overpopulation in metropolitan areas, putting a strain on services and infrastructure and increasing vulnerability to dangers and environmental shock.[50]

4. LAWS SET IN PLACE IN RELATION TO MIGRATION

South Asia is a signatory to various international conventions and treaties that relate to migration, such as the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, the 1954 Convention Relating to the Status of Stateless Persons and its 1961 Convention on the Reduction of Statelessness, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children.[51] However, these instruments are not fully ratified or implemented by all countries in the region, and there are gaps in compliance and

[47] Victoria M. Esses, 'Prejudice and Discrimination Toward Immigrants', (Annual Review of Psychology 2021).
[48] H.G Virupaksha, A. Kumar, B.P Nirmala, 'Migration and mental health: An interface', (2014) Journal of Natural Science, Biology and Medicine.
[49] Graeme Hugo, 'Migration, Development and Environment', (2008) (35) IOM Migration Research Series, International Organization for Money.
[50] ibid.
[51] T. Vargas and Others, *'Asylum Seekers, Refugees and Stateless Persons'*, (Situation Report on International Migration in South and South-West Asia, 2011) <https://sitreport.unescapsdd.org/files/documents/Asylum-seekers.pdf> accessed 20 July 2023.

reporting. Furthermore, some countries have reservations or declarations that limit their obligations under these instruments.[52]

Each state in South Asia has its own national laws and policies that regulate different aspects of migration, such as entry, exit, stay, work, citizenship, and naturalization. However, these laws are often outdated, inconsistent, or contradictory, and do not reflect the realities and needs of migrants and their families. For instance, some countries have restrictive or discriminatory laws that limit the rights and freedoms of migrants based on their nationality, religion, gender, or occupation. Some countries also lack comprehensive laws or policies that address specific categories of migrants.

4.1 Asylum and refugee laws

Asylum and refugee laws refer to the legal framework that governs the process of granting protection to those fleeing persecution or conflict in their home countries.[53] South Asia hosted 2.1 million forced migrants in 2021, and among them, almost 300,000 are refugees and asylum seekers. However, most South Asian countries are not signatories of international refugee treaties, and they have yet to develop a regional mechanism to coordinate policy responses to refugee populations.[54]

The 1951 Refugee Convention defines a refugee as a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his or her country and unable or unwilling to return thereto.[55] The 1967 Protocol expands the definition and includes an additional clause regarding persecution or the fear of persecution based on "race, religion, and nationality, membership of a particular social group or political opinion".[56]

Asylum and refugee laws in South Asia largely follow the international frameworks provided by the 1951 Refugee Convention and the 1967 Protocol.

---

[52] ibid.

[53] United Nations High Commissioner for Refugees (UNHCR), 'Civilian and humanitarian character of asylum', (2023) <https://emergency.unhcr.org/protection/legal-framework/civilian-and-humanitarian-character-asylum> accessed 20 July 2023.

[54]International Organization for Migration (IMO), Asia-Pacific Migration Data Report (2020) <https://publications.iom.int/system/files/pdf/Asia-Pacific-Migration-%20Data-Report-2020.pdf> accessed July 20, 2023.

[55] Convention relating to the Status of Refugees 1951, Article 1.

[56] Protocol relating to the Status of Refugees 1967.

In India, the primary legal framework is the "Refugees Act, 1950" and "The Citizenship Act, 1955" which provides refugee and citizenship status to foreign nationals, including those from South Asia.[57] The major countries of origin in South Asia are Bhutan, Burma, Afghanistan and Bangladesh, and a number of these asylum seekers and refugees eventually end up in India.[58]

In Sri Lanka, the government has recognized the existence of refugees and has established a national body called the Colombo Plan Action Group to oversee the affairs of refugees.[59] The government also provides assistance and protection to asylum seekers through the National Program of Action for Refugees.[60]

In Pakistan, asylum seekers and refugees are generally not granted refugee status and the government does not have any formal mechanism. Instead, the government relies on United Nations High Commissioner for Refugees to help care for refugees and asylum seekers.[61]

In Bangladesh, the major countries of origin for refugees and asylum seekers are Myanmar and Bhutan. The government has established a National Plan of Action for Refugees, and it has received assistance from the UNHCR to assist refugees and asylum seekers.[62]

In Nepal, asylum seekers and refugees are processed and assisted through a collaboration between the UNHCR and the government. The government has established a National Plan of Action for Refugees and has established the National Refugee Protection Office to oversee refugee and asylum seeker affairs.[63]

4.2 Visas, permits, citizenship and naturalization

Visas, permits, citizenship and naturalization laws in South Asia can be very complex and vary widely depending on the country.

---

[57] P. Raj, 'Understanding Citizenship and Refugees' Status in India', (06 June 2020) 55(23) Economic and Political Weekly <www.epw.in/journal/2020/23/perspectives/understanding-citizenship-and-refugees-status.html> accessed 20 July 2023.

[58] ibid.

[59] S. Warusavitarana, 'Migrants, refugees and asylum seekers: the Sri Lankan context', (1 April 2019) United Nations Development Programme <www.undp.org/srilanka/blog/migrants-refugees-and-asylum-seekers-sri-lankan-context> accessed 20 July 2023.

[60] ibid.

[61] UNHCR, 'Asylum system in Pakistan' <www.unhcr.org/pk/protection/asylum-system-in-pakistan> accessed 20 July 2023.

[62] UNHRC, Annual Results Report – Bangladesh (2022) <https://reporting.unhcr.org/operational/operations/bangladesh> accessed 20 July 2023.

[63] HNHCR, 'Asylum System in Nepal', <www.unhcr.org/countries/nepal> accessed 20 July 2023.

In Bangladesh, visas are required for citizens of most countries, and can be obtained from the Bangladesh Mission in their home country or upon arrival. Permits are issued on a case-by-case basis for temporary residency, and require a sponsor in Bangladesh and official permission from the Bangladesh government. Citizenship by birth is possible for those born to a Bangladeshi mother or father, and citizenship by naturalization is possible after at least five years of residency in Bangladesh and after passing a citizenship test.[64]

In India, visas are required for most foreign nationals, and are intended for tourism, business, and research, visiting family or medical treatment. Permits are issued on a case-by-case basis for temporary residency, and require valid documents and a sponsor in India.[65]

In Maldives and Nepal, visas are required for most foreign nationals, and are intended for tourism, business, research or visiting family.[66] Permits are issued on a case-by-case basis for temporary residency, and require official permission from the Maldivian and Nepali governments. Citizenship by birth is possible for those born to Maldivian and Nepali parents, and citizenship by naturalization is possible after at least five years of residency in Maldives and Nepal after passing a citizenship test.[67]

The SAARC Visa Exemption Scheme was launched in 1992. The leaders at the Fourth Summit in Islamabad, realizing the importance of people-to-people contact among SAARC countries, decided that certain categories of dignitaries should be entitled to a Special Travel document. The document would exempt them from visas within the region.[68] As directed by the Summit, the Council of Ministers regularly kept under review the list of entitled categories. Currently, the list has 24 categories of entitled persons, which include dignitaries, judges of higher courts, parliamentarians, senior officials, entrepreneurs, journalists, and athletes. The Visa Stickers are issued by the respective Member States to the entitled categories of that particular country and is valid for one year. The implementation is reviewed regularly by the Immigration Authorities of SAARC Member States.[69]

---

[64] High Commission for the People's Republic of Bangladesh, 'Visas', (National Portal Bangladesh) <https://colombo.mofa.gov.bd/en/site/page/General-Information-for-Visa> accessed 20 July 2023.

[65] Ministry of Home Affairs, 'General Policy Guidelines Relating to Indian Visa', (2018).

[66] Visa Guide World, 'Nepal Visa', <https://visaguide.world/asia/nepal-visa/> accessed 20 July 2023.

[67] Maldives Immigration, 'Tourist Visa', <www.immigration.gov.mv/tourist-visa/> accessed July 20, 2023.

[68] SAARC, 'SAARC Visa Exemption Scheme',<www.saarc-sec.org/index.php/about-saarc/saarc-visa-exemption-scheme> accessed 20 July 2023.

[69]SAARC Chamber of Commerce and Industry, APEX Business Organization of SAARC, 'SAARC Visa Exemption Sticker Scheme (SVES)'

4.3 Border control

South Asian countries face unique challenges related to border control and security, and the region as a whole also faces challenges related to illegal immigration, cross-border terrorism, drug trafficking and human smuggling.

The governments of these countries have adopted various policies and measures to address these challenges, including the deployment of border forces, the use of technology such as cameras, drones and sensors, and the establishment of cooperation mechanisms with neighboring countries.[70] Additionally, some countries have adopted visa policies aimed at limiting cross-border movements, while others have implemented passport and identity card systems to prevent fraud and enhance border security.[71]

Despite these efforts, some borders in South Asia are still disputed, and the region is home to several active conflict zones that hinder the effective implementation of border control measures. Furthermore, the region is still struggling with corruption and the influence of criminal networks on border control.

It is clear that most borders between South Asian States are heavily militarized and guarded. This is especially seen with the India-Pakistan border, which is highly sensitive and prone to border conflicts.[72] The Afghanistan - Pakistan border is also heavily militarized especially with the recent Taliban take over, which saw an increasing level of threat by the Taliban on the Pakistani Border.[73] The maritime border between Sri Lanka and India has a moderately high presence of naval activity due to illegal fishing and drug smuggling. [74]

Meanwhile, in Bhutan, there are interior border checkpoints and, in certain areas, require special permits to enter, whilst visitors not proceeding beyond the border city of Phuentsholing do not need

<www.saarcchamber.org/index.php?option=com_content&view=article&id=88:saarc-visa-exemption-sticker-scheme-sves&catid=24:index&Itemid=471> accessed 20 July 2023.

[70] Peter Andreas, 'Redrawing the Line: Borders and Security in the Twenty-First Century' (2003) 28(2), International Security.

[71] **D Suba Chandran,** *Border Management in South Asia: Volatile, Violent and Porous*, (Institute of Peace and Conflict Studies, 22 August 2013).

[72] Thorsten Wojczewski, 'The Persistency of the India–Pakistan Conflict: Chances and Obstacles of the Bilateral Composite Dialogue' (2014) 1(3) Journal of Asian Security and International Affairs.

[73] Brusells Kabul, 'Afghanistan's Security Challenges under the Taliban', (International Crisis Group) <www.crisisgroup.org/asia/south-asia/afghanistan/afghanistans-security-challenges-under-taliban> accessed 20 July 2023.

[74] Kosala Wijesooriya, 'Churning "Historic Waters": Maritime And National Security In The Palk Bay And Sri Lanka', (2017).

permits to enter for the day. Individuals who are not citizens of India, Bangladesh, or the Maldives must obtain both their visa and any regional permits required through a licensed tour operator prior to arriving in the country.[75]

5. INSTITUTIONS SET IN PLACE FOR MIGRATION IN SOUTH ASIA

South Asia has several regional mechanisms and agreements that aim to facilitate cooperation and dialogue on migration issues, such as the South Asian Association for Regional Cooperation (SAARC), the Colombo Process, the Bali Process, the Abu Dhabi Dialogue, Global Forum for Migration and Development, and the High-Level Dialogue on International Migration and Development.[76] However, these mechanisms have limited scope and effectiveness, often lack implementation and monitoring mechanisms. Moreover, some of the agreements are non-binding and do not cover all aspects of migration, such as human rights, protection, and integration. However, it is necessary to understand the process and functioning of these institutions in order to provide a better recommendation to protect the rights of the Migrants.

5.1 The South Asian Association for Regional Cooperation (SAARC)

SAARC is an intergovernmental organization comprising eight members: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. The organization was founded in 1985 with the aim of promoting regional cooperation and economic integration in South Asia. SAARC organizes regular summits and meetings at the head of state and government levels to discuss and address regional issues and challenges.[77] The SAARC Charter outlines the objectives and principles of the organization, including promoting economic growth, social development, and regional cooperation in South Asia.[78]

SAARC member states have committed to a number of international instruments to safeguard the human rights and fundamental freedom of individuals, including the Universal Declaration on Human Rights 1948, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, International Covenant on Civil and Political Rights (ICCPR) 1966, and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979.

---

[75] Krishnandu Sarkar, 'Bhutan Entry Permit – All You Need To Know', (Bhutan, Travel with Krish Blog) <www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiajvme48qAAxWITmwGHb5TCJkQFnoECBAQAQ&url=https%3A%2F%2Fkrishnandusarkar.com%2Fbhutan-entry-permit-need-know%2F&usg=AOvVaw3GiwyKIF0bqzced_qMmfa1&opi=89978449> accessed 20 July 2023.

[76] South Asian Regional Trade Union Council, 'Global and Regional Migration Processes', (2019).

[77] SAARC, About SAARC (July 2020) <www.saarc-sec.org/index.php/about-saarc/about-saarc> accessed 20 July 2023.

[78] Charter of the South Asian Association for Regional Cooperation.

Few countries in the region are also signatories to the International Convention on the Protection of Rights of All Migrant Workers and Members of their Families (1990) and are considering ratifying the Domestic Workers' Convention 2011, the Migrant Workers (Supplementary Provisions) Convention 1975, and the Private Employment Agencies Convention1997. The planned adoption of these instruments indicates the commitment of the SAARC countries to uphold the rights and the well-being of all individuals, including migrant workers.

Additionally, South Asian states are committed to the SAARC Convention on Preventing and Combating Trafficking on Women and Children for Prostitution 2002, and the SAARC Convention on Mutual Assistance in Criminal Matters, and in the 18th SAARC Summit Declaration committed to establishing a "South Asian Economic Union" to facilitate free trade, common market, and a common economic and monetary union in the region.[79]

SAARC has recognized the importance of migration in South Asia and has taken several steps to address its impact on the region. Firstly, SAARC has developed a Migration Policy Framework for South Asia, which outlines the principles and guidelines for managing migration in the region. The framework aims to promote regular migration and protect the rights of migrants while also addressing the needs of countries of origin, transit, and destination.[80]

Next, SAARC has established several migration information systems to collect, analyze, and disseminate information on migration in the region. These include the SAARC Migration Information Portal, which provides information on visa and entry requirements for South Asian citizens, as well as the SAARC Migration Information Platform, which provides information on migration data, statistics, and research in the region.[81]

SAARC has conducted several regional projects on migration, including the SAARC Centre on Migration Policy, which focuses on promoting good governance in migration policy and strengthening its implementation in South Asia.[82]

[79]SAARC, Areas Of Cooperation (July 2020) <https://saarc-sec.org/index.php/directors-profile/38-areas-of-cooperation> accessed 20 July 2023.

[80] S. Rajan and A. Kumar, 'Migration, Development Within the SAARC Framework: Towards a Migration Governance Model of the Future', (Springer, 29 June 2023) <https://doi.org/10.1007/978-3-031-34194-6_15> accessed 20 July 2023.

[81] Y. Uramoto, 'Labour migration: SAARC commits to helping migrant workers', (ILO, 2014) <www.ilo.org/asia/media-centre/articles/WCMS_329302/lang--en/index.htm> accessed 20 July 2023.

[82] ibid.

Furthermore, SAARC has also established several mechanisms for dialogue and cooperation on migration, including the SAARC Expert Group on Migration, which provides a platform for governments and experts to discuss and share experiences on migration.[83]

Overall, SAARC has taken several steps to address migration in South Asia and has developed a migration policy framework and mechanisms for dialogue and cooperation. These efforts aim to promote regular migration and protect the rights of migrants while also addressing the needs of countries of origin, transit, and destination.

5.1.1 Shortcomings of SAARC

While SAARC has made significant contributions towards promoting social, economic, and cultural integration among South Asian countries, there are also concerns that have been raised about its effectiveness.

One of the main criticisms of SAARC is its lack of political unity among its member states, which has often led to slow progress on important issues and limited its impact on regional cooperation. In addition, SAARC's dependence on its executive committee for decision-making has been criticized for slowing down the decision-making process. Another concern with SAARC is its limited ability to address cross-border issues such as terrorism, security, and regional conflict resolution. Despite the establishment of several subcommittees within the SAARC framework, there is still a lack of cohesive regional strategies to address these challenges.[84]

Furthermore, SAARC's limited budget and resource constraints have also limited its capacity to effectively implement its programs and initiatives. This has resulted in a slowdown in the pace of regional integration and limited progress in key areas such as economic development.[85]

Existing literature, including sources mentioned previously, suggest that SAARC has not been able to achieve its goals and expectations in 35 years.[86] This deals with several areas of SAARC, including South Asian regionalism; trade, investment, and economic cooperation; identification of

[83] ibid.

[84] S.C. Saha, 'South Asian Association for Regional Cooperation (SAARC) and Social Development in South Asia: A Study of Some Successful Experiences', (2005) 18(2) Indian Journal of Asian Affairs 1–44 <www.jstor.org/stable/41950457> accessed 20 July 2023.

[85] Asian Development Bank, 'Regional Cooperation Strategy' (2011), <www.adb.org/sites/default/files/institutional-document/33266/rcs-southasia-2011-2015-0_0.pdf> accessed 20 July 2023.

[86] J.K. Bishwakarma and Z. Hu, 'Problems and prospects for the South Asian Association for Regional Cooperation', (Policy Studies Organisation 2021) <https://onlinelibrary.wiley.com/doi/epdf/10.1111/polp.1244> accessed 20 July 2023.

common challenges and opportunities in the region; and inherent problems of this organization and its prospects for revival.[87] SAARC has not been able to make expected contributions to social, economic, and infrastructural development in this region. It has been victimized and crippled by the blow of Indo-Pak conflicts and the state of perplexity among other states.[88]

5.2 Colombo process

The Colombo Process is a Regional Consultative Process on the management of overseas employment and contractual labor for countries of origins in Asia. It was established in 2003 at a ministerial consultation in Colombo, Sri Lanka, with the aim of enhancing cooperation and dialogue among the participating states on issues related to labour migration. The 12 Member States includes Afghanistan, Bangladesh, China, India, Indonesia, Nepal, Pakistan, the Philippines, Sri Lanka, Thailand, Vietnam and Cambodia. The process is supported by the International Organization for Migration (IOM) as the secretariat and by other international organizations and partners as observers.[89]

The main objectives of the Colombo Process are to provide a forum for dialogue and exchange of good practices on labour migration policies and programs among the countries of origin, fostering cooperation and partnerships with countries of destination and other stakeholders to promote the protection and well-being of migrant workers and enhancing the development impact of labour migration on the countries of origin and destination, as well as on the migrants themselves.[90]

The Colombo Process operates through regular meetings at the senior officials' and ministerial levels, as well as through thematic working groups on specific topics of interest. The working groups consist of skill development, qualification recognition, upskilling and reskilling of migrant workers, fostering ethical recruitment, effective pre-departure orientation and empowerment, reducing the costs of remittance transfer, enhancing capacities of the Colombo Process Member States to track labour market trends.[91]

Since 2005, the Colombo Process Member States have taken concrete, proactive steps to manage labour migration by, amending existing regulations or adopting new legislation, creating new

[87] ibid.
[88] Jham Kumar Bishwakarma, and Zongshan Hu, 'Problems and prospects for the South Asian Association for Regional Cooperation (SAARC)', (2022) Politics & Policy 50.
[89] Migration Forum in Asia, 'Colombo Process', (2022) <https://mfasia.org/mfa_programs/advocacy/colombo-process/> accessed 20 July 2023.
[90] Institute of Policy Studies-Sri Lanka, 'Institutionalizing Regional Approaches to Migration Management in South Asia – Concept Note', (2017).
[91] ibid.

government structures dedicated to managing labour outflows, signing Bilateral Agreements (BAs) and Memoranda of Understanding (MOUs) with key destination countries and launching innovative programmes and activities at various levels of government.[92]

The Colombo Process also engages in dialogue and collaboration with other regional consultative processes on migration, such as the Abu Dhabi Dialogue, the Bali Process and the Prague Process. The Colombo Process aims to contribute to the global agenda on migration governance, such as the Global Compact for Safe, Orderly and Regular Migration and the 2030 Agenda for Sustainable Development.[93]

Despite successes in key areas, challenges remain, especially surrounding implementation. There is often a gap between the stated aims of policy measures and their application on the ground, particularly in four key areas; dissemination of information, the recruitment process, welfare support to migrants and maximizing the benefits of labour migration.[94]

Some limitations of the Colombo process are firstly, the lack of consensus among member states on the issues to be addressed and this has resulted in a lack of leadership and direction at the top. Secondly, lack of funding and resources makes it difficult to achieve the process objectives. Thirdly, organizational bureaucracy often leads to delays in the implementation of projects and initiatives. Lastly, the process does not always lead to follow-up actions, which means that many of the issues raised in the meetings have not been resolved.[95]

6. THE BIRTH OF A NEW SOUTH ASIAN SYSTEM

The most important factor in determining migration flows into a country is demand for labour. Immigration policies do not have the effect of stopping migration flows.[96] The implementation of policy which seeks to restrict immigration or the lack of policy on immigration usually has the effect of migrants resorting to illegal means to enter such countries. This in turn affects the

[92] Dovelyn Rannveig Agunias and Christine Aghazarm, 'Labor Migration From Colombo Process Countries Good Practices, Challenges and Ways Forward', (IOM, 2012).
[93] Colombo Statement, 'High-level meeting of the Global Consultation on Migrant Health, Colombo', (IOM, February 2017).
[94] Dovelyn Rannveig Agunias and Christine Aghazarm, 'Labour Migration from Colombo Process Countries: Good Practices, Challenges and Ways Forward', (Issue In Brief: A Joint Series of the IOM Regional Office for Asia and the Pacific and the Migration Policy Institute, 2012).
[95] ibid.
[96] Philipp Engler, *et al,* 'Migration to Advanced Economies Can Raise Growth', (Population and demographics, International Monetary Fund –Blog, 2020) <www.imf.org/en/Blogs/Articles/2020/06/19/blog-weo-chapter4-migration-to-advanced-economies-can-raise-growth> accessed July 20, 2023.

conditions that migrants work and live under and has a severe impact on their rights. There have been attempts to negotiate bilateral agreements between sending and receiving countries as a means of improving the conditions of Migrants.[97]

Policy should, therefore, move away from a narrow focus on specific "problems", such as trafficking, to take a wider perspective on migration as a whole. A better understanding of the reasons for and impacts of migration, can help in developing policy that is effective in supporting and protecting all types of migrants.[98] The policy on migration in Sri Lanka should be used as an example in South Asia of how safe, legal emigration can be encouraged. Such an approach would fit in with proposals for a dialogue between governments of South Asia thereby sending countries on ways of protecting nationals working abroad.[99]

The main framework for the rights of migrants already exists in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[100] However, few countries have ratified the convention, and repeated calls from the UN for an international conference on migration have gone unheeded. One other possible way forward would be to develop examples of what works and what doesn't work, using the framework of the Convention.[101] These examples could be used as a basis for negotiating bilateral agreements between major senders and receivers of migrants.

6.1 Reforming SAARC

In order to establish a new South Asian system, this article recommends building upon the existing foundation rather than starting from the very beginning. The most influential organization in South Asia with regards to Inter-governmental communication is SAARC. Despite being intended to work on similar challenges of member states such as poor intra-regional commerce, infrastructure, sustainable development, and poverty reduction, SAARC has however, failed to be successful and has become dysfunctional. With this in mind, the European Union's success was aided by the union

[97] International Organization for Migration, The UN Migration Agency, 'The Responsibilities And Obligations Of Migrants Towards Host Countries', (Global Compact Thematic Paper, Responsibilities and obligations of migrants).
[98] Stephen Castles, 'The Factors That Make and Unmake Migration Policies', (2004) 38(3) The International Migration Review.
[99] International Labour Organization, 'Sri Lanka's policy on labour migration: How far have we come?', (2015).
[100] Juhani Lonnroth, 'The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation', (1991) 25(4) The International Migration Review.
[101] ibid.

of France and Germany, two longtime enemies. In contrast, India and Pakistan, the two major enemies, could not, and practically will never reach an agreement.

South Asians want to live in a peaceful, affluent, and secure future. Therefore, in order to build a new South Asian system, SAARC should seek free and advantageous trade agreements with other regional organizations, particularly the EU and ASEAN.[102] It should also be completely focused on the SAARC Social Charter in order to reach out to the common man. Security may be attained via honest and consistent attempts to bridge political divides. SAARC is an excellent instrument not only for building confidence, but also for resolving conflicts and creating a favorable environment for the implementation of the SAARC Charter.[103]

In order to implement the SAARC Charter, a sense of unbiasedness needs to be integrated into the functioning of the organization. Therefore, SAARC should function as an autonomous organization capable of implementing driving ideas, strategic activities, and legal regulations in a fashion that is relevant to both its own members and other growing nations.[104]

This organization therefore, needs to see the Indo-Pakistan conflict on the level of a common man without being overrun by either parties. Furthermore, bilateral issues between India and Pakistan, India and Sri Lanka, Pakistan and Afghanistan, must be improved via meaningful engagement and collaboration, working together to bring peace and stability to the region as a shared benefit.[105]

As a result, intelligence on terrorism, trafficking, and smuggling, among other things must be shared, and joint exercises must be done to foster mutual confidence and capacity.

Finally, the SAARC must concentrate on improving infrastructure and regional connectivity, collaboration in scientific research, university exchange programs, tourism, and other areas that would benefit bilateral relations.

6.2 A new system for migration in South Asia

Once SAARC is significantly reformed, it should initiate cooperation with The Colombo Process and other organizations involved in migrational data collection and improving and protecting migrant rights. South Asian states may opt to build on previous achievements and focus on

[102] Jham Kumar Bishwakarma and Zongshan Hu, 'Problems and prospects for the South Asian Association for Regional Cooperation (SAARC)', (Politics & Policy 2022).
[103] South Asian Association for Regional Cooperation, 'SAARC Social Charter', (2004).
[104] Mohamed Nasih, 'CHARTER', (SAARC Charter Provisional Rules of Procedure, 2019).
[105] Niha Rodrigo, 'SAARC: Towards Meaningful Cooperation', (2012).

enhancing present projects through more rigorous program implementation, monitoring, and assessment.[106]

SAARC governments can consider focusing their efforts on several critical areas under the guidance of the Colombo Process and other organizations. First, existing pre-departure orientation programs should be improved. Second, current migrant resource or information centers and related services should be developed and expanded. Following that, regulations governing recruiting agencies need to be developed and harmonized.[107]

Many answers to labor migration's difficulties are also transnational and transcontinental. Colombo Process member nations have already inked BAs and MOUs with a number of destination countries. The next problem is to provide mutually agreed protocols and operational instructions, as well as to monitor how agreed principles are executed.[108] Formalizing partnerships among CP and SAARC member states is an even larger difficulty. These formal alliances might be extremely beneficial since they would provide Member States with greater bargaining power when dealing with destination nations. Speaking on behalf of a "critical mass" of migrants may result in more impact, particularly on difficult topics such as irregular migration, the usage of minimum or reference salaries, and the portability of visas and benefits.[109]

To capitalize on the experience among South Asian States, governments must formalize practical discussions by establishing an Independent Advisory Council or Consultative Body comprising senior past and present officials. This body might pave the way for a more systematic dialogue on specific areas of concern or interests regarding migration. A multi-stakeholder deliberative committee comprising migrants, civil society leaders, employers, recruiting agencies, and senior government officials, including those from destination countries, would be another alternative.[110]

Forming these independent committees would effectively save lives because it would solve many challenges faced by migrants. Especially, by monitoring illegal migrations via insecure means as seen in cases such as Sri Lankan Migrants using fishing boats to enter Australian Waters and

[106] Santosh C Saha, 'South Asian Association for Regional Cooperation (SAARC) and Social Development in South Asia: A Study of Some Successful Experiences', (2005) 18(2) Indian Journal of Asian Affairs.
[107] ibid.
[108] D. Rannbeig Agunias and Others, 'Labour Migration from Colombo Process Countries: Good Practices, Challenges and Ways Forward', (IMO, 2011) <https://publications.iom.int/system/files/pdf/colomboprocessstudy_final.pdf> accessed 20 July 2023.
[109] ibid.
[110] Sanjay Barbora, *et al* 'Migration Matters in South Asia: Commonalities and Critiques', (2008) 43(24) Economic and Political Weekly.

Pakistani and Afghan migrants using the same means to enter European Waters. Using such unsafe, unregulated and illegal means have resulted in the loss of hundreds of lives in recent years.[111]

This new system of migration under the unity of SAARC, CP and other organizations could regulate state obligations to protect the lives of migrants and to initiate a crackdown on illegal employment agencies operating in SAARC member states. The independent committees that would be established by SAARC and CP will be able to thoroughly identify the scale of illegal migration and would help in investigating where the main problems are.[112]

7. CONCLUSION

This article has established that the transnational and transcontinental migration in South Asia affects the region both positively and negatively. Over the last two decades, international migrants from South Asia have continued to increase in numbers and amount of money they remit. International South Asian migrant populations, which retain a strong link with their place of origins, are large and well established. In response to ongoing and renewed demand from existing locations, as well as a growing number of new destinations in South Asia, migrant numbers have increased throughout the region. In the next decade, it appears clear that global migration will continue to be of increasing importance.

The SAARC organization and CP are essential in combating issues relating to migration. Even Though these organizations have their own shortcomings mainly due to the political divisions and regional conflicts, independent committees should be established through close cooperation between SAARC, CP and other organizations. It is clearly established that there is a need to develop a more reliable system that would provide comparable statistical data on international migration in South Asia.

Since SAARC being the most influential inter-governmental organization in the Indian Sub-Continent, its reformation is vital to establish a better and more conflict free region. Reforming the SAARC organization could bring in a new age in regional politics where regional powers or political divisions will not be able to affect the regulations and obligations made by SAARC with regards to protecting migrants. This newly reformed SAARC should be able to cooperate with CP and other organizations related to migration and establish Independent Committees that would

[111] Ravi Srivastava and Arvind Kumar Pandey, 'Internal and international migration in South Asia: drivers, interlinkage and policy issues; discussion paper', (UNESCO Office in New Delhi, 2017).
[112] S. Irudaya Ranjan, 'Migration in South Asia', (IMISCOE Regional Reader, 2023).

investigate the statistics of migration protection and promote migrant rights within regional states and initiate thorough investigations on the causes of illegal migration.

BUILDING DEMOCRATIC MILITARIES: A CRITICAL REVIEW OF THE SRI LANKAN MILITARY JUSTICE SYSTEM

Sanduni Rathnayake

ABSTRACT

This article aims to critically interrogate the military justice system of Sri Lanka to discuss how it may conflict with democratic values of a nation. Critics have elaborated on the importance of a separate justice system for the military for a swift process of adjudication which is crucial for its operational purposes, but less has been said about how such a system may conflict with the democratic values which should be equally enjoyed by the military personnel. Therefore, through an analysis of the military law in Sri Lanka, this article highlights the possible ways in which a separate military justice system may conflict with the values of a democratic nation. It argues that increasing accountability of the military justice system, allowing the interventions of civil courts and civil institutions into military adjudication, as well as constant revision of military law provisions while adapting best practices from foreign jurisdictions will help the process of dispensing justice more democratically.

Key words: military justice system, democracy, Sri Lanka, court martial, summary trial

1. INTRODUCTION

As the Nobel Peace Prize laureate Rigoberta Tum once remarked, 'Peace cannot exist without justice, justice cannot exist without fairness, fairness cannot exist without development and development cannot exist without democracy.' What her statement suggests is that democracy becomes the cornerstone for most values that we consider integral to a civilized society: i.e.,, peace, justice and fairness. Democracy remains the main source of the rights, responsibilities and freedoms that people enjoy, laying the foundation for a more just and equal society. Thus, it aims to engrain in people, not only an awareness about what they are entitled to, but also as to their duties to each other, leading to fair and equitable social interactions. Although it is difficult to observe democracy in its purest forms within modern states, a democratic society thrives on the said virtues, thereby taking people and their liberties as its centre focus.

The role of the Military in a democracy is "an ever-relevant concern" which was first raised by Plato 2500 years ago.[1] Over the years, the military has come to play an increasingly central role in our societies, evident by various wars that were fought across the world. Thus, military strength becomes a key constituent of the power that a state enjoys and the influence that it can exert on its citizens and other states, becoming central to decide the fate of a democratic government. As critics point out, this role of the military within a democracy was felt more acutely during the cold war and the subsequent decades that followed. Increasing threats of international terrorism, human trafficking and similar menaces that endanger the safety and the wellbeing of individual countries and the global community at large have also legitimized the increasing emphasis that is placed upon amassing the military power of a nation. As Funabashi (2002) remarks, the role of the military has now evolved from that of only providing security to actively taking part in the national development of a country.[2] Using Turkey as a case study she argues that militaries today stand as an important force in furthering "national interests" of a state while helping to achieve "social security", owing to its strength to work as "a cohesive political entity".[3]

Although such amassing of military powers could be justified in the face of the increasing vulnerabilities of the global community and the need to maintain peace, justice and fairness which are integral for a democratic society, it also poses the threat of such powers being abused by the governments to satisfy their own political agendas. As Alapishvili points out, "armed coups" for example, can squash the democratic values in a society, leading to military dictatorships.[4] Moreover, the interventions of international organisations such as the UN Security Council and the UN Institute for Disarmament Research, International Pressure Groups, as well as the cooperation of states which led to different international treaties,[5] such remarks also emphasise the need to curtail the powers of the military to build more democratic societies. In light of that, it becomes clear that the role a military can play within a democratic rule has become ever more delicate within the contemporary socio-political landscape.

One key demand that is made of the military due to the increasingly central role that it plays within modern states is its ability to act swiftly and efficiently within a crisis situation. For instance, the main task that a military unit is trusted with would be to maintain the national security of its country.

[1] North Atlantic Treaty Organization, *'*The Role of the Military in a Democracy*'* Address (*NATO*, 5 November 2008) < https://www.nato.int/cps/en/natohq/opinions_26071.htm?selectedLocale=en > accessed 06 June 2023.
[2] Yoichi Funabashi '*New Roles of the Military in the 21st Century: The Japanese Perspective*' (2002) accessed 06 June 2023.
[3] ibid.
[4] Levan Alapishvili 'The Civil-Military Relations and Democratic Control on Armed Forces in Caucasus Region: A comparative study' (2018) accessed 15 June 2023.
[5] Some of those treaties include The Antarctic Treaty entered into force on June 23, 1961, Outer Space Treaty, Moon Treaty.

In this regard, their ability to respond quickly and efficiently to a crisis situation becomes crucial. Thus, measures are taken by every nation so as to assure that the military is not deprived of this ability. The existence of a separate justice system for military is one such example where it aims to dispense justice "swiftly and efficiently" which is crucial for achieving the main military objective of alleviating any threats to the frontiers of its nation.[6] Thus, the military is given judicial powers to take disciplinary action against any misconduct of their members, avoiding the interventions of a third party for that process. Explaining the nature of a military justice system Vashakmadze contends,

> Military justice is a distinct legal system that applies to members of the armed forces, and in some cases, to civilians closely associated with the armed forces. The main purpose of military justice is to preserve discipline and good order in the armed forces and ensure its operational effectiveness.[7]

Explaining further, Major Lindsay Rodman points out, "Commanders have always been at the centre of the military justice process."[8] Viewed in this light, "Structures, rules and procedures in military justice can be substantially different from their civilian counterparts," as it aims to give more authority to commanders which is justified by claims of stricter disciplines that is required for swift and efficient deployment of military actions.[9]

Various critics have justified this accumulation of judicial powers in the hands of military commanders. For instance, it is argued that such a procedure helps "enforce internal discipline and ensure the operational effectiveness of the armed forces."[10] Similarly, as Major Rodman points out,

> Primarily, the question of accountability must be paired with responsibility. If commanders are accountable for what happens in their units—that is, whether their troops are following orders and maintaining discipline—then they must have the concomitant authority and responsibility to address disciplinary infractions.[11]

---

[6] KAAN Thilakarathna and HSD Mendis, 'Scales of Natural Justice in a Military Summary Trial: A Critical Analysis with Special Reference to Sri Lanka*'* (2021) 36 accessed 11 June 2023.

[7] Mindia Vashakmadze 'Understanding Military Justice: A Practice Note*'* (DCAF 2018) accessed 15 June 2023.

[8] Lindsay L. Rodman 'Unity of Command Authority and Responsibility over Military Justice' (2019) 93 JFQ 2nd Quarter 71 <https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-93/jfq-93_71-78_Rodman.pdf?ver=2019-05-14-151532-800> accessed 16 June 2023.

[9] Vashakmadze (n 7).

[10] Rodman (n 8).

[11] ibid.

She further contends that, within such a system of control, "the commander is uniquely positioned to ensure that the system is effective holistically" which in turn is important for the efficient functioning of a military. As she explains,

> Commanders have the ability to take a systems-based approach to protect the rights of both victims and those accused of crimes, rather than disaggregating the various services and processes that go into investigations (courts-martial and victim rehabilitation).[12]

As observed above, the existence of a separate judicial system for the military is mostly justified on the grounds of its importance for the efficient operation of the army.

However, this swift procedure of dispensing justice within militaries is often criticized for its friction with democracy. Critics argue that both military and civilians are equally entitled to the benefits of democracy. However, the existence of a separate judicial system that accumulates both administrative and judicial powers in the hands of army commanders may put military personnel at a disadvantage when enjoying their rights as citizens of a democratic society. On the other hand, modern democracy has been threatened by "politicians, who have military ambitions, and from military with political ambitions."[13] Therefore, critics argue for more accountability and transparency in dispensing justice within militaries, to avoid the danger of the military personnel's rights being overlooked in the face of achieving operational efficiency.

Viewed in this light, it becomes clear that security forces tend to have a strained relationship with the ideas of democracy as the underlying facets of democratic governance such as freedom and equality often collide with the fundamental attributes of a military setting such as hierarchy, discipline, and the projection of strength. Nevertheless, the importance of the existence of a separate justice system for military personnel has long been established in many jurisdictions due to the peculiarities of a military, creating in that process a legal dilemma that could exacerbate democratic values. The same could be observed with regard to the Sri Lankan military justice system which is mostly styled after its British counterpart. Therefore, this study intends to engage in a discussion on the observance of democratic values within the Sri Lankan military adjudication process in light of the following research questions.

- What are the potential threats directed by the military justice system of Sri Lanka towards the full realization of democratic values within its adjudication process?
- What are the legal reformations that can be introduced to the existing military justice system of Sri Lanka to mitigate such frictions?

[12] ibid.

[13] North Atlantic Treaty Organization (n 1).

- How the civilian courts and institutions can intervene or at least interact with the military justice system to mitigate such threats to reinsure democracy?

When answering the above research questions, this study uses literature review as its main research method. A wide variety of primary and secondary sources are therefore reviewed including the Constitution of Sri Lanka and major Human Rights Treaties signed and ratified by the state i.e. International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC), Optional Protocol to CRC on Child Soldiers, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and United Nations Convention against Torture (CAT). Moreover, major legislation dealing with military law namely the Army Act No.17 of 1949 (as Amended), Navy Act No. 34 of 1950 (as Amended) and the Air Force Act No. 41 of 1949 (as Amended) are reviewed to critically interrogate the military justice system of Sri Lanka and understand how it may conflict with the fundamental values of democracy. Furthermore, the researcher analysed military law Acts, Statutes and Regulations of other jurisdictions like New Zealand, Germany, Nepal and India while reviewing the published literature as articles, websites and books to answer the second and third research questions.

2.1 A GLIMPSE INTO THE MILITARY JUSTICE SYSTEM OF SRI LANKA

The military justice system of Sri Lanka consists of two main mechanisms of hearing cases which includes a Court Martial and a Summary Trial. While a Court Martial is "more of an ordinary mechanism of delivering justice as we find within the civilian society, except for the fact that only persons subjected to military law are brought before them, a Military Summary Trial is something which is unique and distinctive as the commanding officer concerned is given a wide variety of powers and discretion in conducting and delivering an appropriate judgement in such a trial".[14] The President of the Republic who is also the Commander-in-Chief of Armed Forces and the Minister of Defence has statutory roles to play in Courts Martial, where such roles are played in terms of the Army Act and Regulations made thereunder. A Court Martial is a military court that metes out justice in the Armed Forces. It is a military court comprising of military officers. Generally, a minimum of 3 officers are required to constitute a Court Martial. For capital cases, there should be 5 officers and an official called Judge Advocate (who is a lawyer). Woven around these two mechanisms of meeting justice is the military justice system of Sri Lanka which will be scrutinised

[14] Vashakmadze (n 7) 36.

in this study, to understand how its substantive and procedural aspects uphold the values of democratic rule.

2.2 OBSERVING THE TRIPARTITE POWER DISTRIBUTION IN THE MILITARY

A key characteristic of a democratic rule is the ability of the government officials who are elected from a free and fair election to govern without external interferences. A fundamental requirement for such a system of governance is a clear separation of powers and a system of checks and balances that complements it.[15] Professors Mark Elliott and Robert Thomas state that the separation of powers is for the prevention of tyranny and the facilitation of socially useful conduct. Therefore, separation of powers and democracy can be taken as two interrelated concepts that mutually reinforce each other.

However, a pure form of separation of powers where separateness is considered in absolute terms among the three branches of the legislature, executive and judiciary is not considered practical in a modern democracy. A breach is unacceptable only if it compromises the achievement of the ultimate objective that the doctrine pursues – i.e. – prevention of the abuse of power. Hence, constructive breaches are welcomed which contribute to the overall prevention of tyranny. Nevertheless, destructive breaches which do not facilitate balance or prevent tyranny should be avoided at all costs.

In light of the above, it becomes important to analyse the present power allocation in the Sri Lankan military to better understand the possible threats that can endanger democratic governance within a military. Unfortunately, it appears that a clear separation of powers cannot be observed under the Sri Lankan military justice system as the same officials i.e., commanding officers are entitled to exercise both judicial and executive powers. For instance, they can serve as judges in summary trials, dispensing justice to the infractions of their subordinates who are legitimately under their executive control. Critics interpret such a consolidation of powers as a 'constructive breach' which is necessitated by the military's need to take swift actions to meet its executive functions.[16] This necessity is felt more heavily in countries like the United States whose military is deployed in foreign territories. They argue that awaiting judgement for the infractions of soldiers who are deployed in remote areas of the world not only delays military operations but is a mere impossibility under such circumstances. Therefore, the need for the military commanders to have more powers

[15] For instance, "within a democracy, an elected assembly that represents the people is generally regarded as having authority to make laws that apply to the entire population," which are implemented by the executive to which the military of a government belongs. On the other hand, the judiciary acts as the watchdog who spearheads the fair delivery of justice in matters arising from the collisions of these branches.

[16] International Commission of Jurists, 'Authority without Accountability: The Crisis of Impunity in Sri Lanka' (ICJ 2012) accessed 11 June 2023.

which may include judicial powers is seen as a necessity to maintain good order and to achieve military objectives. Similar concerns are raised with regard to military units of any nation, thereby arguing that such delays which may be caused by a separate adjudication process cannot be tolerated considering the gravity of the situations a military would have to face.

Despite these circumstances, the accumulation of different powers of governance in one hand might lead to tyranny which is the arch enemy of democracy. For instance, the consolidation of executive and judicial powers in the hands of military officers can pose a major challenge to the democratic values that are inherent in governance, as it denies military personnel an independent entity to listen to their grievances. As pointed out by Charles Louis de Secondat, otherwise known as Baron de Montesquieu, in his lasting contribution in the *Spirit of the Laws* (*L'Esprit des Lois*),

> When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically. Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizen would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor. All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.

Thus, if the same authorities which in this case, the commanding officers exercise the powers of the judiciary and the executive at the same time, they could be viewed, in Montesquieu's terms, as 'oppressors'. Therefore, such a consolidation of powers may be mirrored poorly in the democratic rule within a military justice system.

This amassing of judicial and executive powers in a commanding officer may also cause abuses of power. For instance, according to Section 42 of the Army Act, a military officer below the rank of a lieutenant-colonel or a warrant officer who has opted to be tried summarily, will be heard in a trial preceded by the "same commanding officer who made the allegation against him".[17] In such a situation, the accuser and the jury would be the same person which may leave the room for an unjust verdict. Thus, the commanding officer becomes responsible for framing and deciding the charge as well as for deciding the punishment of the accused, culminating in unfettered powers for

[17] Upali Weerasinghe, *Offences under the Army Act, Navy Act and Air Force Act of Sri Lanka* (Viduravi Prints 2016).

the commanding officer himself. This may lead to an abuse of powers by the commanding officer, thereby threatening the accused's right to a fair trial.[18] Contrary to the above, in the Sri Lankan civil court system, the charges against an accused are framed by the police while the prosecution is carried out by state attorneys (in criminal cases only). Thus, pre-determination of guilt which is contrary to the bedrock legal principle of: innocence until proven guilty will not penetrate a judge's mind, as they are not involved in the making of charged sheets. However, a close examination of military justice systems in some other countries shows that steps are taken to rectify such infractions in their adjudication process. For example, the New Zealand military justice system requires that a summary trial should be held before a presiding officer who is not the commanding officer that has brought the charge against the accused armed personnel.[19]

2.3 PROCEDURAL LIMITATIONS IN SUMMARY TRIAL AND COURT MARTIAL

Another key concern that may cause friction between the Sri Lankan military justice system and the basic tenets of democratic rule can be observed with the legal procedure that is related to the type of court where a case against armed personnel can be heard. According to Section 40(3) of the Army Act, the power of selecting the tribunal to hear their cases (summary trial or district court martial) is prima facie vested with the accused. In practice, "the choice made by the accused will often be influenced by the attitude of the commanding officer as deciding to proceed with a district court martial may become costly, since a district court martial has a greater power of punishment not enjoyed by a commanding officer sitting at a summary trial".[20] Moreover, in cases like *Mendis v Commander of the Army*,[21] the court held that according to Section 40(1) and 42 of the Army Act, it is unnecessary to hold a formal inquiry or a Court Martial in the case of a non-warrant officer, since there is a clear discretion granted by Statute to hold summary trial and to deliver punishments. Such legal and practical barriers may hinder the right of the accused military personnel to receive a fair trial, thereby throwing the values of a democratic rule into question.

A similar situation may arise with regard to the authority of convening a General Court Marshal and District Court Marshal. In Sri Lanka, a person with sufficient knowledge about Court Martial and rules of law is appointed as the Judge Advocate by the commanding officer of the military in question when convening one of these courts. However, this provision does not mandate the Judge

[18] The need to retain such powers in a commander's hands has been justified through the argument that if "Commanders are accountable for what happens in their units, then they must have the concomitant authority and responsibility to address disciplinary infractions". See Rodman (n 8).

[19] Armed Forces Discipline Amendment Act (No. 2) 2007 (NZ), S 115.

[20] ibid (n 7).

[21] *Mendis v Commander of the Army* (2001) (CA).

Advocate General to be a lawyer.[22] However, in the civil courts, properly selected and well-qualified judges with extensive knowledge of the law serve in the judicial branch while individuals with the peoples' mandate to hold the governing power in public trust are required to spearhead such institutions. As observed above, the "supremacy of the powers of the elected and selected is questioned" inside the Sri Lankan military justice system thereby indirectly questioning the vital facets of democratic governance.[23]

2.4 INDEPENDENCE OF JUDICIARY IN THE MILITARY JUSTICE SYSTEM

It is also important to discuss whether the judicial officers so appointed in the military courts can remain independent and impartial in dispensing justice. Judges and tribunals being free from interference and being able to function independently is a hallmark of democracy and good governance. They should be independent of all external pressures and should adhere to the basic principles of natural justice i.e., *Audi alteram partem* and *Nemo judex in causa sua*. However, it is questionable as to how a Judge Advocate who is appointed by the commanding officer himself is able to act fairly and in accordance with the rule of law. Even though the judge advocate might act fairly in the judicial process by following the natural justice principles, his conduct will still be questioned as he was appointed by the commanding officer himself. Thus, this may harm the faith the armed personnel have in the military justice system. On the other hand, critics argue that independence of a court is a mere factual reality, and the appearance of independence where all judges are seen to be independent is equally as important as independence in reality. This rationale was opined in the famous Pinochet case of 1999, where the court held that 'Justice must not only be done but seem to be done'.

Hence, it becomes clear that the officials acting in the judicial capacity in the military justice system should hold a responsibility to adhere to international standards set out for judges. For instance, characteristics like fairness, unbiased adjudication and independent actions which are considered fundamental for a civil court judge should equally be applicable and adhered to by individuals acting in a judicial capacity in the military. Some principles a judge is required to follow in his office are elaborated in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region which becomes exemplary in this regard. Article 1 of the Beijing statement begins with the important concept that 'The judiciary is an institution of the highest value in society'. Thus, anyone acting in the judicial power, or any official acting in judicial power, should not be allowed to undermine the value of the judiciary as all the courts collectively represent the

[22] However, to hear capital cases there should be 5 officers and a Judge Advocate (who is a lawyer).

[23] Jutta Limbach, 'The Concept of the Supremacy of the Constitution' [2001] 64 Modern Law Review 1.

judiciary of the democracy. As per Article 4 of the Beijing Statement, it is the duty of the State to guarantee the independence of the judiciary and to enshrine it in the law and Constitution. As Sri Lanka has already enshrined the concept of independence of the judiciary in the Constitution of the country, the current focus should be laid on the duty of the states in working collaboratively to guarantee independence. When doing so, the military tribunals and officials acting in a judicial capacity under such tribunals should never be overlooked as it is an integral rubric of the entire judicial system of the country. Moreover, Article 7 of the Beijing Statement imposes a reciprocal duty on judges to uphold the integrity and dignity of their office which becomes important in avoiding impropriety, which is required both in reality as well as appearance. Similar sentiments are echoed in the Latimer Guidelines which were also introduced to ensure the impartiality of the judiciary. Furthermore, Articles 11 to 16 in the Latimer Guidelines which deals with the appointment of judges also become significant in this regard. These principles emphasise the importance of recruiting candidates who are both competent and diverse, which in turn can be seen as a significant principle to be followed in military tribunals. A diverse group of military officials from different forces, regiments, and ranks in the bench will ensure justice for the military personnel in a trial proceeding. Similar to Latimer Guidelines, The Bangalore Principles (2001) also emphasise the global standing on judicial conduct. According to these principles, independence, impartiality, personal integrity, propriety, equality, competence and diligence should be reflected by any official acting in a judicial capacity which should be equally applicable in the context of the military.

2.5 COMPLIANCE WITH NATURAL JUSTICE PRINCIPLES

Moreover, critics have outlined some concerns with regard to the process of dispensing justice through a military summary trial or a court martial, as it sometimes may oppose the fundamentals of natural justice principles. According to the maxim of *audi alteram partem* everyone is naturally entitled to a fair hearing. It entails a right to legal representation, calling and cross-examining witnesses and knowing the nature and the extent of the charges beforehand. In contrast, Section 42(a) of the Army Act allows the commanding officer conducting the summary trial to acquit the accused even before hearing the evidence which highlights the "opacity of the military adjudication".[24] Furthermore, in the military summary trial procedure, the accused is not entitled to representation by a counsel whereas in a court martial he could enjoy that privilege. Although the accused is allowed to call in witnesses at a summary trial, examining a witness may become challenging without the aid of a legal representative. Moreover, the right to appeal is also

[24] Brett J. Kyle and Andrew G. Reiter, *Military Courts, Civil-Military Relations, and the Legal Battle for Democracy* (Routledge Publications 2021).

unavailable for an accused within the Sri Lankan military justice system. Thus, it denies the armed personnel the right to question a decision taken by a military officer acting in the capacity of a judiciary, further constraining the space to challenge the authority of an officer who abuses his or her powers.

2.6 RIGHT TO EQUALITY AND NON-DISCRIMINATION

It is also important to note how the military scale of punishment may vary according to different rankers, thereby contesting the ideas of fairness and non-discrimination that should be present in any adjudication process. Critics highlight that these differences in the levels of punishment which differ according to the ranks of the military personnel undermine the rule of law of a country. A.V. Dicey writing in the second half of the 19th century, in his book, *Introduction to the Study of the Law of the Constitution*, emphasized that,

> Every man, whatever be his rank or condition, is subject to the ordinary laws of the realm and amenable to the jurisdiction of the ordinary tribunals. No man is above the law. This rule applies to every official.

According to Dicey, the key to establishing the rule of law in a country is equality. Article 26 of the International Covenant on Civil and Political Rights, as well as the Article 7 of the Universal Declaration of Human Rights reflect this idea by stating that, everyone is equal before the law and is entitled without any discrimination to equal protection of the law. In a similar vein, Article 12(1) of the Sri Lankan Constitution declares it as a fundamental right enjoyed by all persons to be treated equally before the law, entitling everyone to equal protection of the law. Thus, it appears that both international and domestic legal literature accepts the cardinal role played by the rule of law and equality before the law within a democracy, as opposed to a rule by law which leads to dictatorship.

However, in the military justice system, a clear distinction is made among the rankers in the hierarchy of military for which different scales of punishments are enforced. According to critics, this “military's problem of different spanks for different ranks" is built into the military justice system's sentencing process in addition to been stemming from cultural issues.[25] A similar observation can be made in the scales of punishment under the Sri Lankan military justice system. For instance, Section 97 of the Army Act lays down the offences for which army personnel could be punished both in the active service and at other times while introducing the relevant punishments. However, a close analysis of Section 93 reveals that there is a clear distinction

[25] Rebecca Kheel, ‘Here's Why Generals Often Get Light Sentences at Courts-Martial, According to Advocates’ (Military.com 2022) < https://www.military.com/daily-news/2022/05/20/heres-why-generals-often-get-light-sentences-courts-martial-according-advocates.html> accessed 7 June 2023.

between the punishments received by the soldiers and the officers for committing the same crimes that are laid down under this section. Accordingly, Section 97(3) states that, if the wrongdoer is an officer, he or she should be cashiered or be given any less severe punishment set out in Section 133. However, if a soldier has committed the offence, he or she should suffer a term not exceeding 3 years of rigorous imprisonment or any less severe punishment set out in Section 133. These differential treatments might question the fundamental facets of democratic governance which require all people to be treated equally in the face of the law regardless of their creed, rank, sex or any other differences. Furthermore, it can challenge the rule of law, thereby leading to rule by law which indeed can set the turf for many abuses of power.

2.7 POLITICIZATION OF THE MILITARY

This discussion also warrants us to remark how the president, who is the Commander-in-Chief of Sri Lankan Armed Forces can exercise huge executive powers which might politicize the military services. For instance, vested with the convening authority of a General Court Martial by Section 46 of the Army Act, the president may become an external force who can intervene with the democratic rule in a military justice system. Such developments may "lead to a rule by law as opposed to a rule of law which is essential for a democratic governance."[26] In contrast to other states, the commander in chief of the German Armed Forces is not the Federal President but a civilian Minister of Defence who is in charge of both civilian and military officials."[27] This framework has helped the country uphold the supremacy of the Parliament and accountability thereby safeguarding the military from politicisation.[28]

It is also important to notice how the civil courts have attempted to penetrate the opaqueness of the military justice system in certain cases. One such example is the court's recognition of the right of military personnel to appeal to civil courts against a verdict given by a military tribunal. In some progressive cases like *Captain Nawaratne v Major General Sarath Fonseka and six others*[29] and *Amerasinghe v Daluwatte and others*[30] the accused could appeal to the civil courts. For instance,

[26] Geoffrey S. Corn, 'Presidential Power and Military Justice: A Tradition of Effectiveness under Strain' (American Constitutional Society 2019) < https://www.acslaw.org/expertforum/presidential-power-and-military-justice-a-tradition-of-effectiveness-under-strain/> accessed 07 June 2023.

[27] "As a member of the Federal Government, the Minister is bound by the Federal Chancellor's authority to determine general policy guidelines. Upon promulgation of a state of defence, command over the armed forces will automatically pass to the Federal Chancellor. He would then be the supreme military commander of all service personnel". See North Atlantic Treaty Organization (n 1).

[28] This approach has made the military like any other executive function of the state, subject to parliamentary control, judicial control and control by the Federal Audit Office that annually audits the accounts of the Armed Forces and determines whether its finances have been efficiently administered.

[29] *Captain Nawaratne v Major General Sarath Fonseka and six others* [2009] 1 Sri L.R (SC).

[30] *Amerasinghe v Daluwatte and others* [2001] 3 Sri. L.R 258 (CA).

in *Captain Nawaratne v Major General Sarath Fonseka and six others* cited above, the court martial proceedings were equalled to the civil high courts and was granted the ability to appeal to two higher civilian courts namely the Court of Appeal and the Supreme Court. Similarly in *Amerasinghe v Daluwatte and others* cited above, a decision arrived at by the Army Court of Inquiry violating natural justice principles was quashed by the Court of Appeal. This opened up doors for the civilian courts to intervene in the military proceedings. Such interventions by the civil courts and institutions become important in safeguarding the human rights of the military personnel which is another major facet of democratic rule. Nepal and Indian military justice systems are exemplary in this regard as the Special Court Martial in Nepal[31] and the Armed Forces Tribunal in India[32] provide for the right to appeal against the punishments. Since 2009, India has made the appeal and review procedure available for summary court punishments.[33] Encouraging such interventions in the Sri Lankan military justice system can be observed as an important step in safeguarding the rights of military personnel, as it gives the civil courts further leverage to act as a watchdog over the abuses of their power by the military officials.

Although military law becomes the basis for discipline in the armed forces, such laws should also respect the basic human rights of military personnel. Human rights are "inherent and inalienable to all human beings and the states have the responsibility to ensure the full realization of those rights."[34] This should apply equally to military personnel who are a part of the civilian population despite serving an important and a special form of duty. Sri Lanka, among other South Asian countries, has ratified a wide variety of human rights treaties including International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC), Optional Protocol to CRC Child Soldier, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), United Nations Convention against Torture (CAT) and Enforced Disappearance (signed but not ratified). Fundamental protection of the rights provided in Chapter 3 of the 1978 Constitution are also equally available for military and civil people. However, it is also important to note here that actions could be initiated in respect of Article 126 of the Constitution, thereby curtailing the rights to equality, freedom of speech, peaceful assembly, occupation and movement

[31] This Court consists of a judge (Chairman), Secretary Ministry of Defence and Chief Judge Advocate. It has original jurisdiction to proceed with and adjudicate the case. An appeal against its decision may be lodged with the Supreme Court within 35 days.

[32] The Armed Forces Tribunal and its Benches (judicial and administrative member one each), are functioning since August 2009. It has original jurisdiction over service matters and appellate jurisdiction over court martial.

[33] Angela S. Burger, 'Changing Civil-Military Relations in Sri Lanka' [1992] Asian Survey 774.

[34] United Nations General Assembly, 'Summary of the discussions held during the expert consultation on the administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations: Report of the United Nations High Commissioner of Human Rights' (2015).

and the right against arbitrary arrest and detention enjoyed by the military personnel as stipulated in the Article 15(8) of the Constitution. Despite such constraints, authorities should not forgo the fundamental democratic rights military personnel enjoy by using such constitutional clauses to justify their actions. As articulated in the Sri Lankan judicial decisions like *Balthazar v Hulangamuwa and Others* [35] which have progressively interpreted the rights of the military personnel, a man who enlisted as a soldier did not cease to be a citizen and did not forego his civil rights except to the extent expressly covered by the military law. In light of the above arguments, it becomes clear that the officials acting in the judicial capacity under the military justice system have a responsibility to adhere to the international standards set out for fair, independent and unbiased adjudication, similar to the judges in the civil courts.

3. CONCLUSION

The above discussion has analysed the military justice system of Sri Lanka to understand how it may conflict with the democratic values that should be observed in governance. It can be argued that the existence of a separate justice system for the military which remains mostly opaque may have undesirable consequences when upholding democratic values that are essential for a fair and just system of dispensing justice. For instance, the accumulation of judicial and administrative powers in the hands of commanders, the absence of a strong check and balance system, possible violations of natural justice principles during the adjudication process stand as some instances where the military justice system of Sri Lanka may conflict with fundamental ethos of a democracy. Therefore, this study recommends increasing the interventions and interactions between civil courts and military courts, allowing the civil judicial authorities to address the grievances that may arise within the military justice system. Furthermore, it has analysed the military justice systems of countries such as Germany, New Zealand, India and Nepal to discuss how the principles of separation of powers and accountability can be incorporated without jeopardising the key objectives of an army. Therefore, the study concludes that there is a potent necessity to update the military laws of Sri Lanka which in turn will help to bring in more fundamental values of a democratic society to the military adjudication process.

[35] *Balthazar* v *Hulangamuwa and Others* (1986) 2 Sri L.R. 240 (SC).

INTELLECTUAL PROPERTY

OVERVIEW OF THE TRADEMARK LAW IN SRI LANKA: GAPS BETWEEN SRI LANKAN LAW AND INTERNATIONAL PRACTICES

Chanmini Perera

ABSTRACT

Trademarks play a vital role in providing numerous benefits to businesses. Apart from serving as a valuable asset for brand recognition, trademarks offer the opportunity for owners to create a significant income stream through sales or licensing arrangements. Additionally, a registered trademark holds considerable financial value, making it an attractive asset that can be utilized to secure funding from financial institutions, thus enhancing the company's financial standing.

This article seeks to provide an overview of trademark law in Sri Lanka, highlighting the challenges and opportunities that lie ahead. By presenting a roadmap for potential reforms and improvements, it aims to contribute to the enhancement of the trademark system in Sri Lanka, fostering an environment conducive to innovation, business growth, and robust protection of Trademarks.

The research and recommendations on which this study is based, draws from publicly available information. The author aims to draw an analogy from US and European standards in relation to trademark law in Sri Lanka through the desk-based research. The author will be shedding light on the strengths and areas of improvement. By identifying the challenges faced by trademark owners and practitioners, this analysis seeks to offer valuable insights into potential policy reforms or enhancements that can bolster the efficiency and effectiveness of the trademark system in the country.

In recent years, Sri Lanka has demonstrated commendable progress in establishing Trademark protection mechanisms that align with international standards. However, despite these advancements, concerns have been raised by local agents representing U.S. brands regarding the effectiveness of Trademark protection enforcement in the country. This raises questions about the current state of trademark law in Sri Lanka and highlights the need to address key challenges and issues.

By critically analyzing the current state of trademark law and its implementation in Sri Lanka, this article aims to identify key main points and challenges faced by trademark owners, local businesses, and international brands operating within the country. It will also explore international best practices and benchmarks to draw meaningful comparisons and assess Sri Lanka's standing in the global context.

1. INTRODUCTION

Without a mark that would guarantee the marketplace of a good or a service, a customer would be lost in ascertaining the authenticity of the product. Trademarks confer a multitude of advantageous aspects to businesses. The World Intellectual Property Office (WIPO) identifies five main benefits that would accrue to businesses.[1]

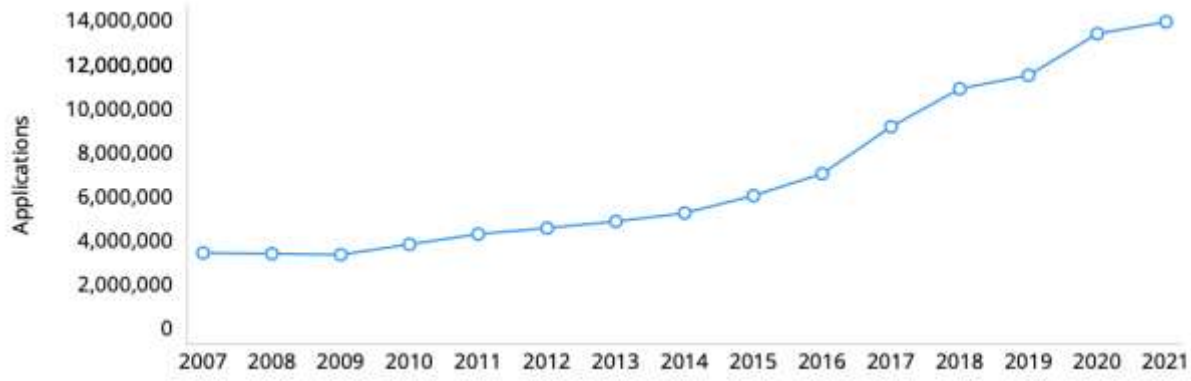
When there is an exclusive right granted to the registered owner of the trademark, it would prevent third parties from producing and marketing similar products or services under an identical or a confusingly similar trademark. This would be further discussed in this article. Furthermore, enforcing registered trademarks is facilitated by the inherent presumption of ownership they carry. Moreover, certain countries have implemented mechanisms that empower customs and authorities to effectively examine and confiscate counterfeit goods that violate a registered trademark. For example, the European Union by implementing Regulation No 608/2013 has allowed customs and authorities in EU member states to detain and seize counterfeit goods that infringe registered trademarks[2]. Australian jurisdiction has established regulations, such as the Customs Act 1901 and the Trademarks Act 1995, which grant customs, authorities the authority to detain and seize counterfeit goods infringing registered trademarks. WIPO states that, 'trademarks are one of the most *enduring* business assets'[3]. This is because, with proper use and regular renewal, a registered trademark has the potential to endure for a significant duration. There are two main economic benefits that the owner would enjoy through registration of a trademark. The sale or licensing of trademarks presents an opportunity for the owner to generate a substantial income stream as well as a registered trademark holds financial value that can be leveraged to secure funding from financial institutions.

As per the World Intellectual Property Indicator 2021, it was indicated that there had been an increase of 4% in trademark applications compared to 2020. This statement can be backed by the illustration below. In numbers, 13.9 million trademarks were filed worldwide in 2021. These statistics indicate that there is a rapid growth in the area of trademarks. However, the growth rate observed in the current period is notably lower than the 16.4% growth rate registered in the previous year 2020, notwithstanding the impact of the COVID-19 pandemic and the subsequent global

[1] WIPO, 'Five ways Trademark Rights can be of benefit to start ups and SMEs', < www.wipo.int/ip-outreach/en/ipday/2022/toptips/trademarks.html#:~:text=They%20allow%20customers%20to%20identify,and%20enhance%20the%20company's%20goodwill > accessed 14 June 2023.
[2] Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 [2013] OJ L181/15 < https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:181:0015:0034:en:PDF > accessed 14 June 2023.
[3] ibid (n.1).

economic deceleration.[4] Illustration 1 below visually represents this information. Furthermore, It could be seen that from 2016 onwards, there has been a growth in the trademark applicants.

Illustration 1: Trademark applications worldwide 2007 - 2021[5]



1.1 Trademark System in Sri Lanka

The Intellectual Property Act, No.36 of 2003[6] primarily governs the trademark system in Sri Lanka. The Act provides legal provisions for the registration and protection of trademarks. The body that governs Intellectual Property in general is the NIPO, which falls under the purview of the Ministry of Trade.[7]

Sri Lanka adopts the 'first to file' principle[8] in relation to trademark registration. In order to obtain trademark protection, the supposed owner of the trademark should file an application at the NIPO with the required information and documents. Once this has been done, the application would undergo an examination to assess its compliance with the legal requirements. As per the Nice Classification system[9], Trademarks in Sri Lanka have been classified into 45 classes. The applicants would have to specify the class/classes under which their goods/services would belong to. Once the application has been filed, it would undergo an examination process which is done in order to determine the registrability of it. This examination would consider the distinctiveness, similarity to existing trademarks, and compliance with legal requirements. Once the application is accepted, the trademark is published in the gazette – the purpose behind this would be for third parties to oppose

[4] WIPO, 'World Intellectual Property Indicator', (2021) < www.wipo.int/edocs/pubdocs/en/wipo-pub-941-2022-en-world-intellectual-property-indicators-2022.pdf > accessed 14 June 2023.
[5] ibid.
[6] Intellectual Property Act No. 36 of 2003, section 102 to section 159.
[7] Extraordinary Gazette No. 2289/43 July 22, 2022.
[8] Intellectual Property Act No. 36 of 2003, Section 102(2).
[9] *Nice Classification – 11th Edition, Version 2022: List of Classes with Explanatory Notes* (WIPO 2022) <www.wipo.int/classifications/nice/nclpub/en/fr/pdf-download.pdf?lang=en&tab=class_headings&dateInForce=20220101> accessed 14 June 2023.

the mark. If a third party opposes and files an opposition, both parties would have to present arguments and support their stance. It is in the hands of the Registrar of Trademarks to make a decision based on the merits of the case. However, if there is no such opposition or if such opposition has been resolved in favor of the applicant, then the trademark would be successfully registered, and a certificate of registration will be issued. Registered trademarks in Sri Lanka are protected for an initial period of ten years from the date of application[10] and is renewable indefinitely in successive ten-year periods.[11]

Illustration 2: Registrations granted and Applications filed between 1995 to 2022[12]

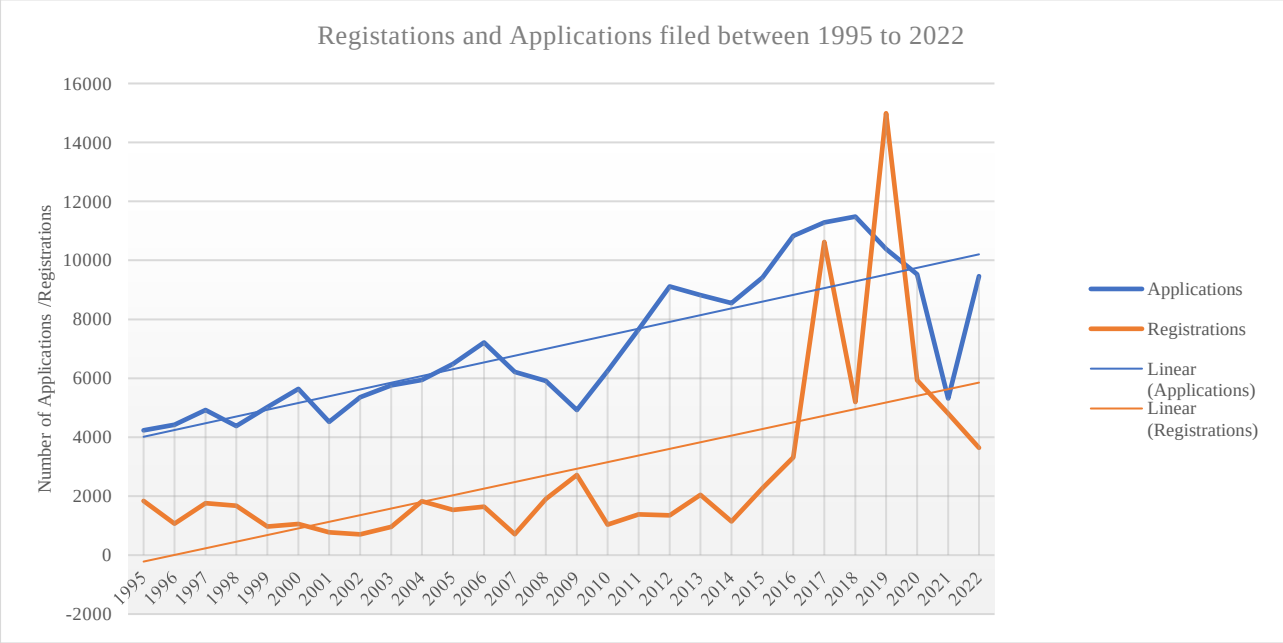


Illustration 2 depicts the filing and successful registration of trademarks at the conclusion of each year. During the period spanning from 2009 to 2012, a consistent rise in both applications and registrations is evident. Notably, between 2016 and 2017, a substantial surge in trademark registrations is apparent. However, in 2021, there has been a decline in both application filings and trademark registrations, which is likely attributed to the closure of the NIPO due to the COVID-19 pandemic.

[10] Intellectual Property Act No. 36 of 2003, Section 118.
[11] Intellectual Property Act No. 36 of 2003, Section 119.
[12] 'Statistics' (NIPO), <www.nipo.gov.lk/web/index.php?option=com_content&view=article&id=8&Itemid=174&lang=en#trademarks> accessed 14 June 2023.

In 2017, Verité Research released a policy brief detailing its findings on trademark registration in Sri Lanka.[13] Economist Dr. Nishan De Mel, emphasized in the brief that there is a notable rise in the demand for registering trademarks in Sri Lanka. The provided illustration accurately reflects this growth, showing an increase in both resident applications and trademark registrations during the specified period.

2. HISTORICAL DEVELOPMENT OF TRADEMARK LAW IN SRI LANKA

2.1 Evolution of Trademark Legislation in Sri Lanka

The roots of trademark law in Sri Lanka can be traced back to the British Colonial era. The British Inventor's Ordinance of 1859 marked a significant milestone as the first legal instrument to provide protection for intellectual property. Consequently, the first patent was granted on 22 November 1860 under this ordinance. Following this, various laws on Intellectual Property were introduced by the colonial government in Sri Lanka which includes the Trademark Ordinance of 1888.[14] Sri Lanka also adopted the Merchandise Marks Ordinance, which provided legal protection to trademarks and aimed to prevent deceptive practices in relation to the marking and labelling of goods.

Fast forward to 1948, Sri Lanka after gaining independence proceeded to develop the laws pertaining to intellectual property. The Merchandise Marks Ordinance was replaced by the Code of Intellectual Property Act No. 52 of 1979.[15] The importance of this Code was that it created a comprehensive framework for trademark registration, protection, and enforcement.[16] In 1978, when Sri Lanka became a member of the WIPO, it resulted in greater conformity with international norms and obligations in relation to trademark law.

2.2 Influence of International Treaties on Sri Lanka's Trademark Regime

In the year 1952, Sri Lanka became a contracting party to the Paris Convention[17]. There are several benefits that would accrue to the contracting party. These would include priority rights, national treatment, protection against unfair competition, cooperation and information sharing, access to dispute resolution mechanisms and promotion of international harmonization. Another Seminal

[13] Verité Research, 'Facilitating The Registration Of Trademarks: A Step towards Creating Internationally recognised Sri Lankan Brands', (Policy Brief, 2017) <www.veriteresearch.org/wp-content/uploads/2018/05/Facilitating-Trademarks_Policy-Brief_English.pdf> accessed 1 July 2023.
[14] Nipun Samaratunga, 'Issues of Trademark Law in Sri Lanka', (Daily FT Colombo, 26 May 2022), <www.ft.lk/columns/Issues-of-Trademark-Law-in-Sri-Lanka/4-735327> accessed 18 June 2023.
[15] Code of Intellectual Property Act No.52 of 1979.
[16] Indunil Abeysekere, 'The Agreement on Trade Related Aspects of Intellectual Property Rights (Trips) and the Sri Lankan Copyright Law', (1998), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/sljinl10&div=8&id=&page=> accessed 14 July 2023.
[17] Paris Convention for the Protection of Industrial Property 1883.

shift in Sri Lanka's trademark regime arose when Sri Lanka entered into the Trade Related Intellectual Property Rights (TRIPS) Agreement on the 1st of January 1995.

The TRIPS Agreement is an agreement that falls under the administration of the World Trade Organization (WTO). Its main purpose is to establish the standards for protecting and enforcing forms of intellectual property rights (IPRs) among member countries of the WTO. This agreement covers a range of property such as copyrights, trademarks, patents, industrial designs, geographical indications and trade secrets.

Sri Lanka joined the TRIPS Agreement with the intention to align its intellectual property laws and regulations with standards and to enjoy the advantages of participating in trade. By becoming a part of this agreement Sri Lanka became involved in a system for safeguarding and enforcing intellectual property rights.

As a party to the TRIPS Agreement Sri Lanka made commitments to provide effective protection for intellectual property rights. It also aimed at ensuring access to and utilization of property while preventing unfair competition practices that could undermine the rights of IP owners.

Furthermore, this agreement includes provisions for resolving disputes related to property. Member countries have access to dispute settlement procedures through the WTO if they encounter any issues regarding IPRs.

2.2.1 Gap Analysis

The analysis aims to identify areas where the IP Act may fall short or deviate from the requirements and provisions outlined in the TRIPS agreement, thereby highlighting potential gaps that need to be addressed to ensure compliance with international standards.

	TRIPS	Intellectual Property Act of 2003 (IPA)
Definition of a trademark	"Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark"[18]	A 'trademark' means any visible sign serving to distinguish the goods of one enterprise from those of another enterprise[19]

[18] TRIPS Agreement, Article 15.
[19] Intellectual Property Act No. 36 of 2003, Section 101.

	TRIPS provides a broader definition. However, this does not explicitly list the types of signs, encompassing any sign being capable of distinguishing goods or services without specifying the types of signs, thus providing more flexibility. The IPA's definition specifically mentions 'visible signs' and lists examples such as words, logos, devices, labels, and numerals. Hence, is a narrower definition.	
Examination and Registration Process	TRIPS does not provide specific guidelines for trademark examination and registration procedures. It allows members to determine the criteria and procedures for the registration of trademarks, subject to certain minimum standards.	The IPA sets out the process for filing a trademark application with the NIPO. It involves an examination for distinctiveness, conflicts with existing trademarks, and compliance with formal requirements.
Well Known Trademarks	Article 6bis of the Paris Convention[20] shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.[21]	The Director-General shall not register a mark — if it is identical with, or misleadingly similar to, or constitutes or translation or transliteration or transcription of a mark or trade name which is well known in Sri Lanka for identical or similar goods or services of a third party, or such mark or trade name is well known and registered in Sri Lanka for goods or services which are not identical or similar to these in respect of which registration is applied for, provided in the latter case the use of the mark in relation to those goods or services would

[20] Article 6bis of the Paris Convention

"The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an Interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well–known mark or an imitation liable to create confusion therewith.

A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.

No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith."

[21] TRIPS Agreement, Article 16.

		indicate a connection between those goods or services and the owner of the well-known mark and that the interests of the owner of the well-known mark are likely to be damaged by such use[22]
	TRIPS agreement acknowledges the protection of well-known trademarks and requires member countries to provide the means for preventing unfair competition and protecting such marks. It sets out factors to consider in determining well-known status such as the degree of knowledge or recognition in the relevant sector. IPA in fact recognizes well known trademarks and provides protection against unauthorized use. However, it does not specify the criteria for determining the well-known status. Therefore, it could be inferred that TRIPS provides more explicit guidance by outlining factors such as the degree of knowledge or recognition of the mark in the relevant sector.	

In relation to enforcement and remedies, the Intellectual Property Act in Sri Lanka, Section 121(1), safeguards three distinct rights under trademark law. These encompass the right to utilize the trademark, the right to transfer or assign the trademark registration to another entity, and the right to enter into license agreements concerning the trademark.

Moreover, Section 121(2) of the Intellectual Property Act in Sri Lanka extends the ambit of trademark infringement beyond the provisions stipulated in Section 121(1). It expressly prohibits third parties from undertaking certain actions pertaining to a trademark without acquiring prior consent from its registered owner.

Where a person to whom any recognised rights granted under this Act, proves to the satisfaction of the Court that any person is threatening to infringe or has infringed his rights or is performing acts which makes it likely to infringe a right under this Act, the Court may grant an injunction restraining any such person from commencing or continuing such infringement or performing such acts and may order damages and such other relief as the Court may deem just and equitable. The injunction may be granted along with an award of damages and shall not be denied only for the reason that the applicant is entitled to damages.

[22] Intellectual Property Act No. 36 of 2003, Section 104.

The Act provides for civil, criminal penalties and enforcement measures against trademark infringement including court actions, seizure of infringing goods and damages or injunctions remedies. TRIPS requires member countries to provide effective enforcement procedures and remedies against trademark infringement, but it does not prescribe specific enforcement measures or penalties.

3. THE EROSION OF TRADEMARK DISTINCTIVENESS: UNDERSTANDING TRADEMARK DILUTION AND GENERICIDE

3.1 Introduction to Trademark Dilution

This section would be discussing the issues appertaining to trademark dilution and genericide. Before delving deeper, it is necessarily important to know what these terms mean. The International Trademark Association defines trademark dilution as 'the unauthorized use of and/or application for a trademark that is likely to weaken the distinctive quality of or harm a famous mark.'[23]

Trademark dilution occurs when someone uses a famous mark in a way that weakens its distinctiveness or harms its reputation, even if the goods or services offered are not similar to those of the trademark owner. In Sri Lanka, s.160(3)(c) defines dilution for the purpose of the IPA. As per this section, dilution means 'the lessening of the distinctive character or advertising value of a mark, trade name or other business identifier, the appearance of a product or the presentations of products or services or of a celebrity or well-known fictional character'[24]

In order to address issues related to trademark dilution, Sri Lanka's courts might apply principles established in other jurisdictions with well-developed trademark laws. They may consider factors such as the fame of the mark, similarity between the marks, distinctiveness of the mark and the strength of the mark's association with the goods or services.

On the other hand, an example of genericide would include the case of Xerox.[25] Xerox was a protected trademark originally associated with the Xerox Corporation's photocopies. However, if people commonly use 'Xerox' as a generic term for any photocopier, it could lead to the genericide of the trademark, potentially resulting in a loss of legal protection for the term 'Xerox' as a brand name.

---

[23] 'Fact Sheet: protecting a trademark - Trademark Dilution (Intended for a Non-Legal Audience)' (International Trademark Association, 9 November 2020) <www.inta.org/fact-sheets/trademark-dilution-intended-for-a-non-legal-audience/> accessed 20 July 2023..

[24] Intellectual Property Act No. 36 of 2003, Section160(3)(c).

[25] *B.V. Ilango vs. Rank Xerox Ltd* [2012] SCC OnLine IPAB 154. See also, IPR studio, 'Case Study:- Xerox's battle with trademark genericide', <http://iprstudio.com/case-study-xeroxs-battle-with-trademark-genericide/#:~:text=Xerox%20is%20actually%20a%20proper,This%20trademark%20is%20registered%20worldwide> accessed 17 July 2023.

3.2 Reforms Suggested for Genericide

Drawing from this case, the author suggests that Sri Lanka, like India, could enforce laws through the IPA to protect trademarks from genericide. By ensuring that trademark owners take preventive measures, educate the public about proper trademark use, and enforce their rights against unauthorized usage, Sri Lanka can protect its trademarks from becoming generic terms.

To avoid genericide and maintain the distinctiveness of trademarks, NIPO and the legal system could consider the following measures:

1. Educating the Public: Conduct awareness campaigns to educate the public about the importance of trademarks and the consequences of improper use. Encouraging correct trademark use can help prevent genericide.

2. Enforcement Actions: Provide a mechanism for trademark owners to enforce their rights against infringers. Prompt and effective enforcement can deter unauthorized use of trademarks.

3. Surveillance and Monitoring: Establish a system to monitor the use of trademarks in the market and detect potential instances of genericide early on.

4. Trademark Examination: Conduct rigorous examinations during the trademark registration process to ensure that only distinctive marks are granted protection, reducing the risk of genericide.

5. Regular Review: Continuously review trademark usage and public perception to identify and address any potential signs of genericide.

By incorporating such strategies into the Intellectual Property Act and strengthening the enforcement mechanisms, Sri Lanka can safeguard the distinctiveness and value of its trademarks and prevent them from falling into generic use.

3.3 A Comparative Analysis

This section will discuss non-traditional trademarks, well-known trademarks, online trademark protection, geographical indications, trademark harmonization and lastly, about the anti-counterfeiting efforts.

3.3.1 Non-Traditional and Well-Known Trademarks

Under the current trademark law in Sri Lanka, only traditional trademarks can be registered, excluding non-traditional trademarks such as colors, smells, shapes, videos, touch, textures, moving images, and holograms, which are not eligible for registration. However, there is a need for complementary legislation to enforce TRIPS provisions and accommodate non-traditional trademarks.[26]

Traditionally, most countries only allowed visually perceptible signs or those that can be represented graphically for trademark registration.[27] However, there is a trend towards allowing the registration of non-traditional trademarks such as single colors, three-dimensional signs, moving images, holograms, audible signs, olfactory signs, gestures, tactile marks, and fluid/mutating trademarks. This trend is increasing in many countries.

Nilum Devapura and Darshana Sumanadasa in 'Protecting Non–Conventional Marks Under the Legal System of Sri Lanka',[28] discusses the need to expand trademark law to cover non-conventional marks due to technological advancements. They highlight that, countries like the United States, the European Union, and India have enacted rules allowing for the registration and protection of non-conventional marks such as color, sound, and scent marks. However, Sri Lanka does not currently allow the registration of such marks under its legal context.

The writers propose investigating the provisions in those jurisdictions that pertain to the registration of non-conventional marks and explores the possibility of incorporating similar provisions into Sri Lanka's legal system. The research method employed for this investigation is described as a doctrinal research method, aimed at collecting information and identifying similarities and differences between the relevant jurisdictions.

They also emphasize that amending Sri Lanka's current trademark laws to include non-conventional, non-visual marks can bring several advantages. It can encourage local industries to expand their products and services by exploring new ways of reaching the public. This, in turn, could contribute to the development of the national economy and improve people's standards of living.

[26] Nipun Samaratunga, 'Issues of Trademark Law in Sri Lanka', (Daily FT Colombo, 26 May 2022), <www.ft.lk/columns/Issues-of-Trademark-Law-in-Sri-Lanka/4-735327> accessed 18 June 2023.
[27] Nishantha Sampath Punchihewa, 'Branding of Tourism-Related Products and Services for a Competitive Advantage in Sri Lanka: An Intellectual Property Perspective' (2021) 1(1) South Asian Journal of Tourism and Hospitality 138-157, <www.sab.ac.lk/mgmt/sajth/assets/SAJTH7.pdf> accessed 18 June 2023..
[28] Nilum Devapura and Darshana Sumanadasa, 'Protecting Non–Conventional Marks Under the Legal System of Sri Lanka; A brief comparative analysis', (2022), <https://icbt.lk/protecting-non-conventional-marks-under-the-legal-system-of-sri-lanka/> accessed 29 July 2023.

The concept of well-known trademarks is recognized in both Sri Lanka and international trademark law. Well-known trademarks enjoy broader protection and can be enforced against unauthorized use even on unrelated goods or services to prevent dilution.

3.4 Customs Ordinance Amendments and Special Antipiracy Unit

According to a blog post D. L. & F. De Saram,[29] The revisions made to the Customs Ordinance serve the purpose of mitigating Intellectual Property rights infringements at the borders of Sri Lanka. These revisions effectively prohibit the import and export of goods that involve counterfeit trademarks, pirated copyright materials, or any other items that contravene the provisions of the Intellectual Property Act. The enforcement of these regulations concerning the import and export of goods falls under the jurisdiction of the Intellectual Property Rights Enforcement Unit of Sri Lanka Customs, operating within the Consumer Protection Unit.

Furthermore, in response to concerns pertaining to Intellectual Property rights within the country, Sri Lanka has taken measures to establish a specialized antipiracy and counterfeit unit within the Criminal Investigation Division of the national police force. The primary objective of this unit is to specifically address issues and challenges related to the protection of Intellectual Property rights.

4. RECOMMENDATIONS

4.1 Improving Trademark Application Processing: A Call for Efficiency and Speed

On average, it takes around 48 – 60 months to process a trademark application in Sri Lanka.[30] This can be compared with other countries in the region, such as Singapore which takes only 8 – 10 months to process an application, and South Asian countries such as India, Pakistan which takes less than 12 months, and Bangladesh which takes between 18 – 24 months. Over the past five years, Sri Lanka has made notable strides towards establishing IP protection mechanisms in accordance with international standards. The government has taken measures to enhance coordination among relevant offices and streamline activities related to IP protection. Despite these efforts, local agents representing U.S. brands have expressed concerns about the inadequate enforcement of IP protection in the country.

[29] Ziyani Marikar, 'How To Protect Intellectual Property In Sri Lanka and Defend Against Infringement', <www.desaram.com/BlogArticles/how-to-protect-intellectual-property-in-sri-lanka-and-defend-against-infringement.php> accessed 30 July 2023.

[30] Verité Research, 'Trademark Registration: From Colombo to Madrid', (2016), <www.veriteresearch.org/wp-content/uploads/2019/01/Trademark-Registration-From-Colombo-to-Madrid_July-2016.pdf> accessed 20 July 2023.

Additionally, the Sri Lankan government has expressed its commitment to join the Madrid Protocol, an international system for trademark registration. However, the necessary legislation to facilitate this accession has not been enacted yet.

To improve the NIPO, the Sri Lankan government has undertaken initiatives to upgrade and modernize its infrastructure. Moreover, the recruitment of new examiners for both trademark and patent matters has contributed to reducing backlogs in trademark and patent examinations at NIPO. [31]

A recommendation would be to have a faster, efficient system in place to process trademark applications.

According to the numbers provided by NIPO,[32] between the 1st of January 2023 to 30th June 2023, there had been 3623 resident applications, out of which 1666 applications were accepted and 619 were rejected. This indicates that 37% of the applications remain stagnant.

Furthermore, Geethanjalie Ranawaka, the Director General of the NIPO of Sri Lanka presented a special project to clear the backlog.[33]

4.2 Implementing the Madrid Protocol

4.2.1 Importance of the Madrid Protocol and Why Should Sri Lanka Become a Party to the Madrid Protocol?

The Madrid Protocol is an international, centralized system designed to facilitate the registration and management of trademarks in foreign countries. It is overseen by WIPO. To utilize the Madrid Protocol, a trademark application must initially be filed and approved in the applicant's home country. Afterward, the application is submitted to WIPO, which then forwards it to all the countries specified by the trademark owner for consideration and registration.

The Madrid Protocol offers significant time-saving benefits through a streamlined process for registering trademarks in multiple countries. This international treaty ensures that the application is processed within a relatively short period of 1 to 1½ years, reducing the time it takes to secure

[31] International Trade Administration, 'Sri Lanka – Country Commercial Guide', <www.trade.gov/country-commercial-guides/sri-lanka-protecting-intellectual-property#:~:text=The%20Sri%20Lankan%20government%20has,have%20yet%20to%20be%20enacted.> accessed 25 July 2023.
[32] NIPO, 'Statistics', <www.nipo.gov.lk/web/index.php?option=com_content&view=article&id=8&Itemid=130&lang=en#trademarks> accessed 25 July 2023.
[33] Geethanjalie Ranawaka, 'Changes in the Sri Lankan IP system responding to the trends of the times', <www.wipo.int/edocs/mdocs/aspac/en/wipo_fit_hl_tyo_18/wipo_fit_hl_tyo_18_p3.pdf> accessed 25 July 2023.

trademark protection in various jurisdictions. Additionally, utilizing the Madrid Protocol can lead to cost savings for trademark applicants.

An analysis conducted by the International Trademark Association of the United States in 2003 demonstrated the cost differences between registering a trademark in the USA and 10 other countries under the traditional national route (by applying through individual IP offices in each country) versus the Madrid route. According to their findings, the cost of registration using the national route amounted to US$ 14,600, whereas utilizing the Madrid route reduced the cost significantly to only US$ 5,800.

By opting for the Madrid Protocol, trademark owners can benefit from a more efficient and cost-effective method of obtaining international trademark protection, making it an attractive option for businesses seeking to expand their brands globally.

However, it is important to mention that as per the Verite Research's report[34], 'the Madrid Protocol without an efficient NIPO can hurt local firms'. The Madrid Protocol imposes a mandatory 1.5-year timeframe for processing foreign trademark applications, but there is no corresponding obligation for processing local applications. This discrepancy may result in foreign applications being given precedence over local ones. Such preferential treatment could consequently lead to additional delays in processing local applications, adversely affecting local businesses.

The International Trade Association has identified that there has been an improvement in the overall IP ecosystem. Notwithstanding, the absence of a robust strategic policy and coordinated efforts among the relevant entities responsible for implementing and executing laws has resulted in the unhindered availability of counterfeit products in Sri Lanka.[35]

4.2.2 Progress Towards Madrid Protocol Accession in Sri Lanka

Despite discussions in previous governments about joining the Madrid Protocol, Sri Lanka has not yet achieved successful accession to the agreement. In 2016, the GoSL allocated LKR 100 million from the budget to speed up the accession to this Protocol. Sri Lanka's entry into the Madrid Protocol was planned for 2017 but experienced delays before being initiated in 2020. The Madrid System provides a convenient and cost-effective solution for trademark registration and

[34] Verite Research, 'Facilitating The Registration Of Trademarks: A Step towards Creating Internationally recognised Sri Lankan Brands', (Policy Brief, 2017) <www.veriteresearch.org/wp-content/uploads/2018/05/Facilitating-Trademarks_Policy-Brief_English.pdf> accessed 1 July 2023.

[35] International Trade Administration, 'Sri Lanka – Country Commercial Guide', <www.trade.gov/country-commercial-guides/sri-lanka-protecting-intellectual-property#:~:text=The%20Sri%20Lankan%20government%20has,have%20yet%20to%20be%20enacted.> accessed 25 July 2023.

management worldwide, allowing brands to apply for protection in multiple countries through a single application and payment. WIPO's Madrid System achieved its 1.5 millionth international registration in November the previous year and welcomed new members like Canada, Brazil, and Malaysia.

In 2020, the cabinet gave approval to a proposal to enter into the Madrid Protocol. In order to accede to the Madrid protocol, the cabinet's decision aims to simplify the international registration process for trade and service marks, making it more efficient. Through the Madrid system, exporters gain a dependable, user-friendly, and economical means to safeguard their trademarks across various jurisdictions. As part of this move, the National Intellectual Property Act of 2003 will undergo amendments.[36]

This move allows Sri Lankan companies, particularly those in the export sector, to obtain trademarks and service marks for their products internationally in a single filing directly from Sri Lanka. Previously, businesses had to visit individual countries to trademark, or service mark their products, incurring higher costs and time-consuming processes.[37]

The NIPO will enable online trademark and service mark applications. The necessary amendments to the Intellectual Property Act of 2003 have been drafted to facilitate Sri Lanka's entry into the Protocol. The accession process involves approval from the Attorney General's Department and the Legal Draftsman's Department, followed by the submission of documents to the WIPO. The WIPO will review the documents and approve Sri Lanka's entry into the Madrid Protocol.

The move has been appreciated by the National Chamber of Exporters (NCE) Secretary General/CEO, who expects it to reduce time and costs for exporters. However, the local registration process at the NIPO is currently lengthy, and stakeholders urge for its expedited improvement to ensure smoother entry into the Madrid Protocol for local brands.[38]

4.3.Applying global best practices on 'Well - Known' Trademarks to Sri Lankan IP Legislation

[36] 'Cabinet nod for SL to accede to Madrid Protocol', (Daily FT, 17 February 2020), <www.ft.lk/News/Cabinet-nod-for-SL-to-accede-to-Madrid-Protocol/56-695817> accessed 17 July 2023. see also, 'International Trademarks straight from Sri Lanka by mid – 2020', (The Morning, 2020), <www.themorning.lk/articles/72067> accessed 25 July 2023.
[37] ibid.
[38] ibid.

The author of this article believes that there is a need for Sri Lanka to consider best practices around the world in order have a good system in place for Trademark law specially for well-known trademarks.

4.3.1. Comparison of Definitions

Sri Lankan IP law may not provide a specific definition of "well-known trademarks", similar to many other jurisdictions. However, the absence of a specific definition in Sri Lankan law can be compared with the situations in the United States, India[39], China[40], Vietnam[41] and other countries where "well-known" or "famous" marks are not explicitly defined at the legislative level. This can highlight the need for legal practitioners and authorities in Sri Lanka to establish criteria for recognizing well-known trademarks through case law and administrative practice.

4.3.2. Legislative and Regulatory Updates

The author of this article suggests that Sri Lanka could explore the possibility of enhancing its IP legislation or regulations by offering a more precise definition and specific criteria for the recognition of well-known trademarks. The experiences of other countries, such as India[42] with its comprehensive definition of well-known trademarks, can serve as a reference point for potential legislative amendments in Sri Lanka.

4.3.3. Consideration of Local Factors

Sri Lankan authorities and legal practitioners should consider the specific socio-cultural and economic context of Sri Lanka when assessing the recognition and protection of well-known trademarks. Factors like consumer behavior, local media, and brand reputation within the Sri Lankan market should be taken into account.

5. CONCLUSION

In conclusion, trademarks play a pivotal role in conferring numerous advantages to businesses, offering exclusive rights to the registered owner and preventing third parties from using similar marks. WIPO has identified five main benefits that businesses can accrue from trademarks,

[39] Article 2 of the Trademark Act 1999
[40] Order No. 5 of the Chinese Trademark Law 2001
[41] Article 4(20) of the 2005 IP Law
[42] Article 2 of the Trademark Act 1999 states *"well known trade mark, in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.*"

including protection against unauthorized use, enforcement advantages, and the potential for generating income streams and securing funding from financial institutions.

Despite notable strides made by Sri Lanka in establishing IP protection mechanisms and its commitment to joining the Madrid Protocol for streamlined trademark registration, challenges persist in the country's trademark landscape. Issues related to trademark dilution and genericide raise concerns about maintaining the distinctiveness and reputation of trademarks.

Trademark dilution, defined as the unauthorized use or application of a trademark that weakens its distinctive quality or harms its reputation, requires effective legal mechanisms to preserve brand identity. Sri Lanka's courts may draw upon established principles from other jurisdictions with well-developed trademark laws to address dilution cases effectively.

Efficient trademark registration processing times are crucial for encouraging local and international trademark applicants. While the Madrid Protocol presents a convenient and cost-effective option for international trademark registration, an expedited and efficient local registration process is equally vital. Local businesses can face delays if foreign applications receive preferential treatment due to the mandatory timeframe imposed by the Madrid Protocol for processing foreign applications.

Sri Lanka's progress in intellectual property protection and its commitment to international treaties and agreements, such as the Paris Convention and TRIPS Agreement, reflect the country's dedication to harmonizing with global norms and obligations. However, ensuring effective enforcement of IP protection requires coordinated efforts among relevant entities, and addressing counterfeit product availability demands the implementation of a robust strategic policy.

As Sri Lanka continues to develop its trademark system, policy reforms, procedural improvements, and stakeholder collaboration will be crucial to fostering an environment conducive to innovation, investment, and the robust protection of intellectual property rights. By addressing these challenges, Sri Lanka can position itself as a reliable destination for businesses seeking strong trademark protection, furthering economic growth and fostering a culture of innovation and creativity within the country.

PERFORMERS' RIGHTS IN SRI LANKA: A TONE-DEAF REGIME

Joshua Weerasingham

ABSTRACT

Being home to a variety of singers and songwriters, Sri Lanka boasts a diverse music industry. However, whilst both parties play crucial roles in the industry, the rights awarded to them differ greatly. Performers' rights, as set out in the Intellectual Property Act No.36 of 2003, provide singers with a limited scope of rights. This creates contrast with the wide range of rights available to songwriters, lyricists and composers, who are protected under copyright law as authors of the work.

The central issue that this article focuses on is the disparity between performers' rights and the copyright law rights available to authors. This poses problems for performers, because their right to authorise certain acts in relation to the work is severely restricted, and their protection limited, quite unlike the nuanced way in which authors are protected. This is problematic given the context of Sri Lanka's music industry, which ranks performers higher up the value chain. The limited rights afforded to them therefore fail to reflect the context of the country's music industry, whilst also leaving performers vulnerable in the wake of the digital age.

This article aims to address the issue of disparity from three standpoints. Firstly, the disparity itself is examined in detail, with the purpose of highlighting the shortcomings faced by performers under the current regime. This is considered together with the history behind performers' rights in Sri Lanka, to showcase how the disparity stems from a lack of contextual understanding. Secondly, the ways in which the disparity may be tackled is assessed. A proposal for performers to receive copyright owner status is considered. The history of copyright law in Sri Lanka is also evaluated, to highlight how it suffers from a lack of contextual understanding. Granting performers' copyright status would therefore entail contextual and economic ramifications. Thirdly, alternative policy recommendations regarding the incorporation of moral rights for performers, a compulsory licence system for cover versions and protection against artificial intelligence are submitted. These changes prioritise the balance between the rights afforded to performers and authors.

1. SRI LANKA'S INTELLECTUAL PROPERTY REGIME

Supermarket aisles. Hotel lobbies. Bus seats. An amalgamation of places tied together with one common factor pulsing through the overheard speakers: music. As an art form that is readily available in the present day, it is easy to forget that music is the product of tireless human creativity that stems from two main parties: the singer and the songwriter. The end product created by both is protected under the Intellectual Property Act No.36 of 2003.[1]

According to the statute, individuals in the music industry are categorised as either authors or performers. It is important to note that even though the music is created by both parties, the rights afforded to performers is more limited than those granted to authors. It is this disparity that the article seeks to analyse, in order to determine whether performers' rights ought to be expanded. Assessing the rights available to both parties will lead to a better understanding of the problems performers may face under the current regime. This will also highlight the complex task of protecting performers whilst ensuring that this does not come at the expense of the protection for authors.

An author is defined as 'the physical person who has created the work'.[2] In the music industry, this includes individuals who are responsible for the music composition, lyrics and production of the song. This means that various parties can be entitled to ownership over different aspects of the same work. On the other hand, the Act defines performers as 'singers, musicians, and other persons who sing, deliver, declaim, play in, or otherwise perform, literary or artistic works or expressions of folklore'.[3] Thus, an individual who provides the vocals for a song recording would not be the author of a song. Instead, they would be categorised as a performer. Singers who perform at live music shows would also be categorised as performers.[4]

The song 'Unmada Prema Geeya' can be used as an example to demonstrate how these definitions are applied. The lyrics for this song were written by Nilar N. Cassim and the music was composed by Chamitha Cooray. The song itself is sung by Bathiya and Santhush, Yohani and Kaizer Kaiz.[5] Here, Cassim and Cooray are the authors, whereas Bathiya and Santhush, Yohani and Kaizer Kaiz are the performers. This distinction is crucial because it determines the rights that are available to these individuals. Authors have rights under copyright, whilst performers are granted what the Intellectual Property Act No.36 of 2003 refers to as related rights. Examining the separate rights that authors and performers are entitled to would reveal the disparity in the protection that Sri Lanka

[1] Intellectual Property Act No.36 of 2003, s.6(1)(e)
[2] Intellectual Property Act No.36 of 2003, s.5.
[3] ibid.
[4] ibid.
[5] <www.lklyrics.com/songs/chamitha_cooray/unmada_prema_geeya> accessed on 13 July 2023.

provides. It is this imbalance that serves as the central argument in favour of broadening performers' rights.

2. AUTHORS AND COPYRIGHT

Copyright stems from intellectual property (hereinafter referred to as "IP") law, and provides authors with exclusive rights. These rights enable authors to determine how their creations are utilised by other individuals. The rights are organised into two categories: moral rights and economic rights. The economic rights comprise a list of acts that authors have the right to authorise. This includes the reproduction, translation, adaptation, public distribution, rental, importation of copies, public display, public performance, broadcasting and other forms of communication of the work.[6] These economic rights are important because they enable authors to reap financial benefits whenever their work is used by other individuals.

Moral rights on the other hand grant authors the right to have their name displayed clearly when the work is utilised for public use.[7] Authors also have the right to do this with a pseudonym.[8] Moreover, distortion of the work that would be prejudicial to the author's reputation can be objected against.[9] These rights ensure that due recognition is given to the author of the work for their creation. The combination of economic and moral rights therefore highlights the extent to which authors are protected by IP law in Sri Lanka.

3. PERFORMERS AND RELATED RIGHTS

These are often described as subsidiary rights that are secondary to the authors' rights under copyright.[10] The driving factor behind this hierarchy is the idea of authorial supremacy.[11] This revolves around the idea that without the lyricists and composers, there would be no song to perform. Put simply, the authors are the sole creators of the song; the performers merely bring it to life. This belief is reflected in the rights available to performers in Sri Lanka. Like authors, performers have the right to authorise when their performance is broadcasted to the public.[12]

[6] Intellectual Property Act No.36 of 2003, s.9(1).
[7] Intellectual Property Act No.36 of 2003, s.10(1)(a).
[8] Intellectual Property Act No.36 of 2003, s.10(1)(b).
[9] Intellectual Property Act No.36 of 2003, s.10(1)(c).
[10] Gowri Nanayakkara, *Performers' Rights in Sri Lanka: Singers' Melancholia* (1st edn, Palgrave Macmillan Singapore 2019) 59.
[11] ibid.
[12] Intellectual Property Act No.36 of 2003, s.17(1)(a).

Performers also have the right to authorise the fixation of a performance that is unfixed,[13] along with the right to authorise the reproduction of a fixation of the performance.[14]

Even when examined briefly, it is clear that the rights available to performers are not as extensive as those granted to authors. This is exacerbated by exceptions that override the performers' right to grant authorisation. For example, where the act in question involves personal usage,[15] the reporting of current events[16] or education,[17] the performer may not have the right to authorise the act. Furthermore, performers are not granted any moral rights. This means that unlike authors, performers do not have the right to have their name displayed in connection to public use of the work. The absence of moral rights also means that performers do not have the right to object to any distortion of the work.

A good example here would be Roshani Abbey and Nuwan Hugh Perera's performance of 'Anagathaye' at the Westminster Abbey Service of Celebration for Commonwealth Day 2023. This was a large-scale performance, carried out in front of prominent figures, including King Charles III.[18] However, no reference was made to the original songwriter (Sanuka Wickramasinghe), nor the original performers (WAYO). It is important to note however that the music for this song was composed by WAYO.[19] Applying the Intellectual Property Act No.36 of 2003 to this scenario would showcase the imbalance in the rights available to authors and performers.

Here, if an action were to be raised by WAYO, it could only be done in their capacity as authors, having composed the music. However, in a hypothetical scenario where WAYO only provided the vocals and did not compose the music, they would not be able to raise an action. This is because performers do not have the right to have their name displayed in relation to public use of their work. In this hypothetical situation, the right would only belong to Sanuka Wickramasinghe as an author.[20]

It can therefore be said that the limited rights requiring authorisation and the absence of moral rights altogether is what leaves performers vulnerable. This vulnerability can easily be exploited in

[13] Intellectual Property Act No.36 of 2003, s.17(1)(b).
[14] Intellectual Property Act No.36 of 2003, s.17(1)(c).
[15] Intellectual Property Act No.36 of 2003, s.21(a).
[16] Intellectual Property Act No.36 of 2003, s.21(b).
[17] Intellectual Property Act No.36 of 2003, s.21(c).
[18] BBC, 'A Service of Celebration for Commonwealth Day 2023' <www.youtube.com/watch?v=TPtTPJtde_U> accessed on 14 July 2023.
[19] WAYO, 'Anagathaye' <www.youtube.com/watch?v=tGGuKDXJHx0> accessed on 14 July 2023.
[20] Intellectual Property Act No.36 of 2003 (n 7).

the digital age.[21] It can be submitted that, whilst authorial supremacy may justify the limited rights available to performers, it leaves performers open to the incoming threats of technological advancements. It is also crucial to note that authorial supremacy is not a concept that originated in Sri Lanka, but rather a foreign concept that has been applied to the local music industry. Analysing the history behind Sri Lanka's current IP laws and its relationship with the Trade Related Aspects of Intellectual Property Rights (hereinafter referred to as the "TRIPS Agreement") will demonstrate how this concept has been incorporated into Sri Lanka, and why it may not be entirely compatible with the current music industry.

4. THE TRIPS AGREEMENT

Sri Lanka joined the World Trade Organization (hereinafter referred to as "WTO") in 1995.[22] This is an international body dealing with trade rules between countries. One of the agreements reached between members of the WTO was the TRIPS Agreement, which enabled signatories like Sri Lanka to effectively protect intellectual property.[23] As a signatory, Sri Lanka was legally obliged to bring its IP laws in line with the content of the TRIPS Agreement. This meant that Sri Lanka was expected to implement a Performers' Rights Regime (hereinafter referred to as "PRR").[24] When comparing the Intellectual Property Act No.36 of 2003 to the TRIPS Agreement, it is evident that the wording of the former is very clearly based upon that of the latter.

This becomes apparent when comparing Article 14 of the TRIPS Agreement with Section 17 of the Intellectual Property Act No.36 of 2003. Article 14(1) of the TRIPS Agreement provides performers with the right to prevent certain unauthorised acts. These acts include the fixation of an unfixed performance as well as the reproduction of a fixated performance. The unauthorised broadcasting of a wireless performance and communication to the public of the performance can also be prevented by performers. These rights are replicated in the Intellectual Property Act No.36 of 2003 with no variations made whatsoever.[25] The only difference appears to be that the Intellectual Property Act No.36 of 2003 elaborates on exceptions to these rights in more detail.[26] However, the ability to incorporate exceptions is provided for in Article 14(6) of the TRIPS Agreement.

---

[21] BARR Ariyaratna, WA Sanath Sameera Wijesinghe, *Protecting Copyrights and Related Rights in the Digital Dilemma: Some Challenges* (2018 Vol.01 Issue 01 "Journal of Business Management and Economic Research") 47.

[22] WTO, 'Sri Lanka and the WTO'<hwww.wto.org/english/thewto_e/countries_e/sri_lanka_e.htm#:~:text=Sri%20Lanka%20has%20been%20a,GATT%20since%2029%20July%201948.> accessed on 25 October 2023.

[23] WTO, 'Overview: the TRIPS Agreement' <www.wto.org/english/tratop_e/trips_e/intel2_e.htm> accessed on 14 July 2023.

[24] TRIPS Agreement, Article 14(1); Nanayakkara (n 10) 106.

[25] Intellectual Property Act No.36 of 2003 (n 12); (n 13); (n 14).

[26] Intellectual Property Act No.36 of 2003, s. 17(1)(a)(i)-(ii).

Therefore, it can be said that this too is done for the purpose of fulfilling the obligations under the agreement.

Prima facie, this highlights Sri Lanka's commitment to fulfilling its obligations under the TRIPS Agreement. However, this also leads to certain problems. This is because the Intellectual Property Act No.36 of 2003 merely applies foreign concepts to an environment that does not share the same cultural context. For instance, Sri Lanka is home to a uniquely structured music industry unlike most countries. This is because performers often earn more than authors in Sri Lanka.[27] Thus, performers are placed higher up the value chain in the industry, thereby going against the idea of authorial supremacy.[28]

This is not the case in areas like the United Kingdom (UK), where performers are ranked below authors in the hierarchy.[29] Put simply, the idea of authorial supremacy retained in the TRIPS Agreement is not entirely compatible with Sri Lanka's music industry, which is driven by its performers. This means that the wording of Article 14 of the TRIPS Agreement, upon which the Intellectual Property Act No.36 of 2003 is based, does not cater to the context of Sri Lanka's music industry. This may explain why the rights granted to performers are so limited despite their higher valuation in the industry.

Ironically, this argument has been supported by the Sri Lankan Parliament despite the contradiction it creates with the Intellectual Property Act No.36 of 2003. This can be seen in two separate situations involving Pandit Amaradeva and Nanda Malini, both of whom are renowned classical singers. Amaradeva was faced with a scenario where a singer created cover versions of songs that were originally performed by Amaradeva himself. Malini's situation involved a boy band that created cover versions of her well-known songs, whilst mimicking her voice in the process.

In both events, the Parliamentary debates focused on ascertaining reasons which could be used to prevent such cover versions from being created. Nanayakkara believes that 'the legislature felt the need to protect and preserve the songs performed by the nation's most prominent artists.'[30] This was mainly attributable to the older generation of singers 'becoming incapacitated due to old age or health issues'.[31] It therefore seems that both singers and legislature were in support of preserving these songs by limiting their accessibility.[32] In fact, Nanayakkara conveys that another reason for

[27] Nanayakkara (n 10) 147.
[28] New IP Lawyers, 'Sinhala Singers' Performers' Rights, Gowri Nanayakkara' <www.youtube.com/watch?v=Wo_lCtdhLhA> accessed on 27 June 2023.
[29] ibid.
[30] Nanayakkara (n 10) 111.
[31] ibid.
[32] ibid.

this may be the idea of vocalists' supremacy. This is because the legislature argued 'that once a vocalist performs/records a song for the first time, no other vocalist should be allowed to generate revenue by performing/recording the same song. This is a clear contradiction of the copyright norms, which provide the author with the opportunity to decide the modes of use of their work.'[33]

This therefore reflects the clash between Sri Lankan culture and replicated provisions. Like an off-key vocalist who does not listen to their musical accompaniment, Sri Lanka's IP laws do not consider local context. Instead, it dances to its own tune. These laws, which prioritise authorial supremacy, do not align with Sri Lanka's vocalist-driven music industry.[34]

Overall, it can be said that Sri Lanka's replication of the TRIPS Agreement rights leaves performers with very limited protection. This is why Harankaha believes that performers should be upgraded to the status of copyright owners.[35] Doing so would draw parallels to India's legal system, where performers are protected under both copyright law and the Performers' Protection Act.[36] However, whilst this may seem beneficial to performers, it would also entail certain repercussions.

5. THE COPYRIGHT DILEMMA

Harankaha argues that instead of providing performers with subsidiary rights, they ought to be granted a higher level of protection directly under copyright law.[37] This is because copyright law accounts for wider levels of protection, as evidenced by the range of rights it grants authors. This wide scope would benefit performers, in contrast to the limited protection currently provided by the related rights.

A similar argument is raised by Rembe, who believes that 'there will be no way around the inevitable: that there be the same degree of control for authors and for performers. The author's right to control the use of his work has not been a negative element in cultural and social development--on the contrary. The right has been exercised basically in collective forms and with noticeable restraint. There is no reason to believe that there would be any less positive effects if performers had the same right to control the many uses of performance afforded by technology. It

[33] ibid.
[34] ibid.
[35] HAM Harankaha, *Protection of Performers' Rights Under Intellectual Property Law: A Way Forward* (2012) Vol. 1 "Proceedings of the First International Research Conference on Humanities and Social Sciences" 28.
[36] Chandockrohit, 'Performer's Rights Under Intellectual Property Rights' <www.legalserviceindia.com/legal/article-10492-performer-s-rights-under-intellectual-property-rights.html> accessed on 14 July 2023.
[37] Harankaha (n 35) 28.

would certainly be offensive to argue that the organizations representing performers would be less capable of dealing with such rights in a responsible manner than those representing the authors'.[38]

Respectfully, however, it may be argued that upgrading performers to the status of copyright owners would lead to contextual and economic issues. The contextual problem is best understood by analysing the history behind Sri Lanka's current IP laws.

5.1 The Contextual Issue

Sri Lanka's copyright laws have been described as 'a British implant'.[39] This is because the copyright laws that the island utilises can be traced back to Britain's rule over Sri Lanka between 1796-1948.[40] During this time, the copyright law introduced by Britain was based solely on their own cultural context. An example is the Copyright Act 1842, which was one of the first methods of incorporating British copyright law in Sri Lanka. This was an imperial piece of legislation that the British Parliament passed and extended to Britain's colonies, including Sri Lanka.[41] This was eventually followed by the Copyright Ordinance No.12 of 1908 and the Copyright Act 1911. Both of these statutes were vessels through which British copyright law was incorporated into Sri Lanka's legal system.[42]

The Code of Intellectual Property Act No.52 of 1979, on the other hand, was incorporated following Sri Lanka's independence. This means that the 1979 Act was the first IP statute to be created by Sri Lanka's Parliament. One of the aims of this Act was to evade the influence of British law. This was because until this Act, copyright law in Sri Lanka was '99 per cent based on English law - without even a parliamentary statute'.[43] However, it is important to acknowledge the base upon which the 1979 Act was moulded - the Tunis Model Law on Copyright for Developing Countries. This is a model that was created in 1976 by both the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO). Ironically, despite attempting to break free from British influence, Sri Lanka's 1979 Act actually embraced it further. This is because the Tunis Model focuses on a single structure for protecting the rights of authors. This is the same focal point of British copyright law following 1887.[44]

[38] Rolf Rembe, *Authors and Performers: Equal Contribution, Equal Protection* (1986, Vol. XX No. 4, "Twenty-Fifth Anniversary of the Rome Convention") 31.
[39] Dr. Chamila S Talagala, *Copyright and its Enforcement in Sri Lanka: A Square Peg in a Round Hole?* (2017, Vol. XXIII "BASL Law Journal") 14.
[40] ibid.
[41] Copyright Act 1842, s. 28.
[42] Talagala (n 39) 15.
[43] Sri Lanka, *Parliamentary Debates (*25 May 1979) 501.
[44] Talagala (n 39) 17.

The statute that operates in the present day is the Intellectual Property Act No.36 of 2003. Even though this Act is based on the TRIPS Agreement, it still incorporates elements of British copyright law. This would explain why Talagala believes that Sri Lanka's copyright law is 'a square peg in a round hole'.[45] The incorporation of copyright law in Sri Lanka is therefore similar to the PRR's incorporation. This is because, like the PRR, the copyright laws implemented in Sri Lanka cater to a foreign environment; they do not cater directly to the island's cultural context.

Thus, even if performers received copyright status, they would still face the same issue. More specifically, performers would still have to deal with IP laws that do not comply with the context of their industry. It may therefore be said that if performers are to be provided with protection under copyright, these laws would first have to be revised to cater to the local music industry.

5.2 The Economic Issue

Globerman and Rothman highlight the economic disadvantages that may arise from recognising performers as copyright owners. These include administrative costs and the accentuation of the income gap between full-time and part-time performers. Such recognition may also have 'potential adverse allocative consequences'.[46] This arguably outweighs the improved income that performers may receive as copyright owners.

Globerman and Rothman explain that in Canada for example, full-time performers already rake in earnings that are above the average income.[47] Similarly in Sri Lanka, performers earn more income than authors.[48] Thus, it can be said that recognising performers as copyright owners may not make a prominent difference in achieving an equal income distribution in the music industry. It can therefore be submitted that providing performers with rights under copyright may not have an extremely beneficial impact. For this reason, a few alternative policy proposals may be considered instead.

6. THE INCLUSION OF MORAL RIGHTS

Unlike economic rights, moral rights are not exclusive to just the copyright owner.[49] This means that it is possible to grant performers moral rights without upgrading them to the status of copyright

[45] ibid 19.
[46] Steven Globerman and Mitchell Rothman, *Should Performers Have Copyright?* (1982, Vol. 8 No. 2 "Canadian Public Policy") 179.
[47] ibid 169.
[48] Nanayakkara (n 10) 147.
[49] University of Notre Dame Australia <https://library.nd.edu.au/copyright/overview/essential/rights#:~:text=Moral%20rights%20are%20separate%20from,as%20%27all%20rights%20reserved%27> accessed on 14 July 2023.

owners. These rights are fundamental in upholding a performer's honour and integrity. In most jurisdictions, this is achieved by granting performers the right to object to their work being used in a manner that is offensive. The right to be credited for their contribution to the work is also usually provided for. It can therefore be said that the lack of moral rights in Sri Lanka leaves performers at a disadvantage. Evaluating the moral rights provided in foreign legal systems may reveal specific rights that Sri Lanka could incorporate.

6.1 Australia

Australia recognises three types of moral rights for performers. These include the right of integrity, right of attribution and right against false attribution.[50] The right of integrity allows performers to protect their work from derogatory treatment, whilst the right of attribution enables performers to be credited for their contribution. Moreover, the right against false attribution prevents other individuals from being credited as the performer of the work.

6.2 India and the UK

These two countries provide performers with the same set of moral rights. The moral rights for performers in India are contained in s.38B of the Indian Copyright Act 1957. This provides for the right to be identified as the performer of a performance. The Act also provides the right to either restrain or claim damages for the distortion of the performance, which could affect the performer's reputation. Similarly, the Copyright, Designs and Patents Act 1988 in the UK provides performers with the right to object to derogatory treatment, along with the right to be identified as a performer.[51]

It can therefore be said that the most common moral rights found in foreign jurisdictions are the rights of integrity and attribution. Since these rights are already available to authors in Sri Lanka, it can be submitted that these may be the ideal rights to implement for performers. This is because the implementation of these rights would bring performers and authors to an equal standing, in relation to moral rights.

7. IMPLEMENTING A LICENSING SYSTEM FOR COVER VERSIONS

[50] Copyright Act 1968, Part IX.
[51] Copyright, Designs and Patents Act 1988, Chapter 3.

A cover version can be defined as 'an extant song… re-recorded, generally by a different label, with different vocalists'.[52] Some recent examples are Cody Fry's rendition of The Beatles' 'Eleanor Rigby' (which earned Fry a Grammy nomination)[53] and Taylor Swift's rendition of Earth, Wind & Fire's 'September'.[54] Cover versions do not only open the doors to creative reinterpretation of the original song, but also enable new performers to gain recognition. For example, the Spotify Single sessions, which provide singers with a platform to perform cover versions of popular songs, has played a pivotal role in garnering recognition for upcoming Canadian artists.[55]

In Sri Lanka, the Intellectual Property Act No.36 of 2003 does not expressly provide for cover versions. Instead, one must resort to reading in between the lines. For instance, the Act conveys that only the author can authorise certain acts relating to the work.[56] Thus, only the author of the original song would be able to authorise the creation of a cover version. Jayadeva argues that 'This is not a healthy regime for the progress of the music industry, given the rapid development in the music industry and owing to the growth of talent and the infusion of technological advancement to it… The immense opportunity available for artists, especially the younger generation to exercise their creativity in audio-visual work in the modern day should be given leeway and due legal recognition.'[57]

For this reason, Jayadeva believes that it is time for the Intellectual Property Act No.36 of 2003 to be amended, with recognition given to a compulsory licensing system.[58] Amending this Act would ensure that performers are able to create cover versions lawfully without authors denying authorisation. However, a series of interviews conducted by Nanayakkara between 2012-2013 indicates that most authors do not seem to have a problem with cover versions.[59] This seems to suggest that authors generally do not prevent performers from covering their songs. Nanayakkara

[52] P Manuel, *The Cassette Industry and Popular Music in North India* (1991, Vol.10 No. 2 "Popular Music") 196.
[53] Billboard, '2022 Grammy Nominees: The Complete List' (23 November 2021) <www.billboard.com/music/awards/grammy-nominations-2022-full-list-1235001871/> accessed on 14 July 2023.
[54] S.Honeycutt, 'Taylor Swift's 'September' Cover Gets Nod of Approval From Earth, Wind and Fire Co-Writer Allee Willis (13 April 2018) <www.billboard.com/music/pop/taylor-swift-september-cover-approval-allee-willis-8317151/> accessed on 14 July 2023.
[55] Globe Content Studio <www.theglobeandmail.com/life/adv/article-with-nearly-seven-billion-streams-spotifys-singles-program-shines-a/#:~:text="Spotify%20Singles%20was%20created%20to,love%2C%20or%20an%20original%20song> accessed on 14 July 2023.
[56] Intellectual Property Act No.36 of 2003, s. 9.
[57] Daily Mirror, 'Copyright Laws vs Cover Songs A Time to Change' <https://www.dailymirror.lk/opinion/COPYRIGHT-LAW-VS-COVER-SONGS-A-TIME-TO-CHANGE/231-222400> accessed on 14 July 2023.
[58] ibid.
[59] Nanayakkara (n 10) 135.

also believes that there is no pressing need for a system governing cover versions because Sinhala cover songs are not very common.[60] Respectfully, it may be argued that this is no longer the case given the rise of Sri Lankan artists on Spotify, which was only introduced to Sri Lanka in 2021.[61] Artists like Minesh Dissanayake have performed multiple cover versions of Sinhala songs on Spotify, gaining recognition as a result.[62] This therefore adds even more weight to Jayadeva's argument.

Overall, the assumption that authors will authorise cover versions is problematic. This is because in the event that an author does not authorise a cover, there is no alternative option available to the performer. As Jayadeva explained, this would be especially detrimental to younger performers.[63] It can therefore be submitted that Sri Lanka ought to implement a licensing system. This would balance the rights of performers and authors evenly. Referring to the laws governing cover versions in foreign jurisdictions may highlight what could be implemented in Sri Lanka.

7.1 The UK

Assessing how the UK deals with cover versions may highlight what Sri Lanka ought not to do. This is because the context of the UK's music industry is different to that in Sri Lanka. In the UK, the Mechanical Copyright Protection Society Ltd (MCPS) governs the process through which licences can be acquired and payments made in order to create a cover.[64] This is a process that depends on the authorisation of the author. If an author refuses to grant authorisation, then a cover version cannot be created legally. Whilst this may seem harsh, it has not been contested by performers in the UK. Nanayakkara believes this is because the UK is home to quite a large music industry, meaning that there is an availability for many performance options.[65] In contrast, this level of power granted to authors in Sri Lanka may not bode well. This is because the Sri Lankan music industry is much smaller than the UK's, and it does not possess as many performance options. An author's rejection of a licence request would have a more detrimental impact for performers in Sri Lanka than it would in the UK. Therefore, Sri Lanka may benefit from curbing the power granted to authors with regard to authorising cover versions. It must also be noted that in the UK, the original performers cannot prevent a cover version from being created. This aspect may be

[60] Nanayakkara (n 10) 134.
[61] Ada Derana, 'Spotify Launches in Sri Lanka' (1 March 2021) <http://bizenglish.adaderana.lk/spotify-launches-in-sri-lanka/> accessed on 14 July 2023.
[62] J.Surendraraj, 'Minesh steps out with "Summer"' (7 July 2019) <www.sundaytimes.lk/190707/magazine/minesh-steps-out-with-summer-356546.html> accessed on 14 July 2023.
[63] Copyright Laws vs Cover Songs A Time to Change (n 57).
[64] Nanayakkara (n 10) 130.
[65] ibid.

beneficial for Sri Lanka because it would strike a balance between the rights of the original performers and the new performers who are covering the original song; the former would not be able to hold back the latter.

7.2 The United States of America (USA)

In contrast to the UK, the USA allows for more leeway when it comes to cover versions. This is primarily due to the USA's Copyright Act, which provides a right to obtain a licence for covering songs that have been released to the public.[66] This means that if the song being covered has been released, the authors cannot object against the granting of the licence. Thus, the cover artist must only inform the author that a cover is being created and submit the relevant payments. Once these formalities are met, the author cannot make any objections.[67] This system may function well in Sri Lanka, because it would ensure that the necessary guidelines are followed and payments made, thereby protecting authors. It would also protect performers by ensuring that authors cannot deny them the right to cover the original song for unjust reasons.

7.3 India

Despite cultural similarities, India seems to be more accepting of cover versions than Sri Lanka. This is evidenced by India's Copyright (Amendment) Act 2012, which implemented a method of statutory licensing for cover versions.[68] This lays down the procedure through which a cover version can be created. More specifically, if the cover version is of the same medium as the original song (an exception being when the medium is no longer used commercially), then a statutory licence can be acquired. It also goes to the extent of providing that no adjustments can be made to the work unless it is necessary for technical reasons. These provisions indicate the strength of the rights awarded to performers. This creates contrast with Sri Lanka's current IP provisions. Sri Lanka may therefore find inspiration in the level of protection awarded to performers in India, whilst also observing how this does not topple the balance between performers and authors. Overall, it can be submitted that a system for cover versions would greatly benefit the performers in Sri Lanka, whilst also working in favour of the authors. This is because it would protect performers by allowing them to create cover versions whilst also protecting authors by ensuring that the relevant procedures are followed so that no parodies are created in the guise of covers.

[66] US Copyright Act, s. 115.
[67] Nanayakkara (n 10) 131.
[68] Copyright (Amendment) Act 2012, s. 31C.

8. PROTECTION FROM ARTIFICIAL INTELLIGENCE

The rapid emergence of artificial intelligence (AI) presents performers with a new conundrum: AI-generated cover versions. A recent example is an AI cover of Kanye West performing Plain White T's' 'Hey There Delilah'.[69] This is essentially a backing track to 'Hey There Delilah' with Kanye West's vocals instead of the voices of the original performers. This artificial performance was generated through a software called SoftVC VITS Singing Voice Conversion, by removing the vocal stems from West's existing recordings, and processing them through this software.[70] The result is an uncanny likeness to Kanye West, singing a song he has never actually performed.

There are two potential options in Sri Lanka for a singer in such a situation. First, performers have the right to authorise the 'broadcasting or other communication to the public' of their performance.[71] However, if the broadcast is created 'from a fixation of the performance, other than a fixation made in terms of' personal use, reporting current events or education, then this right cannot be exercised.[72] Thus, since AI covers are not made for any of these purposes, it seems unlikely that the performer can exercise this right. Put simply, the exception overrides the right to authorise the broadcast of the AI cover.

The second option open to performers is the right to authorise 'the reproduction of a fixation of his unfixed performance or substantial part thereof'.[73] Reproduction is defined as 'the making of one or more copies of a work or sound recording in any material form, including any permanent or temporary storage of a work or sound recording in electronic form'.[74] It can be argued that AI covers do not fall under this definition. This is because AI cover versions are not a copy of the original song. Instead, they extract the vocals from the original work and transform them to fit an entirely different song. Thus, the end product is no longer similar to the original performance. Put simply, the term 'copies' indicates a sense of similarity or identicality that AI covers do not possess. This allows for AI covers to evade the bounds of the 'reproduction' definition. It is therefore unlikely that the performer's right to authorise reproduction would cover such a scenario.

---

[69] E. Siniscalco, 'Artificial intelligence is transforming our music, starting with Kanye West (18 April 2023) <www.cityam.com/artificial-intelligence-is-transforming-our-music-starting-with-kanye-west/> accessed on 12 July 2023.

[70] MusicRadar, 'How to make an AI cover song with any artist's voice' (4 May 2023) <www.musicradar.com/how-to/ai-vocalcovers#:~:text=This%20is%20an%20AI%2Dpowered,it%27s%20currently%20the%20most%20popular> accessed on 12 July 2023.

[71] Intellectual Property Act No.36 of 2003, s. 17(1)(a).

[72] Intellectual Property Act No.36 of 2003, s. 17(1)(a)(i).

[73] Intellectual Property Act No.36 of 2003, s. 17(1)(c).

[74] Intellectual Property Act No.36 of 2003, s. 5.

Overall, it can be said that these gaps in the law allow for AI covers to be made with no protection granted to performers. It may be submitted that 'reproduction' ought to be redefined under the Intellectual Property Act No.36 of 2003. It can be argued that associating the idea of 'copies' with reproduction is what prevents AI covers from being accounted for. Thus, adding an alternative term that does not focus on the idea of identicality would broaden the definition. This in turn would provide performers with the right to authorise AI covers, thereby enabling them to control how their performances are used in such scenarios.

It may be argued that since AI covers are a recent issue, they do not pose a significant threat to Sri Lankan performers. However, Universal Music Group's request to Apple Music and Spotify to remove AI-generated music highlights the severity of the problem.[75] Considering that many Sri Lankan performers have their music on accessible platforms like Spotify and YouTube, it is not difficult to create AI covers using their performances. Thus, it can be said that it is only a matter of time until performers in Sri Lanka are faced with this problem.

9. CONCLUSION

This article first shed light on the disparity between the rights granted to performers and authors under the Intellectual Property Act No.36 of 2003. The disparity stems from the law's failure to acknowledge the context of Sri Lanka's music industry. As a result, performers' rights do not reflect the position of singers in the industry. They are left with rather limited rights in contrast to those granted to authors under copyright, whilst also being left vulnerable in the wake of the digital age.

The article then considered a proposal for performers to be given the status of copyright owners. This proved problematic for two reasons. Firstly, copyright law does not acknowledge the context of Sri Lanka's music industry. Secondly, upgrading the status of performers may also lead to economic ramifications. For these reasons, it can be submitted that performers ought not to be recognised as copyright owners.

Further policy recommendations were then considered. These included the implementation of moral rights for performers, as well as a compulsory licence system for cover versions. Reference was made to the ways in which moral rights and compulsory licence systems are incorporated in

[75]H. Bosher, 'Artificial intelligence is proving to be a legal nightmare for the music industry (18 April 2023) <https://scroll.in/article/1047510/artificial-intelligence-is-proving-to-be-a-legal-nightmare-for-the-music-industry> accessed on 14 July 2023.

foreign jurisdictions. This was done to highlight how Sri Lanka could draw inspiration from these jurisdictions, to improve the protection of its own singers. Finally, the performers' right to authorise AI covers was analysed, with reference to S17(1)(c) of the Intellectual Property Act No.36 of 2003. This analysis revealed that the 'reproduction' definition may not account for the authorisation of AI covers. Thus, altering the definition of 'reproduction' would bring about further protection for performers, by enabling them to authorise such covers. Overall, it can be submitted that these policy changes would enhance the protection afforded to singers in Sri Lanka. Such protection would also preserve the balance between the rights of authors and performers. This is because none of the policy recommendations undermine the rights given to authors. In conclusion, Sri Lanka's music industry would benefit as a whole from subtle improvements made to performers' rights.

INTERNATIONAL PROTECTION OF HUMAN RIGHTS

PROHIBITED BUT STILL PRACTICED: AN ANALYSIS OF TORTURE IN SRI LANKA

Anuradhika Uduwana

ABSTRACT

Any form of torture or degrading treatment that goes against civilized behaviour and basic ethics or violates the same is strictly prohibited in every civilized society. Nonetheless, the number of cases that come before the courts and the relevant authorities, keep rising despite this prohibition. Thus, the question, 'why does torture persist despite its prohibition?' has arisen time after time without being able to find a proper answer. The following article will resort to provide a short analysis of torture in Sri Lanka while describing the legal framework, the development of case law, preventive measures, and the methods of relief available to the public. It will also address the issues that impede the progress of the elimination of torture by giving suggestions for further improvement of the existing process.

1. INTRODUCTION

> "To deny people their human rights is to challenge their very humanity."
>
> \- Nelson Mandela, South African civil rights activist[1] -

After the second world war, with the formulation of the United Declaration of Human Rights (UDHR), the concept of protecting human rights, and the severity of violating the same, came into light. The preamble of the UDHR states that,

> "The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and the disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind."[2]

Sri Lanka has also acknowledged the importance of human rights, and Chapter III of the Constitution of the Democratic Socialist Republic of Sri Lanka is dedicated to guarantee the fundamental rights of its people. Through the statement made by Justice Prasanna Jayawardena in *Ajith Perera v. Daya Gamage*,[3] the significance of human rights can be further realized,

[1] Amnesty International, '15 Inspiring Human Rights Quotes' (Amnesty International UK, 23 May 2023) <https://www.amnesty.org.uk/15-inspiring-human-rights-quotes> accessed 8 July 2023.
[2] Universal Declaration of Human Rights, Preamble.
[3] *Ajith Perera v Daya Gamage [2020], SC FR Application No. 273/2018 23* (Prasanna Jayawardena J).

> "It seems to me that the concept of human dignity, which is the entitlement of every human being, is at the core of the fundamental rights enshrined in our Constitution. It is a fountainhead from which these fundamental rights spring forth and array themselves in the Constitution, for the protection of all the people of the country."[4]

Amongst the human rights that have been recognized by various countries, it can be seen that a majority have regarded torture and other forms of ill treatment to be unlawful. This could be found by the 172 countries that have adhered to the International Covenant on Civil and Political Rights (ICCPR) which prohibits torture and other forms of ill-treatment, and 165 countries that are parties to the UN Convention against Torture.[5]

However, studies indicate that despite many States ratifying the said international conventions and integrating the legalities that prohibit torture into their own domestic laws, many people are still being subjected to torture and other cruel inhumane treatments and punishments on a large scale. While Amnesty International has documented incidents of torture from at least 141 countries[6], the UN refugee agency shows that 32% of the 63 190 submissions for resettlement in 2021 and 27% of the 116 481 submissions in 2022 were 'survivors of violence and torture'.[7] [8] The statistics put forth by the UN Voluntary Fund for Victims of Torture (helping an average of 50,000 victims of torture every year since 1981 in countries all over the world[9]) further indicates that the practise of torture is still continuing.

While the global situation is as such, the circumstances in Sri Lanka are far from better. A significant number of fundamental rights cases come before the Supreme Court every year in relation to torture alone. In fact, S. Thurairaja PC. J. in the recent case of *K. D. Samantha Perera v. Officer in Charge, Police Station, Hettipola and Others*,[10] while affirming this, stated that, "the consistent pattern of police violence, custodial torture and death as evidenced by the considerable number of Fundamental Rights petitions filed before this Court, indicates that the State should consider addressing and mitigating the problem".[11]

---

[4] ibid.
[5] Amnesty International, 'Torture', <https://www.amnesty.org/en/what-we-do/torture/?> accessed 12 July 2023.
[6] ibid.
[7] United Nations High Commissioner for Refugees. 'Resettlement at a glance; January-December 2021' <https://www.unhcr.org/sites/default/files/2023-03/620b99ee4.pdf> accessed 3 November 2023.
[8] United Nations High Commissioner for Refugees. 'Resettlement at a glance; January - December 2022' <https://www.unhcr.org/ie/sites/en-ie/files/2023-01/63cabc1b7.pdf> accessed 3 November 2023.
[9] United Nations, '"A victim of torture is one too many," says UN expert', (United Nations Human Rights Office of the High Commissioner, 13 July 2021) <https://www.ohchr.org/en/stories/2021/07/victim-torture-one-too-many-says-un-expert> accessed 3 November 2023.
[10] *K. D. Samantha Perera v. Officer in Charge, Police Station, Hettipola and Others* [2020], SC FR Application 296/2014 (S. Thurairaja PC. J).
[11] ibid.

Under these circumstances, this article will take into consideration the widespread practice of torture in Sri Lanka and the measures that are put forward to eradicate such barbarous behaviour. The author will also explore the continuing challenges and the major issues that lie in this regard. In respect of this, the author will first take into account the legal framework and the development of laws in relation to torture and other cruel degrading treatment. The author will then assess the preventive measures and the reliefs available to the public in this regard. Finally, the issues that hinder the progress while laying out certain suggestions to improve the status quo will also be taken into consideration.

2. THE LEGAL FRAMEWORK

Ancient Sri Lanka used torture in order to ascertain truth, establish guilt, and more specifically as a method of punishment. It is recorded that there were 32 methods of torture practiced by Sri Lankan kings such as drowning, trampling by an elephant, immersion in a cauldron of boiling oil, impaling on an iron pole, beheading, whipping etc. These were carried out by the kings and other nobles in order to maintain the status quo and to establish authority among the people by instilling fear upon them. However, when the British invaded Sri Lanka (then Ceylon) the Kandyan Convention which was signed on 2nd of March 1815, laid down that 'Every species of bodily torture and all mutilation of limb, member or organ are prohibited and abolished'[12] thereby prohibiting acts of torture. Nonetheless, it can be observed from the records of history that even the British had used punishments such as hanging and whipping to maintain the political and social stability during their regime.[13]

When considering the inhumane acts that are committed throughout global history, the torturous acts that people suffered inside the Hitler's concentration camps during World War II take a prominent place. Records show that not only had the Nazi had beaten, drowned, pulled nails out, hanged prisoners and hammered nails into their joints, but had even performed cruel scientific experiments on them.[14] The severity of these cruel, inhumane acts that still took place in a civilized society, led to the enactment of the UDHR which is the milestone document that caused a massive revolution with regards to human rights. Article 5 of the Declaration states that, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[15]

---

[12] P De Zoysa & R Fernando, 'Methods and sequelae of torture: a study in Sri Lanka' (Reports from Centres,2007) <https://drive.reindex.net/RCT/101/TORT2007.1.6.pdf > accessed 30 July 2023.
[13] K. M. P. Kulasekera, 'Punishment in The Kandyan Polity in The Early Nineteenth Century' (Library, University of Ruhuna) <http://ir.lib.ruh.ac.lk/bitstream/handle/iruor/153/AP-6499-137.pdf?sequence=1&isAllowed=y > accessed 30 July 2023.
[14] S Dowell, 'A hell 'worse than Auschwitz' where thousands were tortured and slain is turned into memorial site'(The First News, June 07 2019)<https://www.thefirstnews.com/article/a-hell-worse-than-auschwitz-where-thousands-were-tortured-and-slain-is-turned-into-memorial-site-6250 >accessed 30 July 2023.
[15] Universal Declaration of Human Rights, Article 5.

Apart from this, the laws pertaining to the prohibition of torture are embedded in many other international documents as well. The European Convention of Human Rights also dedicates Article 3 of the Convention to prohibit torture by laying down similar laws to that of the UDHR. Furthermore, apart from forbidding such cruel and degrading punishments as set out in other International Conventions, Article 7 of the ICCPR also states that "in particular, no one shall be subjected without his free consent to medical or scientific experimentation".[16]

It should be noted that while Article 18 of the 1972 Constitution of Sri Lanka laid down that, 'no person shall be deprived of life, liberty and security',[17] the freedom from torture is expressly enshrined in Article 11 of the 1978 Constitution as a non-derogable, and an absolute right while promulgating that, "no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"[18]. Sri Lanka has also taken measures to incorporate the United Nation's Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment into domestic laws via the Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994 (hereinafter referred to as the Torture Act 1994) thereby criminalizing the act of torture, inhuman and degrading treatment as a serious offence.

This gave clarity with regard to what constitutes torture and other cruel and degrading treatment. As per S.12 of the aforementioned Act, any act which subjects a person to severe physical or mental pain for the purposes of obtaining information or a confession, punishing for any act that was committed or is suspected of having committed, intimidating or coercing a person, or done for any reason based on discrimination amounts to "torture" if it is either done by, or at the initiation of, or with the consent or acquiescence of, a public officer or a person acting in an official capacity.[19] Additionally, according to the Act, any person who attempts to commit, aids and abets in committing, or conspires to commit torturous acts on another is deemed to be guilty under the offence of torture.[20]

The Torture Act 1994 further sets forth that, acts done during a state of war, threat of war, internal political instability or any public emergency, or on order of a superior officer do not become a defence to an act of torture.[21] Moreover, it could be observed that even though the Constitution allows people to hold parties accountable in the events of torture that occur due to executive and

[16] International Covenant on Civil and Political Rights, Article 7.
[17] The Constitution of Sri Lanka 1972, Article 18.
[18] The Constitution of Sri Lanka 1978, Article 11.
[19] Convention Against Torture and other Cruel. Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994, S.12.
[20] ibid, S2.
[21] ibid, S.3.

administrative action,[22] the Torture Act 1994 by relaying that "any person who tortures any other person shall be guilty",[23] had managed to extend the liability beyond the executive and administrative action even to independent individuals (provided that the term 'any person' comes within the public official involvement criteria as mentioned above in S12). It should also be noted that, while the jurisdiction for any fundamental right violation under Article 11 falls under the Supreme Court, the jurisdiction for violations of the Torture Act 1994 lies with the High Court.

Even though in the past the acts of torture were committed openly as a means of deterrence, with the development of society these sorts of barbaric acts are frowned upon. However, it can be seen that even in the modern civilized society torture is still continuing secretly, and most of these arbitrary acts are committed by the security forces, state sponsored paramilitary groups, terrorists, criminals involved in organized crime/mob, and armed political groups.

3. DEVELOPMENT OF CASE LAW

When analysing the staggering number of cases that are filed in the Supreme Court for violations of Article 11, a considerable growth could be observed in relation to the development of case law concerning torture, cruel inhuman or degrading treatment and punishment. It can be seen through many cases that even before the Torture Act of 1994 was enacted in Sri Lanka, the judges were particularly adamant on incorporating the relevant laws from the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the advancement of law related to torture in the country.

In the case of Mrs. *W. M. K. De Silva v. Chairman, Ceylon Fertilizer Corporation*,[24] Amerasinghe, J. held that Article 11 of the Constitution prohibits any act which causes severe pain or suffering, whether physical or mental. Further, in *H. Chandima Samanmalee and S. L. Pubudu Kumara v. Inspector Malaweera, Police Station, Ambalangoda and Others,*[25] where the police officer had verbally abused the two attorneys-at-law and talked to them in a degrading manner causing them severe embarrassment and humiliation, S. Thurairaja PC, J. while taking into account the aforementioned case stated that, "…trauma caused is a form of mental suffering inflicted intentionally by public officials in the discharge of his duties. Thus, it is imperative that such action should be condemned…".[26]

[22] The Constitution of Sri Lanka 1978, Article 17 and 126.
[23] The Convention Against Torture and other Cruel. Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994, S. 2.
[24] *Mrs. W. M. K. De Silva v. Chairman, Ceylon Fertilizer Corporation [1989], 2 Sri LR 394* (Amerasinghe J).
[25] *H. Chandima Samanmalee and S.L. Pubudu Kumara v Inspector Malaweera, Police Station, Ambalangoda and others, SC FR 242/2010*.
[26] ibid, 16.

The same pattern of thinking has been followed in the case of *Adhikary and Another v. Amarasinghe and Others*,[27] where security officers of a minister had stopped the petitioner's car that he was travelling with his wife, child, and mother. They had pulled the petitioner out and abused him, slapped his wife, and pushed his mother all the while threatening to kill him. Here, Bandaranayake, J. held that,

> "...the protection in terms of Article 11 would not be restricted to the physical harm caused to a victim, but would certainly extend to a situation where a person had suffered psychologically due to such action."[28]

It should be noted that in this instance, even the distress caused to the child as well as the psychological distress caused to the husband and wife due to their inability to take care of each other were taken into account.

In addition, the recent case of *Ishara Anjali (Minor) v. Waruni Bogahawatte, Matara Police Station*,[29] interpreted psychological suffering more broadly and established that, "what amounts to a 'high degree of maltreatment' in relation to an adult does not always resonate with the mental constitution of a minor. Therefore, when a minor complains of degrading treatment, the Court as the upper guardian must not be quick to dismiss the claims for failing to meet the same high threshold of maltreatment. Instead, it must carefully consider the impact the alleged treatment may have had on the mentality and the growth of the child".[30]

Furthermore, it could be observed that in many instances the courts have tried to interpret what amounts to degrading treatment as well. One such instance could be observed in the case of *Fernando v Silva*[31] where it was held that, imprisonment of a person without medication and food and without basic amenities for the performance of normal bodily functions constituted a violation of Article 11 of the Constitution.

Also, in the case of *Six Petitioners Vs. K. Udugampola SP and others*,[32] taking into consideration the petitioners who were under a secret mission for the Army were revealed to the public by allowing journalists to photograph and videotape them thereby endangering their lives, and considering the fact that they were placed in an overcrowded cell which had an overflowing toilet pit and vomit inside, the courts took the position that "the feelings of humiliation and the suffering

[27] *Adhikary and Another v Amarasinghe and others [2003],1 Sri L.R 270*.
[28] ibid.
[29] *Ishara Anjali (Minor) v Waruni Boghawatte, Matara Police Station, SC (FR) Application No. 677/2012.*
[30] ibid, 18.
[31] *Fernando v Silva, SC (Application)7/89 SC Minutes 03.05.1991*.
[32] *Six Petitioners v K. Udugampola SP and Others, SC(FR) Applications No. 68, 73, 74, 75, and 76/2002*.

that the petitioners had to undergo was of an aggravated kind that reached the expected level of severity that is necessary to establish a violation of Article 11 on the basis of degrading and inhuman treatment".[33]

In addition, the landmark case of *Amal Sudath Silva v. Kodituwakku*, *Inspector of Police and Others*,[34] considered the wrongs committed by the petitioner. In the said case, the petitioner was kept in police custody for five days on the suspicion of a robbery without even presenting him to a magistrate. During that time, he had been subjected to a series of torturous acts including severe beatings. Here, Atukorale J. took the position that, "every person of this Country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee".[35] Moreover, in *Senthilnayagam v. Seneviratne*,[36] it was held that, in order to obtain rights guaranteed under Article 11, it is irrelevant whether the person has committed prior wrongs or not.

Shirani Silva v. Iddamalgoda, Officer-in-Charge, Police Station Paiyagala and Others,[37] can be identified as another landmark case where the courts extended the legitimate right to prosecute in the event of death by torture or other unlawful deaths. While taking the position that Articles 11 and 13(4) recognize the right to life, the Courts set forth that, the right which is ensured by Article 126[38] in respect of the 'infringement or imminent infringement of a fundamental right by executive or administrative action' is extended to any person with legitimate interest to prosecute.

> "…if a person died by reason of torture or unlawful death, the right of any person to complain against violation of a fundamental right guaranteed by Article 17 read with Article 126(2) should not be interpreted to make the right illusory; but should be interpreted broadly especially in view of Article 4(d) which requires the court to "respect, secure and advance" fundamental rights".[39]

Following this, *Lama Hewage Lal (Deceased), Rani Fernando (Wife of deceased Lal) v. Officer in Charge - Minor offences, Seeduwa Police Station and Others*,[40] also took the position that, "the lawful heirs and/or dependents of a person who is deceased as a result of an act of torture should be entitled to a declaration of the violation and compensation".[41]

---

[33] ibid.
[34] *Amal Sudath Silva v Kodituwakku [1987], 2 Sri L.R. 119*.
[35] ibid.
[36] *Senthilnayagam v Seneviratne [1981], 2 S.L.R.*
[37] *Shirani Silva v Iddamalgoda, Officer-in-Charge Paiyagala and Others [2003], 2 Sri L.R., 63*.
[38] Constitution of Sri Lanka, 1978.
[39] ibid (n.37),64.
[40] *Lama Hewage Lal (Deceased), Rani Fernando (Wife of deceased Lal) v. Officer in Charge - Minor offences, Seeduwa Police Station and Others, S.C. (FR) Application No. 700/2002*.
[41] ibid.

Furthermore, in many cases that have come before the Courts it can be observed that judges have repeatedly clarified the laws, advised and admonished the relevant parties who have performed the inhumane acts while condemning their actions. The case of *Kanda Udage Malika v. D.M. Aberathna, Police Constable, Kandaketiya Police station and Others*,[42] where 17 year old Sandun Malinga had died due to the beatings he received while he was under the police custody took the position that "even if the Respondents are to use minimum force this would not mean subjecting the person to torture or inhuman treatment".[43] In addition, *Manamperige Leelawathi v. Priyantha Kulathunga, Police Sergeant, Sooriyawewa Police Station and Others*,[44] where a person had died while detained in police, Achala Wengappuli, J. by taking into consideration the cases decided previously, clarified doubts with regard to the reliability of the statements made by the persons who are under custody, and stated that,

> "The Courts, in assessing the reliability of claims are mindful of the limitations faced by the victims, who are reluctant to make a very descriptive and truthful disclosure of what they have actually experienced during their arrest and detention. It is not uncommon, that persons who made such accusations were severely dealt with by the concerned officers, once his custody is returned back to them by the Magistrates".[45]

Moreover, in *Janidhu Charuka Daham Seneviratne v. Sub Inspector Nelumdeniya*,[46] where the petitioner had suffered severe beatings while he was under the police custody, Mahinda Samayawardhena, J. stated that, "the police force is responsible for inter alia enforcing the law, maintaining public order and safety. Hence there is a special responsibility on the police to uphold and protect the fundamental rights enshrined in the Constitution. To say the least, assaulting a person in police custody is a cowardly act, not a heroic act. A person in police custody is at the mercy of the police".[47]

4. PREVENTIVE MEASURES

It could be observed that the majority of cases which are filed with regard to torture are levelled against the police. It is appalling to realize that the police force who are appointed to maintain the peace and order and to provide protection to civilians can be the root cause of these barbaric acts. These cases show that most of the acts cause irreversible damages such as paralysis, removal of

[42] *Kanda Udage Malika v. D.M. Aberathna, Police Constable, Kandaketiya Police station and Others, SC FR 157/2014*.
[43] ibid, 14.
[44] *Manamperige Leelawathi v. Priyantha Kulathunga, Police Sergeant, Sooriyawewa Police Station and Others, S.C. (FR) No. 85/2015.*
[45] ibid, 18.
[46] *Janidhu Charuka Daham Seneviratne v. Sub Inspector Nelumdeniya, SC FR 402/2015*.
[47] ibid, 13.

organs, impotency, and in more severe situations even death. In most instances people were often beaten with pipes, batons, poles etc., sexually assaulted, burned, hanged, drowned, and even tortured using chili powder.[48] It could be also seen that these incidents show fabricating and falsifying evidence, public shaming, and in some instances, it is apparent that the inhumane acts were done simply without any reason at all.

Even though it has been enshrined in various Statutes, Judgments, Circulars, Departmental Orders and other related Ordinances about how to treat people who are in custody, a change cannot be observed in all these years in relation to torture. Specifically, the Departmental Order bearing No. A 20 lays down that, "every police officer should keep in mind that a person who is under the custody of police is not in the state of a prisoner convicted and his protection should be considered in every aspect".[49] It further mentions that, "when a person is arrested it should be done without the acts of violence as much as possible".[50] Moreover, Section 23 of the Code of Criminal Procedure Act No. 15 of 1979 dictates that, the person making an arrest shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested.[51] However, if the person forcibly resists the arrest or attempts to evade the arrest, the person making the arrest can use means that are reasonably necessary to effect the arrest.[52] More importantly it emphasizes that, it should not give a right to cause the death of a person who is not accused of an offence punishable with death.[53]

Furthermore, Departmental Order Bearing No. E 6 sets out the procedure to be followed by the police when a prisoner escapes or attempts to escape from the custody of the police.[54] In addition, the IG circular No. 2328/2011 illustrates that, when an arrested person has injuries, he should be referred to a Judicial Medical Officer and a report should be obtained thereby. It also lays down that all the Officers-in-Charge are liable to work in a manner which ensures the rights and protection of all persons who are being arrested, and the officers-in-charge of the district who are monitoring

[48] K Sumanasekara, 'Short analysis on Sentencing Policies on Torture' (Right to Life Human Rights Centre, 2019) < https://www.right2lifelanka.org/wp-content/uploads/2023/07/Short-Analysis-on-sentecing-policies-on-torture.pdf >accessed 31 July 2023.
[49] *N. Lalantha Anuradha v. Head Quarter Inspector of Police, Police Station Anuradhapura and Others, SC FR 369/2013, 7.*
[50] ibid.
[51] The Code of Criminal Procedure Act (No. 15 of 1979), S.23(1).
[52] ibid, S.23(2).
[53] ibid, S.23(3).
[54] ibid (n 49).

such places should strictly monitor the rights and protection of the people who are under arrest as well.[55]

Nevertheless, the above-mentioned cases along with the large number of other cases which are filed in the Supreme Court, High Court, and the Human Rights Commission every year, raise the questions as to how many officers are following the relevant laws, and how many disregard them and act arbitrarily in an uncivilized manner whilst abusing their power.

Apart from the barbarous acts committed by the security forces and other related institutions, it can be seen that there are incidents of child cruelty that occur in schools as well. There are many situations in which teachers and other authorities in schools are verbally abusive and the records show that corporal punishment is also prevalent. In addition to Sri Lanka ratifying the United Nations Convention on the Rights of the Child, and Ministry of Education passing a Circular in 2001 banning the corporal punishment, the Ministry had further drawn the attention of school authorities to the fact that all physical and psychological forms of punishment were prohibited via Circular 17/2005.[56] Moreover, by passing Circular 12/2016 the Ministry of Education had once again cautioned against the use of corporal punishment while listing the positive disciplinary methods as well.

However, as mentioned earlier these incidents still take place, and on several occasions the Supreme Court has also given their opinions and judgments in relation to these issues. In the case of *M. G. Shanuka Gihan Karunaratne (Minor) and P. P. Amila Dilshan Puwakpitiya (Minor) v. Lory Koswatte Deputy Principal, M/Weera Keppetipola Madya Maha Vidyalaya, Pallepola, Akuramboda and Others,*[57] where students were severely caned on their buttocks, back of the chest and shoulders, Aluwihare PC. J. stated that "Children constitute a unique category given their dependency on others, their state of development, their maturity as well as their vulnerability. Therefore, they require a higher degree of protection from all forms of violence".[58] Furthermore, in *Child Petitioner v. Jayantha Prema Kumara Siriwardhana, Teacher, Puhulwella Central College and Others,*[59] where the teacher has slapped the child thereby causing ear drum damage, S. Thurairaja PC. J. stated that,

---

[55] ibid, 8.
[56] K Ranawana, 'Though Banned, Corporal Punishment Is Practiced Across Schools' (Counterpoint, 7 September 2018) < https://counterpoint.lk/though-banned-corporal-punishment-is-practiced-across-schools/ > accessed 1 August 2023.
[57] *M. G. Shanuka Gihan Karunaratne (Minor) and P. P. Amila Dilshan Puwakpitiya (Minor) v. Lory Koswatte Deputy Principal, M/Weera Keppetipola Madya Maha Vidyalaya, Pallepola, Akuramboda and Others, SC FR Application No. 139/12.*
[58] ibid, 17.
[59] *Child Petitioner v. Jayantha Prema Kumara Siriwardhana, Teacher, Puhulwella Central College and Others, SC FR 97/2017.*

> "A Child is a precious national resource to be nurtured and attended with tenderness and care and not with cruelty. Subjecting the child to Corporal Punishment for reforming him cannot be part of education given as it causes incalculable harm to him, in his body and mind".[60]

It has been pointed out that the nature of responsibility borne by the teachers comes from the concept of 'loco parentis' which stands for 'in the place of parents'.[61] Hence, it is quite alarming to realize that the ones that the parents entrust their children to, to educate and safeguard, use such cruel methods to discipline the children thereby trampling their dignity.

5. RELIEFS AVAILABLE

Apart from the aforementioned Article 11 of the Constitution under which a fundamental rights action could be filed in the Supreme Court with regards to torture suffered due to executive and administrative action, Sections 310 – 329 of the Penal Code sets out offences such as, causing hurt, causing grievous hurt, endangering life and personal safety, which can also be used to establish criminal offences irrespective of whether the person who committed the particular crime is a commoner or a public servant.[62]

Further, via the Torture Act 1994, 'torture' has been named as a cognizable and non-bailable offence,[63]and a person who will be guilty under the Act will be sentenced to a term of imprisonment not less than 7 years and not exceeding 10 years and will be fined an amount not less than Rs. 10 000/= and not exceeding Rs. 50 000/=.[64]

Moreover, State (Liability in Delict) Act No.22 of 1969 lays down the instances where the State can be held responsible, and it relays that the State shall be subject to all liabilities in respect of delicts committed by its officers or agents.[65] It also dictates that the State should be accountable when it has failed to comply with a statutory duty that it is bound by,[66] and if an officer on whom the State has conferred functions via written law has committed a delict while performing such duties.[67] Furthermore, by reserving an entire Section for the armed forces, the Act sets out that if an inaction or an omission of a member of armed forces causes death or personal injury to a person

[60] ibid, 24.
[61] ibid, 16.
[62] D Dasanayaka, 'Sri Lanka: 25 Years with Act against Torture, 2019, Right to Life Human Rights Centre,'(Right to Life Human Rights Centre, 2019) <https://www.right2lifelanka.org/wp-content/uploads/2023/07/25-Years-with-Act-against-Torture.pdf> accessed 1 August 2023.
[63] Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994, S 2(5).
[64] ibid, S 2 (4).
[65] State (Liability in Delict) Act No.22 of 1969, S. 2(1).
[66] ibid, S. 2(2).
[67] ibid, S. 2(3).

while he is on duty, then either him or the State shall be held liable in this regard.[68] Thus, it can be observed through these provisions that relief can be obtained via the aforementioned Act in relation to incidents of torture, inhumane and degrading treatment as well.

The Recovery of Damages for the Death of a Person Act No. 2 of 2019 provides that, when the death of a person is caused by a wrongful act, omission, negligence or default of another, a loved one such as, the spouse, parents, children, siblings, grandparents, and the guardian has the right to maintain an action for damages.[69] In such an event, the applicant will be able to recover damages for the loss of that person's love and affection, care and companionship, and for the mental pain and suffering caused by such death.[70]

In addition, the Human Rights Commission of Sri Lanka which acts as the national preventive mechanism also conducts inquiries and investigations either upon complaints, or upon their own initiation (*Suo motu cases*) in respect of incidents related to torture and offers the victims relief as per The Human Rights Commission of Sri Lanka Act No. 21 of 1996.

6. ISSUES THAT HINDER THE ELIMINATION OF TORTURE

Although mechanisms are in place to eradicate torture time and time again, by observing the astounding number of cases that come before Courts and the Human Rights Commission, it could be identified that such inhumane and barbaric acts are continuing. This raises questions about issues related to torture eliminating mechanisms.

The power to file a case under the Torture Act 1994 is vested with the Attorney General. Nonetheless, it is the police who have the authority to conduct the investigations and therewith, by relying on their investigations the Attorney General can take the necessary actions. However, it is questionable as to the impartiality of these investigations since most complaints are levelled against the police themselves. Furthermore, studies[71] show that since the enactment of the Act in 1994 to 2019, only 115 cases have been filed in the High Court, out of which only 34 were decided. In contrast to this limited number of cases, statistics put forth by the Human Rights Commission show that in 2022 alone, 560 complaints had been received by them[72] concerning torture and other cruel, inhuman or degrading treatment or punishment. This vast disparity between the number of

[68] ibid, S. 6.
[69] The Recovery of Damages for the Death of a Person Act No. 2 of 2019, S. 2.
[70] ibid, S. 3.
[71] ibid (n 62).
[72] Human Rights Commission of Sri Lanka, 'Details of Complaints Received by Head Office & Regional Office 2022,'<https://www.hrcsl.lk/wp-content/uploads/2020/02/statistics-2022.pdf > accessed 2 August 2023.

complaints filed before the court and the Human Rights Commission shows that only a fragment of incidents that occur in relation to torture are brought into light while many cases go unheard.

Furthermore, there can be several delays with regards to the hearing of cases irrespective of whether it is in the Supreme Court or the High Court. Other than the aforementioned delays in filing cases in the High Court, it could also be observed through many cases[73] that most of the Fundamental Right Applications filed in the Supreme Court takes at least 6-7 years to be given a final decision. Within these periods the complainants have to bear the cost of legal, transportation and other related fees to seek justice as well. Moreover, they have to be conscious of their torturer who is most likely a person of power such as a law enforcement officer. It could be mentally draining for the victim to constantly live in fear of retaliation until their pleas are heard.

In addition, although courts have provided guidelines such as maintaining proper records of arrests, ensuring equal protection to persons in custody, and training law enforcement personnels[74] to condemn such barbaric actions, it is questionable whether these instructions are seriously considered by the relevant authorities. Moreover, even though it is enshrined in Article 126 of the Constitution that, "the Supreme Court have power to grant such relief or make such directions as it may deem just and equitable…"[75] indicating that judges have a wide discretion in providing relief for the infringement of fundamental rights, the lack of disciplinary actions instituted by the courts against the perpetrators of torture shows that it does not grant the victims of such barbarous acts the desired justice. As studies have shown, this could lead to various problems such as 'the victim being burdened with pursuing multiple legal proceedings to seek justice, and perpetrators of torture being inadequately deterred from their wrongdoings'.[76]

It should also be noted that although compensation is provided by the Courts as well as the Human Rights Commission to the victims of torture after the investigations and delivering the decisions, neither of these bodies have a proper compensation mechanism in place. When analysing Fundamental Rights cases filed in the Supreme Court, it is apparent that remunerations awarded as

[73] *Kanda Udage Malika v. D.M Abeyrathna, Police Constable, Kandaketiya Police Station and Others, SC FR 157/2014, M. G Shanuka Gihan Karunaratne (Minor) and P.P Amila Dilshan Puwakpitiya (Minor) v. Lory Koswatte Deputy Principal, M/Weera Keppetipola Madya Maha Vidyalaya, Pallepola, Akuramboda and Others SC FR 139/12, Manamperige Leelawathi v. Priyantha Kulathunga, Police Sergeant, Sooriyawewa Police Station and Others SC FR 85/2015, Landage Ishara Anjali (Minor), Wijesinghe Chulangani v. Waruni Bogahawatte, Matara Police Station, and Others SC FR 677/2012.*

[74] Verite Research, 'Condemned but not Deterred: Torture in Sri Lanka, 2020,'< https://www.veriteresearch.org/wp-content/uploads/2020/10/VR_Law_Torture-in-Sri-Lanka_27October2020.pdf > accessed 4 August 2023.

[75] The Constitution of Sri Lanka, S. 126.

[76] ibid (n 74), 8.

compensation vastly differ from each other,[77] which in turn could discourage the litigants from filing complaints.

Further, it has been mentioned by the authorities such as the police and armed forces that internal inquiries and investigations are conducted by them, and the necessary disciplinary actions are taken when these inhumane acts come to light. However, it can be seen in such situations that most of these investigations end with the officer being simply transferred to another police station or with no result at all. If the relevant authorities take severe disciplinary actions against this uncivilized behaviour, it would be extremely helpful with regard to raising awareness while also being a deterrence for such barbaric acts.

Apart from these issues, another major problem in relation to eradicating torture is the public opinion. As soon as an incident like 'theft' happens, they expect the police to extract information from the perpetrators using force. In such situations, the authorities with the intention of pleasing others, disregard all morality and use violent means to obtain confessions and establish guilt even by fabricating or falsifying evidence. Hence, to resolve all other issues, first and foremost the public demand for torture must be reduced by changing the mentality of the people about normalizing torturous acts.

7. SUGGESTIONS TO IMPROVE THE EXISTING PROCESS

As mentioned above, the police themselves conducting investigations about incidents of torture could be highly biased. This could also result in the outcome of those investigations being flawed since most of the accusations with regard to torture are made against them. Thus, the most appropriate measure would be to appoint an independent body to carry out investigations regarding torture and ill treatment. Such a committee should consist of experts of a high moral standing with competence in the field of human rights, including personnel such as Judicial Medical Officers, forensic experts, legal experts etc.

Furthermore, in order to provide suitable compensation, a proper compensation scheme should be put forth in respect of both the Supreme Court as well as the Human Rights Commission. Such mechanism should take into account factors such as legal costs, medical costs, mental and physical suffering, the loss of potential earnings, and also the time value, when providing compensation to victims of torture. This could largely encourage people to come before the relevant authorities and bring the abusers into light. Also, in the event the complainants are unable to bear the cost of the

[77] *Lama Hewage Lal (Deceased), Rani Fernando (Wife of deceased Lal) v. Officer in Charge – Minor offences, Seeduwa Police Station and Others SC FR 700/2002, Kanda Udage Malika v. D.M Aberathna, Police Constable Kandakettiya Police Station and Others SC FR 157/2014*.

legal proceedings, a proper mechanism must be established to provide adequate legal aid while giving them priority.

Moreover, the country should put in place more systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in order to prevent cases of torture.[78] For example, having proper measures in place such as, installing CCTV cameras in the interrogation rooms and police stations will act as a deterrence in this regard. Furthermore, establishing mechanisms to prevent other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in the Convention which are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity[79] will also assist in averting such uncivilized and atrocious acts from happening.

In addition, procedures need to be implemented to take strict disciplinary actions against those superiors who fail to conduct just and fair internal investigations and take suitable actions regarding the subordinate officers who commit such atrocious acts. Mechanisms should be established in order to properly institute such measures, to train them about the importance of human rights and severity of violating the same. Apart from raising awareness, an obligation also lies with the State for setting rules and procedure for duties and functions of these persons.[80]

It should be noted that, a majority of those who have experienced torture and other cruel and degrading treatment are mentally scarred. Therefore, having a support system to psychologically heal them and to rehabilitate them would be a tremendous help for such people.

Moreover, when they are under such stress and trauma, filing a case in the Supreme Court within 30 days would be unreasonable when the matter is considered from the victims' point of view. Hence, removing this time restriction in relation to torture would be more advantageous in encouraging people to come before court. Further, educating citizens about the functions of the Human Rights Commission would also be important since the aforementioned time bar would be disregarded if a complaint has been filed with the Commission within one month of the incident.

Additionally, necessary actions such as appointing more judges[81] should be put in place by the State in order to deliver justice to the parties without a delay. Sharing findings and initiating discussions

[78]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 11.
[79] ibid, Article 16.
[80] ibid, Article 10.
[81] K D Sumanasekara, 'Short analysis on Sentencing Policies on Torture,' (Right to Life Human Rights Centre, 2019) < https://www.right2lifelanka.org/wp-content/uploads/2023/07/Short-Analysis-on-sentecing-policies-on-torture.pdf > accessed 5 August 2023.

on studies on judicial trends in the Supreme Court and High Court in relation to torture in Sri Lanka and comparing it with international standards could also help to improve the judicial and the legal response[82]. The lawyers should also pursue civil actions for damages where possible to ensure that victims recover by way of compensation loss and damage resulting from being subjected to torture[83] thus giving the victims a sense of security.

Most importantly, the general public should also be made aware of the detrimental nature and the consequences of inhumane acts and about the State's zero tolerance policy towards torture, thus discouraging them from normalizing torture and other forms of ill treatment.

8. CONCLUSION

While analysing the prohibition and condemnation of acts related to torture and other cruel degrading treatment and punishments, some of the deep-rooted issues that hinder the progress of prevention and eliminations of torture were brought to light.

The inappreciable number of cases that are filed in the High Court which in turn extinguish the purpose of the Torture Act 1994, the investigations being carried out by the police themselves who are oftentimes accused of torture, absence of a proper compensation mechanism, delays in hearings, lack of both internal and external disciplinary actions to act as deterrence, the mindset of the public, and the lack of awareness were identified as some of the major issues that impede the progress of eliminating torture.

In light of this, suggestions such as, forming an independent committee to investigate cases of torture, establishing a proper compensation mechanism, putting in place more systematic methods and rules for interrogation, arrest, and imprisonment, taking strict disciplinary actions, raising awareness among the public as well as the officials, and having a support system to psychologically treat the victims of torture, were made to uplift the current procedures while appreciating the efforts put forth by the courts and other related authorities so far in order to eradicate the practice of torture in Sri Lanka.

It has been stated by the UN Secretary-General António Guterres that, "Torturers must never be allowed to get away with their crimes, and systems that enable torture should be dismantled or transformed".[84] Furthermore, numerous studies show that, when opportunities to torture are

[82] Transparency International Sri Lanka, 'A Review of The Legal and Policy Framework Preventing Torture in Sri Lanka', <https://www.tisrilanka.org/wp-content/uploads/2015/06/PP_Tou_Eng.pdf> accessed 3 November 2023.
[83] ibid, 8.
[84] United Nations, 'International Day in Support of Victims of Torture, 26 June', <https://www.un.org/en/observances/torture-victims-day> accessed 3 November 2023.

reduced, the incidents of torture fall and at the same time if torturers are effectively investigated and prosecuted, it falls further.[85]Thus, it could be stated that, even though the success is not guaranteed, when required conditions and commitment are both present, the aforementioned suggestions and measures would be effective in eliminating torture to a large extent.

[85] Richard Carver and Lisa Handley, 'Does Torture Prevention Work?' (Liverpool University Press 2016] <www.cambridge.org/core/books/abs/does-torture-prevention-work/conclusion/97B552ECF08404F6568F518CDDD528C0> accessed 3 November 2023.

ART, BLASPHEMY AND THE WAY FORWARD FOR SRI LANKA

Sarith Abeygunawardena

ABSTRACT

Sri Lanka is a nation with a troubled history of inter-ethnic and inter-religious groups. The state has failed to enforce the hate speech laws against perpetrators advocating violence against minority groups, along with the abuse of hate speech laws to arbitrarily target ordinary citizens, particularly members of minority communities, satirists and writers, effectively making the offences anti-blasphemy which safeguard Buddhism alone. This article will explore the constitutionality of two such laws, consider the original legislative objectives behind their enactment, and attempt to prove that the enforcement of these laws goes against the spirit of those objectives, the constitution and principles that should be observed in a liberal, democratic society.

1. INTRODUCTION

Sri Lanka has been a democracy for nearly a century, having first achieved universal franchise in 1931, only 2 years after the United Kingdom. In keeping with the democratic traditions, Sri Lanka has always, at least on paper, guaranteed the freedom of expression; however, being a country with a long history of religious and inter-ethnic violence, the nation's constitution was drafted to allow restrictions on fundamental rights by law in the interest of racial and religious harmony. The constitution of Sri Lanka, therefore, does not guarantee absolute and unlimited freedom of expression. These restrictions have allowed the state to retain provisions of the colonial Penal Code prohibiting speech hurting religious feelings. Additionally, as a party to the International Covenant on Civil and Political Rights (ICCPR), Sri Lanka has incorporated provisions of the Covenant intended to prohibit racial or religious hatred.[1]

Any nation committed to safeguarding religious and racial harmony is commendable. However, Sri Lanka's failure to enforce these laws against perpetrators advocating violence against minority groups, along with the abuse of the law to arbitrarily target ordinary citizens, particularly members of minority communities, satirists and others has been a cause of concern. The manner of enforcement of these two laws has transformed them into laws akin to anti-blasphemy legislation observed in jurisdictions like Pakistan, despite the incongruity between anti-blasphemy and the original legislative objectives behind their enactment.

[1] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

This article will explore the constitutionality of these two laws, consider the original legislative objectives and attempt to prove that the enforcement of these laws goes against the spirit of those objectives, the constitution and principles that should be observed in a liberal, democratic society. In doing so, there will be a comparative analysis of analogous provisions from India, the United States of America and other jurisdictions. This article will also attempt to draw limits any future legislation must observe to stay consistent with the Constitution and its principles.

2. HISTORY

Sri Lanka is a multi-ethnic state with diverse religious beliefs, encompassing all four major world religions. The majority, Buddhists, forming 70.1% of the population and the remaining identifying as follows: 12.6% as Hindu, 9.7% as Muslim and 7.6% as Christian.[2]

Most Sinhalese, who make up 74.9% of the population, are Buddhists; with a sizeable following of Christianity by a minority of Sinhalese and Tamils. The majority of Tamils, who make up 15% of the population, identify as Hindus. The Muslim community is ethnically diverse, but the largest group are the Moors, forming 9% of the total population.[3]

Despite its diversity, Sri Lanka has a troubled history of inter-ethnic and inter-religious violence. One of the earliest instances of ethnic violence in the modern history of the island occurred in what is now referred to as the 1915 riots in Ceylon. The riots are believed to have occurred in response to restrictions by the British colonial authorities on the traditional Buddhist practice of worship involving noise. This was perceived by the Buddhists as discriminatory preferential treatment towards the Muslim community, which disapproved of loud music.[4] More recently, between 2014 and 2018, Sri Lanka witnessed several riots, including the Aluthgama Riots and the Digana Riots, which were incited by peddling of conspiracy theories by Buddhist ultranationalist groups. There was also a surge in anti-Muslim hate crimes following the 2019 Easter Sunday Attacks.

Sri Lanka also witnessed a 26-year-long civil war against separatists that sought the establishment of an independent Tamil state in the Northern and Eastern provinces. The movement was rooted in grievances against discriminatory state policies and riots against the Tamil-speaking citizens of Sri Lanka since independence, but the tipping point into a civil war was the riots of July 1983,

[2] 'Percentage Distribution of Population by Religion and District' (Department of Census and Statistics - Sri Lanka, 2012) <http://www.statistics.gov.lk/abstract2021/CHAP2/2.15> accessed 6 August 2023.
[3] 'Population by Ethnic Group and District' (Department of Census and Statistics - Sri Lanka, 2012) <http://www.statistics.gov.lk/abstract2021/CHAP2/2.11> accessed 6 August 2023.
[4] Jacob J, 'Regulating Religious Rites: Did British Regulation of "noise Worship" Trigger the 1915 Riots in Ceylon?' (LSE International History, 29 July 2020) <https://blogs.lse.ac.uk/lseih/2018/03/31/regulating-religious-rites-did-british-regulation-of-noise-worship-trigger-the-1915-riots-in-ceylon/> accessed 6 August 2023.

colloquially referred to as Black July. The violence that followed the state's failure to intervene resulted in the deaths of thousands of Tamil civilians.[5]

If history is anything to go by, Sri Lanka is a volatile state where the maintenance of communal harmony by law is necessary. Sri Lanka's constitutional and legal framework, both colonially inherited laws and laws enacted after independence, enable restrictions on rights and freedoms in the interest of communal harmony.

However, it must be restated that these laws have been used not to maintain harmony in society, but for persecuting members of minority communities and those engaged in creative art, such as satirists and authors. The enforcement of the law in such a manner has rendered them akin to anti-blasphemy laws designed to safeguard Buddhism.

3. THE LAW IN PRACTICE

Incidents involving the misuse of these provisions by the state are numerous, with arrests being made by law enforcement without consideration for the elements making up the offence. A notable instance of such persecution was the detention of M.R Mazahima, a woman of the Muslim faith, under the ICCPR Act for wearing a dress printed with a ship's wheel that faintly resembled the 'Dharmachakra' wheel, an important symbol in Buddhism.[6].

This article's focus, however, will be limited to the misuse of law and its implications for literary and creative artists, specifically satirists and writers of fiction. To this end, this article will analyse the persecutory prosecutions of writer Shakthika Sathkumara and satirist Natasha Edirisooriya.

Sathkumara, an award-winning writer, was charged with offences under Section 3 (1) of the ICCPR Act and Section 291B of the Penal Code in early 2019 for a short fiction story he published. The story depicted the prevalence of homosexuality and sexual abuse within the Buddhist clergy. In 2021, the Attorney General discharged him from all accusations. [7]

Edirisooriya was arrested for comments she made 'defaming' Buddhism during a skit performed as part of her show 'Modibhimanaya' (A Fool's Pride). The skit included comments to the effect that parents of children at the time of Prince Siddhartha Gautama (The Buddha)'s era would have had unrealistic expectations of divine nature from their children by comparing them to Prince

[5] 'Black July: A Tamil Genocide' (People for Equality and Relief in Lanka, 31 July 2023) <https://pearlaction.org/black-july-a-tamil-genocide/> accessed 6 August 2023.
[6] JDSLanka, 'Muslim woman jailed for wearing dress disliked by Sri Lankan Buddhists' (28 May 2019) <http://www.jdslanka.org/index.php/news-features/human-rights/889-muslim-woman-jailed-for-wearing-dress-disliked-by-sri-lankan-buddhists> accessed 6 August 2023.
[7] 'Sri Lanka: Writer Faces up to 10 Years Jail for Story: Shakthika Sathkumara' (Amnesty International, 1 June 2021) <https://www.amnesty.org/en/documents/asa37/0800/2019/en/> accessed 7 August 2023.

Siddhartha Gautama. She was charged under Section 3 (1) of the ICCPR Act and Sections 291A and B of the Penal Code. After being denied bail by a magistrate, she was released on conditional bail by the High Court of Colombo more than a month after her arrest. Edirisooriya has not been discharged as of the time of writing.[8]

Both prosecutions have been internationally condemned for misuse of legal provisions. This article will analyse whether the prosecution of these alleged offences is permissible within Sri Lanka's constitutional and legal framework and whether the internationally recognised thresholds concerning the ICCPR and hate speech have been satisfied in the enforcement of the law.

4. THE CONSTITUTION

4.1 Rights and freedoms

The Supreme Court of Sri Lanka in *Ashik v Bandula and others (Noise Pollution case)*[9] interpreted the 1978 constitution as being secular by declaring that 'it has to be firmly borne in mind that Sri Lanka is a secular State. In terms of Article 3 of the Constitution, Sovereignty is in the People at common devoid of any divisions based on perceptions of race religion language and the like.'

Religious freedom is constitutionally guaranteed by Article 10 of Sri Lanka's 1978 constitution, which entitles every person '*the freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice*'. This freedom is complemented by Article 14 (1) (e), which grants citizens the '*right to freely practice their religion, either individually or in association with others, publicly or privately. This includes worship, observance, practice, and teaching of their beliefs*'.

However, Article 9, which provides that '*the state must give Buddhism the foremost consideration, while assuring rights to all religions the rights guaranteed by Article 10*' has been a major obstacle to equal enjoyment of religious freedom. In the case of *Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation) Bill*[10], the Supreme Court held that Article 9 restricts the rights of non-Buddhists to propagate their religion, which falls within the right to manifest one's belief under Article 14 (1)(e). Gunatilleke argues that although this limitation 'arguably meets the legality test', Article 9 does not specify limitations or qualify the rights of other religions, as it specifically requires the state to assure 'to all religions the rights granted by Articles 10 and 14(1)(e)'.[11] Nevertheless, the position was reaffirmed in *Karuwalagaswewa Vidanelage*

[8] Wasantha Rupasinghe, 'Arrested Sri Lanka Comedian Natasha Edirisooriya Granted Bail' (World Socialist Web Site, 13 July 2023) <https://www.wsws.org/en/articles/2023/07/13/riik-j13.html> accessed 6 August 2023.
[9] SLR - 191, Vol 1 of 2007 [2007] LKSC 4; (2007) 1 Sri LR 191 (9 March 2007).
[10] S.C. Special Determination No. 19/2003.
[11] Gunatilleke G, 'Limitations on Fundamental Freedoms in Sri Lanka: Majoritarian Influence of Constitutional Practice' (2023) International Journal of Law in Context 1.

Swarna Manjula et al. v. Pushpakumara, Officer-in-Charge, Police Station, Kekirawa et al. (Jehovah's Witnesses Case)[12].

For these reasons, amongst others, the equal enjoyment of religious freedom has been interpreted in favour of Buddhism. This view is supported by Gunatilleke (2023) who concludes that 'in practice, majoritarian interests have influenced the manner and extent of limitations on certain fundamental freedoms in Sri Lanka'.

Apart from the freedoms of thought, conscience and religion, the freedom of speech and expression granted by Article 14 (1) (a) is also relevant to the object of this article.

4.2 Restrictions

Many of the rights and freedoms guaranteed by the Constitution can be restricted if such restrictions are proscribed by law and if such restrictions are for the purposes set out in Article 15 of the Constitution. A notable exception is the freedom of thought, conscience, and religion under Article 10, which does not fall within the scope of Article 15.

Article 15 (7) permits limitations on most freedoms, including the freedom of expression, and the freedom to manifest one's religion granted by Articles 14 (1) (a) and (e) respectively. Article 15 (7) recognises a broad category of permissible purposes of restrictions, including 'in the interest of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.' Additionally, Article 15 (2) permits restriction on the freedom of expression when it is necessary to maintain racial and religious harmony and such restrictions are prescribed by law.

Notwithstanding the broad list of possible restrictions, *Sunila Abeysekera V. Ariya Rubasinghe, Competent Authority and others*[13] held that such restrictions are subject to satisfying the three-pronged test of legality, necessity and proportionality.

In summary, the state may restrict the freedom of expression and the freedom to manifest one's religion, but not the right to choose one's religion for one of the permitted grounds found in Article 15 (7). Freedom of expression can also be restricted when it is necessary to ensure racial or religious harmony. However, all such restrictions must be prescribed by law and must satisfy the test in the *Sunila Abeysekara* case.

<https://www.cambridge.org/core/journals/international-journal-of-law-in-context/article/abs/limitations-on-fundamental-freedoms-in-sri-lanka-majoritarian-influence-of-constitutional-practice/A9032967DC2C29A619C261E22F75D3AB> accessed 19 August 2023.

[12] (2018) SC (F.R) No. 241/14 (Supreme Court of Sri Lanka).

[13] Sunila Abeysekera v. Ar1ya Rubasinghe, Competent Authority [2000] SC Application No. 994/99.

It must also be borne in mind that Article 80 (3) of the constitution prohibits post-enactment judicial review of legislation, thereby allowing existing legislation to go unchallenged and most new legislation offending constitutional provisions to be enacted provided a required special majority in the legislature is met. Validity of laws enacted before the constitution is also ousted from review by Article 16 (1) of the constitution which states that 'All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter'.

5. THE LAW

5.1 Penal code

The primary penal provisions dealing with offences intended to wound religious feelings are Section 291A and Section 291B. They read as follows:

291A: '*Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both*.'

291B: '*Whoever, with the deliberate and malicious intention of outraging the religious feelings of any class of persons, by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*'

Given Sri Lanka's troubled history, at first appearance, these provisions appear to be a reasonable measure enacted as a safeguard against incidents that may provoke communal violence. On closer analysis, one may argue that these are overbroad and vague. This argument is substantiated by the state's tendency to enforce them in a manner akin to an anti-blasphemy law, contrary to the original legislative objective of the provisions and in violation of many of Sri Lanka's fundamental freedoms, mainly, the freedom of expression.

5.2 The Original Legislative Objective

Sections 291A and 291B of Sri Lanka's Penal Code ('Penal Code') were enacted in 1939 and are modelled after Section 295 of the Indian Penal Code (IPC).

Section 295 reads:

'*Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished*

with imprisonment of either description for a term which may extend to three years, or with fine, or with both'

As identical provisions, Imperial Legislative Council's intended objectives for Section 295A can assist in ascertaining the original legislative objective of Sections 291A and 291B.

Section 295A of the IPC was enacted after the 1929 trial concerning the 'Rangila Rasul', which mocked the Prophet Muhammed. The publisher of the book was acquitted by the Lahore High Court because, at the time, it was not an offence to mock or offend religious feelings or founders of religions.[14] In response to this ruling and the subsequent murder of the publisher by a religious fanatic inside the courtroom, the Imperial Legislative Council, the colonial legislature of India, moved to criminalise the offending of religious feelings.

Report of the Select Committee on the Indian Criminal Law (Amendment) Bill[15] that deliberated the provision makes the following noteworthy points:

The essence of the offence is that offending or outraging religious feelings must be the primary or sole purpose of the offender.[16]

The words 'with deliberate intention' were included to make an exception for good faith insults made 'with the object of facilitating some measure of social reform by administering such a shock to the followers of the religion as would ensure notice being taken of any criticism so made'. The committee further adds that the inclusion of 'deliberate intention' introduces a requirement of malice, restricting the scope of enforcement.[17]

The Select Committee report makes it clear that the provision was intended to be applicable only if the expression is both malicious and the primary or sole purpose of that expression is to offend religious feelings. It is also clear that there is an exception for good faith insults which would exclude insults that facilitate social reform. It can therefore be concluded that the original legislative intention of Section 295A of the IPC, by extension, Sections 291A and B of the Penal Code, is far from an all-encompassing anti-blasphemy offence.

If so, could cases of satire, like Natasha Edirisooriya's, or a piece of fiction, like that of Shakthika Sathkumara's, which intend to bring attention to misconduct within religion and/or without the malicious and sole intention of offending religious feelings, be prosecuted under Section 291A or 291B

[14] John Boone, 'Salmaan Taseer Murder Case Harks Back to 1929 Killing of Hindu Publisher' (The Guardian, 12 March 2015) <https://www.theguardian.com/world/2015/mar/12/salmaan-taseer-case-harks-back-to-1929-killing-of-hindu-publisher> accessed 7 August 2023.
[15] Parliament of India - Digital Library (Report of the Select Committee on the Indian Criminal Law (Amendment) Bill) <https://eparlib.nic.in/bitstream/123456789/761857/1/jcb_1927_Indian_criminal_bill.pdf> accessed 6 August 2023.
[16] ibid, para 4, 1.
[17] ibid, para 6, 1.

of the Sri Lankan Penal Code? It would appear unlikely that these fall within the mischief of the provision.

Nevertheless, judicial interpretation of Section 295A can further aid in clarifying the scope of Section 291A and Section 291B.

The Indian Supreme Court in *Ramji Lal Modi vs. State of Uttar Pradesh*[18] upheld the constitutionality of Section 295 as not offending the freedom of speech and expression guaranteed by Article 19 (1) of the Indian Constitution, which can be reasonably restricted under Article 19 (2) in the interest of public order. In doing so, the court held that the capacity to cause public disorder is sufficient for restrictions to be reasonable, even if the acts do not lead to public disorder. Further, that section 295A does not penalise every act of insult to religion, and it only extends where the insult is committed with the deliberate and malicious intention of outraging the religious feelings of a class.

The decision in *Rajmi Lal Modi* is crucial to Sri Lankan jurisprudence for several reasons.

Firstly, it supports the view that Sections 291A and 291B would likely be upheld by Sri Lankan courts, if its constitutionality could have been challenged. This is because the concerned Articles of the Indian constitution are identical to Article 14 (1) (a) and Article 15 in the Sri Lankan constitution which guarantee freedom of expression and permitted grounds of restrictions thereof, respectively. However, the court in *Superintendent, Central Prison, Fatehgarh vs. Ram Manohar Lohia*[19] also held that a mere fanciful connection between the alleged offences and breakdown in public order is insufficient grounds to warrant a prosecution.

Secondly, it confirmed the view that only a deliberate and malicious insult falls within the scope of the offence, suggesting that an insult to religious feelings must be determined objectively.

In line with the *Ramji Lal Modi* judgment, the High Court of Madya Pradesh in *Ramlal Puri vs. State of Madhya Pradeshi* [20] adopted an objective test to determine if the mischief is covered by the Section. That is, whether the complainant is an abnormally sensitive person or an ordinary person of common sense. If the complainant is hypersensitive, such acts are not covered by the offence.

The Indian Supreme Court in *Mahendra Singh Dhoni vs. Yerraguntla Shyamsunder and another*[21] also recognised that careless or unwitting insults without malicious intent, do not fall within the offence. *Dhoni* reaffirms and further strengthens the *Ramlal Puri* test. The Court also urged judges of the first instance to scrutinise whether an act satisfies the elements of the crime committed.

[18] Modi v The State Of U.P [1957] AIR 620, [1957] SCR 860.
[19] Superintendent, Central v Ram Manohar Lohia [1960] AIR 633, [1960] SCR (2) 821.
[20] Ramlal Puri v State Of Madhya Pradesh [1971] AIR [1971] MP 152 (CriLJ).
[21] Transfer Petition(s) (Criminal) No(s). 23/2016.

5.3 The ICCPR Act

Section 3 of the International Covenant on Civil and Political Rights Act No.56 of 2007 (ICCPR Act) is another tool of oppression against satirists and writers. Ironically, this domestic adaptation of Article 20 of the ICCPR was meant to safeguard human rights. It reads that:

'*No person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*.'

Although it may appear otherwise, Section 3 (1) of the ICCPR is not plagued by the absence of clear guidance in the same way that Sections 291A and 291B of the Penal Code have. As the domestic incorporation of Article 20 of the ICCPR, courts can rely on the guidance provided by UN Human rights bodies on what constitutes an offence.

The Rabat Plan of Action[22], which was adopted by the UN General Assembly, lays down a test for the threshold on what may constitute an offence under Article 20 of the ICCPR. This threshold test adopted in 2012 is known as the Rabat Threshold test. It sets a high threshold as to what constitutes incitement for racial or religious hatred.

The test has been adopted[23] by the Human Rights Commission of Sri Lanka pursuant to the discharge of its function of ensuring national laws and administrative practices comply with international obligations, under Section 10 (d) of the Human Rights Commission Act, No. 21 of 1996.

The threshold test contains six parts, taking into account (1) the social and political context, (2) the status of the speaker, (3) the intent to incite the audience against a target group, (4) the content and form of the speech, (5) extent of its dissemination and (6) likelihood of harm, including imminence.

The General Assembly's guidance on each element can be summarised as follows:

(1) **Context**: In determining the intent/causation, consideration must be given as to whether particular statements are likely to incite discrimination, hostility or violence against the target group. Further, the analysis of the context should take into account the social and political context prevalent at the time the speech was made and disseminated;

[22] UN Human Rights Council (Annual report of the United Nations High Commissioner for Human Rights - Addendum - Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/101/48/PDF/G1310148.pdf?OpenElement> accessed 6 August 2023.
[23] Human Rights Commission of Sri Lanka, 'LEGAL ANALYSIS OF THE SCOPE OF SECTION 3 OF THE ICCPR ACT, NO.56 OF 2007 AND ATTENDANT RECOMMENDATIONS' (2020) HRCSL <https://www.hrcsl.lk/wp-content/uploads/2020/02/ICCPR-Act-s.-3-Guidelines-English.pdf.> accessed 19 Aug 2023.

(2) **Speaker**: The speaker's standing in the context of the audience to whom the speech is directed should be considered.

(3) **Intent**: Intent is necessary; negligence and recklessness are insufficient for an act to be an offence under Article 20 of the ICCPR, as it provides for 'advocacy' and 'incitement' rather than the mere distribution or circulation of material.

(4) **Content and form**: The content of the speech should be the key focus of a court and its analysis should consider the degree of provocation and directness as well as the form, style and balance struck in the arguments deployed.

(5) **The extent of the speech act**: This includes taking into consideration the reach of the speech to an audience, including which medium of dissemination was employed and the public or private nature of the speech.

(6) **The likelihood, including imminence**: Although incitement is a vague term, the action advocated does not have to be committed for there to be an offence, but some degree of harm must be recognised on a reasonable probability of causing such violence.

The Office of the High Commissioner for Human Rights separately provides further guidance[24], based on international standards, on the definitions of the terms used in Article 20. It provides that the terms 'hatred' and 'hostility' refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; that the term 'advocacy' is to be understood as requiring an intention to promote hatred publicly towards the target group; the term 'incitement' refers to statements which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.

Based on the above definitions and the Rabat Threshold test, one can conclude that in the absence of an element of incitement or advocacy of hatred, which requires intent to promote hatred or cause imminent violence, it is unlikely that satire or fictional writing can be prosecuted under Section 3 of the ICCPR Act, even if it was intended to be merely offensive to a particular religion or faith.

6. ANALYSIS

6.1 Colombo High Court's bail order

The Rabat threshold was persuasive in the Colombo High Court's decision to grant bail to Edirisooriya.

In the landmark order, the judge held that, prima facie, Edirisooriya cannot be held to have incited because incitement requires, per the Rabat threshold test, that there be an imminent threat or hostility

[24] Office of the High Commissioner for Human Rights, 'One-pager on "incitement to hatred"' (OHCHR) <https://www.ohchr.org/sites/default/files/Rabat_threshold_test.pdf> accessed 6 August 2023.

by the hate speaker's audience. However, in this instance the judge found that Edirisooriya's audience instead reacted in laughter, suggesting a lack of such an imminent threat. The judge also applied the threshold test to the context and ruled that, prima facie, the prosecution's report fails to meet the threshold as it was not alleged that there was a conflict between Buddhists and non-Buddhists in the society when Edirisooriya allegedly made this statement. Furthermore, the prosecution did not prove that Edirisooriya was an influential person at the time she made her statement. The judge also notes that simply causing hurt or insult by carelessness or negligence is not sufficient for prosecution under Section 3 (1) of the ICCPR Act, as intent is required.

It was also held that making an offensive statement is not sufficient to bring such a statement under Section 3 of the ICCPR Act nor Sections 291A and 291B. Although Judge Patabendige only referred to the Rabat test[25] in holding that the statement must be both deliberate and malicious for it to fall within the mischief of either law, the decision nevertheless affirms the relevance of *Dhoni* and the report of the Imperial Legislative Council's Select Committee.

The High Court's order, by incorporating the Rabat threshold test in respect of Section 3 of the ICCPR Act and recognising the necessity of an element which incitement involving an instigation of an immediate threat in respect of both the ICCPR Act and Penal Code, has clarified and restricted the scope of provisions which were previously overbroad and vague tools of oppression for the government.

However, it is unlikely that this decision alone will result bringing an end to the misuse of the law by the state as it is ultimately the responsibility and discretion of the state to ensure the prosecution has a basis in law. This may have been the rationale for Judge Patabendige in recognising and emphasising the investigator's duty to ensure that the elements of the crime are sufficiently satisfied in line with the offence and the country's international obligations, without making an arrest solely based on a complaint being made. The order follows the line of thinking by the Supreme Court of India in *Dhoni*, requiring judges of first instance to consider scrutinising all elements of an offence.

In the unlikely but welcomed outcome of this order bringing an end to this chapter of abusing provisions of the ICCPR and the Penal Code to punish blasphemy, it is still unlikely that the state's policy will change. The Government has already announced its intention to bring forth new laws specifically to target speech that is offensive or defamatory to religious feelings.[26]

Even if such legislation is introduced, should satire and offending speech without malicious intention be protected by Article 14 (1) (a) and not fall within the scope of the restrictions permitted by Article 15?

[25] Edirisooriya v Officer-in-Charge, Criminal Investigation Department [2023] HCEBA/1335/2023.
[26] Press Trust of India, 'Sri Lanka to Introduce Law against Religious Slander on Social Media' (NDTV, 29 May 2023) <https://www.ndtv.com/world-news/sri-lanka-to-introduce-law-against-religious-slander-on-social-media-4075023>; accessed 18 August 2023.

The concept of free expression undoubtedly conflicts with the interest in maintaining religious and racial harmony. It is for this reason that the constitution expressly permits restrictions on freedom of expression on various grounds, including public order, and religious and racial harmony. However, the test laid down in ***Sunila Abeysekera V. Ariya Rubasinghe, Competent Authority and others*** dictates that such restrictions must be proportionate and should not exceed the legitimate aim of the government. It remains to be seen whether new legislation, which restricts fiction or satire that is not incitement to discriminate or advocate hatred, can satisfy this test.

7. LIMITS ON FREE EXPRESSION

Satire or parody, which no reasonable person expects to be true, was deemed protected speech by the United States Supreme Court in *Hustler v. Falwell*[27]. However, it must be borne in mind that the Constitution of the United States is exceptional in that it guarantees near-absolute free speech, even when such speech is considered hate speech in most other jurisdictions. Sri Lanka's constitution, as discussed before, takes a more restrictive approach; therefore *Hustler v Falwell* has to be interpreted in line with Sri Lanka's constitutional restrictions.

The issue then is whether the satire or fiction should be restricted even in the absence of incitement, to maintain religious or racial harmony and public order, as permitted by Article 15 of the Constitution. In the absence of relevant domestic precedent, the report on Blasphemy[28] by the Venice Commission of the Council of Europe might serve to be useful in guiding both the Sri Lankan legislature and the judiciary in striking a balance between the freedom of expression and prosecution of offending religious feelings.

The key conclusions reached by the Commission can be summarised as follows:

Insult to religious feelings without an element of incitement to hatred should not constitute an offence because penalising insults to religious feelings could give a powerful signal that 'gratuitously' offensive statements and publications are not tolerated in an effective democracy. Therefore, recourse to criminal actions should be reserved for cases where no other remedy is effective, and should only be taken with extreme caution.[29]

Although the boundary between insult to religious feeling and hate speech is blurry, the dividing line should be established through appropriate interpretation of 'incitement to hatred' rather than by

[27] Hustler Magazine, v. Falwell, [1988] 485 U.S. 46.
[28] European Commission for Democracy through Law (Venice Commission), 'Report on the Relationship between Freedom of Expression and Freedom of Religion : The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred' (Handle Proxy, 23 October 2008) <http://hdl.handle.net/20.500.12389/20429> accessed 6 August 2023.
[29] ibid, Para 64-66.

criminalising 'insult to religious feelings. Context of the statements, including the medium of transmission and the position of the speaker should be considered when deciding if it constitutes incitement. [30]

Religious groups in democratic societies should tolerate criminal public statements and debates about their beliefs and practices provided it does not amount to incitement to hatred or discrimination. However, the Venice Commission does not support absolute liberalism as the freedom of expression carries duties and responsibilities on the individual to avoid expressing scorn or to gratuitously offend others.

The Commission supports the approach taken by the European Court of Human Rights in *Gündüz v. Turkey*[31] that it must be possible to hold responsible those who express ideas that 'do not contribute to any form of public debate capable of furthering progress in human affairs' and cause damage. In such cases, the appropriate cause of action should be claiming damages, without excluding possible cause of action in public disorder offences.[32]

However, it must be possible to criticise religious ideas even if they may be perceived by some as hurting their religious feelings. The award of damages must be strictly justified and proportional to avoid having a chilling effect on the freedom of expression.[33] Furthermore, an insult to a principle, dogma or a representee of a religion does not necessarily amount to an insult to an individual who believes that religion, and consideration must be made to distinguish between group libel and individual libel.

Certain individuals have increasing sensitivities regarding insults to religious feelings and have violently reacted to criticism of their religions. In the short term, national authorities must take into account these sensitivities to protect the rights of others, and preserve social peace when deciding to restrict the freedom of expression or not.[34] However, democratic societies must not become hostage to these sensitivities and freedom of expression must not indiscriminately retreat when facing violent reactions. The threshold of individuals may be too low in specific circumstances, and incidents may happen in places other than, or far away, from the original issue, but this should not itself become a reason to prevent any form of discussion on religious matters involving that particular religion; the right to freedom of expression in a democratic society would otherwise be jeopardised.

The responsible exercise of the right to freedom of expression should endeavour to respect the right to respect the religious beliefs or convictions of others. Sensible self-censorship could help to strike a

[30] ibid, Para 68-69.
[31] Application no. 35071/97 (ECtHR, 14 June 2004) as cited in ibid.
[32] ibid, Para 72-74.
[33] ibid, Para 76.
[34] ibid 79-80.

balance. Refraining from uttering certain statements can be acceptable when it is done in order not to gratuitously hurt the feelings of other persons, but not when it is done out of fear of violent reactions.[35]

In drafting the new anti-blasphemy law, Sri Lanka, being a democracy, should take into consideration the report's conclusion that offending religious feelings should not by itself constitute an offence in the absence of incitement. The legal framework, as it stands, already incorporates much of the Commission's suggestions; the incorporation of the Rabat test enables acts to be analysed in context, and to distinguish between incitement and offending feelings. Nevertheless, as the Commission recommends, absolute liberalism is not a recommended approach; speech without incitement that does not contribute to the 'progress of human affairs' and that causes damage should be subject to criminal sanctions as a last resort, especially given Sri Lanka's history. However, it is necessary in a democratic society like Sri Lanka that all groups be able to withstand criticism for otherwise it would have a chilling effect on all citizens and stifle human progression. Moreover, the abnormal sensitivities of one person or a group of people resulting in violent reactions to free expression should not be a reason for stifling free thinking in a democratic state; doing so would allow violent reactionaries to hold society, hostage.

8. CONCLUSION

Sri Lanka's existing legal framework is sufficient to maintain religious and racial harmony as would be needed in a democratic society. The current law may arguably be overbroad, and the way forward should be to define the existing offences narrowly and uniformly enforce the law without favouring one community over another.

To conclude, in the words of Baroness Onora O'Neill, 'Offence is in the eye of the beholder, and any attempt to make offensive speech unlawful would place everybody's freedom of expression at the mercy of others. It would undermine the right to freedom of expression.'[36]

[35] ibid 82-83.
[36] Onora O'Neill, 'Should it be an offence to offend?' (Equality and Human Rights Commission, 14 December 2015) <https://www.equalityhumanrights.com/en/our-work/blogs/should-it-be-offence-offend> accessed 6 August 2023.

PUBLIC INTERNATIONAL LAW

REGIME GOVERNING THE LEGALITY OF THE USE OF ARMED FORCE IN THE RUSSIAN INVASION OF UKRAINE

George Kiralos Abdelmassih

ABSTRACT

The ongoing war in Ukraine has raised many questions regarding the regime governing the legality of the use of force. The use of force is prohibited on an international level through public international law under treaty, and through customary international law. However, there are exceptions that preclude the wrongfulness of the use of force. The Russian Federation has defended its actions in Ukraine through several exceptions. With claims that they acted in self-defence, for humanitarian intervention, and through an invitation. The law governing the use of force and the valid exceptions that can be used by the Russian Federation concerning their actions in Ukraine and the criteria that must be met for these exceptions to be permissible will be examined. Public international law will be viewed to see if the treaties and laws set after the second world war still stand strong in contemporary politics, or if there are holes that need to be patched by relying on customary international law, to accommodate advancement in technology and great political, economic, and social changes. This article argues that the exceptions used by the Russian Federation albeit available for them to use under international law, the criteria for them to be used in this scenario has not been met and therefore the wrongfulness of the use of armed force in Ukraine cannot be precluded.

1. INTRODUCTION

International law concerning the use of force is divided into two parts. Firstly, *jus ad bellum*, refers to the conditions under which states may resort to war or to the use of armed force in general. Secondly, *jus in bello,* which are rules that regulate the conduct of parties engaged in an armed conflict, also called International Humanitarian Law (IHL). IHL seeks to minimize suffering in armed conflicts, notably by protecting and assisting all victims of armed conflict to the greatest extent possible, an example of that would be the Geneva conventions.[1]

This article will only discuss *jus ad bellum* rules, firstly, by discussing the laws prohibiting the use of force. Then, by analysing exceptions to the prohibition of the use of force. This is all to help assess the Russian Federation's reliance on the exceptions of self-defence, humanitarian

[1] 'What are jus ad bellum and jus in bello?' (International Committee of The Red Cross, 22 January 2015) <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello 0%EF%BB%BF#:~:text=Jus%20ad%20bellum%20refers%20to,of%20armed%20force%20in%20general> accessed 31 May 2023.

intervention, and invitation in its bid to exclude the wrongfulness of its invasion of Ukraine. Lastly, this article will assess whether the increased breaches of the prohibition of the use of force due to gaps in public international law will lead to a higher dependency on customary international law to help maintain order in an otherwise chaotic international realm.

2. BRIEF HISTORY

In the past decade, Russian intervention in the affairs of its Ukrainian neighbour has grown until it escalated into a full armed conflict in February 2022. Following the annexation of Crimea in 2014, two territories from eastern Ukraine proclaimed their separation from Ukraine under the names 'Donetsk People's Republic' and 'Luhansk People's Republic.' The Russian government supplied the region with heavy weaponry and has been considered responsible for turning local grievance into major violence.[2] On 21 February 2022, the Russian Federation issued legislation recognising both the Donetsk People's Republic and the Luhansk People's Republic and promising support to pacify the region through military operations. On 24 February 2022, the President of Russia, Vladimir Putin in an address to the people of Russia announced that he had authorised a special military operation against Ukraine, starting a war that is still on-going. The invasion was preceded by a Russian military build-up along Ukraine's borders, as well as by a series of Russian cyberattacks on Ukrainian government and military websites. The invasion has also significantly impacted the global economy and led to a sharp increase in energy prices.

3. PROHIBITION OF THE USE OF FORCE

Although there is no widely agreed upon definition of what force means in the UN charter, UN General Assembly resolution 3314 provides that, 'Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State…'[3] Further, UN General Assembly resolution 2625 refers to the use of force as physical and armed force.[4] It is important to note that General Assembly resolutions are not binding law, unless they contain customary international law provisions, only then do they establish general practice that is recognized by international law.

Further, the arming of rebels, sending of armed bands, groups or mercenaries that conduct acts of armed force amounts to a breach of article 2(4).[5] The non-aggressive use of force, as was seen by the United Kingdom's minesweeping operations in Albanian territorial water in the *Corfu Channel*

[2] T de Waal, "Uncertain Ground: Engaging with Europe's De Facto States and Breakaway Territories" (3 December 2018) < https://carnegieeurope.eu/2018/12/03/uncertain-ground-engaging-with-europe-s-de-facto-states-and-breakaway-territories-pub-77823> accessed 16 May 2023.
[3]UNGA Res 3314 (XXIX) (14 December 1974).
[4] UNGA Res 2625 (XXV) (24 October 1970).
[5]Nicaragua v United States of America (merits) [1986] ICJ Rep 14.

case,[6] was interpreted under article 2(4) as a use of force due to the United Kingdom breaching Albania's territorial integrity. In the *Armed Activities on the Territory of the Congo* case, the ICJ qualified military occupation as a use of force.[7]

The International Law Commission has noted that the prohibition of aggression is accepted as a *jus cogens* norm. In its report it states that *jus cogens* is a norm "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted…"[8]

The use of force is prohibited under international customary law, as was affirmed by the International Court of Justice (ICJ) in the *Case concerning Military and Paramilitary Activities in and Against Nicaragua*.[9] Where it states that for customary law to come to fruition there must be a state practice that has occurred over a prolonged period of time, this is arbitrary and may vary from case to case, and there must be *opinio juris* among those partaking in this particular practice. *Opinio juris* requires that those partaking in a practice believe that there has become a legal obligation, not just mere usage.

Further it is prohibited under public international law in the form of treaties, most notably the UN Charter. Article 2(4) of the Charter states that, 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations.'[10] The prohibition of the use of force was one of the main building blocks of the UN when being set up in 1945, after two catastrophic world wars, it aimed to prevent a third world war from happening. The ICJ called the prohibition of the use of force a cornerstone of the UN Charter.[11]

Keeping in mind that all members of the UN are obliged to at least try to settle their disputes peacefully as directed under article 2(3) of the Charter which states, 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'[12] There are times where article 2(3) was invoked by the UN Security Council (UNSC), albeit with varying degrees of success. In 1982, UNSC adopted Resolution 502,[13] which called on Argentina and the United Kingdom to cease hostilities and negotiate a peaceful settlement of the Falklands War. In 1991, the UNSC adopted Resolution 687,[14]

[6]UK v Albania (Merits) [1949] ICJ Rep 4.
[7]Democratic Republic of the Congo v. Uganda (Request for the Indication of Provisional Measures) [2000] ICJ.
[8]UNGA 'Report of the International Law Commission' UN GAOR 74th Session Supp No 10 UN Doc A/74/10 (2019).
[9](n 5).
[10]United Nations 'Charter of the United Nations' 1 UNTS XVI (1945).
[11](n 7).
[12](n 10).
[13] UNSC Res 502 (3 April 1982) UN Doc S/RES/502.
[14] UNSC Res 687 (9 April 1991) UN Doc S/RES/689.

which established a cease-fire between Iraq and Kuwait and called for the peaceful resolution of the Gulf War. Further, article 2(3) allows the UNSC to deploy UN peacekeeping forces to help maintain peace, as was done in 1964 when UN peacekeeping force (UNFICYP) was sent to maintain the peace between Greece and Turkey on the island of Cyprus.

4. EXCEPTIONS TO THE PROHIBITION OF THE USE OF FORCE

4.1 Self-defence

The main exception to the prohibition of the use of force is self-defence, set out in in customary international law by the Caroline incident and under treaty by article 51 of the UN Charter.

The Caroline incident was a 19th-century incident in which British forces attacked an American steamboat, the Caroline, on the Niagara River, which separates the United States and Canada.[15] The British claimed that the Caroline was being used by Canadian rebels to attack British targets, and that the attack was therefore justified as self-defence. The Caroline incident is important to self-defence under customary international law because it established a set of criteria that states must meet to use force in self-defence, these criteria, have become known as the Caroline doctrine. First, the necessity of the action, the use of force must be necessary to prevent an imminent attack. Secondly, the immediacy of the threat, the attack must be imminent, not merely potential, or hypothetical. Third, the proportionality of the response, the use of force must be proportionate to the threat. Lastly, the exhaustion of all peaceful means, the state must have exhausted all peaceful means before resorting to force.[16]

Under treaty article 51 of the UN Charter states 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security…'[17] Two schools of thought exist regarding the interpretation of article 51.[18] First, the restrictive school, these scholars interpret article 51 and international customary law to meaning that there is no right to lawful self-defence absent of an armed attack.[19]

[15] MB Occelli, '"Sinking" the Caroline: Why the Caroline Doctrine's Restrictions on Self-Defense Should Not Be Regarded as Customary International Law' (2003) 4 San Diego Int'l LJ 467.
[16]JA Green, 'The 'ratione temporis' elements of self-defence' (2015) 2(1) Journal on the Use of Force and International Law 1.
[17](n 10).
[18]RJ Erickson, *Legitimate use of Military Force Against State-Sponsored International Terrorism* (Air University Press 1989) 140-141.
[19]Y Dinstein, War, Aggression and Self-Defence (5th edn Cambridge University Press 2011) 167.

Second, the expansionist school, these scholars put forward forms of self-defence that do not wait for an actual armed attack to occur, these views have gained traction in recent years.[20]

4.1.1 Preventative self-defence

The first type of self-defence is preventative self-defence. It is employed in response to any form of attack that has not yet occurred, this is not consistent with the literal interpretation of article 51 used by scholars in the restrictive school of thought. [21] It can be ascertained that the use of force in response to a threat was lawful under the pre-charter custom of the Caroline incident. This type of self-defence gains particular potency with rising political tensions and the nature of modern weaponry delivery systems. [22] Especially considering the nuclear capabilities held by many States today, it is safe to assume that no State will voluntarily stand by as another plans for its destruction.[23]

Judge Schwebel in his dissenting opinion in the *Nicaragua* case, while interpreting article 51, commented that the article does not explicitly state that 'if and only if an armed attack occurs'.[24] If it was interpreted in such a way, a state would be forced to withstand a devastating first strike before using force.[25] However, Josef Kunz argues that preventative war is prohibited under article 51.[26]

Israel used the guise of preventative self-defence to attack the Osirak nuclear reactor in Iraq in 1981. Israel claimed that the reactor was being built to produce nuclear weapons, and that it posed an imminent threat to Israel's security. The UNSC adopted resolution 487, which described the attack as a "clear violation of the Charter of the United Nations and the norms of international conduct."[27]

4.1.2 Pre-emptive self-defence

[20]A Garwood-Gowers, 'Israel's Airstrike on Syria's Al-Kibar Facility: A Test Case for the Doctrine of Pre-emptive Self-Defence?' (2011) 16 Journal of Conflict and Security Law 263.
[21]C Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (1st edn, Routledge 2010) 173.
[22]A Deeks, 'Taming the Doctrine of Pre-Emption' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 661.
[23]TM Franck, 'Who Killed Article 2(4) Or: Changing Norms Governing the Use of Force by States' (1970) 64 The American Journal of International Law 809.
[24] DW Bowett, *Self-Defence in International Law* (Manchester University Press, 1958), 197-199.
[25]LR Beres, 'On International Law and Nuclear Terrorism' (1994) 24 Ga J Int'l & Comp L 1.
[26]JL Kunz, 'Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations' (1947) 41 American Journal of International Law 872.
[27] UNGA Res 487 (6 December 1991) UN Doc A/RES/46/39.

Building on preventative self-defence is pre-emptive self-defence. It was presented by the United States in 2002 under the Bush administration, although the concept was present before that.[28] The concept refers to responding to a perceived threat that is temporarily remote.[29] The 'Bush doctrine' as it has been later called was at first viewed as a revolutionary interpretation of self-defence,[30] but was later overwhelmingly rejected by scholars. [31] There are four elements to the Bush doctrine; there must be a strong belief in a state's domestic regime in determining its foreign policy, the perception that great threats can be defeated by new and vigorous policies such as preventative war, a willingness to act unilaterally and an overriding sense that peace and stability require the US to assert its primacy in international politics.[32] What makes the Bush doctrine different is that it seeks to relax the traditional requirement of necessity.[33] The invasion of Afghanistan in 2001, the invasion of Iraq in 2003 and drone strikes in Pakistan, Yemen, and Somalia against suspected terrorists were all attacks done under the guise of the Bush doctrine.

Due to the UN Charter's silence on defending against an anticipated attack, the presumption that pre-emptive attacks are lawful exists.[34] As it would be against reason and nature, particularly in a nuclear age, to interpret article 51 literally to preclude a victim from using force in self-defence if and only if an armed attack has occurred.[35] By the time imminent use of weapons of mass destruction (WMD) has been established, it may be too late to take any kind of successful pre-emptive action.[36] As international law relating to the use of force developed over the centuries and culminated in the UN Charter, the main purpose of the law was to address conventional threats posed by conventional actors, states. Rogue states, terrorists and WMDs pose threats not anticipated by international law. The National Security Strategy (NSS) of the United States issued in September 2002 stated that, "we must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."[37]

[28]T Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press, 2005) 138.
[29](n 16).
[30] C Gray, 'The US National Security Strategy and the New "Bush Doctrine" on Pre-Emptive Self-Defence' (2002) 1 Chinese Journal of International Law 437.
[31]C Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 San Diego International Law Journal 7.
[32] R Jervis, 'Understanding the Bush Doctrine' (2003) 118 Political Science Quarterly 365.
[33] AC Arend, 'International Law and the Preemptive Use of Military Force' (2003) 26:2 The Washington Quarterly 89.
[34]BM Polebaum, 'National Self-Defense in International Law: An Emerging Standard for a Nuclear Age' (1984) 59 NYU L Rev 187.
[35](n 23).
[36] ibid.
[37] White House, *National Security Strategy of the United States of America* (Washington, DC: White House, 2002), <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>

4.1.3 Anticipatory self-defence

Anticipatory self-defence follows pre-emptive self-defence as it adds the criterion for imminence,[38] acting in response to an imminent armed attack.[39] The term anticipatory refers to the ability to foresee consequences of future actions and take measures to counter those consequences,[40] it is the use of force by a state to rebel an attacker before an attack has occurred.[41] It is important to note however that there is still a degree of uncertainty in regard to the definition of imminence.[42] The Caroline incident is relevant to this day in regard to anticipatory self-defence to help in understanding the imminency criterion.[43] As was seen above the Caroline doctrine stated that to prove imminent danger and necessity for self-defence it would be for the state to prove that an armed attack is instant, overwhelming, leaving no choice of means, and no moment for deliberation.[44]

According to scholars in the expansionist school of thought, the right to anticipatory self-defence falls under international customary law, in certain circumstances, and survives under article 51. The NSS argued that, "the greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack."[45] George Walker states that due to mutual defence treaties having continued providing for anticipatory self-defence, it still exists in international customary law as such treaties show *opinio juris*.[46] Both the report of the UN 'High Level Panel on Threats Challenges and Change' in 2004[47] and the Secretary General's response to it in 2005 'In Larger Freedom'[48] endorse lawful anticipatory self-defence when imminence can be proved. The United States used anticipatory self-defence to bomb Libya in 1986. The US claimed that Libya was behind a terrorist attack on the "LaBelle" nightclub, a location in Berlin, West Germany

[38]n (21).
[39](n 16).
[40]CC Joyner, AC Arend, 'Anticipatory Humanitarian Intervention: An Emerging Legal Norm' (1999-2000) 10 US AF Acad J Legal Stud 27.
[41]MF Lohr, 'Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism' (1985) 34 JAG J 1.
[42] N Lubell, 'The Problem of Imminence in an Uncertain World' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 714.
[43]MM Lacey, 'Self-Defence or Self-Denial: The Proliferation of Weapons of Mass Destruction' (2000) 10:2 Ind Int'l & Comp L Rev 293.
[44](n 15).
[45] (n 16).
[46]GK Walker, 'Information Warfare and Neutrality' (2000) 33 Vand J Transnat'l L 1079.
[47]UNGA 'Report of the High-level Panel on Threats, Challenges and Change' UN Doc A/59/565 (2004).
[48]UNGA 'In larger freedom: towards development, security and human rights for all' UN Doc A/59/2005/Add 1 (2005).

frequented by American military personnel. Therefore, it found it justified to use force to prevent future attacks. [49]

However, Philip Jessup, in his book *A Modern Law of Nations*, argues that under strict interpretation of the UN Charter alarming military preparations would justify a resort to the security council and does not justify resorting to anticipatory force by the state which feels threatened. This strict interpretation is further followed by Ian Brownlie,[50] and Michael Glennon.[51]

4.1.4 Interceptive self-defence

Lastly, it leads to the principle of interceptive self-defence, this is a term coined by Yoram Dinstein.[52] Interceptive self-defence counters an armed attack which is in progress, even if still is developing. The attack is imminent and practically unavoidable according to Dinstein.[53] This is the only type of self-defence that follows the restrictive school of thought.

This is a very literal interpretation of article 51, where self-defence is only lawful when an armed attack has occurred or is occurring. Once the aggressor has committed itself to an armed attack in an ostensibly irrevocable way, a state can take forceful action against that state within the boundaries set by the UN Charter.[54] This form of self-defence is unquestionably lawful as it only concerns actions that are already underway.[55]

4.2 Collective Security

The UN Charter also provides for the exception of collective security through the United Nations Security Council. Hans Kelsen, in his book *Principles of International Law*, argues that article 51 restricts the right to self-defence of states until the security council intervenes. Article 39 allows for the UNSC to determine the presence of a threat to the peace. Should a threat be found article 41 allows UNSC to, 'decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."[56] Examples of this would be the arms embargo against Southern Rhodesia in

[49] J A McCredie, 'The April 14, 1986, Bombing of Libya: Act of Self-Defense or Reprisal' (1987) 19 Case W Res J Int'l L 215.
[50]I Brownlie, 'The Use of Force in Self-Defence' (1961) 37 Brit Y B Int'l L 183.
[51] M J Glennon, 'The Fog of Law: Self-Defence, Inherence, and Incoherence in Article 51 of the United Nations Charter' (2002) 25 Harv JL & Pub Pol'y 539.
[52]Y Dinstein, *War, Aggression and Self-Defence* (5th edn Cambridge University Press 2011) 194.
[53] ibid.
[54] ibid.
[55]T Ruys, 'Armed Attack' and Article 51 of the UN Charter (Cambridge University Press 2010) 127.
[56] (n 10).

1966, which was imposed in response to the country's illegal declaration of independence.[57] The economic sanctions against Iraq in 1990, which were imposed after the country's invasion of Kuwait.[58] The travel ban against Sudan in 2005, which was imposed in response to the country's support for terrorism.[59]

If the peaceful methods stated in article 41 fail to achieve the desired goal of peace and security, then the UNSC can rely on the powers given to it in article 42 which states that, "it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[60] The UNSC passed a resolution in response to the Iraqi invasion of Kuwait in August 1990. The resolution authorized the use of all necessary means to liberate Kuwait and restore its sovereignty the United States and its allies subsequently launched Operation Desert Storm.[61]

4.3 Invitation

An invitation of foreign troops could preclude the wrongfulness of the use of force. As the invitation doctrine allows a foreign state to lawfully send troops to another state upon invitation for certain limited operations.[62] The ICJ touched on the issue of consent in the *Nicaragua* case when it stated that a foreign intervention is 'allowable at the request of the government of a state'.[63] When consent is given or an invitation is sent by one state to another to carry our military operations in its territory, such operations must fall under the parameter of the consent given.[64] As was in the limited time Ugandan troops were invited into the Congo to assist the government, however there was a breach by Ugandan forces when the Congolese government withdrew the consent given through the invitation and Ugandan forces refused to leave.[65]

The international community has generally accepted that intervention by invitation is lawful in certain circumstances. These circumstances include when the invitation is genuine and freely given, when the force used is proportionate to the threat that is being addressed, and when the force used

[57] UNSC Res 232 (16 December 1966) UN Doc S/RES/232.
[58] UNSC Res 661 (6 August 1990) UN Doc S/RES/661.
[59] UNSC Res 1591 (29 March 2005) UN Doc S/RES/1591.
[60] (n 10).
[61] UNSC Res 678 (29 November 1990) UN Doc S/RES/678.
[62] L Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 BRITISH YB INT'L L 189.
[63] (n 5).
[64] (n 7).
[65] ibid.

is necessary to achieve the legitimate objective of the intervention.[66] An example of such invitation would such as the one in 2015 when the Syrian government of Bashar al-Assad was facing a major challenge from rebel forces. Russia intervened in Syria at the invitation of the Syrian government. The intervention has been controversial, but it has helped to tip the balance of power in favour of the Syrian government.[67]

It is important to note that not all invitations are legal. If the invitation was given by a government that is not the legitimate government of the state, or if the invitation is used to further the interests of the intervening state rather than the interests of the inviting state, then the intervention may be considered illegal.

4.4 Humanitarian Intervention

Lastly, humanitarian intervention, it is the use of armed force by a state across its borders with the intention to end severe and widespread human rights violations of individuals other than the citizens of the intervening state. Humanitarian intervention only applies in extreme circumstance. No consent needs to be given by the state where the violations are occurring for foreign armed personnel to enter.[68] Similarly to invitation, a state can request foreign military intervention to supress rebels acting against the government.[69] However, its use is controversial under international law if the intervention was not authorised by the UNSC. International law has not yet recognized humanitarian intervention on behalf of individuals within a state, [70] only a state may make the request for assistance. [71] Regarding self-defence, unilateral humanitarian intervention does not meet the criteria for lawful self-defence.[72]

Humanitarian intervention was seen in 1999 as the Serbian government of Slobodan Milosevic was engaged in a campaign of ethnic cleansing against the Kosovar Albanians. The North Atlantic Treaty Organization (NATO) intervened in Kosovo at the invitation of the Kosovar Albanian leadership. The intervention was successful in ending the ethnic cleansing and in protecting the Kosovar Albanians.[73] Also in 1994 the democratically elected government of Jean-Bertrand

[66] C Kenny, S Butler, 'The Legality of 'Intervention by Invitation' In Situations Of R2P Violations' (2018) 51 International Law and Politics 135.
[67] L Visser, 'Russia's Intervention in Syria' (*EJIL:Talk!*, 25 November 2015) <https://www.ejiltalk.org/russias-intervention-in-syria/> accessed 28 May 2023.
[68]TB Seybolt, Humanitarian Military Intervention: The Conditions for Success and Failure (Oxford University Press, 2008) 5-6.
[69]O Gross, 'Unresolved Legal Questions concerning Operation Inherent Resolve' (2017) 52 Tex Int'l L J 221.
[70]ibid.
[71]Y Dinstein, *War, Aggression and Self-Defence* (6th edn, Cambridge University Press, 2017) 317, 320–321.
[72]B Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 EJIL 1.
[73] L Henkin, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 The American Journal of International Law 824.

Aristide was overthrown by a military coup. The United States intervened in Haiti at the invitation of Aristide, who had fled to the United States. The intervention was successful in restoring Aristide to power and in preventing a humanitarian crisis, however this success was short lived.[74]

5. THE RUSSIAN ARGUMENT

When the invasion of Ukraine is looked through the lens of General Assembly resolution 3314, Russia ticks every box regarding aggression.[75] President Vladimir Putin in his speech on 24 February 2022 claimed that NATO's eastward expansion and its efforts to bring its military infrastructure closer to Russia causes a very real threat to Russia, and to its very existence and sovereignty.[76] While the argument that NATO build-up in Russia's bordering states and the failure for NATO to recognize and address Russian security concerns has been seen by numerous scholars as Russia being forced into a war, however even if true, this does not eliminate the wrongfulness of an armed attack against Ukraine.[77]

Conversely, Russia has advanced every possible exception to the prohibition of the use of force to provide legal cover to its action. [78] This has included: self-defence, humanitarian intervention, and invitation. On 21 September 2022, in his address President Vladimir Putin reaffirmed his reasons to continue the military operation in Ukraine.

On 27 February 2022, three days after the Russian invasion of Ukraine had started, the UNSC members voted to allow the UN General Assembly to convene the eleventh emergency special session after Russia had vetoed a resolution that would have condemned the invasion of Ukraine. This is in line with UN General Assembly resolution 337 A (V), widely known as 'Uniting for Peace', where it states "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security … the General Assembly shall consider the matter immediately…"[79]

---

[74] HF Carey, 'The UN Humanitarian Intervention in Haiti and the Development of a Human Rights Enforcement Regime' (1997) ¾ Journal of Haitian Studies 30.
[75] JA Green, C Henderson and T Ruys, 'Russia's attack on Ukraine and the jus ad bellum' (2022) 9 Journal on the Use of Force and International Law < https://doi.org/10.1080/20531702.2022.2056803> accessed 3 January 2023.
[76] M Gavendova, 'Is the Russian invasion of Ukraine justifiable from the view of public international law?' (Czech Centre for Human Rights and Democracy, 19 May 2022) <https://www.humanrightscentre.org/blog/russian-invasion-ukraine-justifiable-view-public-international-law> accessed 3 January 2023.
[77] CFJ Doebbler, 'Russia's Use of Force Against Ukraine: An International Law Perspective' (Jurist, 2 March 2022) < https://www.jurist.org/commentary/2022/03/curtis-doebbler-russia-use-of-force-against-ukraine/> accessed 3 January 2023.
[78] 'Implications Of The War In Ukraine Under International Law – Part 1'(Jus Mundi, 29 April 2022) <https://blog.jusmundi.com/implications-of-the-war-in-ukraine-under-international-law-the-use-of-force-under-international-law/> accessed 3 January 2023.
[79] UNGA Res 377 (3 November 1950) UN Doc A/RES/377.

At the UN General Assembly's resumed eleventh emergency special mission, as the conflict enters its second year, the world body adopted a resolution demanding, "that the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders and calls for a cessation of hostilities." There were 141 states in favour, seven against and 32 abstentions, showing that there has not been much support to the Russian arguments.

5.1 Argument 1: Self-defence

As was seen above regarding pre-emptive self-defence and anticipatory self-defence there is substantial evidence and state practice regarding article 51, that it is not limited to an already occurred attack or an actively occurring attack, it also includes imminent attacks. [80] This interpretation of article 51 was used by the United States during the invasion of Iraq and in this scenario used by Russia against the threat caused by NATO's expansion.[81] Russia's reliance on the exception of pre-emptive self-defence is misplaced, as there was no actual attack or an imminent attack from Ukraine, which Russia has launched an armed attack against, or any imminent threat from NATO that warrants the use of force.[82] The use of force in self-defence against an attack that cannot be proven to be imminent is unquestionably unlawful, in state practice there should be no toleration for the Bush doctrine of pre-emptive self-defence.[83] "To rely on pre-emptive self-defence is as baseless as it was in 2003 as it is in 2022, as it signals that military action is governed by national discretion rather than international law."[84] If a state perceives for there to be a threat, even if the threat is only temporarily remote it should turn to the Security Council or use measures not including the use of force.[85] Even if there were enough grounds to justify pre-emptive self-defence, the Caroline test of proportionality has not been fulfilled to satisfy self-defence under anticipatory self-defence or customary international law.

5.2 Argument 2: Humanitarian Intervention

On the defence of humanitarian intervention, there seem to be two major gaps in Russia's arguments. Firstly, the authorization of the security council is necessary for humanitarian intervention. The ICJ was willing to take Russia's concerns for genocide to be permissible to

[80] C Henderson, *The Use of Force and International Law* (Cambridge University Press, 2018) 277–281.
[81] C Henderson, 'The Bush Doctrine: From Theory to Practice' (2004) 9 Journal of Conflict and Security Law 3.
[82]'Implications Of The War In Ukraine Under International Law – Part 1' (Jus Mundi, 29 April 2022) <https://blog.jusmundi.com/implications-of-the-war-in-ukraine-under-international-law-the-use-of-force-under-international-law/> accessed 3 January 2023.
[83](n 16).
[84]A Chayes, *The Cuban Missile Crisis* (Oxford University Press, 1974) 65–6.
[85]ibid.

warrant humanitarian intervention, however, there seems to be a lack of evidence provided by Russia regarding any ongoing human rights violations in eastern Ukraine.[86]

Even if arguments about humanitarian intervention can be proven, they are of tenuous legal foundation as under international law unilateral humanitarian intervention, intervention carried out without the authorization of the security council, is unlawful.[87] Further, only a state can seek assistance regarding humanitarian intervention, as was mentioned above international law has not yet recognized individuals within the state to seek assistance on the grounds of humanitarian intervention.

5.3 Argument 3: Invitation

Further, the Russian Federation claimed it was responding to an invitation from the two separatist states in eastern Ukraine, the Donetsk People's Republic (DPR) and the Luhansk People's Republic (LPR). The DPR and LPR are self-declared states that broke away from Ukraine in 2014. They are not recognized as independent states by any country, including Russia. However, Russia has provided significant military and financial support to the DPR and LPR and has stationed troops in the region.[88] On February 21, 2022, the leaders of the DPR and LPR issued a joint appeal to Russian President Vladimir Putin, asking for military assistance. In the appeal, the leaders claimed that Ukraine was planning to launch a military offensive against the DPR and LPR and that they were in danger of imminent attack. Putin responded to the appeal by announcing that Russia would recognize the DPR and LPR as independent states. He also announced that Russia would send "peacekeeping" forces into the Donbas region of eastern Ukraine, including the territory controlled by the DPR and LPR.

The claim that Russia acted in response to an invitation from the DPR and LPR has been widely disputed. There is no evidence that Ukraine was planning to launch a military offensive against the DPR and LPR. The Ukrainian government had repeatedly offered to negotiate with the separatists to resolve the conflict peacefully.[89] There is no evidence that Ukraine posed an imminent threat to Russia. The claim that Russia acted in response to an invitation from the DPR and LPR is not

[86] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation), Order of 16 March 2022, Request for the indication of provisional measures, ICJ Rep (16 March 2022).
[87] O Gross, 'Applying the Extra-Legal Measures Model to Humanitarian Interventions: A Reply to Devon Whittle' (2015) 26 EJIL 699.
[88] M Milanovic, 'The Legality of Russia's Use of Force in Ukraine' (2023) 34 The European Journal of International Law 309.
[89] MJ Glennon, 'Russia's Invasion of Ukraine: A Legal Analysis' (2023) 117 The American Journal of International Law 354.

credible.[90] As was previously mentioned an invitation given by a government that is not the legitimate government of the state, or the invitation is used to further the interests of the intervening state rather than the interests of the inviting state, then the intervention may be considered illegal. Murphy also argues that even if the separatists did have the authority to invite foreign military intervention, Russia's use of force would still be illegal because it was not necessary and proportionate. Russia could have achieved its objectives through other means, such as diplomacy or economic sanctions.[91]

6. ARE GAPS IN THE INTERNATIONAL LEGAL FRAMEWORK INCREASING THE DEPENDENCY ON CUSTOMARY INTERNATIONAL LAW

This conflict has been critical to the international community's view on public international law, mainly the law that deals with the use of force. While gaps in the law may cause it to be void, custom always persists and cannot be ignored. Customary international law is not subject to ratification, reservations, or amendments as it simply entails the practice of the states over a prolonged period that led those participating to believe it has become the law.

When the UN charter was adopted in 1945, its writers sought to prevent the types of conflict that had preceded it. Its focus was stopping another major war and did not look at weapons of mass destruction and terrorism, hence leaving gaps in the law. When there are gaps in the legislation states fall back to customary international law. Anticipatory self-defence, which has its origins in CIL, is necessary and practiced by states to this day.[92] Myers McDougal and Florentino Feliciano, in their book *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, argue that in the preparatory work leading to the UN charter, the UN members did not intend for article 51 to narrow the scope of CIL regarding self-defence. Since there is no mention of anticipatory self-defence in the UN charter, it cannot be taken to be interpreted as excluding anticipatory self-defence as the charter did not intend to eliminate the customary right to self-defence.[93] The use of armed force outside the charter has not changed the customary rules regarding self-defence as there is no explicit deniability in the charter that limits the customary right to self-defence to only after an attack has occurred, as argued by Claud Waldock. The growing fashion of small-scale wars, has led to enforcement of article 2(4) through the UNSC being more difficult, as national self-interest of the superpowers has usually won out over treaty obligations.[94] This seems to be a reoccurring theme as breaches on the use of force are not being addressed due to a divided

[90] SD Murphy, 'The Use of Force in Ukraine: A Response to Russia's Legal Arguments' (2023) 48 The Yale Journal of International Law 307.
[91] ibid.
[92] D Bowett, 'Reprisals Involving Recourse to Armed Force' (1972) 66 American Journal of International Law 1.
[93] O Schachter, 'The Right of States to Use Armed Force' (1984) 82 Mich L Rev 1620.
[94] (n 23).

UNSC.[95] State practice seems to sway away from international custom set in the Caroline doctrine,[96] as a state that is powerful enough and willing to use force would use military force against a threat without justifying imminence.[97]

Secondly, the increasing number of humanitarian interventions could be seen as changing *opinio juris* on use of force, as it has led to the decline on the prohibition of the use of force. [98] This is due to powerful states treating the charter with cavalierly, taking note of the west's intervention in Kosovo, Iraq, and Libya.[99] For a customary law to form state practice must be proven and presence of opinio juris, regarding humanitarian intervention there seems to be an increasing trend in state practice, however *opinio juris* is still left to be determined as there is no general consensus.

7. CONCLUSION

The most recent use of force by the Russian Federation against Ukraine has led to many states reassessing the regime governing the use of armed force. To do so, jus ad bellum rules were discussed. Article 2(4) of the UN Charter prohibits the use of force. However, this is not strictly followed. Many exceptions have been used to preclude the wrongfulness of the use of force, both under public international law and customary international law. The main exception states use is self-defence; self-defence is an exception provided for under international law in article 51 of the UN Charter and under CIL through the Caroline doctrine. Self-defence is the only defence with widely varying degree of interpretation; the restrictive school of thought say that self-defence can only be interceptive, happening only after an attack has already occurred. However, recently broader interpretations have emerged to deal with advancements in weapon delivery systems, terrorism, and rouge states. In the expansive school of thought are preventative self-defence, pre-emptive self-defence, sometimes referred to as the Bush Doctrine, and anticipatory self-defence, the only self-defence under CIL.

Further, under articles 41 and 42 of the UN Charter provide that collective security through the UNSC can preclude the wrongfulness of using force against a state by relying on a resolution to send troops against a state that is actively in breach of international law. An invitation of troops by a state to another could constitute an exception if the consent given is genuine and freely given, when the force used is proportionate to the threat being addressed, and when the force used is

[95]ibid.
[96](n 93).
[97](n 15).
[98]I Wuerth, 'International Law and the Russian Invasion of Ukraine' (Lawfare, 25 February 2022) <https://www.lawfareblog.com/international-law-and-russian-invasion-ukraine > accessed 3 January 2023.
[99] N Krisch, 'After Hegemony: The Law on the Use of Force and the Ukraine Crisis' (EJIL:Talk!, 2 March 2022) <https://www.ejiltalk.org/after-hegemony-the-law-on-the-use-of-force-and-the-ukraine-crisis/> accessed 3 January 2023.

necessary to achieve the legitimate objective of the invitation. Lastly, the use of force under the guise of humanitarian intervention has seen a rise in usage in recent years. Like collective security, humanitarian intervention must be authorized by the UNSC, as unilateral humanitarian intervention has not yet been deemed lawful.

To justify a military operation in Ukraine, President of the Russian Federation, Vladimir Putin, in his speech addressing the people of Russia, stated that Russia intends to use force under pre-emptive self-defence, humanitarian intervention and an invitation from separatist governments in eastern Ukraine. However, none of the required criteria by the respective defences was met to justify the military operation. This latest use of force by Russia has led many scholars to ask if the gap in public international law can be filled or even substituted by customary international law. Self-defence survives under CIL, however, regarding humanitarian intervention, new customary law might be forming as state practice might suggest, but *opinio juris* is still unclear.

MISCELLANEOUS

THE MISCARRIAGE OF FAST TRACK JUSTICE

Yasith Hathurusinghe | Saundarya Wellaboda

ABSTRACT

By some mistake of the past, we have been programmed as a society to perceive that efficacy is often the best response to a multitude of problems. The imagery of the hourglass is innate in our minds, and the contemporary man is keen to keep track of time to such meticulous detail. Unfortunately, this misconceived notion has also seeped into the legal thinking of modern legal culture, thus giving rise to the maxim 'justice delayed is justice denied'. While research in support of the contrary is scarce, it is vital for one to recognize the plethora of issues which emerge with an over efficient system of justice. Turning a blind eye to these issues have alarming implications and the fact that this has only been recognized by a few is indeed concerning. Inevitably, the prime focus of parliamentarians and policy makers has always been to concentrate on formulating a substantive legal framework without engaging in proactive monitoring. Moreover, the continuing backlog proves that they give little to no regard as to the way the system is realistically and practically administered. Judges have also over-prioritized the need for efficiency for reasons such as public pressure, the surge in disputes being filed daily and also, perhaps as a matter of convenience. It is indeed a pity, as the halls of justice were once considered sacred, however, we are now afraid its sanctity is at risk for the grace of justice has very little time to spare.

1. INTRODUCTION

While speedy justice is often regarded as a desirable outcome, this study delves into the complexities and unintended consequences that can arise from prioritizing speed over other essential aspects to the administration of justice. Primarily, the authors would evaluate reasons as to why the popular consensus has evolved to accept efficiency as a fundamental element of any justice system; the merits surrounding such a notion; whilst appreciating its necessity to those who frequently collide head-on with the system. This equally invites the discussion to question the credibility of the above. Hence, the authors take it upon themselves to dispute the justifications raised in favour of the accepted and conventional outlook, with the aim of depicting that efficiency does not necessarily equate to the workings of a systemic and balanced justice system. In subsequence, the analysis tempts us to believe that the former reasoning in support of efficiency are merely misconceived perceptions, perhaps generated and given undue emphasis by policy makers. This is reflective of their aim to assess the issue purely from an empirical and statistical

perspective whilst turning a blind eye to the more deep-rooted long-term defects that may tentatively crystalize in the long run.

Secondarily, the article will delve to engage in a critical evaluation concerning several measures undertaken at a global context by different jurisdictions to ensure the efficient resolution of disputes. The focus of the research lands on the findings of the United Kingdom, the United States of America, India and Sri Lanka. The authors, however, would argue that the path taken towards efficiency, despite being a matter of admiration by the majority, is not itself void of shortcomings. Thirdly, on a radical and unconventional stance, the article would highlight the drawbacks and undesirable results of placing efficiency on a pedestal and giving it undue prominence in any legal system. This study entails a discussion on both substantive and practical issues, whilst also evaluating a number of cogent measures undertaken by several leading jurisdictions.

It is the authors' contention that by critically analyzing the disadvantages associated with a rapid justice system, policymakers, legal professionals, and researchers can develop a more nuanced understanding of the trade-offs involved in pursuing efficiency in the delivery of justice. Thus, this research strives to attain a balance and draw a coherent demarcation between an efficient versus a sufficient, systematic, and well-organized judicial procedure.

2. DISPUTING THE POPULAR CONSENSUS.

The authors view the maxim 'justice delayed is justice denied' with a hint of skepticism, despite being the widely accepted and popular consensus of modern legal culture. The discussion first turns into an inquiry as to what 'justice' in this particular context is. It naturally follows the notion that one who seeks redress from a juridical institution is entitled to that form of redress swiftly and efficiently. Leading literature in this area suggests that faster judiciaries and efficient administration of justice are beneficial for economic development and provides incentive to international organizations to adopt a single unifying policy in favor of streamlining judicial procedure and speeding up the resolution of lawsuits.[1] Other studies have also showcased swift justice to be an inevitably and urgent outcome of modernization. This is indeed true given that information technology and electronic support can be of great assistance in developing systematic case management which aid in harnessing a more streamlined and efficient justice system.[2] It is highlighted that the administration should no longer tolerate waste, delay and failure. The individuals who most suffer from these failings include victims and witnesses who have placed

[1] Alessandro Melcarne, Giovanni B. Ramello and Rok Spruk, 'Is Justice Delayed Justice Denied? An Empirical Approach' (International Review of Law and Economics 2020) 65 accessed 20 August 2023.
[2] Tania Sourdin and Naomi Burstyner, 'Justice Delayed is Justice Denied' (*Victoria University Law and Justice Journal 2014)* pp. 49–62.

their trust in the judicial system often during a traumatic period in their life.[3] One litigant participating in a research on delay and injustice commented saying that his case *"…took five years to settle. Each dismissal incurred more costs…[a] simple unfair dismissal case".*[4] Another litigant asked *"[w]hy does something that is so straightforward have to go through such a prolonged process?".*[5] It equally follows that considerable delay in proceedings have human rights implications for the parties involved in the trial as well.[6] Article 14 of the International Covenant on Civil and Political Rights 1967 explicitly recognizes that the right to a fair trial involves the right for a case to be tried without undue delay.[7] In *Shane Edward Williams v The Queen*[8], the defendant appealed to the New Zealand Supreme Court on the basis that there was an undue delay between his date of arrest and trial (almost being 5 years). The court termed this delay as being *"plainly excessive"*[9], resulting in the defendant receiving a reduction of his sentence. As the foregoing illustrates, the need for efficient dispute resolution is a valued and ongoing concept in almost any developed legal system.

Nevertheless, the authors dispute this popular consensus under the argument that 'justice in haste is also justice denied'. Thus, centering our focus on the meaning behind the phrase "justice denied", authoritative sources in the area suggest that the denial of justice is traditionally defined as any gross miscarriage of justice by domestic courts resulting from the ill-functioning of the State's judicial system.[10]

On this note, in order to empirically test the theory that justice delayed is actually justice denied, one must primarily discuss whether the performance of judiciaries (in its quantitative dimension) would contrast with the overall quality of the 'justice' delivered by courts. In other words, is there a trade-off between the timeliness and quality of justice?[11] In addressing this concern, while it was established above that, a speedy justice system not only fosters economic development but also facilitates the convergence of international organization policies and aligns with the transformative

[3] Ministry of Justice, '*Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System*' [July 2012].
[4] Comment in plaintiff focus group (conducted at the Law Institute of Victoria 10 July 2008) accessed 21 August 2023.
[5] Comment in plaintiff focus group (conducted at the Law Institute of Victoria 10 July 2008).
[6] Equality and Human Rights Commission 'Article 6: Right to a fair trial' (Article 6: Right to a fair trial, 03 June 2021) <https://www.equalityhumanrights.com/en/human-rights-act/article-6-right-fair-trial> accessed 20 Aug 2023.
[7] International Covenant on Civil and Political Rights 1967, Part III, Article 14.
[8] Shane Edward Williams v The Queen [2009] 41 NZSC, Wilson J at para. 13.
[9] ibid.
[10] Carlo Focarelli, 'Denial of Justice' (Oxford Public International Law, December 2020). <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e775> accessed 20 Aug 2023.
[11] Alessandro Melcarne, Giovanni B. Ramello and Rok Spruk, 'Is Justice Delayed Justice Denied? An Empirical Approach' (International Review of Law and Economics 2020).

outcomes of modernization, it is vital to remember that justice rushed can be just as detrimental as justice delayed. Accordingly, leading literature in the area states that when judges, juries, or prosecutors are pressured to make hasty decisions simply in the name of speedy justice, they may overlook important evidence or make mistakes. This can lead to wrongful convictions, acquittals of guilty defendants or other unjust outcomes pertaining to the notion that *"Justice hurried is justice buried"*.[12] Likewise, at times, intricate cases that necessitate detailed and patient hearing suffer in the haste to deliver *"some justice"*[13], thereby undermining the integrity of our esteemed legal system, which we still strive to protect.

In support of this statement, the discussion would now turn into case law; namely, *The State vs. Mohammad Afzal*[14], where Afzal Guru, a Kashmiri man was convicted for the conspiracy of the 2001 attack on the Indian Parliament and sentenced to death in 2004. His appeal was rejected by the Indian Supreme Court in 2005 describing Afzal as a *"menace to the society"*, a man whose *"life should become extinct"* to satisfy *"the collective conscience of the society".*[15] Thus, he was executed in 2013, just days after his mercy petition was rejected by the President of India, which have led many individuals including human rights activists and some political parties to criticize the hasty execution while expressing concerns for the fairness of the trial. A number of scholars questioned the court's decision to set aside Afzal's confessional statement as it resulted in the story of a conspiracy linking the ISI, Masood Azhar, Jaish-e- Mohammad, Lashkar-e-Toiba, Ghazi Baba, Tariq and the rest to disappear from the judgement of the court: *"All we've gathered—all that the court judgement tells us— is that five heavily armed men with rather commonplace names attacked our Parliament—and were all killed— and that Mohammad Afzal participated in the conspiracy. This, after five years, is all that we know about the 13 December attack. The entire media has failed to mention this single, enormous fact."*[16]

Another example for a similar inaccurate exercise of justice can be found in the facts of the 'Hyderabad Rape Case Encounter' where four men accused of the gang rape and murder of a veterinary doctor in Hyderabad were killed in an alleged police encounter in 2019.[17] The encounter took place just a few days after the crime was reported, and though it proceeded to receive

[12] Ara J, 'Justice Delayed Is Justice Denied & Justice Hurried Is Justice Buried: Reformation of Justice System to Meet the Ends of Justice without Delay & Haste' (LinkedIn, 19 February 2023). <https://www.linkedin.com/pulse/justice-delayed-denied-hurried-buried-reformation-system-jahan-ara/> accessed 20 Aug 2023.
[13] ibid.
[14] State v Mohd. Afzal [2003] 107 [2003] DLT 385.
[15] Judgement of the Supreme Court of India on Mohammad Afzal vs. the State (NCT of Delhi) [2004].
[16] Arundhati Roy, 'The Hanging of Afzal Guru: And The Strange Case of the Attack on the Indian Parliament.' (Penguin, 2013).
[17] The Economic Times, 'All 4 Accused in Hyderabad Gang-Rape, Murder Shot Dead in Police Encounter' (2019).

widespread public acclaim as a swift and decisive action against the perpetrators, concerns were raised regarding the legality of the encounter and whether proper adherence to due process was ensured. Among those who raised concerns, congress leader and Lok Sabha member, Shashi Tharoor, opined that extrajudicial killings were not acceptable; while activists such as Kavita Krishnan were convinced that the killing of the four men is not justice but a "*ploy*" to shut down demands for accountability from the police, judiciary, governments, and justice and dignity for women.[18] Hence, it is clear that a faster judiciary does not necessarily imply better justice and that purely focusing on solving the highest number of cases under a minimal amount of time might come at the cost of an overall deterioration in the quality of the judiciary's work. This indicates the need to strive to strike a balance between an efficient but also a sufficient trial procedure.

3. EVALUATING MEASURES ADOPTED ON A GLOBAL PERSPECTIVE.

In order to take a better gage at the practical and substantive issues surrounding the popular consensus, it is wise to analyze and dispute the so-called mechanisms employed by selected legal systems to ensure the prompt and efficient delivery of justice. Hence, it is crucial to explore the key strategies, reforms, and technologies implemented to expedite legal proceedings, reduce backlog, and provide timely resolutions for individuals and entities engaged in legal disputes. This also allows one to determine the challenges and potential solutions in achieving speedy justice on a global scale, considering the diverse legal traditions, cultural factors, and resource disparities among different jurisdictions. Further, gaining insights into these mechanisms would allow policymakers, legal professionals, and researchers to contribute to the ongoing improvement and modernization of legal systems worldwide.

3.1 India: the drawbacks of a fast-track court system.

As mentioned, the constitutional guarantee of a speedy trial plays a crucial role in preventing undue and oppressive incarceration prior to the trial, in order to minimize concern accompanying public accusation. It also limits the possibility of long delays hindering the ability of an accused to defend himself.[19] However, historically, the Indian justice system, like most countries, has suffered the consequences of a slow-moving judiciary, a concern underscored by Justice Krishna Iyer while dealing with the bail petition in *Babu Singh v. State of UP (1978).*[20] He remarks, *"Our justice system even in grave cases, suffers from slow motion syndrome which is lethal to 'fair trial' whatever the*

[18] ibid.
[19] Agarwal C, 'Right to Speedy Trial: Problems and Solutions' (Legal Service India) <https://www.legalserviceindia.com/article/l297-Right-To-Speedy-Trial.html&gt> accessed 21 August 2023.
[20] Prateekhanda, 'Constitutional Right to Speedy Trial' (Legal Services India) <https://www.legalservicesindia.com/article/571/Constitutional-Right-to-Speedy-Trial.html&gt> accessed 21 August 2023.

ultimate decision."[21] This revelation through time led to the establishment of a number of legal measures, namely, the right to a speedy trial implied under Article 21 of the Constitution of India[22] and the Fast Track Special Court system (FTSCs) implemented by the Department of Justice to ensure a prompt trial procedure.

Article 21, which reads *"No person shall be deprived of his life or personal liberty except according to procedure established by law"*[23], implies that the citizens are entitled to a right to a speedy trial as per the judicial interpretation of the Supreme Court, though it is not expressly listed as a basic right. [24] This was reaffirmed in *Hussainara Khatoon v. Home Secretary, State of Bihar*[25] where the court held the right to a speedy trial is a fundamental right, declaring that *"No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21".*[26] Likewise, in *Katar Singh v. State of Punjab*[27] it was acknowledged that right to a speedy trial is an essential part of the fundamental right to life. Furthermore, s467 read with s468 of the Criminal Procedure Code 1973 infers authority upon the Court to ensure every possible measure is taken to dispose of cases within 6 months to 3 years, while no adjournments should be granted until and unless circumstances are beyond the control of the judiciary. However, in *Ramachandra Rao v. State of Karnataka*[28], the Supreme Court emphasized that no time bound direction for completing a trial can be issued by a Court as it is not an appropriate expectation in the interest of justice. Similarly, in the case *Abdul Rahman Antulay v. R.S. Nayak*, it was clarified that certain aspects and guidelines regarding a speedy trial and quashing of cases should depend upon the nature of the case; stating *"it is neither advisable nor feasible to draw or prescribe an outer time limit for conclusion of all criminal proceedings".*[29]

In practical terms, when an innocent person is arrested and held in custody, it has significant consequences to their rights and freedoms. They endure the hardships of prison life despite being falsely accused, while having to partake in a lengthy legal process, sometimes with the possibility of one party passing away before justice is served[30]; thus denying the innocent person a chance to clear their name. Participating in court proceedings requires substantial financial resources, time,

[21] ibid.
[22] One Hundred and Fifth Amendment Act, 2021.
[23] ibid.
[24] Bhatia A, 'Right to Speedy Justice' (14 November 2022) accessed 17 June 2023.
[25] Hussainara Khatoon v Home Secretary, State of Bihar [1980] AIR 1360, [1980] SCC (1) 81.
[26] Law Commission of India Reports 'Report No. 154, Chapter XXI, Speedy Justice' (Law Library) <https://www.advocatekhoj.com/library/lawreports/codeofcriminalprocedure/28.php?Title=The+Code+of+Criminal+Procedure%2C+1973&STitle=Speedy+Justice> accessed 18 June 2023.
[27] 1994 SCC (3) 569, JT 1994 (2) 423, 1994 SCALE 1.

[28] Brij Mohan Lal v Union of India [2002] JT [2002] (4) SC 92.
[29] Judgement of Abdul Rehman Antulay and Ors. v R.S. Nayak & Anr. [1992] 1 SCC 225.
[30] Harshad S. Mehta v Central Bureau of Investigations [1992].

and energy, which can be burdensome for the wrongfully accused, who may lack the necessary means. Additionally, all prisoners, including the innocent ones, face the genuine threat of prison violence, resulting in physical and emotional suffering and even death. These practical challenges have thus necessitated the *"constitutional reality"*[31] of a speedy trial, which must be given due respect. As remarked by Chief Justice Burger *"A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value..."*[32] This was further demonstrated in the case of *Hussainara*, where a petition was submitted for a Writ of Habeas Corpus on behalf of multiple individuals, including children, who had been detained for an extended period without any charges. This was because their charges, even if proven, would not have resulted in a sentence of more than a few months.

Nevertheless, deference to this "*constitutional reality*" should not come at the expense of failing to provide satisfactory justice to the claimant; either by depriving him or her of adequate time to find evidence or present their case in court etc. as it would defeat the purpose of a judicial system; which is to maintain balance within a society by providing fair justice to all. Nonetheless, one may argue that in the circumstances of a guilty defendant, a speedy trial could also stand to benefit the claimant. However, that is only if the trial proves to be not only efficient but also a sufficient procedure. In addition, although a judge may overlook a technicality that hinders substantial justice, it is important not to view the entire process of civil or criminal proceedings as mere formalities or technicalities. Demeaning the importance of procedure can lead to a decreased understanding of its relevance and value to the justice system, which could consequently diminish the people's interest and respect for the procedure as well. This ultimately would result in the decline of respect for the judicial system as a whole, viewing it to be just another obstacle to justice and a waste of the court's time.

Shifting the focus to the FTSCs, in October 2019, the Department of Justice implemented a Centrally Sponsored Scheme to set up FTSCs, including 389 exclusive POCSO Courts (for cases under the Protection of Children from Sexual Offences Act 2012), across the nation for expeditious trials relating to sexual offences as a result of prolonged hearings failing to provide timely relief to

[31] Prateekhanda, 'Constitutional Right to Speedy Trial' (Legal Services India) <https://www.legalservicesindia.com/article/571/Constitutional-Right-to-Speedy-Trial.html&gt> accessed 21 August 2023.
[32] Sameena Sayyed, 'Speedy Trial: Need of the Hour' (Jus Corpus Law Journal, 23 February 2022) <https://www.juscorpus.com/speedy-trial-need-of-the-hour/> accessed 19 June 2023.

victims.[33] Further, as of March 2023, 773 FTSCs, including 415 exclusive POCSO Courts, are functional in 28 States / Union Territories which have disposed of more than 156,000 pending cases.[34] Likewise, in the case of *Re: Alarming Rise in the Number of Reported Child Rape Incidents, Suo Moto Writ Petition (Criminal) No.1/2019*, the Supreme Court issued directions applicable to every district in the country, stating that an exclusive FTSC should be established where there are more than 100 cases under the 2012 Act, which shall try no other offences except those under that Act. However, the FTSCs in India are plagued with several issues, such as the lack of legislative backing and proper framework, which must be addressed to ensure proper justice.[35] To emphasize, a FTSC defers from a normal court in several ways. While FTSCs have a target number of cases that need to be disposed of in a particular time period, that does not apply to the normal courts. Further, FTSCs are required to have all witnesses examined in a single trial and are not allowed to postpone hearings or allow adjournments. The jurisdiction of FTSCs is also restricted in comparison. For instance, there are FTSCs specifically for POCSO offences, unlike normal courts which have a wider jurisdiction over civil wrongs and criminal wrongs.[36] Likewise, it is evident that the FTSC is a system that prioritizes speed over all else and this could lead to creating negligent precedents due to declaring verdicts based on inconclusive evidence. This was addressed in *Zahira Habibullah Sheikh v. State of Gujarat (Best Bakery Case)*[37], where the Supreme Court noted that there were substantive concerns in the manner in which the FTSC had considered evidence, especially as no proper Cross-Examination Procedure was followed by the FTSC in this case involving the 2002 Gujarat Riots. Thus, it is wise to recognize that the FTSCs are not without their limitations, and they are not always in the best interests of society to fast-track justice.

3.2 The United States of America: the shortcomings of the right to a speedy trial.

As per Jeremy Bentham's view on the functions of a legal system, *"it is necessary that the punishment should be as near, in point of time, to the crime, as possible; because its impression upon the minds of men is weakened by distance; and because this distance adds to the uncertainty of its infliction, by affording fresh chances of escape."*[38] In line with this notion, the Sixth Amendment to the constitution reads *"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime*

[33] Department of Justice (India) 'Fast Track Special Courts (FTSCs)' <https://doj.gov.in/fast-track-special-court-ftscs/> accessed 20 June 2023.
[34] ibid.
[35] Ajay Pal Singh, 'Fast Track Courts in India: Past, Present and Future' (2021) Vol. 4 Issue 4 (International Journal of Law Management and Humanities).
[36] ibid.
[37] Zahira Sheikh v State of Gujarat [2004] (4) SCC 158.
[38] Jeremy Bentham, 'Principle of Penal Law' (1952).

shall have been committed…"[39] Nonetheless, the amendment in its self fails to define the nitty-gritties of a speedy trial in America, which is in turn noted under the Speedy Trial Act of 1974 that attempts to safeguard this right by requiring a defendant to be brought to trial within 100 days after arrest with a penalty for violation of this right being the dismissal of charges.[40] It further establishes time limits for completing the various stages of a federal criminal prosecution by requiring the information or indictment to be filed within 30 days from the date of arrest or service of the summons, necessitating the trial to commence within 70 days from the date the information or indictment was filed, or from the date the defendant appears before an officer of the court in which the charge is pending (whichever is later) etc.[41] However, this evidently raises concerns as to whether attempts at micro managing a trial procedure through statutory provisions is the appropriate way to ensure efficiency within the justice system.

To emphasize, leading research portrays that timely conclusion of cases consists of three main purposes; to effectuate the right of the accused to a speedy trial, to further the interests of the public, including victims and witnesses, and to ensure the effective utilization of resources[42]. Nonetheless, it is important to recognize that, when attempting to uphold the standards set for an efficient trial process by the 1974 Act, it should not be to the detriment of the parties involved: meaning the claimant or the public (victims, witnesses etc.). Yet, one could argue that hoping to constitutionally micromanage the system could result in such detriment. Thus, when applying these standards to individual cases and developing policies for overall management of caseloads, jurisdictions should strive to guarantee that both prosecutors and defense counsels have sufficient chances to investigate their cases, consult with witnesses, examine documents, file necessary motions, and carry out other essential elements of case preparation. Accordingly, to ensure that defendants are not rushed to trial without an adequate opportunity to prepare, Congress amended the 1979 Act[43] to provide a minimum time period during which trial may not commence, stating that the trial may not begin less than 30 days from the date the defendant first appears in court, unless the defendant agrees in writing to an earlier date. Further, in *United States v. Rojas-Contreras*[44], it was held by the Supreme Court that this 30-day trial preparation period would not restart upon the filing of a substantially similar superseding indictment. Hence, the authors do agree that Congress, in this instance, has provided significant statutory guidance in order to ensure both an efficient and a sufficient system.

[39] The Constitution of the United States of America.
[40] LM Ariola, DA Demasi, ED Loughman and TG Reynolds 'Speedy Trial Act - An Empirical Study' (1979) Vol. 47 Issue 5 Fordham Law Review.
[41] The United States Department of Justice Archives: Criminal Resource Manual (601-699).
[42] The American Bar Association 'ABA Standards for Criminal Justice: Speedy Trial and Timely Resolution of Criminal Cases' (3rd edn, 2006)
[43] The Speedy Trial Act 1974 (as amended on August 2, 1979).
[44] United States v. Rojas [1985] 474 U.S. 231 [1985].

However, it has been observed that though there is appropriate constitutional guidance, the authorities have failed to provide the proper groundwork for the practical application of these legal provisions within the justice system, and this has weakened the progress of this constitutional right. This is further addressed by Anthony G. Amsterdam who states, "*Progress towards the difficult goal of providing expeditious handling for the large volume of the country's criminal business cannot be achieved by the mere manipulation of legal doctrine…"* and adds that in order to make an actual change, the authorities *"must encompass far more basic institutional changes".*[45]

3.3 United Kingdom: perfection or a mere façade?

The United Kingdom justice system has been considered to be the envy of the world, one revered for its excellence in the delivery of efficient and quality justice.[46] In 2016, the need to raise this bar arose and consequently the government invested £700 million towards modernizing the court system across UK through technological advances, the introduction of summary justice in the Magistrate's courts and better case management being implemented in the Crown courts.[47] These reforms were primarily aimed at improving case progression, which would ultimately lead to fewer delayed and aborted trials. Despite being desired at the time, recent Hansard reports suggest very few additions to the initial suggested reforms, thus displaying a lack of enthusiasm to the subject. In response to a question posed, the Parliamentary Under-Secretary of State for Justice, Mike Freer, recently expressed in Parliament the continued commitment to improving the efficiency and economy of the trial process. He stated that the government is "*looking at increasing digitization so that the cost of access to justice is also reduced, and that is an addition to all the measures mentioned in response to other questions to ensure the capacity of our system is robust*".[48] In addition, Under-Secretary Freer also presented some favourable statistics stating that "*for online civil money claims the times for issuing, responding and hearing dates are down to 9.4 days from 25 days, while damages claims are down from 11.4 days to one day and financial remedy consent orders are down to four weeks rather than many months, all making access to justice faster, more efficient and cheaper for those who need it*".[49]

The statistics do in fact evidence interesting progress, but it must not be forgotten that these results are merely the outcome of years of stagnant reforms. The government's over-emphasis on

[45] Anthony G. Amsterdam, 'Speedy Criminal Trial: Rights and Remedies' (1975) Vol. 27 No. 3 (Stanford Law Review).
[46] The Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals of the Ministry of Justice, 'Transforming Our Justice System' (2016).
[47] The Comptroller and Auditor General of the Ministry of Justice 'Efficiency in the criminal justice system' (2016).
[48] HC Deb 16 May 2023, vol 732, col 688.
[49] HC Deb 16 May 2023, vol 732, col 688.

efficiency ignores some fundamental issues which affect the true meaning of justice. Primarily, it is argued that the recent statistics presented in Parliament may only reflect the reality of courts in developed and commercial constituencies and is not reflective of the mechanisms and workings of the urban courts. The Bar Council in 2022 reported some alarming statistics where over 65% of parliamentary constituencies are still without an active local court and also more than 47% of local authority areas are without an active local court. In addition, there were 239 court closures across England and Wales over the past decade and justice funding being cut by 24% between 2010 to present is a major dilemma which potentially halts the expansion and introduction of various reforms.[50] This evinces the fact that the goal should not be primarily focused on efficiency but rather on the delivery of fair, clear and independent justice which is most importantly consistent, cost effective and predictable, which would ultimately raise the bar on a more holistic basis. However, this mode of thinking has not necessarily illuminated the authorities of England and Wales yet. Recently in the case of *Bilta (UK) Limited (in liquidation) and Ors v Natwest Markets Plc. and Another*[51], the Court of Appeal ordered a claim for dishonest assistance and knowing participation to be retried after judgement not being handed down for 19 months. The decision for the retrial being heavily dominated and influenced by delay does not sit well with the author's conception of justice. Did their Lordships forget the injustice that may well be caused by such a decision? The effect of this is that the court would be spending additional costs, time and resources due to its infatuation over efficiency. This is rather unfortunate indeed!

3.4 Sri Lanka: an arduous attempt amidst an economic crisis.

Sri Lanka's justice system has only witnessed little change over several decades. As a result, it has been accepted that the administration of justice has been notoriously difficult to navigate and is in desperate need of updated human and electronic resources. The then Minister of Justice, Ali Sabry PC, placed due emphasis on bringing forth reforms to reinvigorate the efficiency of the present system. Digitalization was at the forefront of the core reforms and has been on the agenda for nearly eight years. Another tentative reform proposal has been the introduction of a pre-trial court process, which enables several small claim cases to be dealt with swiftly rather than be backlogged with other high-profile cases which await decades of resolution at the District and High courts.[52] However, it must be noted that pursuant to the Judicature Act of 1979, the Small Claims Court was in fact established in Sri Lanka, for what we can assume, is to reduce the backlog of cases in the inferior courts and promote a smooth flowing process. Subsequently the said Act of 1979 has been supplemented by the Small Claims Courts' Procedure Act, No. 33 of 2022. Despite the provisions

[50] Access to Justice in England and Wales in 2022, November 2022, (The Bar Council.
[51] Bilta ltd & Ors v Natwest [2020] EWHC 546.
[52] Ali Sabry PC, 'Future-Proofing Sri Lanka's Legal System' (2022).

of these Acts standing strong to uphold its intentions, through the above discussion it is evident that the process is nothing but dormant in its practical application.

Despite the long-term benefits that could accrue with these reforms, it is doubtful whether this would be adopted holistically as it requires a level of tech-savviness, which often does not come easy for the legal professionals based in rural and suburban areas. Moreover, data and cyber security issues also arise with a complete system of digitalization. However, the same equally applies to physical documents where it could easily be damaged, stolen or even tampered with.[53] The need for a system change is indeed in major demand, and it cannot be denied that incentive does exist. It has been argued that economic rejuvenation and maintaining a credible system of economic management is a major component attached to a well-functioning justice system guarding against corruption or abuse of power.[54] However, presently, with the country facing an economic catastrophe, it is difficult to see that the Government would pursue any reforms, and sadly, the continuation of the perils is anticipated.

Sri Lanka is a developing nation, and what is discussed above reflects that emphasis on speed would not be the appropriate measure for any developing state. What is required is the imputation of an enlightening thought process that would contribute towards holistic development; but it is certain that this would take considerable time.

4. REVITALIZING THE FUTURE OF SPEEDY JUSTICE: REFORMS.

It is implicit in the foregoing that a number of practical and substantive issues emerge through a justice administration that puts efficacy on a pedestal. Substantively, a hasty agenda, as promulgated by many legal systems, paves the way towards underdeveloped case law setting out faulty precedence, dominated by errors by reason of limited judicial discretion. On the other hand, verdicts based on incomplete investigations, insufficient time for defense preparation and overworked public defenders are major practical implications that result from an over-efficacious justice system. In addition, such haste could result in increasing coercive plea bargains where defendants would be unduly pressured to accept unfair settlement terms so as to expedite the trial process. It is noteworthy that while the right to a speedy trial is crucial for protecting the rights of both parties, its implementation should also ensure fairness, thoroughness, and access to adequate legal representation to avoid potential injustices. Thus, this article further hopes to provide a few

[53] Hoole and Sallay, 'Urgent need for justice reforms: Digitalization can lead the way' (2021), originally appeared in *The Morning* and *Daily FT*.
[54] Basil Fernando, 'Sri Lanka: Delays in Justice as A Major Cause of Economic & Political Catastrophe' (2002) Asian Human Rights Commission.

guidelines, based on the authors' analysis of well-balanced justice systems around the world, so as to provide a comprehensive scheme that may well come in hand for authorities in future.

As per the World Justice Project rankings of 2022, Denmark, Norway, and Finland take the top three positions as countries with the most effective legal systems.[55] This paves the way for the authors to inspect the measures they adopted, which aided in setting their bars higher. For example, in Denmark, there is a prevalent system where both the quality of justice delivered, and the efficiency of outcome is equally valued. Pursuant to the enactment of the Danish Constitution in 1849, the judiciary has assumed a wider scope of authority over Parliament, the Government and the Monarch himself. This raises the level of accountability, thus increasing the quality of justice offered.[56] On the other hand, Norway has the unique system where courts of any hierarchy are not bound by past precedent; this reduces exhaustive deliberations of previous case law, allowing judges to arrive at decisions which are more appropriate to the present case more efficiently and swiftly.[57] Interestingly, Finland has a judicial system where there are special, designated courts for distinct matters; this delegates time and jurisdiction in a wide scale and segregates expertise appropriate to the court in session. For example, the Market Court deals only with disputes regarding public acquisition and competition between firms, and the Insurance Court only concerns itself with disputes regarding occupational, accident insurance and pensions etc. This allows for an expedite process because often the court concerned would have lesser cases in general.[58]

The authors do not underestimate the difficulty in upholding the above-mentioned measures. The time, expense and the expertise associated with establishing such measures are difficult to find. However, an amalgamation of the above resonates indeed a very attractive addition to any legal system that strives to balance both the quality and efficacy of its judicial process.

5. CONCLUSION

The implementation of guidelines as suggested by the authors would be an attractive addition to any justice system. However, one cannot expect change to be drastic, as this is a direct attack on the conventional mindset. It is high time for legal professionals to embrace the matter with deeper intellect and build a more holistic understanding of justice, which involves not equating efficacy

[55] World Justice Project, 'WJP Rule of Law Index 2022 Global Press Release' (World Justice Project, 26 October 2022) <https://worldjusticeproject.org/news/wjp-rule-law-index-2022-global-press-release&gt> accessed 10 July 2023.
[56] Stockholm Institute for Scandinavian Law; 'The Danish Courts: An Organization in Development' (1957-2010) <https://www.scandinavianlaw.se/pdf/51-27.pdf> accessed 10 July 2023.
[57] Helen Michelle Jørgensen, 'Law Making Tradition, Contracts, Legal Terms and Concepts' (16 January 2013) <https://slideplayer.com/slide/4691725/> accessed 10 July 2023.
[58] 'An Overview of the Current Organization of the Courts in Finland' <https://rm.coe.int/ministry-of-justice-department-of-judicial-administration-the-finnish-/168078f3d2> accessed 10 July 2023.

as justice itself but identifying it as a mere by product of its operation. This would entail the fact that change would be subtle, making it frustrating for some. However, as pointed out by the authors, it is apparent that different countries have unique and varying issues surrounding the administration of justice. Thus, it is hard to reach a compromise and therefore, to offer a one-size-fits-all solution is nearly impossible. This involves relevant authorities of the said countries to formulate their own response to the combats arising as a result of spotlighting efficacy to the expense of sabotaging the true conception of justice. The authors are not disputing nor denying the drawbacks caused by the inefficient management of juridical administration; but throughout the article it was argued that the drawbacks caused by inefficient justice is almost equal to those caused by over-efficient justice. Thus, a balance must be struck, and it is extremely vital for this balance to be maintained in the interests of future stability. Research has often focused on several legal systems for being well-established and solvent. Thus, through a thorough evaluation of these systems, it is not impossible for authorities to compile a workable set of guidelines which aids in upholding the rule of law. Decades of jurisprudential thinking have crystallized attractive manifestations and theories of law, and it would indeed be a waste if their essence was lost in the process of justice administration.