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EDITORIAL NOTE

KDU Law Journal (KDULJ) was first published in the year 2021 by the Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka with the primary objective of disseminating legal knowledge among the members of the legal profession, academia and public. The current issue of the KDULJ marks the successful completion of the third year. Eventhough, only few years have passed from the point of its genesis, KDULJ has achieved great heights by becoming the first internationally indexed journal in KDU. After being indexed in the world renowned database 'HeinOnline', KDULJ now occupies a position among top most academic publications in Sri Lanka in the field of Law.

The current issue of the KDULJ contains 09 articles presented by domestic and foreign legal researchers. They have embarked on research in different areas of Law, which has ultimately resulted in the publication becoming a combination of diversified talents. The significance of the Issue II, Volume 3 of the KDULJ is that the authors are from different intellectual backgrounds that include the academics, professionals and researchers.

Successful continuation of an internationally indexed journal attracts hardwork. It is not a singlehanded function of the Editorial Committee. The completion of Issue II, Volume 3 is a corporative work of the members of all four Departments of the Faculty of Law including both academic and administrative staff. In addition to this, KDULJ is blessed with an eminent panel of reviewers and manuscript editors whose punctuality and devotion paved the way to release it on time.

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Laws Governing Military Aircraft under International Aviation Law and International Humanitarian Law: A Critique

Kapila De Silva*

Abstract

This paper examines the laws governing military aircraft and elaborates on a set of principles outlined in several conventions that determine their legitimacy and obligations under international law. The research method of this paper is qualitative, and it adopts legal research methodology, which is a library-based black letter approach. The governing regulations of two legal regimes-aviation law and humanitarian law-are considered for the purpose of analysis while considering the practical aspects and distinctive role of military aircraft. The paper is divided into three parts, and Part One provides a brief discussion on the history and evolution of governing laws for military aircraft. The second part of the paper explores the Paris Convention and the Chicago Convention's specific provisions as they relate to military aircraft. Part three of the paper delves into military aircraft under international humanitarian law embedded in the Hague regulations and Protocol I of the four Geneva Conventions and identifies how indiscriminate air attack and unlawful interception violate the law of armed conflict principles. Finally, this paper argues that while assuring legitimacy under the contemporary international legal regime, it would result in state responsibility if an act of military aircraft breached customary international law principles.

Keywords: Military aircraft, *Paris Convention*, *Chicago Convention, Hague rules, Four Geneva Conventions*

*LLM (KDU), LLB (Hons)(OUSL), BA (Def), Pg Dip (HRM), Pg Dip (Def Mgt), Attorney-at-Law, Lecturer, Institute of Supplies and Material Management (ISMM)

Introduction

One of the most advanced and effective strategic weapons on the modern battlefield is the military aircraft. This became clear and understood when evaluating the evolution of air war regimes and outcomes produced by combat aircraft in post-modern warfare. Since the beginning of the history of aviation, the use of aircraft for military purposes has revealed an efficient and dangerous weapon in the arsenal of a state. First it was used as an observatory post during the First World War, and then the aircraft took a more active role in combat until it became a destructive and deadly weapon during World War II[1]. Because of aviation's lethal tactical and strategic potential in postwar wars, drafters of public international air law have sought to establish and propose significant legal provisions dealing with military aircraft, which have gradually evolved into the present laws. However, it is observed that the concerns for national security that prompted states to legally curtail the access of military aircraft to their territory are not a recent issue but date back to well before the onset of World War I, when aviation was in its infancy.[2] Hence, it is obvious that the fundamental principles of codified international air law that affect military aircraft were created in the shadow of World War I.[3]

Currently, a minimum civil-military regulatory interface within the international legal framework is required to create safe skies on a global level. However, current and previous international legal instruments governing aviation functions have largely dealt with civil or commercial aviation, effectively excluding military aircraft from their sphere of applicability. Although the legal status of state

1 Richard Overy, "*The Air War: 1939-45 Cornerstones of Military History"* **(**Annotated edn, potomac books 2005)140-150

2 Michel Bourbonniere and Louis Haeck ," Military Aircraft and International Law: Chicago Opus 3" (2001) 66,Journal of Air Law and Commerce,885

3 MichaelTremblay,*" The Legal Status of Military Aircraft in International Law"* (LLM Thesis, McGill University,2003) 3-12

aircraft, including military aircraft, has not been specifically dealt with in international treaties, it has not been completely ignored either. This is witnessed when evaluating the content of enacted aviation laws such as the Paris Convention[4] and the Chicago Convention[5]. Furthermore, there are International humanitarian laws (IHL) that apply to armed conflicts that take into account the use of military aircraft in the conduct of hostilities. Those laws elaborate a set of mandatory rules governing the status of aircraft near or in the operational theatre in various treaties, such as the Hague Rules of Air Warfare (HRAW)[6] and the Four Geneva Conventions (IV GC).[7] However, no specific determination or definition has been reached so far on military aircraft by the global community as civil aircraft. But in general, but not in most legal regimes, a military aircraft is considered to include all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline.[8] Today, due to technological advancements and their expected use in military air operations, including aerial reconnaissance, aerial assault, aerial defence, and aerial interception, the role of military aircraft in aerial combat has changed significantly. Therefore, the legal regime governing military aircraft operations in the contemporary period needs to be identified within these broad areas. As a result, based on selected legal regimes, this article investigates international rules established by convention and customary principles governing the

4 Convention Relating to the Regulation of Aerial Navigation (Paris Convention), 1919
5 The Chicago Convention on International Civil Aviation,1944
6 Hague Rules of Air Warfare (HRAW), 1923
7 Four Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV),1949
8 George N Walne, "The Conduct of Armed Conflict and Air Operations and the Linebacker Bombing Campaigns of the Vietnam War" (USAF pamphlet AFP 110-31: International Law ,1988) para. 2-4b, at 2-4 to 2-5. https://apps.dtic.mil/sti/pdfs/ADA191278.pdf> accessed 05 May 2023

flight of military aircraft as a subset of state aircraft. The paper is divided into three parts. Part one evaluates the history and evolution of governing laws for military aircraft. Part two of the article analyses the two prime conventions governing aviation, the Paris Convention and the Chicago Convention, and their specific provisions governing military aircraft. Part three of the article elaborates on military aircraft under the law of armed conflict within the specific provisions of Hague rules and the four Geneva conventions. To achieve the objective of the paper, this research was carried out as library research, adopting the black letter approach. It was conducted by collecting data through primary resources such as relevant legislation, international conventions, and Secondary sources include research articles, books, journal articles, and other electronic resources.

PART 1

History and the evolution of governing laws for military aircraft

This part of the paper will briefly discuss the historical routes of military aircraft and the evolution of two distinct legal regimes, Aviation Laws and IHL, that oversee their rulings for military aircraft.

Development of military Aircrafts

The development of the aircraft and navigable airship in the first decade of the 20th century marked the beginning of true aviation for military use. On December 17, 1903, the Wright brothers achieved the first powered, sustained, and controlled flight in an aeroplane.[9] They thought such an aircraft would be primarily valuable for military surveillance. The history recorded the first use of an

9 Tara Dixon-Engel and Mike Jackson, *"The Wright Brothers: First in Flight"* (Sterling Publishing Company, Inc., 2007)

airplane for combat purpose on October 23, 1911, during the Italo-Turkish War, when an Italian pilot made one-hour reconnaissance flight over enemy positions near Tripoli, Libya,

in a Blériot XI monoplane.[10] Until '1914, aircraft had no military use except for reconnaissance. However, with the commencement of the First World War, manufacturers were pressed to equip aero planes with guns, bombs, and torpedoes. During World War I, the military value of aircraft was quickly recognised and demonstrated, and modern warfare improved their destructive forces.[11] In World War II, modern fighter planes were used for air combat because they were the fastest and easiest to manoeuvre. Fighter planes were often used in conjunction with bombers to shoot down enemy bombers. Transport planes used for military purposes carried supplies and troops during the war. In the contemporary period, military aircraft can be either combat or non-combat and broadly include jet fighters, bombers, attack helicopters, electronic warfare, maritime crafts, multirole military planes, and unmanned aircraft.

Development of International convention rules for military aircraft

The Hague Peace Conference of 1899, which adopted a declaration prohibiting any aerial bombardment for a period of five years, marked the first attempt to regularise military aviation activities.[12] Later, the First World War showed that the deployment of military aircraft in battle may have a substantial influence on state sovereignty and national security. The WWII later reiterated the matter. As a consequence, the international community opted to choose between the concepts of state sovereignty and freedom of the air.

10 John W.R. Taylor and John F. Guilmartin, Military aircraft, (*Britannica.com,*2023)< https://www.britannica.com/technology/military-aircraft/Stealth> accessed 05 May2023
11 ibid
12 Russell J. Parkinson, "Aeronautics at the Hague Conference of 1899 " (1960) 7, *The Air Power Historian*, 106– 11< *JSTOR*, http://www.jstor.org/stable/44512745 > accessed 06 May 2023.

State sovereignty implies that its legitimacy and authority can be established exclusively by reference to the legal system itself. Hence, sovereignty over the air is vested in the state. Under freedom of the air, one state grants another state or states permission to fly through its territory without landing. Thereby, the concept does not vest exclusive air sovereignty in the state over air. Finally, the global community has chosen to adopt the principle of state sovereignty. This resulted, at the end of the First World War in 1919, in the Paris Convention[13] codifying the concept of air sovereignty. For the first time in legal history, the Convention incorporated provisions for identifying military aircraft in its articles 30 to 32, as discussed later in this paper. It became clear during the Second World War that a new foundation for international civil aviation was needed, one that would replace mainly regional arrangements with a global structure to address aviation issues. Therefore, in the aftermath of World War II, in 1944, the Chicago Convention on Civil Aviation[14] was adopted to deal with civil aircraft and civil aviation. Like the previous Paris Convention, it does not give a definition of "aircraft," and that definition can only be found in subsidiary legal sources. Especially in Article 3, the Convention restricts the scope of its applicability to "civil" aircraft[15]. The Chicago Convention, in contemporary Public international air law, presently has its "Magna Carta" *status quo*. A comprehensive illustration of the governing legal statutes on military aircraft under the Paris and Chicago conventions will be contained in the next part of this article.

Development of international humanitarian laws governing military aircrafts

The universal codification of IHL began in the nineteenth century

13 ibid (n4)
14 ibid (n5)
15 ibid art 3(a)

with the development of aviation matters.[16] However, the continuous and rapid technological progress being made in the area of aviation led to complicated questions to be determined in armed conflict, such as proportionality and the indiscriminate nature of air attacks under IHL. It is apparent that even today, it is challenging to apply treaty rules, particularly those controlling IHL, to military aviation because of the unique nature of the crucial role played by aircraft in combat operations in modern conflicts. However, specific rules have gradually evolved and been established in the contemporary period. Especially the Hague Rules of 1922, the Hague Convention of 1954, the San Remo Manual, and the four Geneva Conventions are recognized as principle laws having obligations embedded in them to be adhered to the operation of military aircraft in armed conflicts.

PART 2

Aviation Laws governing Military Aircrafts

This part of the article explains the legal provisions available in two conventions, namely the Paris Convention and the Chicago Convention, which govern the functions of military aircraft and provide foundations for military warfare exclusive to the air sovereignty of states in international law.

Military aircrafts under Paris Convention of 1919

The first codification of public international air law originated in the Convention for the Regulation of Aerial Navigation of October 13, 1919. The Convention recognized a distinction in public international law between "private aircraft" and "state aircraft." In this convention the military aircraft has been recognized as in the category of State aircraft within the following articles, namely:

16 Amanda Alexander, "A Short History of International Humanitarian Law" (2015) 26 (1) European Journal of International Law <https://academic.oup.com/ejil/article/26/1/109/497489> accessed 06 May2023

"Article 30 - The following shall be deemed to be State aircraft:

(a) Military Aircraft;

(b) Aircraft exclusively employed in a state service, such as posts, customs, police.

Every other aircraft shall be deemed to be a private aircraft. All State aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention."[17]

"Article 31 - *Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft*[18].

It is important to note that a specific disposition pertaining to military aircraft was included within **Article 32** of the Paris Convention, which reads;

"*No military aircraft of a contracting state shall fly over the territory of another contracting state nor land thereon without special authorization. In case of such authorization the military aircraft shall enjoy, in principle, in the absence of special stipulation the privileges which are customarily accorded to foreign ships of war. A military aircraft which is forced to land or which is requested or summoned to land shall by reason thereof acquire no right to the privileges referred to in the above paragraph*."[19]

The Paris Convention's Articles 30 to 32 establish a presumption as to what is to be "deemed" to be a state or military aircraft rather than providing a definition of "military aircraft." In addition to the aforementioned Articles 30 and 31, the Convention defended the

17 ibid (n4) art 30
18 ibid art 31
19 ibid art 32

notion of a state aircraft in terms of a state public authority and, as a result, established a special regulatory regime for military aircraft and aircraft used solely for state purposes. According to Article 31, an aircraft can only be considered a military aircraft if it is operated for military objectives and is under the command of a member of the military. So, from the very beginning of the international air law regime established by this convention, military aircrafts were given a special status restricting their freedom of operation in foreign sovereign air space and making them subject to a "special authorization" of the state to be overflown. As per Article 32, aircraft from other states are not allowed to fly over restricted zones inside the state, save for military, postal, customs, and police aircraft. When flying to another country, a state aircraft does not have the same rights it does when flying within its own country of origin. State police and customs aircraft may be permitted to cross the border under special state-to-state agreements, but military aircraft cannot fly over the territory of another state or nation without a special authorization. However, as a result of Article 32, military aircraft are excluded from the legal enforcement actions that other governments may use against civil aircraft, recognising the military aircraft's sovereign immunity.[20] Another fundamental principle was the acknowledgement of the principle that the Convention should not affect the duties and rights of belligerents and neutrals in wartime. In Article 38 of the Convention, the concept was expressed as follows:

Article 38 - *ln case of war, the provisions of the present convention shall not affect the freedom of action of the contracting States either as belligerents or as neutrals.*[21]

It seems the Convention not only did not set any restrictions to this effect, but it also appeared to indicate that in the event of war,

20 ibid (n2) p.891.
21 ibid (n4) art 38

anything is permissible. As a result, military aircraft are accorded a unique status that allows for unrestricted missions during wartime. It is evident that international law rule which stipulates military aircraft are instruments of nations fulfilling noncommercial

sovereign functions, was crystallised in the Paris Convention. Then, as a result of its widespread adoption, this standard developed into a conventional one. In the work of famous legal publicists, the development and current status of this norm are categorically and unquestionably accepted.[22]

Military aircrafts under Chicago Convention of 1944

The Convention on International Civil Aviation, or Chicago Convention of 1944 [23], is the core document regulating international civil aviation. Its governing body, the International Civil Aviation Organisation (ICAO), is responsible, among other duties, for minimum standards of flight safety as a specialised agency of the United Nations (UN). The Convention contains 96 articles divided into 22 chapters and 4 parts: The Chicago Convention does not contain a definition of the word "aircraft," and the status of military aircraft was also not re-envision within it. In plain English, Article 3 of the Convention limits its applicability to "civil" aircraft; nonetheless, , and the remaining provisions of the Convention must be elucidated in light of this limitation. Thus, evaluating the implied terminologies of Article 3 will amplify the degree of applicability of the convention to military aircrafts . It reads as follows:

Article 3

(a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.

22 International Court of Justice (ICJ) 1945, Article 38 (d),("subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law ")
23 ibid (n5)

(b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.

(c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by a special agreement or otherwise, and in accordance with the terms thereof.

(d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft."[24]

The inference of Article 3(a) above is very clear and achieves the goal set out in the preamble and purposes of the Convention. It gives the impression that the material scope of the Convention is limited to civil aviation alone.[25] However, Article 3 (b) raises a number of questions. The provisions state that, on the one hand, military aircraft are those aircraft used in military services and that such aircraft are to be excluded from the jurisdiction of the Chicago Convention.[26] On the other hand, the expressions "military aircraft" and "aircraft used in military services" are not necessarily synonymous; this question applies *mutatis mutandis* to police and customs aircraft[27]. According to Article 3(b) of the Convention, although the use of the phrase "shall be deemed to be" resulted in an aberration from the state of definition, the word "deemed" resulted in a presumption. Therefore, it is crucial to correctly determine both the nature of the enumeration and the nature of the presumption when interpreting Article 3(b). Using a **broad interpretation** of Article 3(b), the enumeration would not be limited. Therefore, in order to justify its application to other fields, many other types of aircraft may be involved in activities of the state; for instance, governmental aircraft such as privately

24 ibid (n5) Art 3
25 ibid (n5) Art 3(a)
26 ibid Art 3 (b)
27 Bin Cheng, "State Ships and State Aircraft" (1958) 11 Current Legal Problems, 233 < https://doi.org/10.1093/clp/11.1.225 > accessed 05 May 2023

owned aircraft conveying military troops, disaster relief, VIP travel, postal services, and medical, mapping, or geological survey services could be considered. The consequence of this approach is an expansion of the exception, reducing the scope of applicability

of the Chicago regulatory system. However, if one resorts to a **restrictive interpretation** of Article 3(b), the enumeration becomes limitative or exhaustive, and the only category of aircraft excluded from the applicability of the convention by the Chicago Convention are those used in "military, customs, and police services."[28] In this regard, a restrictive interpretation may limit the use of the exception and broaden the area in which the convention framework is applicable. Because the aforementioned article does not expressly define the nature of this enumeration, there is an interpretive conundrum with Article 3(b). However, this research contends that a restrictive interpretation is more resource-full than the other. Therefore, regardless of its actual ownership, whether private or public, the Chicago Convention criterion for defining an aircraft's public character is based on the role it plays at the time.[29] This certainly represents a practical solution to the problem. So, it's possible that a specific aircraft could have two classifications: civil and state. The ICAO navigation and security criteria should be adhered to if a military aircraft is being utilised to undertake a "civil flight," in which case the "military" aircraft would be subject to the rights established by the Chicago Convention. Thus, states should not allow military aircraft that do not respect ICAO standards to make civil flights. However, the public authority of the state must be present when the aircraft is executing a task or a mission to claim the status of a state aircraft.[30] Hence, it is perceived that the global community does not have a universally accepted interpretation of Article 3(b). This lack of a common interpretation is certainly

28 ibid 225
29 ibid 233.
30 ibid (n28)

problematic. It is, however, important to note that the presumption carried by this provision applies to the nature of the flight and not to the aircraft itself. Hence, under Article 3(b), it is conceivable that a given aircraft may be classified alternatively as either civil or state. Based on the presumptive background, each state can have a different interpretation of Article 3(b), and this creates an "open door," resulting in divergence in national air regulations.

Article 3(c)[31] states that on the basis of a specific authorization and in accordance with the terms of such authorization, state/ military aircraft may fly within a foreign sovereign territory. Such permission must be granted "or otherwise" in a particular agreement. According to state practise, obtaining "ad hoc" permission properly obtained through diplomatic channels or a bilateral or multilateral agreement between the States involved is the preferred method of authorization; it would appear that a simple operational air traffic control (ATC) clearance for the flight would not be sufficient to meet the requirements of Article 3(c).[32] Thus this article contain the directive towards the state/military aircraft on overflight. Hence, as previously noted, while the application of state aircraft is expressly excluded as per Art. 3(a), the current article, however, infers that the convention applies to state or military aircraft; thus, the logic of the convention, which is restricted to civil aircraft, is further inveigled.

As stated in the wording of Article 3(d), [33] the Convention's "due regard" provision, which is applicable both in times of peace and of armed conflict, continues to be the principal treaty duty placed on governments for the control of the flight of military aircraft. It seems these specific applications include the interception of civil aircraft by military aircraft, the potential use of force against civil

31 ibid (n4) art 3(c)
32 Michael Milde,"Rendition Flights and International AirLaw" (*redress.org* 2008)< https://redress.org/wp-content/uploads/2018/01/Jul-08-.pdf > accessed 06 May 2023
33 ibid (n4) art 3(d)

aviation, the conduct of military activities that might endanger civil air navigation, and the interface for communication between the military and the civilian sector.[34] Thus, the term due regard in Article 3(d) becomes an obligation for contracting states of the

Chicago Convention. It creates an obligation on states to regulate state aircraft or military aircraft in order to ensure that state or military aircraft exercise appropriate attention as well as heed and care for the safety of the course and position of civil aircraft, avoiding obstruction to the course of and collisions with civil aircraft[35]. Furthermore, as every obligation has a corresponding right, this interpretation presupposes that civil aviation is legitimately entitled to receive this attention. Indeed, an obligation of due regard is expected from the state or military aircraft, hence the convention is again deviating from the principle of application mentioned in Art. 3(a). The "due regard" rule in Art. 3(C) thus creates a reciprocal obligation on military aircraft towards civil air navigation.

Article 3 *bis* of the Chicago Convention[36] is one of the provisions that attempts to regulate actions governing interception of civil aircraft, and the interaction between civil and military aircraft. It was adopted into the Chicago Convention by the UN General Assembly's 25th Session in 1984 (extraordinary)[37] in reaction to many instances in which a civilian aircraft was shot down after unintentionally violating another country's airspace and being erroneously identified as a military aircraft. The turning point was Korean Air Lines Flight 007, a Boeing 747 with 269 passengers on board that the Soviets shot down after mistaking

34 ibid (n2) 891
35 ibid
36 ibid (n5) art 3 *bis*
37 See Protocol Relating to an Amendment to the Convention on International Civil Aviation, Res. A25-1, ICAO, 25th Session , Doc. 9436, (1984).

it for another reconnaissance plane.[38] Article 3 *bis* reiterates the prohibition against the use of weapons by civil aircraft while in flight and requests that the contracting states take action to stop airspace violations by other nations.[39] It emphasizes " *... that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered.,*[40] It also recognizes the right for every State, in the exercise of its sovereignty, to require civil aircraft flying above its territory without authority to land at designated airport.[41] Article 3 bis does not identify the "appropriate means" that may be used during the interception.[42] Nor does it identify "the relevant rules of international law" or "the relevant provisions of this Convention," except in subparagraph (a), where it prohibits the use of weapons against civil aircraft[43]; It makes the claim that "the lives of persons on board and the safety of aircraft must not be endangered," and it makes reference to the obligations and duties of states under the UN Charter.[44] These objectives were expected to be achieved if the interceptions of civil aircraft conformed to the determinations made by the International Court of Justice (ICJ) in many rulings. For instance, the ICJ in the Corfu Channel Case (*United Kingdom v. Albania*), Merits in 1949 , held that:

"*elementary considerations of humanity rather than necessity, even more exacting in peace than war*"[45]

In light of the threat posed, it appears that the final expectation of

38 Farooq Hassan, "A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union" (*scholar.smu.edu. Com,* 1984) <https://scholar.smu.edu/jalc/vol49/iss3/3> accessed 02 May 2023
39 ibid (n5) art 3 bis para. (a).
40 ibid.
41 ibid (n5) art 3 bis para (b)
42 Christine D. Gray, "*International Law and the Use of Force"* (2nd edn, OUP 2004) 97-99
43 ibid (n5) art 3 bis para (a).
44 ibid
45 [1949] ICJ. Rep. 4 at 22.

the law was to prohibit excessiveness in the retaliatory measure and not to prohibit self-defence actions. In general, this new law intends to prohibit any use of armed force against a civil aircraft. The restriction on operating military aircraft as it previously existed before adopting Article 3bis extends the use of military power to the extent that it cannot use weapons or open fire to destroy the aircraft, but it may lawfully employ any other measure aimed at stopping the security breach. Thus, scholarly opinion supports the conclusion that Article 3bis is a principle of customary international law,[46] and to contravene it by function of military aircraft would amount to a grave breach.

Interestingly, the Paris Convention's initial norms governing the legal status of military aircraft, which recognised the military aircraft's sovereign immunity, were ultimately not directly or implicitly rejected by the Chicago Convention. Nonetheless, unlike the Paris Convention, the Chicago Convention applies only to civil aviation and civil aircraft, as mentioned in Article 3, but obviously does not limit the scope of applicability to military or state aircraft. Therefore, this research argues that the effect of the Chicago Convention on military aircraft is considerable. Consequently, the status of military aircraft was not redefined with the Chicago Convention and seems to have been further reiterated, as stated in the Paris Convention, as a norm of customary international law.

PART 3

Military aircraft under the International Humanitarian Law

In general, armed conflicts are classified as either international (IAC) or non-international (NIAC) under IHL. An armed conflict must be properly classified in order to identify which set of rules

46 Malcolm N. Shaw, *"International Law"* (5th edn , CUP 2003) 477

apply to the parties involved. As stated earlier, the role and function of military aircraft in armed conflict are crucial and decisive. Therefore, the outcome of the military aircraft participating in belligerent activities must be clearly identified and adhered to within the IHL principle, with no exception as other parties are subjected. In addition, during times of armed conflict, international law governing the conduct of hostilities imposes obligations on parties involved to distinguish themselves from the civilian population. This position was outlined in the following manner in the ICJ's Advisory Opinion in the Legality of the Threat or Use of Nuclear Weapons Case (1996):

"*a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the laws applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.*[47]

Hence, once determining a claim of military aircraft status in an armed conflict, the relevant legal principles concerning military aircraft are drawn from customary international law principles codified in treaty laws. In light of this, the discussion that follows will focus on two primary legal documents that include important provisions governing military aircraft under the law of armed conflict:

Hague Rules of Air Warfare, 1922[48]

The Draught Hague Rules of Air Warfare (HRAW) contain sixty-two articles.[49] Although these rules were never adopted in legally binding form, they are of importance as an authoritative attempt to clarify and formulate rules of law governing the use of military aircraft and other aircraft in war. As per the HRAW In a scenario

47 [1996] I.C.J. Rep. 226 at 245 [Nuclear Weapons]
48 Hague Rules of Air Warfare, Drafted by a Commission of Jurists at the Hague, December 1922 - February 1923.
49 ibid

involving air warfare, only two opposing belligerents and neutral states are recognised under the rules[50] as distinct parties. Military aircraft, public non-military aircraft, private aircraft, and flying ambulances are the four different classifications of aircraft.[51]

The first article of the HRAW specifies that the rules of aerial warfare "*... apply to all aircraft, whether lighter or heavier than air, irrespective of whether they are, or are not, capable of floating on water.*"[52] HRAW specifies A military aircraft's crew must be entirely composed of military personnel, and it must be commanded by someone who is commissioned or enlisted in the state's armed forces. [53] The interpretation is a reasonable effort as it elaborates for the first time on the nature of the military aircraft, but it seems like a subjective codification since the conversion of state to military does not assess. The HRAW is crucial once more because the marking of military aircraft has not before been covered by any treaty provision as it has. The laws specify how crucial it is that a military aircraft have an outside mark indicating its country and military origin in order for it to be visible.[54] This can be distinct and important. Whether or not an aircraft is a military aircraft is important because military aircraft may exercise belligerent rights.[55] Further HRAW Art 17 and 18 stipulate that flying ambulances must have the distinctive Red Cross emblem in addition to the conventional identification markers. These markers must be permanently attached, unable to change while in flight, and large enough to be seen from all sides as well as from the top and bottom.[56] The Art. 19 of the HRAW edicts prohibit

50 ibid art 13-17
51 ibid
52 ibid (n48) art 1
53 ibid art 14
54 ibid art. 3.
55 ibid art. 13.
56 ibid art. 7

perfidy through the use of false external markings on the aircraft[57], as such combatant status should be easily recognised. Indeed, in the context of the discussion of markings, it is often assumed that military aircraft will be marked.

More importantly, the HRAW represented many rules governing military aircraft operations. Especially aerial bombardment, which amounts to an indiscriminate bombing: *dolus eventualis*, or conditional intent, over a civilian population without attempting to attack military objectives, was prohibited. For the first time, the legitimacy of air attack in the presence of military objectives was recognised, and its effect on international law was reflected in the form of specific rules from Articles 22, 24, and 25 and residual provisions in HRAW.[58] First, the HRAW provides that the bombardment of a civilian population for the purpose of terrorising them is prohibited.[59] Further, the rules stated that aerial bombardment is only permitted during military air operations when it is directed at a military target whose destruction would give the belligerent a clear military advantage.[60] Bombardment of private property, not of a military character is prohibited as follows; "... *cities, towns, villages, dwellings, or buildings not in the immediate vicinity of the operations of land forces is prohibited.*[61] The circumstances in which this provision was drawn up in **Article 22** read with **Article 24** make their interpretation a simple matter, especially as regards an air attack that may be directed exclusively against a military objective, i.e., the attacker's intention must be to destroy the military object alone.[62] The question of intention is, in fact, decisive in interpreting any such rule. Moreover, the possibility of subsumption was limited to the concept of "military

57 ibid art 19
58 ibid art 22,24 and 25
59 ibid art. 22
60 ibid (n48) art. 24
61 ibid
62 James M. Spaight, *"Air Power and War Rights"* (3rd edn, Longmans, Green 1947) 76-99

objective." Not every object could therefore be considered a military objective -only those whose destruction would constitute a military advantage representing the *sine qua non* for military success.

The aforesaid obligatory laws codified in HRAW stem from those that objected to the prohibition of "indiscriminate" attacks on civilian and private properties in armed conflict. This is obviously the initial effort in developing the legal principles of distinction, proportionality, precautions, humanity, and avoidance of unlawful methods or means of war of the Law of Armed Conflict. As those obligations are inevitably owed to the accountability actions of military aircraft pilots, and they must ensure their adherence in aerial operations. This rule is again important because it facilitates and alarms military aircraft operators in advance of the measures to be implemented to avoid indiscriminate and degrading human rights. Thus, the rules in HRAW governing military aircraft during the conduct of hostilities not only protect the victims after the event, i.e., after hostilities have taken place, but also make an assumptive effort to inculcate knowledge in military pilots prior to engagement in air operations.

Rules under Four Geneva Conventions in 1949[63]

The foundation of IHL is the four of Geneva Conventions, which were adopted on August 12, 1949. The protection of war victims and international law, which governs the conduct of armed conflict and aims to lessen its impacts, are the main concerns of all four conventions. Being the most potent and effective tool, military aircraft were also subjected to the specific provisions available in those conventions in armed conflict. Two Protocols, in addition to the four 1949 Geneva Conventions adopted in 1977, strengthen the protection of victims of international(Protocol I) and non-

63 ibid (n7)

international (Protocol II) armed conflicts.[64] Important regulations governing military aircraft operations contained in Protocol I[65] are identified in this discussion.

Protocol 1[66] relates to the protection of victims of international armed conflicts either on the ground or in the air under the principles of humanity, distinction, necessity, and proportionality. Hence, for this discussion, specific provisions provided in protocol related to air travel are considered. Part II (Articles 8-34)[67] extends the protection of the Conventions to civilian medical personnel, equipment, and supplies, as well as to civilian units and transports, and contains detailed provisions on medical transportation, including a regime for the protection of medical aircraft. **Article 18**[68] provides medical aircraft have to be clearly marked with their national colour and the emblem of the Red Cross on a white background, the Red Crescent, or the red lion and sun on a white background. **Article 21**[69] provides that medical vehicles shall be respected and protected in the same way as mobile medical units under the Convention and this Protocol, and as per **Article 23**[70]**,** it is insisted that they will be protected by the employment of the emblem, and this protection can only be successful if they can be identified and recognised as medical aircraft. **Art. 24**[71] directs that medical aircraft be respected and protected in the air. As per **Article 27**[72]**,** military medical aircraft must follow designated routes and

64 The Geneva Conventions and their Additional Protocols,(*icrc.org* ,2014) <(https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols#:~:text=In%20response%2C%20two%20Protocols%20Additional,the%20way%20wars%20are%20fought> accessed 06 May 2023

65 Protocol 1, Additional to the IV Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977

66 ibid

67 ibid (n 65) Part II

68 ibid (n 65) art 18

69 ibid art 21

70 ibid art 23

71 ibid art 24

72 ibid art 27

altitudes and must bear a Red Cross or Red Crescent. **Article 35** [73] of the Additional Protocol provides that and establishes a prohibition on using 'weapons, projectiles, materials, and methods of warfare of a nature to cause superfluous injury or unnecessary suffering'. This rule has crystallised into a customary norm in international humanitarian law.[74]

The above articles are particularly concerned with the safety of medical personnel and medical equipment in armed conflict and impose an obligation on the parties concerned based on the humanity and distinction principle. Hence, when an aerial operation takes place, state responsibility arises on the nature of military air craft operation within these provisions, whether the matter in issue is an air raid, aerial bombing, or interception. Therefore, the aforesaid articles 23,24, 27 and 35 on medical transportation, identification of markings, are to be concerned with two aspects: interception/attack of belligerent aircraft and an aircraft that is clearly in a *hors de combat* state. Rules of proportionality and distinction of International Humanitarian law prohibit the attack on a disabled aircraft that has lost its means of combat or on an aircraft where the pilot is surrendering. Yet it is crucial to keep in mind that under Chicago Convention **Article 89**[75], it is acceptable to pretend to be disabled or in distress in air combat if the goal is to persuade the enemy to cease an attack. As a result, an aircraft that seems damaged can still be attacked legally. Further, in the case of interception, these provisions must be read with Article 3bis of the Chicago Convention too. The wording of **Art 49 (3)** Protocol I[76] makes the provisions applicable to "air or sea warfare that may affect the civilian population, individual civilians, and civilian

73 ibid art 35
74 Jean-Marie Henckaerts and Louise Doswald-Beck, "*International Committee of the Red Cross, Customary International Humanitarian Law – Volume I: Rules*" (CUP 2005) 237-244
75 ibid (n5) art 89
76 ibid (n 65) art 49(3)

objects on land." However, the most important obligation lies in the following terms of the article:

"They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air".[77]

As directed in the above provision, if the requirements to select acceptable techniques and targets exist in air raids, it shall be the duty to ensure that the proportionality principle is followed every time. The crew of an aircraft or a missile has no time to consider alternatives and is rarely sufficiently certain that a different attack will actually be successful. As a result, those planning and deciding on an attack on an enemy military aircraft are simply unable to predict where such a moving target will actually be hit. **Articles 51 and 56**[78] forbid indiscriminately attacking civilian targets and destroying supplies of food, water, cultural properties and other necessities of life. Here direct assaults on civilian (non-military) targets fall under the category of indiscriminate attacks by using uncontrollable technologies like land mines, biological weapons, and nuclear weapons. As per **Article 57**[79]**,** air strikes are subject to the obligations to do «everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection;» to «take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimise,"collateral damage; and to cancel or suspend an attack "if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to" violate the rule of proportionality. The specific obligations are outlined in Article 57, which mostly mirrors

77 ibid
78 ibid (n65) art 51-56
79 ibid art 57

customary international humanitarian law applicable in both international and non-international armed conflicts. The majority of issues related to arial attacks in international armed conflicts fall under this category, and if proceedings are initiated for war crime or any other sort of violation of IHL based on this scenario, individual criminality of aircraft operators and state responsibility under collective responsibility may result.

In general, under armed conflict, military aircraft participating in belligerent activities must therefore be expected to engage only legitimate targets anywhere in the theatre of war and outside of

a neutral jurisdiction.[80] When taken together with the Chicago Provisions, the IHL principles, and the principles of the Geneva

Conventions, those laws express that parties are not prohibited from using aircraft to strike legitimate military targets as long as they follow the proportionality principle and refrain from using indiscriminate bombing.

Conclusion

The thorough regulation of the law of air warfare has made aircraft one of the most contentious aspects of the law of war. Generally, problems posed by military aircraft have far more to do with traditional concepts of the laws of war on land than with the specificities of air combat in the strict sense of the term. Nevertheless, the current public international air law has a considerable area governing military aircraft that evolved into existing statutes in the aftermath of World War II. Having examined the law governing military aircraft under two distinct legal regimes: convention-related aviation laws and laws governing armed conflict, it was necessary to identify the nature of the laws affecting military aircraft. The Paris Convention made a distinction for the

80 ibid (n74)

first time in public international law between "private aircraft" and "state aircraft," "which includes military aircraft as state aircraft. It is inferred that the Paris Convention has acknowledged that military aircraft that performed sovereign functions benefited from sovereign immunity. The Chicago Convention, being the magna carta of contemporary aviation law, neither explicitly nor implicitly negated the customary norms affecting the legal status of military aircraft as initially codified within the Paris Convention. So the status of military aircraft was not amended by the Chicago Convention and remains as stated in the Paris Convention. However, the Convention, through the use of an extremely narrow

definition of "state aircraft, interprets the term civil aviation very broadly and creates a regulatory distinction between the flight of a state aircraft and the flight of a civil aircraft. Therefore, this article argues that the applicability scope of the Chicago Convention, as expressed in Article 3, is not limited to civil aircraft. This stance was further reiterated once Article 3bis was enacted in 1983, when the prohibition of the use of force against civil aircraft was already a part of general international law. Thus, that provision aimed to create a direct customary law obligation towards military aircraft to protect civil aircraft. Under the humanitarian legal regime, there are elaborated sets of rules in different treaties governing the status of military aircraft in armed conflict. The Hague Rules have set forth the issues and obligations of aerial bombardment, which amount to indiscriminate bombing posed by military aircraft and has significantly more to do with classical conceptions of land law than with the specificities of air conflict. The Geneva Conventions, especially Protocol I, mainly concern the preservation of customary international law obligations based on the principles of humanity, distinction, necessity, and proportionality when conducting air operations. Finally, this study made the observation that no unified and specifically codified laws are available that affect military

aircraft in current regimes. However, according to this study, statutes embedded in both aviation law and IHL regimes already impose both individual and collective culpability under state responsibility in the case of indiscriminate air assaults and illegal air interceptions by military aircraft, which is in grave violation of customary international law.

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A Critical Appraisal of the Sri Lankan Legal Regime Governing Electronic Communication of Offer and Acceptance under English Common Law and Electronic Transactions Act

Sivanesan Pradinath*

Abstract

This paper examines the legal framework governing the communication of offer and acceptance, considering both traditional and non-traditional means, under English Common Law. It also explores the challenges presented in the technological era. Additionally, the study analyzes the influence of the UNCITRAL Model Law on Sri Lankan jurisprudence. By conducting a systematic literature review, the paper highlights recent scholarly contributions. The common law rules on offer and acceptance have faced criticism due to their lack of clarity and their inability to address issues arising in electronic contracts. To address this, the research focuses on provisions of the UNCITRAL Model Laws and Sri Lanka's Electronic Transactions Act No.19 of 2006, examining how these modern laws address the timing of the communication between offeror and offeree via data messages. The findings provide valuable insights for entrepreneurs, traders, and stakeholders to effectively utilize electronic contracts and suggest avenues for future research in e-commerce. The paper concludes that comprehensive regulations encompassing data protection, privacy, security, intellectual property rights, dispute resolution mechanisms, consumer rights, and transaction transparency are crucial for the effective protection of e-transactions in Sri Lanka. By addressing challenges and concerns related to online trading, a more robust framework can be established.

Keywords: *Contract Formation , Electronic Commerce, UNCITRAL Model Law, Electronic Transactions*

*LL. B (Hons), LL.M (Col), Attorney at Law, Lecturer, Department of Law, University of Jaffna

Introduction

It is virtually axiomatic that no modern nation can remain self-sufficient. Globalization has ensured that the movement of goods, services and people across borders takes place regularly, as a matter of course.[1] Thus, the emergence of 'electronic commerce' has radically changed the patterns and practices of the commercial world by opening new pathways. Electronic commerce has started to revolutionize spending habits and change the way how everyone does business[2]. The reasons for this are many and varied; globalization and dismantling trade barriers, the disposition of smart cards and the internet, etc. Admittedly, e-commerce has made significant changes in traditional contractual relationships as well. The internet has been identified as an effective medium not only for advertising and distributing product information but also for doing business transactions more efficiently. In this scenario, the traditional face-to-face, paper-based contracts turn less important. Instead, electronic contracts have become an essential part of our day-to-day life.

Orthodox English Common Law Rules pertaining to the Communication of Offer and Acceptance: Adams vs Lindsell

In the absence of specific legislation on the law of contract, our legal system follows the English Common Law jurisprudence on the matter by virtue of section 3 of the Introduction to Civil Law Ordinance[3]. The English Common Law requires a clear assertion of

1 Naazima Kamardeen, *Global Trade and Sri Lanka; Which way forward?*, Stamford Lake Publication, 2016 page 1.

2 B.A.R.R Ariyaratna, Contracting in Cyber Space: A Comparative Analysis of Electronic Transaction Law in Sri Lanka, 9thInternational Research Conference-KDU, Sri Lanka,2016

3 Section 3 of the Civil Law Ordinance No.5 of 1852 reads as follows " *In all questions or issues ....with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance, the law to be administered shall be the same as would be administered in England in the like case.."*

'*Consensus ad idem* or assent' to presume the formation of a valid contract. The legal position is the same in private international law. The common law courts look at the external appearance of a transaction to discover the relevant point when the parties have exchanged the assent. It is an objective investigation of the facts and circumstances of each case. Moreover, the court considers the language the parties used to make an offer and accept. Awareness of the parties in relation to the material transaction is also relevant in determining the validity of a contract.[4] Prior to the invention of electronic devices and the internet, contractual assent was to be communicated via written letters or by word of mouth. The common law was ambiguous regarding the particular point of time upon which the parties' actual intention was communicated. Therefore, the author seeks to give a very brief outline of the English Common Law precedent governing relevant legal issues.

In *Adams vs Lindsell*[5], the Court of Law was to determine the three crucial points of time when the acceptance of an offer was communicated; (1) when the letter of acceptance is put into the post-box, (2) when the letter of acceptance is delivered to the offeror's address, or (3) when the offeror actually reads the letter of acceptance. In the court's view, the first proposal was reasonably suited to the issue at hand and resolved that the acceptance communicated through the post reached the offeror upon the Act of posting. Posting a letter was considered an act of manifestation of the consent of the acceptor. The acceptor /offeree will not be required to adduce further evidence to prove his acceptance.

The Common Law makes it clear that where a contract is formed *inter presente,* the communication of the assent by both offeror and offeree takes place simultaneously. However, when a contract

4 L E. Trakman and K Sharma, The Binding Force of Agreements to Negotiate in Good Faith, The Cambridge Law Journal Vol. 73, No. 3 (November 2014), p. 598
5 *Adams v Lindsell* [1818] 1 B &Ald 681.

is formed i*nter absentes*, by the usage of non-instantaneous communication tools, the exchange of assent manifests at a different point in time. The English Common Law principles are paradoxical on the issue of communication of assent: The first rule says, "parties must have full knowledge of communicated acceptance for a formation of a valid contract",[6] and the second rule, the postal rule, says a valid contract can be formed even without the knowledge of an offeror, i.e. the Act of positing an acceptance constitutes the communication of acceptance. The author submits that the Common Law rules on the communication of contractual assent are ambiguous and unsuitable for the modern commercial world. However, with the modern technological invention of e-postal services, one can track the whereabouts of letters, and an offeree can ascertain with certainty if and when the letter of acceptance reaches the offeror. Therefore, *David Pugsley* strongly believes that the Receipt Rule should be recognized as a valid rule to regulate the communication of assent of the parties to a contract. *"We should therefore recommend that as a general rule, in accordance with the reasonable expectations of the man on the Clapham omnibus and the fundamental principles of the modern law of contract, a letter of acceptance should take effect, and the contract should therefore be complete when the offeror receives the letter."*[7]

Law governing the Modern Form of Contract: Instenous and Near- Instantaneous Contracts

Though there are some similarities between postal and e-mail communications, the common law courts do not treat them as the same communication medium. E-mails are not considered an instantaneous communication tool. The courts are reluctant to apply

6 Victor Morawetz, *The Elements of a Contract, American Bar Association Journal* , 1925, Vol. 11, No. 2pp. 87-90

7 D Pugsley, 'Postal Contracts' (1976) 11 Irish Jurist 3, 6.

postal rules to e-mail communications. They preferred to apply the receipt rule[8] for the transmission of assent to take place via e-mail. In *Chwee Kin Keong v Digilandmal,*[9]the court was in favour of applying the receipt rule for the e-mail communication of offer and acceptance. It suggested that the "*general (or recipient) rule ought to govern e-mail transactions*" and even suggested that the possible abolition of the postal rule must be seriously considered. Therefore, the recipient rule is more convenient and relevant in instantaneous and near-instantaneous communications. A similar view was adopted in the case of *Jafta v Wildlife*.[10]

In *Entores v Miles Far East Corp*[11] the question of communication of an acceptance arose in the context of telex, an instantaneous form of communication. The English Court of Appeal held that a contract made using an instantaneous mode of communication is only complete when the offeror receives the acceptance. Accordingly, under instantaneous communication, the external manifestation of assent reaches the offeror when the acceptance message reaches him. Yet, there is another legal question to be resolved. **When** does an acceptance really 'reach' the offeror?

Lord Justice Denning's observations suggest that "…in the case of 'true' *inter praesentes* situations, the matter of communication is a non-issue, as the parties are in one another's presence (either physically or virtually) and there will be no contract until the offeror perceives the acceptance through one or more of his senses. However, in the case of *inter absences* when the parties actually communicate their approval by an external manifestation of action

8 SWB Hill, '*Email contracts–When is the contract formed*?' (2001) 12 Journal of Law and Information

9 *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* [2004] SGHC 71

10 *Jafta v Ezemvelo Kzn Wildlife* [1st July 2008] D204/07 ''*[t]he assumption that postal contracts are concluded when a letter or telegram of acceptance is handed at the post office cannot apply to acceptance by e-mail or SMS because communication differs substantially*.''

11 *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327

either by way of posting or other forms of communication."[12]

Inadequacy of the English Common Law to govern the Instantaneous and Non-Instantaneous Communication

Though e-mail communication is faster than posting, it is not genuinely real-time. An e-mail is transmitted instantly from the acceptor to the offeror, and reaching the other end might take some time. At the same time, there is no universal rule to ascertain whether the person receiving the e-mail is aware of the arrival of the same. There is a gap between the reception of an acceptance e-mail and when the offeror became aware of the acceptance. Therefore, many scholars argue that e-mail communications are not truly an *inter praesentes* form of communication, nor are they *interabsences* communications[13].

The law is unsettled when the acceptance in e-mail actually reaches the offeror's e-mail server. Is it when it reaches the server of the offeror? (constructive knowledge) or Is it when the offeror is actually notified of the e-mail and reads it (actual knowledge)? The answer to this question does not seem to have been settled in the common law world[14] In *Brinkibon v Stahag Stahl*[15], the court was of the view that *"[n]o universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgement where the risks should lie."* It is a well-settled law in

12 *Entores Ltd v Miles Far East Corporation* [1955] 2 QB Pg. 332-33

13 K O'Shea and K Skeahan, 'Acceptance of Offers by E-Mail–How Far Should the Postal Acceptance Rule Extend?' (1997) 13 Queensland University of Technology Law Review 247, 259.

14 *Thomas & another v BPE Solicitors [2010] EWHC 306* (Blair J)–*"Once one sets aside the "postal rule" as inapplicable to emailcommunications, the question whether an email acceptance is effective when it arrives, or at the time when the offeror could reasonably be expected to have read it, is not a straightforward one, and does not appear to be settled by authority."*

15 Lord Wilberforce, in *Brinkibon Ltd v Stahag Stahlund Stahlwarenhandelsgesellschaft mbH [1983] 2 AC 34*

the context of postal communication of acceptance that the offeror has constructive knowledge of the acceptance, at the moment when the letter is put into the post-box. Similarly, acceptance occurs in e-mail communications within working hours which is sufficient to attribute constructive knowledge of the acceptance to the offeree.

The Doctrine of Fault-based Analysis

In *Entores v Miles Far East Corp* Denning LJ expressed his view supporting fault-based analysis which reads as follows:-

> *"In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it. But, suppose that he does not know that his message did not get home. He thinks it has. This may happen if the listener on the telephone does not catch the words of acceptance but nevertheless does not trouble to ask for them to be repeated: ..... so that the man who sends an acceptance reasonably believes that his message has been received. The offeror in such circumstances is clearly bound because he will be stopped from saying that he did not receive the message of acceptance. It is his own fault that he did not get it.."*[16]

In the above-mentioned case, it is emphasized that via e-mail communications, the contract comes into force even if the offeror does not know the acceptance and has no knowledge of the acceptance, as the acceptance message was not communicated owing to the fault of the offeror. It is further stated that if the acceptance is not clear, it is the responsibility of the offeror to make it clear, or he must ask the offeree to repeat it, which will enable the offeree to know that the acceptance was not properly

16 Denning LJ, in *Entores v Miles Far East Corp*[1955] 2 QB 327

communicated to the offeror. Otherwise, the offeror will be at fault and the doctrine of estoppel will be applied to him by saying that he does not aware of the acceptance or denying the acceptance.

This idea of constructive knowledge can be considered as an exception to the general rule that to conclude that there is assent in instantaneous communications, an acceptance ought to be communicated to the offeror. As well, absence of fault on the part of the offeror no contract will come into existence. It is stressed that assent is the fundamental factor in forming a valid and enforceable contract rather than a meeting of minds.

The Model Law and the Convention governing the Communication of Offer and Acceptance

Provisions of the UNCITRAL[17]Model Law governing the instantaneous communication neither the Model Law nor the Convention[18] seeks to set out substantive rules for forming a contract. However, they do help to judge when electronic communication is dispatched and received. The Model Law provides that *"[u]nless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator."*[19] According to the Model Law, the time of receipt of a data message will be determined based on whether the addressee has designated an information system for the purpose of receiving the messages. Thus, a relevant provision of the Model Law says that the addressee has designated an information system for the purpose of retrieving data messages, and receipt occurs at the time when the data message enters that designated information system[20] If the message is sent to an

17 [15] United NationsCommission on International Trade Law 1996
18 United Nations Convention on the Use of Electronic Communications in International Contracts, (The Convention-2005)
19 UNCITRAL Model Law, Art 15(1).
20 Ibid, Art 15(2)(a) and (b).

information system not designated by the addressee, then receipt occurs only when the addressee retrieves it.[21]

Provisions of the Convention Governing the Communication of Data Message

According to Art 10(2) of the Convention, electronic communication is presumed to be capable of being retrieved by the addressee the moment it reaches the addressee's 'electronic address. The drafting committee was to wrestle with the actual "concerns over the security of information and communications in the business world have led to the increased use of security measures such as filters or firewalls which might prevent electronic communications from reaching their addressees." [22] However, they could not provide one solution to the issue at hand when such data messages reach the intended receiver. In their recommendation, the drafting committee suggested, "It was noted that the presumption of receipt of data message…could be rebutted in cases when security or other devices would prevent the communication from being retrieved. It was further argued that the operation of the presumption would allow greater flexibility in assessing facts, should there be arguments as to whether a communication had been received or not".

Introduction of Electronic Transactions Act No.19 of 2006

UNCITRAL Model Laws and the United Nations Convention on the Use of Electronic Communications in International Contracts play a significant role in introducing a uniform legal framework in Sri Lanka. Sri Lanka has introduced the Electronic Transaction Act No.19 of 2006 as a significant piece of legislation which broadly addresses the issues in electronic transactions in the country. The

21 Ibid Art 15(2)(a)(i).

22 UNICTRAL, Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts (Explanatory Note on Convention), para 185

Sri Lankan Electronic-Transaction Act enshrines three major principles of Convention and Model Laws: technology neutrality, functional equivalence and party autonomy. The principle of technology neutrality is ensured by the Act stating

that technology would not be given preference when applying the law[23]. The preamble to the ETA states that it is *an Act to facilitate the formation of contracts….in electronic form*. As well, Section 2 of the Act ensures that establishing legal certainty, reliability and public confidence with regard to electronic transactions is the main objective of the Act. These provisions simply align with the objectives of UNCITRL Model law as well as the Convention.

Section 11 of the Act says offer and acceptance may be exchanged using the electronic form and just because it is in electronic form a contract shall not be denied legal validity. It is apparent that this section has recognized the legal validity and the enforceability of Electronic Contracts. Similarly, Article 11 of the ECC recognizes an online invitation to treat which ought to be included in our law. Section 14 of the Act and Article 15 of the UNCITRAL Model Law enshrine a similar view of the time and place of dispatch and receipt of electronic communications. Accordingly, dispatch of a data message takes place at the place of business of the originator and is deemed to be received at the place of business of the addressee. This section confirms the proper communication of the offer and acceptance.

Section 3 of the Electronic Transaction Act confirms the legal validity of electronic records as well section 4 provides that the requirement of writing shall be satisfied by a data message or any other form of electronic communication. Another important arrangement is that section 7 of the Act gives legal validity to electronic signatures as similar to the written form of signature.

23 Saleem Marsoof, *Electronic Transactions in the Modern World: An Analysis of Recent Sri Lankan Legislation*, Law College Law Review 2006

Also, Section 17 (d) of the Act states a contract should not be treated as invalid as there was no act done by a natural person or the action done by an automated message system. This section gives effect to the electronic form of communication as same as any act done by a natural person.

Hence, the above-provided discussion gives a clear overview that the Domestic Law (Electronic Transaction Act) is enacted with the view of unifying it with international Model Law and strengthening international and national e-Commerce. However, there are lacunas in the enacted Act which curtail achieving its full potential. For instance, The Evidence (Special Provisions) Act No. 14 of 1995 governed the evidence pertaining to contemporaneous audio and video recordings as well as computer evidence in Sri Lanka[24]. However, the Electronic Transaction Act (ETA) explicitly excluded the application of the Evidence Ordinance (Special Provisions) Act to any transaction falling under the purview of the Electronic Transaction Act. In 2017, an amendment was introduced to the Act to establish a specific framework for the admissibility of data messages, electronic documents, electronic records, and communications under the Act. This amendment aimed to address various deficiencies and shortcomings in the previous provisions.[25]

The primary objectives behind the introduction of this amendment were to achieve the following:

(i) Provide greater legal certainty to e-commerce providers operating within the country. This was intended to create a more favorable environment for electronic business transactions and promote the growth of e-commerce. (ii) Ensure the validity and enforceability of electronic contracts. By establishing a specific regime for the admissibility of data messages, electronic documents, electronic records, and communications, the amendment aimed to eliminate

24 ss 4, 5of Evidence (Special Provisions) Act No. 14 of 1995.
25 ETA; Section 22.

uncertainties surrounding the legal status of electronic contracts and enhance trust and confidence in online transactions. (iii) Facilitate cross-border trade. The amendment sought to align Sri Lanka's legal framework with international standards for electronic transactions. This was intended to promote seamless cross-border

trade by enabling the recognition and acceptance of electronic records and communications in international transactions, thereby reducing barriers and enhancing efficiency[26].

Nevertheless, it is important to note that the Act does not specifically address the procedures for dispute resolution and settlement in the context of e-commerce transactions. As a result, the traditional resolution and settlement processes outlined in the Judicature Act No.2 of 1978 (as amended), the Civil Procedure Code Nos. 2 of 1889 (as amended), and the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 continue to govern the resolution of disputes arising from e-commerce transactions in Sri Lanka. These acts serve as the primary procedural laws for handling disputes through the established judicial system.

E-contracts present several significant differences from traditional contracts, as the buyer or consumer cannot physically interact with and examine the product in real-time. This gives rise to various challenges in electronic transactions, including concerns regarding quality, performance, brand, color, size, price, quantity, and more. Unlike in traditional commerce, the buyer relies heavily on the seller's contract terms in e-contracts, which are often structured as unilateral contracts[27]. Consequently, the clauses in these contracts tend to be skewed in favor of the sellers. Since there is typically no regulatory authority specifically dedicated to e-commerce

26 Electronic Transactions (Amendment) Act, No. 25 of 2017.

27 Alison S. Brehm & Cathy D. Lee,(2015) ; 'From the Chair: "Click Here to Accept the Terms of Service"', American Bar Association (Jan 2015), Vol. 31 No. 1, Available at: <http://www.americanbar.org/publications/communicationslawyer/2015/january/click_here.html> accssed on…….

(such as the Consumer Affairs Authority), unfair or restricted trade practices may occur frequently. As a result, e-commerce faces numerous challenges, such as receiving goods that are not suitable for the buyer's intended purpose, insufficient cooling-off periods, difficulties with returns and refunds, issues with defective goods, and several other related problems.

Due to the absence of specific dispute settlement mechanisms in the Electronic Transaction Act of Sri Lanka, traditional civil dispute settlement methods have been adopted to resolve disputes arising from e-commerce transactions. These methods primarily include traditional litigation, which involves resolving disputes through court proceedings. Additionally, alternative dispute resolution methods, such as arbitration, mediation, collective agreements, and industrial courts, are also utilized for dispute resolution in the context of e-commerce transactions. These mechanisms provide avenues for parties to seek resolution outside of the traditional court system, offering flexibility and potentially faster and more cost-effective means of settling disputes[28].

Conclusion

This paper aims to bring attention to the existing gap and underscores the critical need for comprehensive laws to address the evolving challenges in the e-commerce landscape. The study convincingly illustrates that the current legal framework governing e-commerce in Sri Lanka is insufficient in effectively facilitating and promoting electronic commerce. With the advent of new challenges in the digital realm, the existing laws have proven inadequate in meeting the demands of the e-commerce sphere. To enhance and invigorate the e-commerce sector in Sri Lanka, it is crucial to incorporate international standards into national legislation. By adopting and implementing these standards through various legislative measures,

28 Ariyaratna, Ruwanthika. (2020). 'Consumer Dispute Resolution in B2C E-commerce in Sri Lanka: A Comparative Legal Analysis'.

the country can foster a conducive environment for the growth and development of e-commerce. This would enable Sri Lanka to keep pace with global advancements in e-commerce and unlock its full potential in the digital marketplace. With the objective of achieving the desired level of uniformity and certainty, the United Nations Commission on International Trade Law (UNCITRAL) has drafted

the Convention on the Use of Electronic Communications in International Contracts (e-Contracting Convention). It is optimistic fact to note that Sri Lanka is at the forefront of this effort to bring greater harmony to the law, which has been hailed as one of the most significant recent developments in international electronic commerce law. The enactment of the Act enabled Sri Lanka to be among the first three countries to sign the Convention.

Indeed, implementing online trading regulations is a crucial step forward in effectively governing e-commerce platforms registered in Sri Lanka. Such regulations would provide a clear legal framework and guidelines for e-commerce activities, ensuring consumer protection, fair trade practices, and the overall integrity of online transactions. By introducing specific regulations tailored to the unique characteristics of e-commerce, Sri Lanka can address the challenges and concerns associated with online trading more effectively. These regulations can cover a wide range of aspects, including data protection, privacy, security, intellectual property rights, dispute resolution mechanisms, consumer rights, and transparency in online transactions. By establishing comprehensive online trading regulations, Sri Lanka can create a trusted and reliable e-commerce ecosystem, promoting economic growth and safeguarding the interests of all stakeholders involved.

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Judicial Appointments in India and Sri Lanka: A Comparative Constitutional Matrix

Rangaswamy Nayak*

Abstract

Successful democracy presupposes Independent Judiciary (IJ). Written form of constitutions, consisting bill of rights, postulate autonomy of the judiciary. IJ implies that the judicial power ought to be free from internal motives and external influences. The process of Appointment of Judges (AOJ) is the stepping stone of such IJ. Sri Lanka and India being democratic, republic and socialist nations have made enormous efforts to establish IJ required for strengthening the constitutional values. Despite concrete constitutional mechanism for appointment of judges in India and Sri Lanka, the experience of both the countries recorded lack of stability in these systems. The purpose of this paper is to understand rationality of the practice followed in AOJ along with incidental issues couple with it. The basic principles and standards meant for AOJ are tested and examined in the backdrop of these two systems. The methodology adopted for the study is non-doctrinal in nature. The paper concludes that the practices of both the countries entangled with certain shortcomings addressing of which may resulted elevation of constitutionalism to the greater in both the countries.

Keywords: *Judiciary, India, Sri Lanka, Appointment, Comparison*

*Assistant Professor of Law, Karnataka State Law University, Hubballi, Karnataka, India

Introduction

Both Sri Lanka and India, in addition to having geographical and historical affinity,[1] are sovereign, democratic, republic, socialistic states founded on the values of human dignity, equality, human rights and freedoms, pluralism and open government system. [2] Responsible and accountable governance is the hallmark of both political systems. The political systems of both countries, although, are influenced by Anglo-Saxon system these two countries are best testimonies for 'Constitutional Autochthon.'[3] The role of Judiciary in both countries is distinctive. It is a supreme ultimate constitutional power to interpret the Constitution.[4] Constitution shall be interpreted in a constructive way and it shall be interpreted in a destructive manner.[5] The intrinsic character of judiciary and non-delegation of the core judicial functions resulted in outstanding place for judiciary under the constitutional scheme.[6] The judiciary is the true example of a body with specialized skills and technical knowledge.[7] Predominate use of the free and fair judicial system for better protection and advancement of the Human Rights under

1 For historical, geographical, political, Military relationship between the two countries see, Russell R. Ross and Andrea Matless. *Sri Lanka: Country Study* (DA pam: Area handbook series, 1998)

2 See preamble of the both the countries.

3 S.A. De Smith, *Constitutional And Administrative Law* (Penguin Books Ltd, Harmondsworth 1971) 65.

4 Constitution of Kosovo Constitution Art.112; Constitution of Kyrgyzstan 2010, Art.97(6); Constitution of Latvia 1922, Art.85; Constitution of Lebanon 1926, Art.19; Constitution of Lesotho 1993, Art.128; Constitution of Liberia 1986, Art.2; Constitution of Libya 2016, Art.150; Constitution of Liechtenstein 1921, Art.104; Constitution of Lithuania 1992, Art.102; Constitution of Luxembourg 1868, Art.95; Constitution of Malawi 1994, Art.12; Constitution of Federated States of Micronesia, 1978, Art.11 Sec.8; Constitution of Republic of Moldova, 1994, Art.135 (1)

5 Constitution of Maldives 2008, Art.69. It provides: "No provision of the Constitution shall be interpreted or translated in a manner that would grant to the State or any group or person the right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set out in this Constitution."

6 Arthur T. Vanderbilt, *Doctrine of the Separation of Powers and Its Present-Day Significance* (University of Nebraska Press 1963) p.xi

7 Ibid

various international[8] and regional[9] and national level instruments[10] accelerated concern for the impartial and IJ. Wherefore, to enable the judiciary to achieve its objectives and perform its functions, it is essential that judges are selected on the basis of proven competence, integrity and independence.[11]

The Indian judicial system is pyramidical and unified in nature.[12] The judicial power of the Republic of India is vested in Supreme Court,[13] High Courts[14] and Subordinate Courts[15] consisting of both civil and criminal Courts. The Supreme Court of India (SOI) is sovereign in its allotted sphere. Indian judiciary has dressed up with suitable legislative as well as executive powers for the purpose of maintenance of IJ.[16] The Parliament is also authorised under the scheme of the Constitution to make laws investing jurisdiction to the Courts. Thus, the constitution has left to the discretion of the Parliament the determination of the degree to which the jurisdiction of the courts is to be utilised for the administration of justice. The Constitution of the Democratic Socialist Republic of Sri Lanka (CDSRS) has provided prudent provisions relating to

8 Universal Declaration of Human Rights, 1948, Art.8 & Art.10; International Covenant on Civil and Political Rights, 1966, Art. 14(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, Art.18; Convention on the Elimination of All Forms of Discrimination against Women, 1979, Art.15; Convention on the Rights of the Child, 1989, Art.37 (d)

9 See for example Statute of the Inter-American Court of Human Rights, 1977, Art.24; American Declaration of the Rights and Duties of Man, 1948, Art.26; American Convention on Human Rights "Pact of San José, Costa Rica, 1969, Art.8; European Convention on Human Rights, 1950, Art.6; African Charter on Human and Peoples' Rights, 1981, Art.7

10 Constitution of Bulgaria 1991, Art.121; Constitution of Burkina Faso 1991, 136; Constitution of Burundi 2018, Art.211; Constitution of Cape Verde 1980, Art.33; Constitution of Croatia 1991, Art.117; Constitution of Timor-Leste 2002, Art.34; Constitution of Eritrea 1997, Art.17; Constitution of Gambia 2019, Art.43 & Art.45; Constitution of Germany 1949, Art.103; Constitution of Ghana 1992, Art.19

11BSPIJ, para 11

12 Mamta Kachwala, *The Judiciary in India* (Leiden University 1998) vii.

13 COI, Part IV, Chapter IV, Art. 124 to 137

14 COI, Part VI, Chapter V, Art.214 to 231

15 COI, Part V, Chapter VI, Art.232 to Art.237

16 For example, Art. 141 and Art. 145 mirror the legislative powers of the SOI. Art.146 symbolizes executive power of SOI

Judiciary.[17] It provides specific provisions relating structure of the courts,[18] public hearings,[19] appointment of the judges,[20] security of the tenure,[21] removal of judges[22] and protection of salaries of judges.[23] The power to appoint the Chief Justice, the President of the Court of Appeal and every other judge of the Supreme Court and the Court of Appeal vested with president in concurrence with Constitutional Council.[24]

The dependency of the judiciary on rest of the organs of the State in terms of appointment, posting, promotion and leave would certainly impair IJ. Such nexus with rest of the organs of the State may influence judges in discharging their duties. It may result in weeding out of impartiality, free and fair principles sine quo non for administration of justice system. Both the systems have severe concerns about AOJ and IJ. Despite such constitutional backup, both India and Sri Lanka have witnessed certain unconventional development as to the appointment and removal of the judges. In this background, the present has been undertaken to analyse approaches and practices adopted by these two countries for the AOJ.

IMPORTANCE OF JUDICIAL APPOINTMENT

The Judiciary is a branch that is autonomous and independent of all other powers.[25] The scheme of the Constitutions is structured and organized in line with this exceptional characteristic of the judiciary. Because of this standout position of the judiciary, appointment of

17 Chapter XV, Art.105 to 111 C, Chapter XV A, Art. 111D to Art.117, Chapter XVI, Art. 118 to 147
18 Art.105
19 Art. 106
20 Art. 107 (1)
21 Art. 107 (5)
22 Art. 107 (2)
23 Art. 108
24 Art. 107 (1)
25 Constitution of Italy, 1947, Art. 104

judges right from those of the Supreme to those of the subordinate courts is dealt with by separate provisions of the Constitution.[26] *Nakul Dewan* point outs that the reason why selection of judges to the higher judiciary sparks debates and assumes significance is because in practice the real political- judicial interaction takes place in the superior judiciary.[27] Further *Mark Ryan* opines "the system of appointing judges is of immense constitutional importance because the individuals appointed must be considered to be constitutionally acceptable and legitimate."[28] In view of immense importance of the nexus between IJ and judicial appointment, this part of paper analysis constitutional values such as check and balance theory, rule of law, protection of human rights in the backdrop of AOJ.

Check and Balance Theory

Separation of Power theory is the intrinsic principle of Constitution across the globe.[29] The constitution is the document structuring the allocation of the power of each of the organs of the State which is usually peculiar to one of the other departments.[30] It is bounden duty to of the judiciary to ensure that executive and legislative powers are exercised within the framework of the Constitution. The influence of these executives and legislature over the process of AOJ may dilute this sacred duty of the judiciary and devalue the constitutional morality. The tussle between the executive and the judiciary, *Nakul Dewan* writes, in the matter of selection of judges flows out of the 'separation of power' and the 'check and balance' principles that are embedded in the Constitution.[31]

26 V.S. Deshpande, 'High Court Judges: Appointment and Transfer' (1985) 27 Journal of the Indian Law Institute 179, 181-182

27 Nakul Dewan, 'Revisiting the Appointment of Judges: Will the Executive Initiate a Change?' (2005) 47 Journal of the Indian Law Institute 199, 202

28 Mark Ryan, *Unlocking Constitutional and Administrative Law* (Third Edition, Routledge 2014) 332

29 See for example Constitution of Algeria 2020, Art.15; Constitution of Angola 2010, Art.2(1); Constitution of Armenia 1995, Art.4

30 Arthur T. Vanderbilt (n 6) vii

31 Nakul Dewan (n 27) 199

Rule of Law

Rule of law is the foundation of modern polity.[32] Rule of law protects people against arbitrary actions by the government and those who are empowered to act for the State.[33] It is expression of popular will.[34] Rule of law can only ensure system based on pluralism and guarantee of fundamental freedoms and human rights.[35] Legal stability and respect for legal system rooted with rule of law.[36] Justice is the symbol of rule of law.[37] The State of democratic rule of law means the safeguarding of justice and legality as fundamental values of collective life.[38] The sacred and central duty of the highest court of the country is to exercise supreme supervision over the enforcement of the Constitution, decide breach of the constitutional scheme and to ensure strict observance of the Constitution by the State Organs to ensure wings of the justice. It is possible for justices and judges to uphold Constitution and maintain rule of law when they are appointed through transparent and accountable manner and justice without fear and favour can be expected only from these judges.

Human Rights

The immense importance attached to the Human Rights protection and judicial system can be understood by looking into very first article of Chapter VI of the Oman Constitution deals with judiciary. It mandates "The rule of Law shall be the basis of governance in the

32 See for example, Constitution of Montenegro, 2007, Art.1; Constitution of Namibia 1990, Art.1; Constitution of Nicaragua 1987, Art.6; Constitution of Norway 1814, Art.2; Constitution of Palestine 2003, Art.6; Constitution of Peru 1993, Art.3; Constitution of Portugal 1976; Art.2; Constitution of Romania 1991, Art.2; Constitution of Slovenia, 1991, Art.1; Constitution of Sudan 2019, Art.6;

33 Eric Mintz, Christopher Dunn, Livianna S. Tossutti, *Democracy, Diversity and Good Government : An Introduction to Politics in Canada By* (Pearson Prentice Hall 2011) 471.

34 See Preamble of Constitution of Spain, 1978

35 See, Constitution of Mozambique 2004, Art.3

36 See, Constitution of Mozambique 2004, Art.212

37 Constitution of Niger 2010, Art.117

38 Constitution of Sao Tome and Principe 1975, Art.7

State. The dignity of the judiciary, and the integrity and impartiality of the judges are a guarantee for the rights and freedoms."[39] Rule of law is a fundamental prerequisite for the Constitution which is based on inalienable human rights.[40] Inalienable human and minority rights having purpose of preserving human dignity and exercising full freedom and equality of each individual in a just, open and democratic society based on the principle of the rule of law.[41]

The relation of judiciary to rule of law, separation of powers, check and balance theory, and human rights are fundamental and inseparable. The close nexus between all the above-mentioned principles can be understood through the following text of the Serbian Constitution: "The rule of law shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary and observance of Constitution and Law by the authorities."[42] Protection of rights of minorities and prevention of abuse of the power by the majority require independent organ of the State. Though separation of power theory is the mirrored in check balance theory under modern constitutions, inherent nature of the judiciary requires that judiciary shall guard these two constitutional theories. Accordingly, the respect for these primordial constitutional values is dependent upon IJ backed by competent and efficient judges elected for judiciary. Countries across the globe have adopted their own models to ensure transparent appointment process. Out of 48 independent Commonwealth nations, in 38 countries (79.16%) there is a judicial appointments commission, constituted under either the Constitution or specific legislation, which plays pivotal

39 Constitution of Oman 1996, Art.59
40 Constitution of Serbia, 2006, Art.3
41 Constitution of Serbia, 2006, Art.19
42 Ibid

role in the selection and appointment of judges.[43]

AOJ IN INDIA AND SRI LANKA

It is clear from the history of the drafting of the Constitution of India (COI) that framing of the Constitution was plugged with numerous anomalies. [44] The importance of the AOJ, as emphasized by *Govind Ballabh Pant*, member of the constituent assembly: "The future of this country is to be determined not by the collective wisdom of the representatives of the people, but by the fiats of those elevated to the judiciary."[45] Consequently, this part of the paper emphasises Modality Principle, Competence and Integrity Principle, Security of the Tenure Principle and Diversity Principle as adopted and practiced under Indian and Sri Lankan system. It is necessary to analyse these principles to understand in depth the scheme of the Constitution in the background of in which way these principles are conceived and the spirit with which these principles are implemented.

Modality Principle

The Modality Principle by the author here is the method through which judges are appointed. There is no bounden duty for the State to follow specific modality for the AOJ and each State is at liberty to adopt and practice her own system. It differs from the society to society. [46] Notwithstanding, the modality shall be in line

43 Bahamas, Belize, Botswana, Cameroon, Cyprus, Fiji, Ghana, Guyana, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nigeria, Organisation of Eastern Caribbean States, Pakistan, Papua New Guinea, Rwanda, Samoa, Seychelles, Sierra Leone, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Uganda, the UK, Vanuatu and Zambia. Cited in; J. van Zyl Smit, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles A Compendium and Analysis of Best Practice' (The British Institute of International and Comparative Law 2015) Report of Research Undertaken by Bingham Centre for the Rule of Law, 30

44 B.Shiva Rao, *The Framing of India's Constitution: Select Documents*, vol 2 (Indian Institute of Public Administration 1967) 328

45 Ibid, 243

46 BSPIJ, para 14

with principles of IJ. The integrity of ideal system mandates that the process of AOJ should be clearly defined and formalised and information about them should be available to the public.[47]

The AOJ is encapsulated under Art. 124 (2) of the COI. This provision insulates Courts from political influences. Contrary to legislative model, the AOJ under this provision is domain of executive and judiciary. Though there is no scope for separation of theory under Constitution,[48] the appointment and removal clauses of Art.124 clearly indicate incorporation of check and balance theory under the Constitution. It contemplates that:

> "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years"[49]

The Indian Model is popularly called as *'Collegium'* which is an extra-constitutional concept developed and evolved by the judiciary through the series of the cases popularly called as First Judges Case,[50] Second Judges Case,[51] Third Judges Case[52] and Fourth Judges Case.[53] This process of appointment is further supplemented by Memorandum of Procedures adopted for appointment of Supreme Court as well as High Court judges.

47 BSPIJ para 16

48 Some extent Art. 50 of the Constitution is the example for separation of power. it says that "The State shall take steps to separate the judiciary from the executive in the public services of the State."

49 COI, Art. 124 (2)

50 *S.P. Gupta v. Union of India, AIR 1982 SC 149*

51 *Supreme Court Advocates Record Association v. Union of India,* (1993) 4 SCC 441.

52 *In Re Presidential Reference Case,* AIR 1999 SC 1

53 *Supreme Court Advocates-on-record Association & Anr. vs. Union of India* (2016) 5 SCC 1, (2016) 2 SCC (LS) 253

Under the scheme of the CDSRS, appointment of judges of Supreme Court, including other judges of the SOI, are to be appointed by the President in terms of Art.107 of the CDSRS. It provides:

"The Chief Justice, the President of the Court of Appeal and every other judge of the Supreme Court and the Court of Appeal shall be appointed by the President subject to the approval of the Constitutional Council, by warrant under his hand."[54]

It is clear from the above provision that while the power to appoint is vested in the president, it is subjected to the approval of the Constitutional Council set up under the Constitution[55] The Constitutional Council is bound to consult Chief Justice.[56] The Indian model which was clearly intended by the framers of the Constitution as co-operative model has been turned into judicial model by upholding primacy of the opinion of collegium against Central Government opinion through the judges' cases. The Sri Lankan model appears to be a model giving much scope for political voice as the appointments are subjected to the approval Constitutional Council.

Competency and Integrity Principle

Competency is a major metric to assess efficacy of holders of the State power.[57] When appointments are made to the judiciary, only objective factors, such as merit and competence, shall be taken into account.[58] Accordingly, competence principle has been given primordial importance in the process of AOJ.[59] Incompetence of the judges would be the ground for their removal from the office.[60]

54 CDSRS, Art.107 (1)
55 CDSRS, Chapter VIIA, Art.41A to Art.41J
56 CDSRS, Art.41C (4)
57 See for example Constitution of Thailand Sec.259 (2) (4)
58 Constitution of Sweden 1974, Art.6
59 See for example, The Constitution of Togo 1992, Art.100; the Constitution of Turkey 1982, Art.140; the Constitution of Ukraine 1996, Art. 148;
60 See for example, Constitution of Uganda 1995, Art. 144 (2) (b)

According to Beijing Statement on Principles of the Independence of the Judiciary(BSPIJ), 1995 both appointment[61] and promotion[62] of judges require their competency. The SOI rightly pointed out devastating impact of incompetence of the judges in following words: "There are various factors which make a Judge pliable. Some of the factors are - individual ambition, loyalty-based on political, religious or sectarian considerations, incompetence and lack of integrity."[63]

There is no specific mention about competence principle under the Constitution. Qualification clause contemplated for judges of SOI as well as High Courts is the base test for competency principle of the AOJ. The qualifications such as 'at least five years as a judge of High Court'[64] 'at least ten years as an advocate of High Court'[65] and 'distinguished jurist,'[66] and 'ten years as judicial officer,'[67] 'ten years as practice advocate before High Court,'[68] These are the supportive provisions expecting and strengthening competence of the judges in order to discharge their duties to highest pedestal. There is no specific provision under Sri Lankan Constitution analogous to Indian Constitution as to the qualification.

Security of the Tenure Principle

The tenure of the judges has colorful history. A Judge in England held tenure at the pleasure of the Crown and the Sovereign could

61 BSPIJ, para.14. See also, Code of Conduct for United States Judges, 2019, Canon 3
62 BSPIJ, para 17. See also, para 2.17 of Universal Declaration on the Independence of Justice (Montreal Declaration) 1983, para 2.17; Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), 1985, para 14
63 *Supreme Court Advocates-on-record Association & Anr. vs. Union of India* (2016) 5 SCC 1, (2016) 2 SCC (LS) 253, para 30
64 COI, Art. 124(3) (a)
65 COI Art. 124(3) (b)
66 COI, Art. 124(3) (c)
67 COI, Art. 217 (2) (a)
68 COI, Art. 217 (2) (b)

dismiss a Judge at his discretion.[69] The Act of Settlement, 1688 substantially changed the position. This Act substituted "tenure at pleasure" with "tenure during good behaviour".[70] The BSPIJ has envisaged elaborative provisions relating to security of tenure of the judges. It mandates that Judges must have security of tenure.[71] This document sheds light on: (a) Confirmation of the tenure of the judges by the legislature; (B) Fixing specific age; (c) Protection against arbitrary removal of the judges; (d) Shield against alteration of the tenure of the judges to his disadvantage.

In India, the age of the judges of SOI[72] and High Courts[73] is specifically contemplated under the COI. The position of security of the tenure of the judges of Supreme Court of Sri Lanka and Court of Appeal is substantially similar to India. It is respectively fixed at 65 and 63 years.[74] The common law principle of good behaviour has specifically been retained under Sri Lankan Constitution and same is not reflected under the Indian Constitution.[75]

India has witnessed none of the cases shaking security of the tenure of the judge, except aborted efforts of impeachment cases such as V. Ramaswami J, Soumitra Sen J, P.D. Dinakaran J, Dipak Misra CJI, C.V. Nagarjuna Reddy J and J.B. Pardiwala J. However, Sri Lanka witnessed a constitutional crisis and tussle between the state organs and procedural anomalies in removal of certain judges.[76]

69 Cited in; *Supreme Court Advocates-on-record Association & Anr. vs. Union of India* (2016) 5 SCC 1, (2016) 2 SCC (LS) 253
70 Ibid
71 BSPIJ, para 18
72 COI, Art. 124 (2) (b). The retirement age of judges of SOI is 65 years
73 COI, Art. 217 (2) (b). The retirement age of judge of High Courts is 62 years.
74 Art. 107 (5)
75 Art. 107 (2)
76 For details see, Anthony Francis Tissa Fernando, 'Procedure for Removal of Superior Court Judges in Sri Lanka and the Issue of Quis Custodiet Ipsos Custodes' (2013) 39 Commw L Bull 717

Diversity Principle

Diversity is the order of the world. This system bound to be part of the system. *J.S.Mill* writes "It still remains to speak of one of the principal causes which make diversity of opinion advantageous, and will continue to do so until mankind shall have entered a stage of intellectual advancement which at present seems at an incalculable distance."[77] Accordingly, no specific ideology shall be the ideology of the State.[78] Protection of diversity is part of the State. Understanding, recognizing and respect of diversity is one the core constitutional values. Ethnic diversity is related to supportive culture to the sense of identification in terms of geographical extension and its legitimate quality on which every durable form of political system essentially rests.[79] Both India and Sri Lanka are known for their diversity. The mixed heritage of today's Sri Lanka results in a varied and vibrant culture.[80] The judicial appointment process shall champion this diversity to live through the confidence of the diverse population of the nation. The mechanism for considering candidature for the judge of the apex Courts was supposed to look into relevant factors including geographical, gender, language and multicultural characters.

Notwithstanding its diversity, skimpiness of diversity principle as to AOJ is very much clear in the text of the Constitution. The Constitution (Ninety-Ninth Amendment) Act, 2014 introduced to National Judicial Appointment Commission to the Indian constitution consisted of provision for the existence of two eminent persons.[81] This is the mirror image of diversity principle for AOJ in India. Unfortunately, this 99th constitutional amendment Act

77 John Stuart Mill, *On Liberty (*Longman, Green, Longman, Roberts & Green 1864) 82
78 See for example, The Constitution of Russian Federation 1993, Art. 13 (2)
79 Andre W.M Gerrits & Dirk Jan Wolffram, *Political Democracy and Ethnic Diversity in Modern European History* (Stanford University Press 2005)4
80 Royston Ellis, *Sri Lanka: The Bradt Travel Guide* (Chalfont St Peter, Bucks 2014)12
81 COI, 124 A 1 (d)

struck down as unconstitutional. As a result, currently maintaining diversity rule is the complete domain of collegium and president of India.

The roots of diversity principle for the purpose of AOJ in Sri Lanka is correlated with the composition of Constitutional Council. Under the constitutional scheme, appointment of the Chief Justice, the President of the Court of Appeal and every other judge of the Supreme Court and the Court of Appeal is subjected to the approval of constitutional council.[82] Out of ten members of the Constitutional Council, five members to be appointed by the President in consonance with the Prime Minister, the Speaker and the Leader of the Opposition or the Members of Parliament. [83] While selecting these five members for constitutional council, these political entities need to ensure that the Council reflects the pluralistic character of Sri Lankan society, including professional and social diversity.[84]

Removal Principle

Concrete provisions relating to removal of the judges symbolize the cultivated culture of the AOJ. Judges shall not be subjected to arbitrary removal from the executive and legislature. Security of the tenure principle and removal principle are related mutually. Removal of a judge from their office shall be based on valid grounds. The BSPIJ has recognized 'proved incapacity,' 'conviction of a crime,' or 'conduct that makes the judge unfit to be a judge', as the grounds for the removal of the judges.[85] Similarly, there shall be a casual way to imitate action against judges unless there are serious grounds against judges.[86] Much importantly, proportionality principle would be matter in case of allegation against judges.

82 CDSRS Art. 107 (1)
83 CDSRS Art. 41 A (e)
84 CDSRS Art 41 A (4)
85 BSPIJ, para. 22
86 BSPIJ, para.25

Removal of the judges shall be last resort and alternative means are to be exhausted to punish judges instead of removal.

Commission of serious professional or ethical misconduct which may result in discredit for the image of the judiciary has been contended with prudent provisions under both the Sri Lankan and Indian Constitutions. The CDSRS mandates:

> "Every such Judge…shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity"[87]

In a similar way, the COI stipulates that:

> "A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity."[88]

Power of the legislature to remove judges implanted with British and American systems.[89]The comparative look at these provisions manifests reverence given for parliament being great democratic institution of the nation. These provisions also demonstrate check and balance theory promulgated under constitutional scheme of the countries. The AOJ will be the domain of the executive, on

87 CDSRS, Art. 107 (2)
88 COI, Art. 124 (4)
89 Alexander Hamilton and others, *The Federalist Papers* (New American Library 1961) 302

the other removal of judges is the province of legislature. Sri Lankan system is considerably more stringent than Indian. The majority required for the removal of the judges is majority of the total number of members of Parliament including both members present and remained absent for the voting. However, the majority required for the same under the Indian constitution is fixed at two-third members present in the house.[90] The grounds responsible for removal are also similar. However, both the Constitutions lack proper definitions for 'Misbehaviour' and 'Incapacity'. The procedure to be followed for the removal of the judge is given due legal status under Sri Lankan[91] and Indian legal systems. [92] The total number of the parliamentarian required for a notice of a resolution for the presentation of an address to the President for the removal of the judges is not specified either under Constitution or Standing Orders in Sri Lanka. But the same has been spelled out under the Indian legal system.[93] The procedural deficiency has also been emphasised by the Supreme Court of the Democratic Socialist Republic of Sri Lanka in the matter of a reference under and in terms of article 125 of the CDSRS. [94]

Conclusion and Discussion

Justice springs from the popular will. It shall be administered on behalf of the State. Judges are the custodians of it. Judicial power dressed up with judges for the purpose of administration of justice shall be independent and accountable. The principle of JI flourishes through AOJ. Both the Constitution of India and Sri Lanka have strong faith in IJ. Guarantee of fundamental rights and freedoms, respect for rule of law, defense for democracy, promotion of welfare of the society and enhancement of quality of the life

90 COI, Art. 124 (4)
91 Standing orders of the Parliament of the Democratic Socialist Republic of Sri Lanka, R.84.
92 See COI, Art.124 (5) and Judges Enquiry Act, 1968
93 Judges Enquiry Act, 1968, Sec.3
94 S.C. Reference No. 31201 2 C.A.(Writ) Application No.35812012

closely connected with proper enforcement of the Constitution. Promotion of fair, efficient and good governance for the purpose of these constitutional values requires unequivocal and IJ rooted with concrete constitutional scheme.

Lack of scope for diversity principle and manipulation of modality principle is a serious concern for India. Multiformity of the nation and inadequate representation of certain diverse groups in the highest judiciary resulted in trembling of confidence of the people of the country in judiciary. Considerably least representation of women, minority members and marginalised sections pitched deep concerns about impropriety of diversity principle in India. It was argued by central government in fourth judges' case[95] that "the presence of 'eminent persons' was necessary, to ensure the representative participation of the general public, in the selection and appointment of Judges to the higher judiciary. Their presence would also ensure, that the selection process was broad-based, and reflected sufficient diversity and accountability, and in sync with the evolving process of selection and appointment of Judges, the world over." Despite such convincing arguments, the Central Government struck down the NJACA as unconstitutional. This diversity principle is flowering principle of the Sri Lankan Constitution. The structure of the Constitutional Council responsible for the appointment of the judges promises prevalence of members representing diversity.

The AOJ on the basis of seniority of the judges of the SOI is the conventional practice. It may be stated without fear of contradiction that the strong executive may manipulate the conventional practice and dilute the spirit of the Constitution. This Convention was broken down in appointment of A.N.Ray by superseding three senior judges due to the judgement of *Keshavananda Bharathi* case and Justice Beg was appointed as CJI, superseding the seniority

95 *Supreme Court Advocates-on-record Association & Anr. vs. Union of India* (2016) 5 SCC 1, (2016) 2 SCC (LS) 253

of Justice Khanna as retaliation for Khanna J's dissent in *ADM Jabalpur* case. This is the clear indication of the constitutional immorality of the executive authority of the country. The upper hand of political voice in appointment of judges is clear from the composition of the Constitutional Council of Sri Lanka. Proportionate increase of appointment of the Attorney Generals, being part of executive, as the judges of the highest Court is also serious concern of the modality principle of Sri Lanka.

The law relating to removal of the judges is another area of concern for both the countries. The Judge Enquiry Act, 1968 is outdated law in view of the idealistic nature of law. The longstanding pending of the Judicial Standard and Accountability Bill, 2012 is the best testimony to show the lack of will of the parliamentarian for betterment of the system. In Sri Lanka it was held by Supreme Court of Sri Lanka way back in 2012 that there shall be separate law to rejuvenate legal regime on removal of the judges. But so far nothing has been done in Sri Lanka. The procedure followed for removal of the judges according to the standing order may clash with the procedural law applicable to removal of the judges in Sri Lanka. In order to avoid such developments, there is a need for separate laws contemplating procedure for removal of the judges. India witnessed such kind of clash in case of Justice V. Ramaswamy.

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Looking Beyond the Shores of Home: The Value of Comparative Constitutional Adjudication in Advancing Environmental Justice in Sri Lanka

Natasha Wijeyesekera*

Abstract

What does the study of constitutional adjudication reveal about Sri Lanka's judicial engagement with comparative law? What are the models employed by courts in embracing constitutional experiences of foreign jurisdictions? What are the dangers associated with judicial borrowing? In seeking answers to these questions of comparative method, this paper evaluates several emblematic decisions handed down by the Sri Lankan judiciary in the sphere of environmental justice. While the analysis suggests that the courts have drawn inspiration from Indian authorities and international environmental law standards to varying degrees, the discourse on comparative constitutional adjudication remains characterised by two broad criticisms; Firstly, that foreign law/concepts fail to adequately capture the needs and aspirations of the people as, constitutions are, by their very nature, linked to a particular nation's identity. Secondly, that citation of foreign authorities occurs as an ad hoc judicial practice, leaving room for absurdities to seep in. Notwithstanding these criticisms, the paper emphasises that, in the context of Sri Lanka's constitutional scheme where specific environmental rights are absent, the careful judicial adoption and adaptation of foreign law could prove useful in filling the void left by the legislature, in bolstering the rights of vulnerable communities, and in promoting greater governmental accountability.

***Keywords**: Comparative Constitutional Adjudication, Environmental Justice, Judicial Borrowing, Judicial Activism, Right to Environment*

*LL.B. (Hons.), Faculty of Law, University of Colombo; Attorney-at-Law, The Supreme Court of Sri Lanka; Lecturer (Part-Time) Asia Pacific Institute of Information Technology (APIIT).

Introduction

Throughout history, constitutional designers and interpreters have looked beyond their shores to discover, in the practices of other nations, possible sources for emulation.[1] This comparative endeavor is wide-ranging and encompasses the transfer/borrowing[2] of precedents, arguments, concepts, tropes, and heuristics across different doctrinal boundaries.[3] The proliferation of foreign legal materials online, the globalization of legal education, and the ease of travel and communication have contributed to the intensification of such constitutional borrowing.[4] However, with the global judicialization of politics and the increased exchange of constitutional ideas, the appropriateness of drawing on alternative, foreign perspectives-particularly in the context of judicial activity has become a contentious issue in recent years.[5]

Against this backdrop, this paper engages in a critical evaluation of the use of comparative law in constitutional adjudication. In order to avoid the abstract nature of the discussion, the paper explores this theme in light of new benchmarks set by the Sri Lankan judiciary

1 Gary J Jacobsohn and Shylashri Shankar, 'Constitutional Borrowing in South Asia' in Sunil Khilnani, Vikram Raghavan and Arun K Thiruvengadam (eds) *Comparative Constitutionalism in South Asia* (Oxford University Press 2013) 204.

2 A survey of the literature reveals concern about the choice of metaphors to capture cross-constitutional interaction. Available options include 'transplants', 'diffusion', 'borrowing', 'circulation', 'cross-fertilization', 'migration', 'engagement', 'influence', 'transmission', 'transfer', and 'reception'; See, Vlad F Perju, 'Constitutional Transplants, Borrowing and Migration' in M Rosenfeld and A Sajo (eds) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1306.

3 Nelson Tebbe and Robert L Tsai, 'Constitutional Borrowing' (2010) 108 Michigan Law Review 459.

4 Vlad F Perju, 'Constitutional Transplants, Borrowing and Migration' in M Rosenfeld and A Sajo (eds) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1306.

5 Jacobsohn and Shankar (n 1).

in the sphere of environmental justice litigation.

For theoretical and conceptual clarity, the paper begins with Part III; a brief overview of the models employed by courts to embrace the constitutional experiences of foreign jurisdictions. Part IV evaluates several emblematic decisions delivered by the apex courts of Sri Lanka with a view to understanding the ways in which comparative jurisprudence has influenced judges in framing and articulating their own position when adjudicating on controversial environmental issues. Drawing from the analysis of selected jurisprudence, Part V discusses the potential risks associated with judicial borrowing, questioning whether the process of comparative constitutional law adequately addresses the needs and aspirations of the people. Part VI offers concluding reflections on the significance of comparative perspectives for constitutional adjudication in Sri Lanka.

Methodology

In order to answer the research questions articulated above, the paper adopts an analytical as well as comparative approach that involves the study of both primary and secondary sources. While primary sources such as constitutional provisions, international conventions and case law authorities form the analytical basis of the paper, cross jurisdictional referencing between Sri Lanka and India form the comparative basis. The paper also uses expert opinion drawn from a library-based study in validating claims, formulating findings, and drawing conclusions.

Models employed by courts to embrace constitutional law and experience of foreign jurisdictions: carving out typologies

Literature on comparative law presents various typologies to explain the use of foreign law in constitutional adjudication. One

simple model conceives the use of foreign legal experience along a spectrum.

At one end of the spectrum is the 'soft use' of comparative law - where the court places no reliance on foreign experience in reaching its final conclusions.[6] Passing references to foreign experience, presentation of empirical information of how principles or practices urged on the court have worked elsewhere, and use of foreign legal rules or judicial arguments to define or justify consideration of an issue (which is then resolved by reference to domestic sources), are some practices found at the 'soft' end of the spectrum.[7]

On the other end of the continuum is the 'hard use' of comparative law – where foreign authorities actively shape the conclusions reached by the court. This includes borrowing reasonings of other courts, reliance on foreign law to support or assist with the interpretation of a constitutional provision, and empirical recourse to foreign experience to justify transplantation of the foreign rule, institution, or practice.[8]

Advancing environmental justice through judicial activism in Sri Lanka: hard and soft use of comparative law

The Sri Lankan Supreme Court's jurisprudence on environmental justice offers a host of examples indicative of the hard and soft use of comparative law.

One of the earliest judgements symbolic of this trend is *Bulankulame v The Secretary, Ministry of Industrial Development*

6 Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law (The George P. Smith Lecture in International Law)' (2006) 13(1) Indiana Journal of Global Legal Studies 37.

7 Ibid.

8 Ibid.

and Others (*Eppawala Case*).[9] The case involved a proposed agreement between the Sri Lankan government and an overseas company for the exploration and mining of phosphate from a deposit located at Eppawela in the North Central Province. The Environmental Foundation Ltd. (EFL) sought to challenge this project by a fundamental rights application to the Supreme Court. Due to the restrictive application of *locus standi* with regard to the fundamental rights applications at the time,[10] the lawyers of EFL strategically filed the case under the names of local villagers, who could claim that they would be materially affected by the project and could therefore, present themselves as petitioners.[11] At the inception, the respondents raised a preliminary objection claiming that, being an alleged 'public interest litigation', the petition should not be entertained under the provisions of the Constitution.

Dismissing this objection and upholding a violation of the residents' right to equality under Article 12(1), the court declared that the petitioners were not disqualified from litigating the matter merely because it dealt with the collective rights of the citizens of Sri Lanka.[12]

Guided by the Indian case of *M.C. Mehta v Kamal Nath*,[13] the court stretched this argument further by observing that fundamental rights litigation is an effective means of holding the government accountable as a 'trustee' of Sri Lanka's natural resources for the benefit of future generations. The court also broke new ground by

9 [2000] 3 Sri LR 243.

10 Under Article 126(2) of the 1978 Constitution of Sri Lanka, standing to invoke the jurisdiction of the Supreme Court for the violation of fundamental rights is restricted to the person affected (victim) or his Attorney-at-Law.

11 Camena Guneratne, 'Using Constitutional Provisions to Advance Environmental Justice – Some Reflections on Sri Lanka, 11/2 Law', (2015) Environment and Development Journal 72 <http://www.lead-journal.org/content/15072.pdf> accessed 19th September 2022.

12 [2000] 3 Sri LR 243, 258 (Amerasinghe J.).

13 (1997) 1 SCC 388 (SCI)

absorbing the international environmental law standards of 'inter-generational equity' and

'sustainable development'[14] (as propounded by Justice Weeramantry in the *Hungary v Slovakia*[15]) into the corpus of domestic law in Sri Lanka. Justice Amerasinghe, delivering judgment for a unanimous bench of the Supreme Court, made specific observations regarding the reception of international law: *Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the sense in which an Act of our Parliament would be. It may be regarded, merely as "soft law." Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would… be binding if they have been either expressly enacted or become a part of the domestic law by adoption by superior courts of record and by the Supreme Court in their decisions.*[16]

While the comparative method employed by Justice Amerasinghe in relaxing the rules of standing and in recognizing the doctrine of public trust is illustrative of the 'soft use' or 'silent absorption' of comparative law, the turn to principles of international environmental law is illustrative of the 'hard use' of comparative law. The *dictum* quoted above was undoubtedly an indelible turning

14 The court took note of the concept of 'sustainable development' as developed by the Stockholm and Rio Declarations on the Environment to hold that *'Human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature'*; UN General Assembly, United Nations Conference on the Human Environment (adopted 15 December 1972) UNGA/RES/2994; UN Commission on Human Rights, Human Rights and the Environment (adopted 9 March 1994) E/CN.4/RES/1994/65.

15 *Gabcikovo-Nagyamaros Project (Hungary v Slovakia)* (1997) ICJ 7.

16 *Bulankulame v The Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri LR 243, 274 (Amerasinghe J.).

point in the dualist constitutional scheme of Sri Lanka.[17] Scholars have observed that this *dictum*, if followed by subsequent benches, would facilitate the reception of international law (whether treaty or 'soft law') into the domestic legal system with greater ease,[18] and fill the vacuum left by the legislature through its inaction.[19]

Another case which adds to the growing body of jurisprudence on environmental justice is *Watte Gedera Wijebanda v Conservator General of Forests*.[20] The petitioner in this case alleged an infringement of his right to equality, when he was refused a permit for mining of silica quartz in a quarry located in an archaeologically sensitive area.

Drawing an important parallel with the Indian courts, and reading the non-justiciable Directive Principles of State Policy (DPSP) in a complimentary fashion, the court affirmed that the right to a clean environment and the principle of inter-generational equity (with respect to the protection and preservation of the environment) are inherent in a meaningful reading of Article 12(1).[21] Keeping up with the judicial trend established in the *Eppawela Case,* the court also declared that, *'...although international instruments... are not legally binding upon governments, they constitute an important*

17 Constitutional scholars have maintained that, in light of the acceptance of the doctrine of sovereignty of Parliament, treaties have no legal status unless directly transformed through enabling legislation; JAL Cooray, *Constitutional and Administrative Law of Sri Lanka* (Sumathi Publishers 1995) 237-238.

18 Deepika Udagama, 'The Politics of Domestic Implementation of International Human Rights Law' (2015) 16 Asia-Pacific Journal on Human Rights and the Law 104.

19 Wasantha Senevirathne, 'Proposal for a Marriage between Monism and Dualism: Is a Mixed Method of Incorporating International Law into Domestic Law of Sri Lanka Apposite?' in *Law in Defence of Human Integrity: Principles and Policies, Collected Essays* (Colombo University Press 2020)

20 [2009] 1 Sri LR 337.

21 *Watte Gedera Wijebanda v Conservator General of Forests* [2009] 1 Sri LR 337, 356 (Thilakawardena J.).

part of our environmental protection regime.'[22] However, in contrast to the judicial approach in the *Eppawala Case* – where reliance on foreign authorities was both extensive and elaborate, reference to foreign authorities in *Watte Gedera Wijebanda's Case* was rather 'soft' and 'decorative' in character as it was limited to reinforcing an interpretation that had been made on a previous occasion by the court.

A more recent case where the court strengthened the obligation of the state to protect the environment in their performance of statutory duties through a soft use of comparative law is *Ravindra Gunawardena Kariyawasam v Central Environmental Authority (CEA)*[23] (*Chunnakam Power Plant Case*). The case concerned the operation of a thermal power plant in the Chunnakam area of Jaffna, in a manner which polluted groundwater, making it unfit for human consumption. The petitioner alleged, *inter alia*, that the relevant statutory authorities including the CEA and Board of Investments had failed to exercise its power and enforce the law in the best interests of the public, thereby denying the residents of Chunnakam their legitimate expectation to clean water and violating Article 12(1) of the Constitution.

In considering the question of whether the scope of Article 12(1) could be stretched to encompass environmental rights, the court made passing references to the jurisprudential developments in India[24] where it is well established that the right to a clean environment is embedded in Article 21 (right to life) of the Constitution of India. Following a thorough analysis, the court upheld the petitioner's claim and recognised three substantive aspects of environmental rights, including the right of access to

22 Ibid, 359 (Thilakawardena J.).

23 SCFR 141/2015, SC Minutes 04 April 2019.

24 The court cited the Indian case of *ND Jayal v Union of India* (2004) SC 867 (SCI) in support of this view

clean water. In doing so, the court enjoined the concepts of public trust and sustainable development with DPSPs.[25]

Drawing inspiration from a string of Indian cases[26], including the often-cited case of *Vellore Citizen's Welfare Forum v Union of India*,[27] the court also justified the application of the 'Polluter Pays' principle to offset the substantial loss/damage caused to the residents of Chunnakam by the groundwater pollution.

However, as far as reference to international law is concerned, it is quite intriguing that the court has confined itself by referring only to the older international law standards on sustainable development such as the Rio Declaration of 1992.[28] Reference to the Sustainable Development Goals and the 2030 Agenda adopted by the UN General Assembly in 2015, particularly Goal 6 – clean water and sanitation, would have strengthened the normative jurisprudential argument of the court.[29]

The foregoing analysis indicates that the Sri Lankan courts have demonstrated a bold, albeit sporadic, adoption of recent developments in Indian jurisprudence to promote environmental justice. First, as in India, the courts have liberalised standing requirements; thereby enabling non-governmental organisations and public-spirited individuals to litigate on environmental

25 *Environmental Foundation Ltd. and Others v Mahaweli Authority of Sri Lanka and Others* [2010] 1 Sri LR 1

26 *S Jaganath v Union of India* (1997) AIR 811 (SCI); *M.C. Mehta v Kamalnath* (1997) 1 SCC 388 (SCI); *Ramji Patel v Angrik Upbhokta Marg Dharshak Manch* (2000) 3 SCC 29 (SCI).

27 (1995) 5 SCC 647 (SCI)

28 Dinesha Samararatne, 'Sri Lanka's public trust doctrine as responsive judicial review?' Hong Kong Law Journal (forthcoming)

29 Ibid.

conservation and development matters.[30] Second, and more importantly, the courts have re-interpreted the core of fundamental rights to address environmental justice by infusing fundamental rights with the state's obligations under DPSP.[31] While the Supreme Court of India has utilized the right to life provision as the entry point for environmental claims,[32] the Sri Lankan Supreme Court has employed the right to equality provision to entertain environmental claims. Most notably, the Lankan judiciary has stretched the equality provision to include a right to a clean and healthy environment,[33] a right of access to clean water, [34] a right to information on environmental issues,[35] and has guided state functionaries to refrain from the arbitrary exercise of power in

30 The main catalyst for the evolution of environmental justice and Public Interest Litigation (PIL) in India is deemed to be the Bhopal disaster of 1984; See, Shyami Puvimanasinghe, 'The Role of Public Interest Litigation in Realizing Environmental Justice in South Asia: Selected Cases as Guidance in Implementing Agenda 2030' in Sumudu A Atapattu, Carmen Gonzales and Sara L Seck (eds) *The Cambridge Handbook of Environmental Justice and Sustainable Development* (The Cambridge University Press 2021).

31 Rehan Abeyratne, 'Rethinking Judicial Independence in India and Sri Lanka' (2015) 10 AsJCL 99

32 Ibid.

33 *Bulankulame v The Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri LR 243.

34 SCFR 141/2015, SC Minutes 04 April 2019: The Court observed that 'access to clean water is a necessity of life and is inherent in Article 27(2)(c) of the Constitution'; Art 27(2)(c) is a Directive Principle of State Policy which declares that the state must ensure to all citizens 'an adequate standard of living'. This is probably one of the first times that the Court has made a clear declaration on the right of 'access to clean water'; Dinesha Samararatne, 'Chunnakam Power Plant case: Court recognises right to be free from 'degradation of the environment' (Daily FT, 29 July 2019) <http://www.ft.lk/columns/Chunnakam-Power-Plant-case--Court-recognises-right-to-be-free-from--degradation-of-the-environment-/4-682834> accessed 15 August 2022

35 *Environmental Foundation Limited v Urban Development Authority* [2009] 1 Sri LR 123

alienating land in environmentally sensitive areas.[36] Likewise, the courts have recognised environmental law principles such as polluter-pays, sustainable development and inter-generational equity by referencing international and foreign authorities.

Although these judgements reflect a judicial attitude that is responsive and receptive to the jurisprudential developments in comparative jurisdictions and international law, reference to authorities outside the Sri Lankan system continues as a random, arbitrary and unregulated judicial practice.[37] What seems to be happening mostly is that, judges make passing references to one or two authorities drawn from a single jurisdiction in seeking to validate a decision that is already established in his/her mind,[38] thereby reducing constitutional interpretation to an outcome-determinative test.[39] As a result of this 'cherry picking' / 'forum

36 *Environmental Foundation Ltd. and Others v Mahaweli Authority of Sri Lanka and Others* [2010] 1 Sri LR 1; *Sugathapala Mendis et al v Chandrika Bandaranayake Kumaratunge* [2008] 2 Sri LR 339.

37 Dinesha Samararatne 'Use and Relevance of Strasbourg Jurisprudence in Sri Lanka's Fundamental Rights Judgements' (forthcoming); Mark Tushnet refers to this practice as 'bricolage' (a term borrowed from Claude Lévi-Strauss) *i.e.*, where constitution-makers and interpreters randomly adapt what is 'at hand' in ways that contribute to a certain eclecticism; See, Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 Yale Law Journal 1225.

38 See, Andrea Lollini, 'Legal argumentation based on foreign Law: An example from case law of the South African Constitutional Court' (2007) 3(1) Utrecht Law Review 60.

39 Ernesto J Sanchez, 'A Case against Judicial Internationalism' (2005) 38 Conn L Rev 185.

shopping'[40] exercise, courts neither delve into the nitty-gritties of the foreign decisions cited, nor provide strong justifications for citing them. For instance, in all cases analysed above, the courts have failed to explain or justify the case selection or jurisdiction selection using clear standards. Close geographical proximity and similarities between the legal systems of India and Sri Lanka, perceived similarities of socio-cultural contexts and the institutional links between judges seem to be the most compelling factors that enabled such judicial affinity and doctrinal convergence.[41]

Another pertinent observation is that it has taken approximately a decade for Indian jurisprudence to travel across the Palk Strait and creep into Sri Lankan judicial determinations. This delay is indicative of the time it takes for the Sri Lankan system to respond and adapt to comparative jurisprudential developments.[42]

Dangers associated with judicial borrowing

Almost by definition, each constitution is linked with a particular

40 The phrases 'cherry-picking' and 'forum dressing' is used interchangeably by scholars to describe how judges chose jurisdictions in order to support a conclusion favoured by them, leading to arbitrary decision making – not legitimate judging; See, Anne Smith, 'Internationalisation and Constitutional Borrowing in Drafting Bills of Rights' (2011) 60 Int'l & Comp LQ 867; Christopher Mc Crudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 Oxford Journal of Legal Studies 499; Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law (The George P. Smith Lecture in International Law)' (2006) 13(1) Indiana Journal of Global Legal Studies 37; Ursula Bentele, 'Mining for Gold: The Constitutional Court of South Africa's Comparative Experience with Comparative Constitutional Law' (2009) 37 Georgia Journal of International and Comparative Law 239.

41 Dinesha Samararatne, 'Judicial Borrowing and Creeping Influences: Indian Jurisprudence in Sri Lankan Public law' (2018) 2(3) Indian Law Review 205.

42 Dinesha Samararatne, 'Travelling jurisprudence and porous boundaries – prospects for Comparative Public Law' (*Admin Law Blog,* 12 September 2018) <https://adminlawblog.org/2018/09/12/dinesha-samararatne-travelling-jurisprudence-and-porous-boundaries-prospects-for-comparative-public-law/> accessed 3 November 2022.

state, its system of government, and its people.[43] Consequently, one of the strongest arguments against the migration of constitutional ideas is that foreign law/concepts do not adequately reflect or respond to the unique context in which it is embedded, including the needs and aspirations of the people, that nation's particular history, culture, economy, geography and demography.[44] This line of criticism, which assumes that reference to foreign materials is 'undemocratic,' overlooks the fact that utilizing foreign law is a means by which a constitutional system engages with the outside world.[45] Such engagement[46] or dialogue[47], not only enable judges to import traditions that are lacking in their own systems,[48] but also help them to tease out new interpretations of domestic constitutional provisions while reinforcing critical components of their home country's constitutional identity. The judicial recognition of notions such as inter-generational equity and sustainable development in Sri Lanka, by referencing Indian law and international standards,

43Cheryl Saunders, 'Designing and operating constitutions in global context' in Mark Elliot and David Feldman, *The Cambridge Companion to Public Law* (1st edn, Cambridge University Press 2015).

44 Sujith Choudry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74(3) Indiana Law Journal 820; Ernesto J Sanchez, 'A Case against Judicial Internationalism' (2005) 38 Conn L Rev 185.

45 Vlad F Perju, 'Constitutional Transplants, Borrowing and Migration' in M Rosenfeld and A Sajo (eds) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1306

46 Vicki Jackson uses the term 'engagement' to refer to constitutional borrowing; Vicki C Jackson, 'Comparative Constitutional Law: Methodologies' in M Rosenfeld and A Sajo (eds) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

47 Sujith Choudry uses the term 'dialogue' to refer to constitutional borrowing; Sujith Choudry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74(3) Indiana Law Journal 820.

48 Quoting Vlad F Perju, 'Constitutional Transplants, Borrowing and Migration' in M Rosenfeld and A Sajo (eds) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1306 as cited in Eszter Bodnar, 'The Invisible Factors behind Using Comparative Law in Constitutional Adjudication' (2019) 10 Rom J Comp L 201.

exemplifies this point.[49]

A second related criticism of the use of comparative or international law is that it is in tension with originalism. According to originalists, foreign or international law should not be used as authority because they are contemporary and shed no light on the original understanding of the Constitution.[50] For instance, originalists claim that the use of the Indian model of PIL, which supports the infusion of fundamental rights with the teleological objectives of the directive principles, results in re-writing the Sri Lankan constitution, straying away from its original purpose.[51] The accusation here is that the convergence of enforceable rights with unenforceable welfare obligations, dilutes the sanctum of individual rights within the framework of a liberal democracy paving way to judicial socialism.[52] This argument too is untenable as it fails to recognise that the importation of values under DPSP empowers vulnerable communities to vindicate their rights through existing legislation and compels public authorities to take steps to enhance the welfare of the citizens.[53] Such a model of standing is not only suitable, but is also encouraged, for a meaningful realisation of fundamental rights in Sri Lanka, especially in light

49 A perusal of historical and religious sources reveals that concepts such as sustainable development were embedded in the wisdom of ancient Sri Lankans; See, Kokila Konasinghe, 'The Role of the Judiciary in Promoting Sustainable Development in Sri Lanka' (2021) 3(1) International Journal of Governance and Public Policy Analysis; Kokila Konasinghe and Asanka Edirisinghe, '(Re) thinking Nature: Follow thy old Wisdom – What can Sri Lanka's ancient Kings tell us about protecting the natural world' (*The Association of Commonwealth Universities* 7 December 2021) <https://www.acu.ac.uk/the-acu-review/follow-thy-old-wisdom/> accessed 5 November 2022.

50 John O McGinnis, 'Foreign to Our Constitution' (2006) 100 Nw U L Rev 303.

51 Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37 The American Journal of Comparative Law 3.

52 Ibid.

53 Lakshman Marasinghe, 'Public Interest Litigation and the Indian Experience: Its Relevance to Sri Lanka' (2003) 15 Sri Lanka J Int'l L 51.

of the constraints on judicial review of legislation, governmental apathy and legislative inertia. As observed by Justice Prasanna Jayawardena in the *Chunnakam Case*, *'The Directive Principles of State Policy are not wasted ink in the pages of the Constitution. They are a living set of guidelines which the State and its agencies should give effect to.'*[54] This is a commendable approach as the concern of the judiciary is rightly fixated on the injustice alleged in the petition.

Criticism of the use of foreign materials in constitutional adjudication also focuses on the possible impact of variations between legal systems.[55] The argument here is that, invocation of imported constitutional materials stands a good chance of proving unreliable considering the presumed inability of judges to make the necessary functional translations between two cultures.[56] In the opinions of some comparative scholars, transplantation simply cannot work and 'nothing can be translated.'[57] Other critics counter that basic principles of constitutional law are 'the same around the world' and fears that foreign experiences will be misinterpreted are exaggerated.[58]

Further, when the state, which is the potential source of borrowed knowledge and experience, is vastly larger than the borrower – as is the case with India and Sri Lanka, sensitive political issues related to constitutional sovereignty and autonomous statehood arise.[59]

54 Cassels (n 49).

55 Louis J Blum, 'Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication' (2002) 39 San Diego L Rev 157

56 Deepika Udagama, 'Constitutional Borrowing in South Asia' in Sunil Khilnani, Vikram Raghavan and Arun K Thiruvengadam (eds) *Comparative Constitutionalism in South Asia* (Oxford University Press 2013) 204.

57 John C Reitz, 'How to Do Comparative Law' (1998) 46 AM. J. COMP. L. 617.

58 Blum (n 53).

59 Sunil Khilnani, Vikram Raghavan and Arun K Thiruvengadam (eds) *Comparative Constitutionalism in South Asia* (Oxford University Press 2013) 204.

Regardless of the merits / demerits of constitutional borrowing, the judiciary needs to be mindful that the transplantation of foreign constitutional ideas is not exposed to what has been described as the 'mutation effect' *i.e.*, the process of extending the scope of a holding, regardless of its factual basis, to cover abstract situations not even contemplated in the reasoning that grounded the original decision.[60]

Conclusion

Sri Lanka is a classic example of a young constitutional democracy in South Asia that has made significant strides in advancing environmental justice through comparative constitutional adjudication. Despite the apex court's reputation for citation of foreign authorities, the discourse on comparative constitutional adjudication remains characterised by two broad criticisms. First, as a matter of jurisprudential philosophy, foreign law/concepts fail to adequately capture the needs and aspirations of the people as, constitutions are, by their very nature, linked to a particular nation's history, culture, and identity. The second criticism focuses on lack of method; citation of foreign authorities occurs as an unregulated/unprincipled judicial practice or a 'cherry picking/ forum shopping' exercise, leaving room for absurdities to seep in. Notwithstanding these criticisms, the study of cases demonstrates how the careful adoption and adaptation of foreign or international law by judges could prove useful in filling the void left by the legislature, bolstering the rights of vulnerable communities, and promoting greater governmental accountability.

60 For a fuller discussion of the mutation effect see, Horacio Spector, 'Constitutional Transplants and the Mutation Effect' (2008) 83 Chi.-Kent L. Rev. 129.

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The Passionate Art with Living Flesh and Medical Fidelity: Coding Ethics for Surgeons

Ayodhya Prabhashini Rathnayake*

Abstract

Who is a proficient surgeon? The inventions in modern surgery bring different answers to the question. In the traditional sense, the practice of surgery is supported by three pillars namely the technical skills of the surgeon (techne), his knowledge (episteme) and the capacity to make judgments (phronesis). It is axiomatic that in the purview of medicine, medical ethics have been recognized. 'Medical ethics 'particularly concern about the doctor-patient relationship. The paper focuses on the' surgical ethics 'which form a part of medical ethics. The main objective of this paper is to study the scope of the surgical ethics which are applicable in the context of modern surgery. The author has analyzed the surgeon-patient relationship and the nature of it. As the last objective, the author has analyzed the ethical issues and the importance of developing surgical ethics. The methodology adopted by the author in this paper is purely qualitative in nature and the content analysis of secondary sources of law. Secondary sources of law include the texts, publications, journal articles. In the conclusion, the author suggests to develop the ethical framework to strengthen the surgeon-patient relationship and proposes to develop a separate code on surgical ethics to Sri Lanka.

Keywords: *Surgeon, Ethics, Medicine, Patient, Fidelity*

*LLB Hons (OUSL), LLM (UK), Attorney At Law, Lecturer in Law (Probationary), Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana- Sri Lanka.

law.faculty@kdu.ac.lk

Introduction

Performing a 'surgery' is an art to handle with living flesh.[1] The successful completion of a surgery is the competence of the surgeon whose technical capability, knowledge and the skillfulness of making judgments are at the zenith. In the view of the French Poet Paul Valery, 'All of the science in the world cannot make an accomplished surgeon. It is the doing that consecrates it'.[2] 'Professional Competence 'is the habitual and judicious use of communication, knowledge, technical skills, reasoning, emotions, values and reflection in daily practice for the benefit of the individual and the community being served'.[3] Thus, a proficient or a competent surgeon is equipped with the knowledge and skills to comply with appropriate operative procedures. In addition to this, his / her medical fidelity is recognized. Medical fidelity is concerned with ethics. The term 'medical fidelity'; a basic ethical principle which is involved in the regulation of the professionalism of surgeons. It simply stands to the prioritization of the interests of patients than that of other persons.[4] 'Ethics' form the basis for the decision making on the fact whether what is right or wrong. Among the ethics discussed in the different kind of disciplines, 'Medicine 'is dealt with the medical ethics which deeply discuss the moral aspects pertaining to doctor- patient relationship.[5] The surgical practice is a combination of technology, evolution, resources and it necessitates the development of surgical ethics. The existence of surgical ethics as a separate section of medical ethics is worth

1 Cardenas D, 'Surgical ethics: a framework for surgeons, patients, and society' (2020) 47 Revista do Colégio Brasileiro de Cirurgiões <http://dx.doi.org/10.1590/0100-6991e-20202519> accessed 23 March 2023

2 Ibid [1]

3 Epstein RM, 'Defining and Assessing Professional Competence' (2002) 287(2) JAMA 226 <http://dx.doi.org/10.1001/jama.287.2.226> accessed 03 February 2022

4 Hui, E.C. (2005) 'The patient-surgeon relationship. Part II: Medical fidelity as morality and law', *Asian Journal of Oral and Maxillofacial Surgery*, 17(4), pp. 210–216. doi:10.1016/s0915-6992(05)80014-7. accessed 03 February 2022

5 Ibid [1]

for an academic discussion. The objective of the paper is to present a legal and ethical analysis on surgical ethics. The author's perception is to impart the legal and medical communities with an academic exposure on the legal and ethical framework of modern surgery. The author has discussed two basic research questions in this paper namely the scope of the surgeon- patient relationship and the developments in ethical framework pertaining to modern surgery.

Methodology

Methodology adopted in the paper is purely qualitative in nature and the author has perused primary and secondary sources of law to develop the paper into an analytical. The review of literature is significant throughout the paper.

Review of literature

As the paper is developed on the legal research methodology, the review of literature is of predominance. The main purpose of adhering to the review of literature is to get an understanding about the methodologies adopted by other authors in the course of their work. This has been supportive in the identification of pitfalls faced by the previous researchers in adopting such methodologies. Additionally, literature supported in the shaping the research problem. This stands to an instance where the literature or the secondary sources of law that the author perused clearly reflect the subject area. Thus, such an elaboration results in the conceptualization of the research problem clearly. The contextualization of research findings has become convenient in the process of reviewing literature due to the fact that, such a review facilitates the deep comprehension of the work done by the researchers of the field of interest and provides the author with the appropriate knowledge about the loopholes and gaps in the field.

Doctrinal Methodology and Content analysis

The doctrinal or library based approach which can be used in the research which are theoretical nature.[6] A theoretical research can either be a simple research or a deep research which has more logic.[7] The content analysis comprises of two levels of analyses.[8] 'The first level analyses the manifest content of texts and documents by statistical methods' and the second level analyses the 'latent content of the text and documents'.[9]

Results and Discussion

Surgeon and Patient; What Type of A Relationship?

Surgery or the surgical therapy which is life threatening and invasive in nature has shaped the surgeon-patient relationship.[10] This perception highlights two basic requirements from each party where it is essential for the patient to trust the surgeon and the latter must adhere to ethical actions. The surgeon-patient relationship as a bond which is dependent on communication, patient satisfaction, trust and decision making.[11] This further emphasizes in the research that, the surgical performance is not a convenient task for the persons who embark on it.[12] In other way, Surgery is viewed as an ethical practice; 'each surgeon should have a moral compass in their

6 Salim Ibrahim A, Zuryati Mohamed Y and Zainal Amin A, '*Legal Research of Doctrinal and Non-Doctrinal*' (2017) 4(1) International Journal of Trend in Research and Development 493 <www.ijtrd.com/papers/IJTRD6653.pdf> accessed 24 January 2023

7 Ibid [6]

8 Seuring S and Gold S, 'Conducting content-analysis based literature reviews in supply chain management' (2012) 17(5) Supply Chain Management: An International Journal 544 <http://dx.doi.org/10.1108/13598541211258609> accessed 2 May 2023

9 Ibid [8]

10 Axelrod DA, 'Maintaining Trust in the Surgeon-Patient Relationship' (2000) 135(1) Archives of Surgery 55 <http://dx.doi.org/10.1001/archsurg.135.1.55> accessed 4 April 2023

11 Jannu A and Jahagirdar A, 'Surgeon-patient relationship' (2021) 2 Advances in Oral and Maxillofacial Surgery 100071 <http://dx.doi.org/10.1016/j.adoms.2021.100071> accessed 4 April 2023

12 Ibid [11]

armamentarium to effectively guide their actions'.[13] This elaborates on the fact that, it is essential for the surgeons to demonstrate their competency and diligence in the performance of a surgery.

The significance of surgeon - patient relationship is the uniqueness of the procedure involved in it. The unique features of the process of surgery are the pain or the hurt before it heals invasiveness and the penetration through the body of the patient, decision making in uncertain circumstances with complications and consequences.[14] Thus in a medico-legal sense, the relationship between a surgeon and a patient is contractual in nature. However, the essence of such a bond is fiduciary as the patient imposes a certain degree of trust on it.

The contract so formed is dependent on the trust and confidentiality.[15] Thus, a surgeon should always respect the autonomy of the patient.[16] In addition to this, surgeon-patient relationship is buttressed by the medical informed consent law. The surgeons should have the skill proficient in art and medicine and the relationship should be based on the trustworthiness.[17] A proficient surgeon should have the talent in understanding the ethical problems involved in the process of a surgery with the capacity to exercise judgment in the course of ethical decision making.[18]

13 Ferreres AR and Patti M, 'Ethical Issues in the Introduction of New Technologies: From Mis to POEM' (2015) 39(7) World Journal of Surgery 1642 <http://dx.doi.org/10.1007/s00268-015-3067-8> accessed 7 May 2023
14 Ibid [13]
15 Thejaswini V, Contemporary Surgery, vol 3 (Micro laboratories and Association of Surgeons 2019) <www.researchgate.net/publication/332072679_Ethics_in_Surgery> accessed 4 March 2023
16 Ibid [15]
17 Ibid [1]
18 Ibid[1]

Psychology of surgeons; a grave issue to be considered?

The psychology of surgeons is an imperative aspect in the context of surgical practice.[19] The performance of a surgery has a tendency to bring out negative mental consequences on a surgeon. If further elaborated, a post-operative complication of a surgery can result in psychological impact on surgeons.[20] This provides testimony to the fact that, the surgeons become the second victim of such complicated events.

Proficient surgeon and the characteristics

Pellegrini's tenets elaborated on the characteristics of a competent surgeon.[21] Thus, the surgeon is expected to endow with good clinical skills and the surgical judgment, good technical skills and expertise in the performance of operative procedures and the practice of humanism, moralism and ethics.

Types of surgeries in the modern world

As Royal College of Surgeons specifies there are different types of surgery that exist in the world.

a) Open surgery - The type of surgery which is common among the patients and is characterized by the staples and stiches to close the incisions.[22]
b) Keyhole surgery-The surgery perform on the skin of the patient through small incisions by use of a fabric optic light source. The insertion of instruments to the fabric optic light source facilitates the surgery and this procedure considered as less traumatic to the patient.[23]

19 Ibid [11]
20 Ibid [11]
21 Ibid [1]
22 *Types of surgery*, *Royal College of Surgeons*. Available at: https://rcseng.ac.uk/patient-care/having-surgery/types-of-surgery/ (Accessed: 25 March 2023).
23 Ibid [22]

c) Laparoscopic surgery- Almost resemble a keyhole surgery and predominantly used in the contexts where abdominal issues are concerned.[24]
d) Microsurgery - Surgical procedures involve with the use of magnifying devices and extremely small instruments which are delicate in nature. Microsurgery is predominantly involved in the operation of tiny structures namely the veins, arteries, bones and nerves of the human body.[25]
e) Cosmotic surgery - The surgery which a person chooses to undergo with the expectation of getting the appearance changed. The reason behind the performance of such a surgery is not necessarily medical in nature.[26]

The birth of 'Surgical Robots'.

The recent development in the purview of robotics is the involvement of surgical robots in different operative procedures. 'Surgical Robots' are machines perform complex surgical tasks in a master-slave configuration system.[27] There are different classifications among the surgical robots. The main classification is between the autonomous industrial robots that are supportive in the fulfillment of a greater extent of work without the intervention of a surgeon.[28] The second classification is dealt with the robots that are supportive to the surgeons and perform the task of assisting.[29] In addition to this, there is a classification namely the internal, external and mixed robots.

24 Ibid [22]
25 Ibid [22]
26 Ibid [22]
27 Graur S and others, 'Surgical Robotics-Past, Present and Future', New Trends in Medical and Service Robots, Mechanisms and Machine Science (Springer, Cham 2017) <www.researchgate.net/publication/318708869_Surgical_Robotics-Past_Present_and_Future> accessed 21 April 2023.
28 Ibid [27]
29 Ibid [27]

a) External Robots - Perform surgical ventures on the surface of the patient's body such as Acrobot, Cyberknife etc.[30]
b) Internal Robots - Perform surgical ventures inside the body of the patient such as endoscopic capsules.[31]
c) Mixed Robots - In this process, one segment is placed inside the patient's body and simultaneously, outside the body of the patient. Example: Neuro Mate, da vinci.[32]

'Medical Ethics' and the importance

'Medical Law' is a legal discipline which involves the regulation of the relationship between the patient and medical personnel.[33] This regulation is pursuant to the legal norms and general practice of medicine. Further, the elaboration further signified the fact that, medical law and ethics are complimentary in nature.

As the Code of Medical Ethics presented by the American Medical Association (AMA) defines, the patient - physician relationship as a clinical encounter which is fundamentally a moral activity and arises from the care to patients with the expectation of alleviating poverty. The relationship is based on trust. This definition is further buttressed by an ethical responsibility to prioritize the welfare of the patient over the self-interest. A physician is bound to serve the interests of the patient and the relationship is solely based on the mutual consent.

Patient's autonomy as a core principle

The patient's autonomy and the respect for it are core principles in

30 Ibid [27]
31 Ibid[27]
32 Ibid [27]
33 Ivanović S and others, 'Medical Law and Ethics' [2013] Acta medica medianae 67 <http://dx.doi.org/10.5633/amm.2013.0310> accessed 03 April 2023.

the process of interaction in healthcare. 'Every adult human being of sound mind as a right to determine what shall be done with his own body and he/ she has the right and responsibility to make healthcare decisions'.[34] This simply stands to an instance where the people are making own decisions and no one is to interfere in such a process. The process of decision making by the patient should be based on the information.[35] This is based on the right of a person to receive information.

Medical Informed Consent Law

Infliction of a force on a person without his/ her consent is considered as 'Battery'.[36] This arises in an instance where there is no lawful justification for the act committed. There are two main categories of the 'consent' namely:

a) Implied Consent - This is a consent which has not been written in any document but there is a legally binding nature.[37]
b) Express Consent - This is a type of consent which is mentioned in distinct and explicit language. The express consent can be divided into two namely oral or written. Oral consent is basically directed towards the minor examinations and therapeutic procedures. The obtaining of the oral consent is supplemented by the presence of a witness. Contrarily, the 'written consent' involves the process of guaranteeing the patient.[38]

34Sakellari E, 'Patient's autonomy and informed consent' (2003) (13) ICUS NURS WEB <www.researchgate.net/profile/EvanthiaSakellari/publication/241752332_Patient's_autonomy_and_informed_consent/links/0a85e52f4ffec906a7000000/Patients-autonomy-and-informed-consent.pdf> accessed 05 May 2023.
35 Ibid [34]
36 Sareen R and Dut A, 'Informed Consent in Medical Decision Making In India' (2019) 1(1) Journal of Counselling & Family Therapy 30 <http://doi.org/10.5281/zenodo.2597154> accessed 24 March 2023.
37 Ibid [36]
38 Ibid [36]

The informed consent is one of the dominant doctrines in the context of patient - physician relationship.[39] This is identified as a concept rooted in the fundamental principles of medical ethics and human rights law. The purview of informed consent into different types of areas namely:

c) Informing the patient - the right to receive information is considered as one of the legal and ethical entitlements. Before undergoing any medical/ therapeutic procedure, the patient must be informed about the nature of it and the physician has a simultaneous obligation to provide correct information.[40]

d) What to inform? - In the case **of *Canterbury v. Spence***, the information which should be given by a physician to a patient includes, the illness and its nature, an elaboration on the nature of the treatment, that they are going to administer, a risk and benefits analysis, the pain and complications of the treatment, the existing alternatives, the possibility of getting it successful and the experience and qualifications that, the staff possesses.[41]

e) How to inform? - Providing information is not sufficient, if it is not done in a way which becomes comprehensible to the patient. Such information should be imparted in a comprehensible and an understandable language.[42]

f) To what standard shall the physician inform? - This is dealt with two main standards namely the physician standard and the patient standard. The physician standard is signified in the case of *Salgo*. The basis of the case revealed the fact that, a physician becomes liable and considered as breached the

39 Man H, 'Informed Consent and Medical Law', Legal and Forensic Medicine (Springer-Verlag Berlin Heidelberg 2013) <www.researchgate.net/publication/278649612_Informed_Consent_and_Medical_Law> accessed 31December 2022
40 Ibid [39]
41 Ibdi [39]
42 Ibid [39]

duty, when he withholds the information to a patient. The significance of this liability is that, such information has the potential to support the patient in giving an intelligent consent by the patient to the proposed treatment.[43]

g) What is the standard of the patient? - Simultaneously, the law accepts the 'objective patient standard'. The standard identifies the fact that, there is a reasonable, objective patient to whom the physician should impart information to make a reasonable decision.[44]

h) Exceptions to the disclosure - It is axiomatic that, the physician has an ethical and legal obligation to impart patients with correct and relevant information about a treatment.[45]

Therapeutic privilege is considered as one of the grounds on which the provision of information to a patient can be withheld.[46] This situation arises in instances where it is reasonably believed by the physician that, the providing of information to the patient would make him upset and it would make it unable for him to make a rational decision over the treatment. This further reveals the fact that, such a disclosure would become harm to the patient himself/ herself. ***Cobbs v. Grant***[47] explained therapeutic privilege as a '*disclosure need not be made beyond that required within the medical community when a doctor can prove by preponderance of the evidence he relied upon facts which would demonstrate to a reasonable man the disclosure would have so seriously upset the patient that the patient would not have been able to dispassionately weigh the risks of refusing to undergo the recommended treatment'*. This signifies an instance where the physician is relieved from the liability or entrusted with the privilege of not informing the

43 Ibid[39]
44 Ibid[39]
45 Ibid[39]
46 Ibid [39]
47 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (Cal. 1972)

patient about the condition and the proposed treatment. A privilege prevents the patient from **overreaction and excessive desperation**. The principle on 'Beneficence' forms the basis of the therapeutic privilege.[48]

A patient has a right to give an informed consent and simultaneously the right to withdraw the same.[49] This is an absolute right where the patient is allowed to withdraw consent in the inception or in the course of a treatment with or without a reason. This should be done by communicating the specific decision of withdrawing to the physician involved. The right of refusal, if further elaborated, states that the patient has a right to refuse the treatment.[50] The right to 'informed consent' symbolizes the authorization of the patient in the continuation of the treatment. Right to refusal has a simultaneous importance as the patient can reject the diagnosis and the proposed treatment.

What is the Bolam Test (Reasonable Doctor Test?)

In this test, it was held that, '…a doctor cannot be held liable for the negligence if he acted according to the practice accepted as proper by a responsible body of medical men skilled and specialized the particular art..'

Canterbury v Spence (Reasonable patient Test?)

The patient has a right to know all the material risks and the physician has a main obligation to disclose all the risks associated with the treatment. If the doctor has not complied with it, that amounts to medical negligence.

48 Ibid [39]
49 Ibid [39]
50 Ibid[39]

Rogers v. Whittaker[51]

The relevant medical professional being an ophthalmic surgeon failed to disclose to the patient that, the vision of her left eye would be damaged as a result of the surgery to the right eye. The court was of the view that, the surgeon was guilty of negligence and it was emphasized that, the standard care of disclosure should be decided by the court and not the medical profession.

Smith v. Tunbridge Wells[52]

A rectal prolapse surgery was performed on a young person without informing him of the threats of impotency and bladder dysfunction. In the perspective of the court, risk incurred was remote but still the surgeon is liable for the conduct of negligence.

Beneficence and Non-Maleficence

Beneficence and Non-maleficence are considered as the fundamental principles in the context of clinical practice.[53] The basis of these principles is to promote the wellbeing of the patients and restrain from causing harm or exposing the patients to harm. Beneficence is considered as a foundational ethical principle in the context of the medical field.[54] 'Non-maleficence' is enshrined in the moral intent of abstaining from causing harm or injury to another. The amalgamation of the concepts of the beneficence and non-maleficence signifies the responsibility of a medical professional to not inflict harm or evil and also ought to prevent harm or evil to remove harm or evil. Further an obligation is imposed on the

51 (1992) 175 CLR 479

52 (1994) 5 Med LR 334

53 Singh JP and Ivory M, 'Beneficence/Nonmaleficence', The Encyclopedia of Clinical Psychology (University of South Florida 2015) <http://dx.doi.org/10.1002/9781118625392.wbecp016> accessed 23 March 2023.

54 Bester JC, 'Beneficence, Interests, and Wellbeing in Medicine: What It Means to Provide Benefit to Patients' (2020) 20(3) The American Journal of Bioethics 53 <http://dx.doi.org/10.1080/15265161.2020.1714793> accessed 09 May 2023.

medical professional to promote good.

Surgical Ethics; the way forward

It is axiomatic that, the surgical culture is in need of a formalized ethical behavior. However, there is less open discussion on the category of surgical ethics. The predominant consideration of surgical ethics is dealt with the virtues of surgeons.[55] 'Virtues' possessed by the surgeons are of different facets namely the punctuality, perseverance, kindness and teamwork.[56] The developed virtues of surgeons should be based on the capacity of a surgeon to make a good judgment or the practical wisdom. The community, whether it is law or medical has a doubt about the aims of surgery. However, it is certain that, the ultimate aim of a surgery is not the surgical technical performance. This signifies the fact that, a surgery should be performed for the best interest of the patient with a proportionate care. The highlighted feature of a surgical procedure is that, it causes the bodily penetration of the patient with the use of incisions, sutures and cuts. The use of such procedures apparently demonstrates a breach or a violation of bodily integrity of the patient. This is prima facie contrary to the Hippocratic principle '*primum non nocere'*; *first do no harm*. However, if such a body penetration is imperative to heel the patient, it is necessary for the surgeon to separate the soul and body. The body of the patient can be considered as an 'object'. The object can be healed and the soul can be respected without causing damage. The surgical innovations or the techniques introduced with the passage of time, may satisfy the surgeons but not address the interests of the patients.[57] The era commenced in the 21century necessitates the 'surgeon' to be competent. Thus, a surgeon is expected to be proficient in

55 Ibid [1]
56 Ibid [1]
57 Ward C, 'Ethics in surgery' (1994) 76(4) Ann R Coll Surg Engl 223 <https://pubmed.ncbi.nlm.nih.gov/8074381/> accessed 3 April 2023.

clinical skills, expert decision making in the field of surgery and technical skills.[58] The competence is further nourished by the solid ethical atmosphere.[59] Thus, the core of surgical professionalism is established on 'ethics'. Surgical decision making is comprised of two main facets namely 'how to treat' and 'why to treat'. 'How to treat' is an aspect that emerged in the purview of surgical science. 'Why to treat' is related to ethics.[60] All the surgeons are expected to carry a moral compass in their hands to guide their own actions.

Surgeons frequently confront responsibility, uncertainty, Fallibility, Confidence and Humility. 'Responsibility' is an experience which the surgeons undergo the ethically difficult situations as a part of their professional life. Such ethically difficult situations are dramatic and tragic in certain circumstances.[61] In the view of Surgeons, they have been confronted with the very challenge of learning to live with the unpredictable consequences of their lives.[62] Further, the practice of surgery is considered as more specific and responsible than the other fields of medicine.[63] In addition to the responsible nature of the surgical venture, there is an inherent uncertainty. The surgeons in their professional framework are uncertain about the disease condition of the patient, the survival of the patient, the complications which are fatal and serious in nature, and the quality of life of the patient after the performance of surgery. This uncertainty has the effect of making surgeons more petrified and clueless. Facing the reality is considered as the most serious challenges that a surgeon would face. One of the main duties of a surgeon is to make the patient's condition

58 Ferreres AR, Surgical Ethics: Principles and Practice (Springer 2019)
59 Ibid [58]
60 Ibid [58]
61 Torjuul K, Nordam A and Sørlie V, 'Ethical challenges in surgery as narrated by practicing surgeons' (2005) 6(1) BMC Medical Ethics <http://dx.doi.org/10.1186/1472-6939-6-2> accessed 30 April 2023.
62 Ibid [61]
63 Ibid [61]

better. The fallibility concerns with the surgeon's identification of limitations of surgery, errors which will incur and the surgeon's inability to alleviate the sufferings of the patient. The significant aspect in the professionalism attached to surgery is the 'confidence' that the surgeons have. The main focus of the surgeons is on the curing of patients. In the process of exercising the art of surgery, the surgeon's confidence is getting increased with the workable solutions that he would find amidst the clinically and ethically difficult circumstances. The better performance of the surgery is dependent on the courage that the particular surgeon has on the convictions and the personal ethical values. The simultaneous focus is on the fact of humility. This specifies that, the surgeons are not in a position to govern the human conditions or in other words, he is in a position to postpone death but not perfectly save the life of the patient.

The Sri Lankan Context

The errors of judgment and the negligence of a surgeon will result in the morbidity and mortality. In Sri Lankan context, most of the surgeons were accused of surgical errors and such errors have caused the death of patients. Thus, the liability is extended to the hospital staff. In the year 2013, a 47 years old husband and the daughter claimed damages from a private hospital in Colombo for the death of a female patient aged 38 years. The ground of such a legal action was an error incurred in the course of surgery of an ovarian cyst.[64] However, there is a doubt in existence on the availability of a clear and a comprehensible code of surgical ethics in Sri Lanka. The Medical Council of Sri Lanka by its guideline on the ethical conduct for medical and dental practitioners introduces a concept called 'Good Doctors' The guideline states '*Patients*

64 'Durdans Hospital Sued For Medical Negligence And Keeping Guardians In Custody' (asianmirror.lk, 15 August 2014) <https://asianmirror.lk/news/item/2742-durdans-hospital-sued-for-medical-negligence-and-keeping-guardians-in-custody> accessed 05 December 2023.

need good doctors. Good doctors make the care of their patients their first concern: they are competent, keep their knowledge and skills up to date, establish and maintain good relationships with patients and colleagues, honest and trust worthy, and act with integrity.' The guideline has specifically balanced the two aspects namely the surgical performance and skill' and the other facet is the ethical facet.

Conclusion

The surgical ethics are considered as a part of the Medical ethics which have been expanded in a wide purview. The duty of a surgeon towards the patient is considered as specific and comparatively responsible than the other fields of medicine. The reason for this recognition is the fact that, it being an art or an expertise that surgeons possess to deal with living flesh of humans. The surgeon - patient relationship is dependent on the trust, patient satisfaction and the solidity of decision making. A surgeon's performance at its zenith for the best interest and wellbeing of the patient creates the medical fidelity. However, the modern surgery is full of technological advancements. Surgical Robots assist human surgeons in the performance of surgery. The technologically enveloped surgical procedures specifically bring out ethical implications and challenge the professionalism of surgeons. This creates the necessity to develop separate surgical ethics codes specially by considering the legal aspects such as medical informed consent law. In the context of Sri Lanka, the surgeons are often being subject to allegations on surgical errors and there is no separate code on surgical ethics that can be found to govern them. As a country which faces rapid development in the field of medicine, it necessitates the codification of separate guidelines on surgical ethics.

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The Necessity for Criminalizing Marital Rape in Sri Lanka

Thisari Shashindri*

Abstract

Marriage is a partnership of equals contrary to the traditional definition of it being a union in which the wife is supposed to be a subservient slave of the husband. In marriage, both man and woman require mutual respect and recognition as 'equals. The notion of equality of men and women in marriage is engraved in international human rights instruments such as the UDHR, ICCPR and CEDAW. Marital rape happens because, denies the equality of spouses and thereby hindering the sexually abused lives of the spouses. Thus, to eliminate this miserable fate faced by the spouses, there must be an urgent need to remove the marital exemption for rape. Theoretical analysis of the research is conducted through qualitative data assembled through library and online sources. This research focuses on assessing the laws related to criminalizing marital rape in Sri Lanka, with an aim to review the social, legal, and moral impact of marital rape and its scandalous and controversial nature and to highlight the huge gaps and loopholes existing in the legal literature. In doing so, it is intended to focus on social, cultural, and moral barriers within society that enable this offence being swept under cultural carpet. The paper also discusses how the insane attitude of condoning marital rape could be legally addressed. Under the doctrinal approach to this research data gleaned from Statues, Acts, Legislations, case laws, journal articles, textbooks, research papers, assessments, past case studies, reports with respect to the subject matter and related electronic data bases in reaching its conclusion. In conclusion, the researcher intends to recommend that if legislators consider rape as an offence committed against physical integrity of an individual and in turn against the whole of humanity, criminalizing marital rape and imposing suitable punishment is nothing but a social need from which the State

*LLB Hons (Peradeniya), Lecturer (Probationary), Faculty of Law, University of Colombo

cannot easily escape today.

Keywords: *Marital rape, women's rights, equality of spouses, sexual autonomy, criminalizing, physical integrity.*

Introduction

"The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband's privilege but rather a violent act and injustice that must be criminalized."[1]

This path-breaking and progressive judgement of the High Court of Gujarat reveals that the time has now arrived to remove the old fiction of the spousal or marital exemption for rape from the statutory book.

As recognized in modern times, marriage is a partnership of equals contrary to its traditional definition of a union in which the wife is considered as a subservient role player for the husband. Shedding light on the concept of "equal partnership in marriage",[2] Kanodia and Ray (2016) emphasizes that marriage is a sanction where both man and woman gain some rights, responsibilities and duties towards each other and it requires mutual respect and recognition as "equals" in the relationship. In a broader sense, the notion of equality of men and women in marriage is etched in international treaties such as theThe Universal Declaration of Human Rights (UDHR)[3], The International Covenant on Civil and

1 'Marital Rape Is Not A Husband's Privilege But A Violent Act An Injustice That Must Be Criminalized' (Live Law 2018) <http://www.livelaw.in/marital-rape-not-husbands-privilege-violent-act-injustice-must-criminalized-gujarat-hc-read-judgment/.>accessed 20.08.2022.

2 Ray, R & S Kanodia, 'Why Penalize Marital Rape' [2016] IOSR Journal of Humanities and Social Science 49, 49

3 The Universal Declaration of Human Rights – UDHR was adopted by the United Nations General Assembly in Paris on 10th of December 1948 (General Assembly resolution 217 A)

Political Rights (ICCPR)[4] and The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Article 16(1) of the UDHR states that "men and women are entitled to equal rights in terms of marriage and during marriage". Article 23(4) of the ICCPR too emphasises the same recognition. Article 16(1) of the CEDAW prescribes that "States parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses during the marriage". Hence, in that equality allows both spouses to make decisions about their sexual and reproductive lives without violating each other's human rights and sexual autonomy.

For a long period in the human history, marriage has meant the unreservedly "consented to sex"[5] and thus, the husband cannot be held guilty of raping his wife. Diana Russell (1990) opines that this is an extension of making the wives of their husbands to have unwanted sex, whenever the husbands wish, even with impunity.

Even though the marriage is a holy promise taken in front of God, especially in some Christian and Hindu marriage ceremonies, which are often seen as a sacred bond, to cherish the body of the spouse; yet it remains another expression of horror and dominance over a woman by a man. Nonetheless, the legal status of marriage along with matrimonial consent alludes the idea that the wife has given up herself into her husband and thereafter she cannot retract. Thus, the implied consent within the marriage contract creates a loophole, whereby husbands can easily escape from any sexual offences committed against their spouses. In other words, between the spouses there cannot be any rape and it is a legal impossibility. But unfortunately, marital rape is often misinterpreted, as a spontaneous outcome of passion, or worse as love, or rather an uncontrollable emotion; yet, by which, it cannot be equally denied

4 International Covenant on Civil and Political Rights (ICCPR) (1966)

5 Rev.Dr. Susan Brook Thistlethwaite, 'Yes, Marital Rape Happens, and It Is Terrible' (HUFFPOST (blog) 2015) <https://www.huffingtonpost.com/rev-dr-susan-brooks-thistlethwaite/yes-marital-rape-happens_b_7891192.html> accessed 17.08.2022.

that women undergo sexual violations when sex is demanded by their violent and abusive husbands.

Although, marital rape is the act of sexual intercourse by one spouse without the consent of the other, generally, it turns out to be a frequent form of domestic violence and grave sexual abuse against women. To constitute "rape", the essential fault element of the offence, i.e. the absence of consent must be necessarily considered. In that sense, when a woman is being subject to rape within the marriage against her will and without her consent, it is perplexing why still there is no attempt, made to legislate criminalizing the marital rape in Sri Lanka.

No fuss over the statement that a victim of marital rape can be either a woman or a man. However, irrespective of the form of gender, still many jurisdictions and lawmakers are reluctant to criminalize it and accept marital rape as a punishable offence committed against the human body and dignity. Apart from the lackadaisical legal approach to the issue, society itself has viewed marital rape as the fate of the woman, once she entered the wedlock. Unlike in the past, now the society goes through radical changes and thus, rape is not just an ordinary crime but, in certain situations, a crime against humanity, and as such none can be exempted from the offence just because there is a marriage subsisting between the parties.

It is quite apparent that marital rape takes place because of the old-fashioned blind-theory, which denies sexual equality of the spouses. Specially still in the countries like India. (In recent years, there have been several high-profile cases that have brought the issue of marital rape to the forefront in India. Some of the outstanding cases

are: *Independent Thought vs Union of India (2017)*, *RIT Foundation vs Union of India (2019)*)[6]. Thus, to eliminate this miserable fate faced by the spouses, meaningful steps must be taken to remove the marital exemption for rape from legal liability of the perpetrator .Although the marital exemption for rape is not a feasible procedure to be carried out easily in the Eastern world, there are some other jurisdictions where marital rape is considered as an offence. To name a few, all fifty American states, three Australian states, New Zealand, Canada, France, Sweden, Denmark, Norway, Soviet Union, Poland, and Czechoslovakia. Interestingly, even Nepal, in 2006, declared marital rape as an illegal act and treated it as a criminal offence, while half of the countries in the Asian continent are still reluctant to take steps to remove the irrational exemption for marital rape. In this line, Sri Lanka is also not an exception in showing sluggish attitude in adopting what it is legally obliged to do in this area.

With the aim to steer the idea that marital rape should be criminalized and included the statutory book in Sri Lanka, as a rigorously punishable, serious, mortifying, and displeasing sexual assault against a person.

Application of Criminal Law in Sri Lanka

The scope of criminal law in Sri Lanka, the Penal Code, which was enacted as Ordinance No. 2 of 1883, contains the country's most significant penal laws regarding criminal liabilities and punishments for offences committed within the country. Nevertheless, the provisions of Sri Lanka's Penal Code for the most part it reflect the attitude of old-English law principles, mainly because the British ruled the island as a colony for one and a half century. For example,

6 'Marital Rape Is Not A Husband's Privilege But A Violent Act And An Injustice That Must Be Criminalized: Gujarat HC'(Livelaw News Network 2018)https://www.livelaw.in/marital-rape-not-husbands-privilege-violent-act-injustice-must-criminalized-gujarat-hc-read-judgment/?infinitescroll=1> acessed 05.11.2022

"the effect of the statutory codification of English common law principle that a woman by entering into a marriage contract, gives irrevocable consent to sexual intercourse at all times,"[7] is reflected through the exception provided by section 363 of the Sri Lanka's Penal Code.

Prior to the Amendment Act No. 22 of 1995, as per the exception under Section 363 of the Penal Code of Sri Lanka, "sexual intercourse by a man with his own wife, the wife not being under twelve years of age, is not rape." However, this was amended in 1995 when the English law itself rejected the common law principle of the exclusive rights of the husband over the wife. Due to strong lobbying from pressure groups against penalizing marital rape in its entirety, the 1995 Amendment was narrowed down only to outlaw marital rape between judicially separated spouses. On the other hand, since the marital rape is recognized as a serious and common form of domestic violence, in Sri Lankan context, the legal framework that protects women from their abusive husbands is the Domestic Violence Prevention Act No.34 of 2005 (PDVA). But the main concern regarding the PDVA is it only allows protection for the victims of the offences contained in Chapter XVI of the Penal Code, whereby in all circumstances brushed off filing cases related to marital rape. This is another restrictive approach of the statutory law, where it excludes the application of marital rape offence. Marital rape is considered as to be a form of domestic violence and sexual abuse, so defined as the act of sexual intercourse by one spouse without the consent of the other. In this domestic violence and marital rape is taken a women centric approach and treated the woman as a victim according to the interpretation of rape in the Penal Code, as an act committed by a 'man' and 'penetration is sufficient to constitute the sexual intercourse necessary to the

7 'Re-visiting Our Right to Choice' (Sunday Times 2018) <https://www.huffingtonpost.com/rev-dr-susan-brooks-thistlethwaite/yes-marital-rape-happens_b_7891192.html>accessed 02.08.2022.

offense of rape' (Section 363).

In addition, Women's Charter of Sri Lanka (1993) is another basic policy framework that lays out women rights. Section 16 of the Charter states that "the State shall take all measures to prevent the phenomenon of violence against women in the work place, in the family, as well as in custody, in particular manifestation of it as rape, incest, sexual harassment and physical and mental abuse, torture and cruel, inhumane or degrading treatment."[8] In reality, according to the key findings of the Department of Census and Statistics of Sri Lanka, 17% of ever-married women in Sri Lanka between the age 15-49 suffered from domestic violence by their intimate partner. Thus, it is quite evident that though there are many domestic violence prevention policies and international conventions, which Sri Lanka has signed and ratified but violation of women's rights within the marriage has not been addressed accordingly.

Why Sri Lanka needs to adopt marital rape as a crime?

In a way, in countries like Sri Lanka sex is viewed as a forbidden subject and hence, rape within the marriage becomes a uniquely domestic and private matter, where even the legislation itself interprets it as an "excessive interference with the marital relationship."[9] Given that many women in Sri Lanka undergo the harsh, disgraceful, and indecent sexual assaults that amount to marital rape; yet, the victims remain silent or rather hide their suffering due to the patriarchal and stereotyped social norms that are prevalent in the society.

Further, neither the legislation nor the judiciary, or not even the society dare to come forward to take up the issue and marshal the

8 Section 16, "Women's Charter of Sri Lanka,"1993

9 Deya Bhattacharya, 'Marital Rape Legitimized by Law, Protected by Courts' (firstpost.com)<https://www.firstpost.com/long-reads/marital-rape-legitimised-by-law-protected-by-courts-3401002.html> accessed 02.08.2022

necessary support for criminalizing marital rape in the country. In consideration of the consequences of marital rape, it is in the interest of the entire society that such legislation becomes an urgent need of the day.

Women being subject to sex slavery within a marriage, in its entirety, violates the basic and fundamental human rights of the victims. According to Article 1 of the UDHR, "all human beings are born free and equal in dignity and rights. "[10] However, consequences of marital rape severely undermine the universally accepted common standard of human rights of women. Moreover, the offence seriously violates Articles 5 and 12 of the UDHR as well. In that sense, since the provisions of the UDHR are considered a part of customary international law there cannot be any excuse for Sri Lanka to hide behind a cultural mask to avoid addressing the pressing need for such legislation criminalizing marital rape.

In 2017 itself, 294 cases were reported where women over 16 years of age have been raped. Other than that, 616 cases have been reported regarding grave sexual abuse. Nonetheless, many cases go unreported when women become victims of grave sexual violence .

Impact of Criminalizing Marital Rape

Sri Lanka stands itself as a victim of a social phenomenon where it succumbs to outdated social practices and beliefs and fails to pass the relevant legislation to protect the rights of married women within the household. Hence, even though, the Constitution of Sri Lanka recognizes the freedom from torture, cruel, inhumane, or degrading treatment by the Article 11, no attempt has been made so far to abolish the marital exemption for rape, which involves horrendous cruel treatment in the hands of the wedded partner. Hence, it is even more relevant to discuss the significance of criminalizing marital rape and its impact on the Sri Lankan society.

10 Article 1, Universal Declaration of Human Rights

In general, numerous physical, psychological, and reproductive issues; but marital rape has far more negative consequences than that of general rape, *per se*. Marasinghe (2012) contended that, "sexual crimes are the most horrendous of all crimes committed against women."[11] In that sense, if marital rape is criminalized many women would be free from torture, dreadful, and fearsome matrimonial sexual assaults that they undergo inside their houses, Such criminalization protects women from the violation of their bodily integrity, freedom and genuine discretion. The mere fact of marital rape happening among the spouses doesn't mitigate its harm. Being assaulted and battered by the spouse, who is usually considered as the embodiment of trust, affection and care creates feelings of betrayal, disillusionment, and isolation in the woman.

Moreover, criminalization of marital rape saves the children in households from the psychological effects of witnessing violence among the parents, witnessing such violence influences negative mentality in the children. If the children become routine witnesses of such gross violence, it is more likely that they grow hatred towards their parents and thus they learn negative habits from their social environment. A lot of rural and semi-urban schools in Sri Lanka have children coming from such backgrounds where they only see, hear, and grab negative energies from their family surroundings. The ultimate consequence is such children are prone to consuming illegal drugs, alcohol and engaging in activities that are contrary to accepted social norms. Thus, to prevent victimization of innocent lives, criminalizing marital rape is vital as a moral and healthy aspect.

In addition, research indicates that marital rape causes severe and long-lasting effects in women. Injuries to private organs, lacerations, fatigue, soreness, and torn muscles, bruising and

11 C Marasinghe, Sri Lanka law directory on protection of women and girl children (1st, Ministry of Child Development and Women's Affairs, Sri Lanka, Colombo, Nugegoda 2012)

vomiting are some physical threats obvious in marital rape. Assault and battering may result in broken bones, black eyes, bloody noses and even knife wounds in grave cases. In supporting this view, a report done by the WHO (2002) reveals that, "women who once abused by their intimate partners, suffer more depression, anxiety, and phobias than non-abused women."[12] Further, the same research reveals that long term sexual violence within the marriage during the pregnancy has serious impacts that can be linked to increasing the risks of miscarriage, stillbirth, premature labor and birth, fetus injury, and low birth weight that can be a major cause of infant death in the developing world. Thus, it is indubitably apparent that when women constantly undergo a difficult time in protecting themselves from having unwanted pregnancy and sex against their will caused by sexual violence within the marriage, it results in negative consequences not only for the woman but even for the developing fetus. Further, this situation violates the fundamental right of both the woman and the unborn child "to life, liberty, and the security of person."[13]. Even the judiciary recognized at some point that, "the continuous threats and abuses could also make a person unwell both physically and mentally."[14]

Furthermore, accomplishing equality between women and men and eliminating all forms of discrimination against women are fundamental human rights and the United Nations values. Criminalizing marital rape allows sexual rights and authority to the female party to provide validity to their discretion as to give or not to give consent to sexual intercourse. Thus, the woman gets an integral part to play in the institution of marriage. The

12 Étienne G. Krug, 'World Report on Violence and Health, report, World Health Organization,' (who.int 2018) <www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf> accessed 22.08.2022.
13 "Article 3," Universal Declaration of Human Rights.
14 I Udani, 'CONTESTING THE CONSENT: AN ANALYSIS OF THE LAW RELATING TO MARITAL RAPE EXCEPTION IN SRI LANKA' [2017] International Journal of Business, Economics and Law 125, 133.

cultural assumptions such as marriages are harmonious because husbands and wives agree always are based on fictional bias. In a chauvinistic society, the mental picture all men have about the ideal woman is that of a woman who fulfills the role of a wife and a mother with a subservient mindset. Now the time has changed, and the ideal woman is no longer traditional and conservative. Both the male and the female counterparts in marriage deserve equality without discrimination for either party. Thus, by pointing out the vitality of the role played by a woman in the institution of marriage she can be empowered and assured that she on par with the male counterpart.

It is a long-standing perceptive norm that has existed in our society that the affairs of the marital home must be kept private. There is even a Sinhala proverb which says '*gedara gini eliyata dhanna epa'*, meaning 'if there is fire at home do not put it outside'. Social tolerance to marital rape and fear of social taboo hinders the rape victims from stepping out and being vociferous. Hence, still a conservative society in which the family members try to hide matters among married couples, thereby allowing the spouses to suffer silently within their marriage. Additional pressure is added on the woman from family members and friends to remain with the abusing perpetrator. Especially, in bad conditions of economy in some countries, some abused women are afraid to report violence within marriage because they rely financially dependent on their husbands for maintenance. Fear and humiliation also play a role in stopping women from reporting to the authority's violence committed by their husbands. Until people recognize the harm of spousal rape caused to a woman, they will not see the immediate need to address the issue. Publicity itself is not a solution to the problem, but it could bring the issue into the spotlight and generate public discussion. The lack of discussion and understanding about marital violence harms Sri Lankan women by preventing

them from seeking help from community members. So, to cease stigmatization and ostracism of women who openly talk about their husbands' violence there is a need to educate people as to the gravity of the issue of marital rape.

As there are two sides of every coin, establishing marital rape as a punishable offence in Sri Lanka is not free from negative impact as well.

The birth of the concept of "the vindictive wife" is one such crucial negative impact. A vindictive wife may seek revenge from her husband maliciously[15]. The woman is portrayed not as a victim of violence and abuse but as someone who gained power through her control over her body. It is possible that a woman might accuse her husband on false grounds and make false allegations against her husband. Introducing marital rape as a crime to Sri Lanka has a possibility of creating vengeful wives as well as husbands. This may lead to dramatic situations and fabrication of evidence purposely. Sri Lanka, being a patriarchal society pays attention to masculine privilege. In such a society, the fear of vindictive wife will play a dominant role in opposing criminalization of marital rape.

Further, breakdown of marriages impacts on children of such marriages negatively and it affects their well-being as well. If marital rape is criminalized, and if a spouse is convicted of the crime, children of such a union will lose the mother or the father. Thus, innocent lives must suffer the consequences of losing one of their parents.

Additionally, one practical difficulty in criminalizing marital rape is when the wife must face cross examination, the defense counsel

15 'A vindictive spouse may play dirty during divorce' (fawelllaw.com 2020) <https://www.fawelllaw.com/blog/2020/01/a-vindictive-spouse-may-play-dirty-during-divorce-2/>accessed 12.08.2022

would constantly question her on the implied consent because the perpetrator is her husband. It will be difficult for the prosecution to prove the non-existence of consent when it comes to the husband-and-wife relationship in a conservative society. Moreover, the prosecutorial system and the court system in the country are subjected to long delays such as 8-10 years when it comes to sexual violence cases. In such a scenario, in a case of marital rape, it might compel the prosecution to make the children as witnesses and as a result, their future would be made hopeless and scarred. Thus, it cannot be ruled out that criminalizing marital rape can lead to the destruction of the family unit and might result in frustration of the entire family.

However, though there are significant negative impacts that might occur in criminalizing marital rape, it should be, in fact, necessity to adopt such a law to deal with it in Sri Lanka. The motive for this is twofold. Firstly, the rights of a woman and her consent should not, at any stage, be ignored. Next, perhaps by adopting marital rape as a punishable offence, the traditional notion of patriarchy that exists in a family unit can be negated and more recognition and respect can be given to a woman. In this respect, there are certain factors that should be taken into consideration in criminalizing marital rape in Sri Lanka.

Conclusion

The foregoing analysis of the legal framework of Sri Lanka pertaining to rape and the marital exemption for rape proves that it does not provide adequate protection to the victim and assure the fundamental rights and freedoms of the victim that she is legally entitled to. Hence, the stand maintained by this paper clearly supports the view that to make marital rape a crime is imperative to go, in all circumstances, beyond the outdated and conservative judicial and legislative principles followed in this country.

A downside is the fact that even though the Penal Code prescribes violence as a criminal act, the Prevention of Domestic Violence Act does not criminalize the beating of one's spouse; it only protects the victim by way of a Protection Order. No punishment is given to the perpetrator unless he violates the order, in which case he can be subjected to a one-year jail term or a small fine which doesn't act as much of a deterrent today. The fact that the Protection Order is valid for only a year is yet another weakness of the Act. In doing so, marital rape must be included explicitly in both the Penal Code and as well as in the Domestic Violence Act. In addition, supplementary mechanisms must be accompanied by substantial legal reforms in order to balance the interests of both parties, such as "presumption of innocence must be valued, anonymity must be maintained during the litigation process, corroborative evidence such as forensic and medical evidence digital evidence, and the history of previous violent attempts of the husband can be used efficiently. Other than that, the verdict, or the sentence regarding marital rape must be considered in such a way that it deters any kind of sexual crime against women in all circumstances whether within marriage or outside.

The ultimate purpose of criminalizing marital rape should provide, "the right to access to justice for all rape victims, irrespective of their marital status or their relationship with the perpetrator." Therefore, it is high time for the patriarchal beliefs of the society to be eradicated and take steps to criminalize marital rape in the interest of all its members.

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Proposed Anti-Terrorism Act 2023: A Non-Functioning Legislation?

Nuwan Peiris*

Abstract

Proposed Anti-terrorism Act 2023 of Sri Lanka may contain procedures which are arbitrary when come to application in the short term; but, in the long-term, given the "over-structured" and "circumambulatory" nature of the offences, the proposed legislation may cause a structural collapse when come to apply it to combat global terrorism, especially if Sri Lanka is to follow the 'definition based terrorism approach' which has a "human rights bias" – an approach which the countries like UK has not followed.

Keywords: *Anti-terrorism Act, Human rights, Constitutional law, Criminal law, Police powers*

*Attorney-at-law (Sri Lanka), Chartered Shipbroker (UK) and UN-ITLOS Nippon Fellow 2012/2013. M.Sc. Logistics (BCU-UK), LL.M (International Maritime Law) (IMO-IMLI), LL.M (International Trade Law) (Wales), LL.B (O.U.S.L). Weblink: https://lawyers.academia.edu/NuwanPeiris

Introduction

Contrariwise, if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic. – Mathematician Charles Dodgson (AKA Lewis Carroll)

As the crescendo of criticisms on the proposed Anti-Terrorism Act (ATA) recedes, the Sri Lankan government's decision to suspend the enactment of the law and call for a parliamentary select committee is a sublime tribute that political defiance has ever paid to reason. Encrusted by the obsolescence, enervated by ineffective enforcement and burdened by international pressure, the government's decision to formulate a new ATA became commendable. Yet, the formulation of the new ATA became very controversial. The proposed ATA[1] has now become a cauldron of contradiction – to dub in Charles Dodgson's logic. The draft law triggered criticisms in extreme divergent angles that it has now become difficult to formulate a coherent philosophy on the matter; and this is certainly not ideal for Sri Lanka which is in desperate need of a workable ATA in its effort to combat global terrorism.

Writer wishes to point out that issues concerning global terrorism – more particularly, matters concerning global maritime terrorism – need to be addressed in the proposed ATA much more effectively, especially from the universal jurisdictional point of view. At the time of writing, the Government is reconsidering the proposed ATA. During this period, many have aired their views, especially, the Bar Association of Sri Lanka (BASL),[2] International Commission of Jurists (ICJ),[3]

1See<https://www.academia.edu/103322753/ANTI_TERRORISM_Bill_2023_Sri_Lanka_Government_Gazette_> viewed on 14 June 2023.

2 See<https://basl.lk/media-statement-of-the-bar-association-of-sri-lanka-regarding-the-anti-terrorism-bill/> viewed on 14 June 2023.

3 See<https://www.icj.org/sri-lanka-proposed-anti-terror-bill-set-to-introduce-death-penalty-and-break-existing-human-rights-violations-record/> viewed on 14 June 2023.

Centre for Policy Alternatives (CPA)[4] and many others; and the public is grateful to have received such diverse and in-depth views on the proposed ATA. It is the writer's view that, whilst ATA being law that is weaker than that of the UK's Anti-Terrorism Act 2000[5] (hereinafter referred to as UK's ATA 2000) compared to its substantive offences; the proposed ATA may be an abusive weapon as far its enforcement orders are concerned, such as the Miscellaneous Orders contained in Part X. The writer took this view in an article titled, 'Proposed Anti-Terrorism Bill: Real tiger, paper tiger or mixed bag' published in the Sunday Island Paper dated 23/04/2023.[6]

The Objective of the write-up

There is a far greater concern which prompted the writer to do this write-up. Is the proposed ATA a non-functional legislation given the convoluted and spiral nature of the main offences like those mentioned in clauses 6, 7, 8, 9, 10, 11, 12 etc. which are built on clause 3? The laws comparable to that of the UK's Anti-Terrorism Act 2000 (as amended) seem to be more practical, and do not follow the proposed ATA approach in the drafting of the main offences.

The structure of this write-up is that; first, writer will begin with an outline of the proposed ATA; Second, the main argument of why the proposed ATA has become a non-functional legislation given the convoluted and spiral nature of the offences like those mentioned in clauses 6, 7, 8, 9, 10, 11, 12 etc. which are built on clause 3 is discussed. Thirdly, the writer will address various schools of thinking on anti-terrorism law, like that of the requirement of a definition on terrorism, universal jurisdiction required to address international terrorism etc.

4 See< https://www.cpalanka.org/cpa-statement-on-the-anti-terrorism-bill-2023/>viewed on 14 June 2023.

5 See < https://www.legislation.gov.uk/ukpga/2000/11/contents > viewed on 14 June 2023.

6 See< https://island.lk/proposed-anti-terrorism-bill-real-tiger-paper-tiger-or-mixed-bag/ > viewed on 14 June 2023.

The writer will reach the conclusion that in the long-term, given the "over-structured" and nature of the offences, the proposed ATA may cause a structural collapse. This is mainly the result of Sri Lanka following a 'definition-based terrorism approach' which has a "human rights bias" – an approach which the UK/USA laws have not followed.

Outline of Structure of the proposed ATA 2023

There are two primary provisions in the proposed ATA – clauses 2 and 3. Clause 2 enunciates the jurisdiction and clause 3 deals with the offence of terrorism. This is the archetypal structure of an ATA law in many countries, and draftsmen followed the universal structure. Clause 2 becomes the international jurisdiction base for the implementation of the proposed ATA.

Clause 3 contains the 'offence of terrorism' that becomes the foundation on which other offences and provisions are built; that means, clause 3 is the mother provision, and the rest of the offences are the offspring of Clause 3 – which is characteristic of any ATA in the world including the UK. The clause 2 – the provision on jurisdiction – becomes the foundation for enforcement powers mentioned in the Part X of proposed ATA. Whilst the enforcement powers in the Miscellaneous Part – that comprises of Proscription Orders, Prohibition Orders, Restriction Orders etc., which is less judicially accountable – are wide and arbitrary when applied within Sri Lanka; conversely, its overall reach and enforcement of such Orders in the context of global terrorism is 'fragile' given the limitations in clause 2.

Both clauses 2 and 3 are the foundational structure of the proposed ATA, and the enforcement provisions contained in the rest of the ATA, including Part X forms the superstructure. Since this article is based on a review of clause 3, I will, notwithstanding its length,

reproduce it in full;

3. (1) Any person, who commits any act or illegal omission specified in subsection (2), with the intention of–

(a) intimidating public or section of the public;

(b) wrongfully or unlawfully compelling the Government of Sri Lanka, or any other Government, or an international organization, to do or to abstain from doing any act;

(c) unlawfully preventing any such government from functioning;

(d) violating territorial integrity or infringement of sovereignty of Sri Lanka or any other sovereign country; or

(e) propagating war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, commits the offence of terrorism.

(2) An act or an illegal omission referred to in subsection (1) shall be –

(a) murder;

(b) grievous hurt;

(c) hostage taking;

(d) abduction or kidnapping;

(e) causing serious damage to any place of public use, a State or governmental facility, any public or private transportation system or any infrastructure facility or environment;

(f) causing serious obstruction or damage to or interference with essential services or supplies or with any critical infrastructure or logistic facility associated with any essential service or supply;

(g) committing the offence of robbery, extortion or theft, in respect of State or private property;

(h) causing serious risk to the health and safety of the public or a section thereof;

(i) causing serious obstruction or damage to, or interference with, any electronic or automated or computerized system or network or cyber environment of domains assigned to, or websites registered with such domains assigned to Sri Lanka;

(j) causing the destruction of, or serious damage to, religious or cultural property;

(k) causing serious obstruction or damage to, or interference with any electronic analog, digital or other wire-linked or wireless transmission system including signal transmission and any other frequency-based transmission system;

(l) being a member of an unlawful assembly for the commission of any act or illegal omission set out in paragraphs (a) to (k); or (m) without lawful authority, importing, exporting, manufacturing, collecting, obtaining, supplying, trafficking, possessing or using firearms, offensive weapons, ammunition, explosives, or any article or thing used or intended to be used in the manufacture of explosives, or combustible or corrosive substances or any biological, chemical, electric, electronic or nuclear weapon, other nuclear explosive device, nuclear material or radioactive substance or radiation emitting device.

However, if clause 3 is structurally deficient, then the whole law collapses.

Is the Proposed ATA a Non-Functional Legislation?

The proposed ATA seems to have placed a high legal threshold for the prosecution, so much so that, it is very difficult to bring home a conviction under clause 3 or other offences built on clause 3. The offences like those mentioned in clauses 6, 7, 8, 9, 10, 11, 12 etc., are built on clause 3, which necessitates the proof of the offence of terrorism (clause 3) as a 'condition antecedent', or a 'condition subsequent'. This places far greater onus and a stress on the prosecution to prove an array of ingredients in an offence built upon the mother offence, namely clause 3, as a 'condition antecedent', or a 'condition subsequent'. And this 'network or the reticulum of ingredients in these offences will make the whole scheme of offences unworkable when come to the application in a court of law.

These cascaded offences based a 'network or the reticulum of ingredients' should be carefully reconsidered before introducing the same into the legislative text. It is common to have offences built upon offences in the criminal law. For instance, robbery is one example of an offence built on a structure and a superstructure respectively on either theft or extortion as per section 379 of the Penal Code.

Another example is clause 10.

> 10 (1) Any person-
>
> (a) who publishes or causes to be published a statement, or speaks any word or words, or makes signs or visible representations which is likely to be understood by some or all of the members of the public as a direct or indirect encouragement or inducement for them to commit, prepare or instigate the ***offence of terrorism (clause 3)***; and

(b) such person-

(i) intends directly or indirectly to encourage or induce the public to commit, prepare or instigate the ***offence of terrorism (clause 3)***; or

(ii) is reckless as to whether the public is directly or indirectly encouraged or induced by the statement to commit, prepare or instigate the ***offence of terrorism (clause 3)***, commits an offence under this Act.

(2) …

(3) For the purposes of subsection (1), a "statement" includes every statement–

(a) which glorifies the ***commission of the offence of terrorism*** (***(clause 3)***or preparation for the **offence of terrorism**; and

(b) from which the public may reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances. (*Emphasis and interpolations are mine*)

It is observed that clause 10 brings clause 3 into the offence of the former.

Whether such multilayered approach should be introduced to the Sri Lankan legal structure remains dogmatic given the fact that the UK law on terrorism does not follow such a strong inclination - at least not to the extent of Sri Lanka's proposed law. While there is always room for abuse when comes to procedural due process involving the implementation of the proposed ATA resulting from Part X,

the substantive offences built upon the clause 3 will axiomatically make the proposed ATA unworkable for the prosecution in the long term – or even when come to framing charges against a suspect.

Let us take section 15 from the UK's ATA;

15 Fund-raising.

(1) A person commits an offence if he—

(a) invites another to provide money or other property, and

(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the ***purposes of terrorism***.

(2) A person commits an offence if he—

(a) receives money or other property, and

(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the ***purposes of terrorism***.

(3) A person commits an offence if h

(a) provides money or other property, and

(b) knows or has reasonable cause to suspect that it will or may be used for the ***purposes of terrorism***.

(4) In this section a reference to the provision of money or other property is a reference to its being given, lent or otherwise made available, whether or not for consideration. (*emphasis mine)*

It seems that the term *'purposes of terrorism'* mentioned in the UK Act in many provisions is much wider than our proposed ATA term – *the offence of terrorism.*

The appearance of injecting rationality and coherence into the proposed ATA's structure built on cascaded criminal offences will make the prosecution labour for a conviction: and the inflections/ deflections to other offences within an offence will make the prosecution trial more tedious; and this is compounded by the fact that such offences have a limited sovereign jurisdictional application.[7]

As the offences are added and layered on top of the 'mother offence of terrorism' (clause 3) in response to the *ad hoc* concern to prevent any abuse in application, any semblance of rationality or coherence required for a successful prosecution has been made to disappear. What is needed at this point is not to rush this proposed legislation; but rather, to reflect deeply on the criminal jurisprudence and its associated schools of thinking and reframe a coherent criminal law ideology based on other countries like the UK.

Human Rights Oversight Bodies and the Anti-Terrorism Laws in the UK/USA

There is a far greater concern when one compares the policies of the UK and USA when comes to legislating on the issue of combating of global crime.[8] A careful analysis will show that none of these legislations in UK/USA carry direct and overbearing provisions that bring such legislations within the human rights oversight

7 Supra note 6.

8 See generally, Joyner, Christopher C. "The United Nations and terrorism: rethinking legal tensions between national security, human rights, and civil liberties." International Studies Perspectives 5.3 (2004): 240-257.

bodies,[9] although such checks and balances are given in, no small measure, by the involvement of the judiciary – or for that matter by their human rights regulatory bodies.

There is a reason. The war on terrorism declared by a State party never originates by directing on a clear target, and the war on terror is not over until the State party declares it to be over. And the targeted group is not clearly identified until the State party declares as such, based on its own evidence, and the use of force is also to the extent of the what the State party considers it to be necessary to destroy the so called target.[10] Given the supervening subjectivity on the global war on terror, the offences on terrorism is kept broad, purposefully; and the UK/USA laws do not carry direct and overbearing provisions that bring such legislations within the human rights oversight bodies.

The writer is aware and appreciative of the human rights groups of the world that pursue the 'schools of thinking' that a definition of terrorism is a 'pre-condition' for the purposes of drafting the offence on terrorism.[11] This school of thinking inherently has a 'human rights bias', rather than "pro-state prosecutorial bias".[12] So far what seems to have prevailed, given the complexity of the global terror networks, is to have broadly drafted offences in anti-terrorism laws of the UK/USA. If such be the case, should Sri Lanka follow the 'definition-based terrorism approach' which has a human rights bias, or should Sri Lanka follow a practical

9 See generally, Jaeger, Paul T., et al. "The USA PATRIOT Act, the Foreign Intelligence Surveillance Act, and information policy research in libraries: Issues, impacts, and questions for libraries and researchers." The Library Quarterly 74.2 (2004): 99-121.
10 See generally, Saul, Ben. "Defining terrorism." The Oxford handbook of terrorism. 2006.
11 See generally, Greene A. Defining terrorism: one size fits all?. International & comparative law Quarterly. 2017 Apr;66(2):411-40.
12 See generally, "The Definition of 'Terrorism' in UK Law. Justice's Submission to the Review by Lord Carlile of Berriew QC," March 2006.

approach taken by the UK/USA?[13] This is a matter that should be carefully deliberated by the policy makers and criminal law practitioners. As I observed earlier, the proposed ATA follows a cascaded offences based a 'network or the reticulum of ingredients' which makes it very difficult for the prosecution to bring home a conviction; which means that the legal convulsions within the structures, superstructure, and infrastructures of the offences in the draft ATA can be understood to mean a seriously unworkable legal set-up for the prosecution.

Take this example. Assume that a terror group takes a LNG carrier and her crew as hostage in the outer-harbour of Colombo Port, where the sabotaging of this carrier would cause enormous destruction comparable to an explosion of a nuclear bomb. The hostage situation goes on for a minimum of 10 days in the outer-harbor. Fortunately, in the early hours of the hostage crisis Sri Lanka arrests a suspect in Colombo Port connected to the hostage crisis. It is not preferable to bring in a human rights oversight body[14] to question the welfare of the suspect taken to custody in the first few days, since the hostage crisis is ongoing and the arrested suspect may be needed for hostage negotiation and other counter-terrorism measures.

This example reflects the complexity of fighting against global terrorism, and institutionalizing human rights oversight bodies alongside counter-terrorism operations may not be the most advisable thing to do, especially when the UK/USA laws on human rights institutions do not penetrate so deep into such legislation.[15] If so, why should Sri Lanka overbearingly subordinate her anti-

13 See generally, Fenwick, Helen. "The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?" The Modern Law Review, vol. 65, no. 5, 2002, pp. 724–62.
14 Clauses 2 and 34 as examples in the proposed ATA.
15 See generally, Gearty, Conor. "11 September 2001, Counter-Terrorism, and the Human Rights Act." Journal of Law and Society, vol. 32, no. 1, 2005, pp. 18–33.

terrorism laws to the mandate of the human rights oversight bodies "within the text" – I repeat, "within the text" – of the proposed ATA, when UK/USA laws have not been so progressive in this regard? If one is to be so human rights' conscious when come to dealing with global terror suspects, then such a policy should be carefully deliberated in the parliament.

Defining Terrorism

There is a trend towards following the definitions and approaches of the international conventions which are supposed to combat global terrorism. In this regard, BASL too has issued its erudite observations on the proposed ATA by an assembly of top legal luminaries,[16] and the writer graciously appreciates the forward-looking nature of the contents of this report. The report recommends the application of the definition contained in Convention on the Suppression of Terrorist Financing Act No. 25 of 2005 on the 'terrorism' to the proposed ATA.

The writer wishes to point out that, whilst some Conventions like the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[17] carry a broad explanation for what is meant by maritime terrorism, other conventions may or may not carry meaningful and a workable definition on terrorism.[18] The legislature should be mindful not to import definitions of some of the international conventions, although Sri Lanka is a party. Such definitions on terrorism are mostly politically compromised definitions in the negotiation stages on what is meant by terrorism in specific contexts to which the respective international convention

16 Supra note 2.

17 UN General Assembly, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, No. 29004, available at: https://www.refworld.org/docid/3ae6b3664.html [accessed 14 June 2023].

18 See generally, Kraska, James. "Effective implementation of the 2005 convention for the suppression of unlawful acts against the safety of maritime navigation." Naval War College Review 70, no. 1 (2017): 10-23.

refers to. In any event, such definitions may not be legal definitions, and may just be political or socio-economic definitions, which are not capable of having "judicially manageable standards".[19]

For instance, conventions like Convention on the Suppression of Terrorist Financing[20] purports to contain a definition in Article 2 which is unlikely of a workable legal definition in all contexts, which in fact refers to acts of terrorism in a particular context– that is terrorist financing; and in any event makes no sense given the list of treaties Article 2 refers to in order to make semblance of a definition. And it is questionable whether such a non-legal definition on terrorist financing can be imported to the proposed ATA outright when the proposed ATA deals with all kinds of terrorism, including terrorist financing.

It is in this regard that it is much safer to follow the legal standards maintained by the UK laws, where such countries follow no overbearing definition on terrorism, even after being a party to such Conventions. Such nations understand that their international obligations are best met by adopting their own legal standards and approaches which are inherently better than a vague text, and a better and a more meaningful international compliance can be achieved within the framework of such international conventions when such nations follow their own legal standards.

The Need for Universal Jurisdiction

Last, by no means least, it must be said that it is preferable to discard the approach of our proposed ATA being territorial or extra-territorial in its international application. Although the UK

19 See generally, Hodgson, Jacqueline S., and Victor Tadros. "The Impossibility of Defining Terrorism." New Criminal Law Review: An International and Interdisciplinary Journal, vol. 16, no. 3, 2013, pp. 494–526.

20 UN General Assembly, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349, available at: https://www.refworld.org/docid/3dda0b867.html [accessed 14 June 2023]

law seemingly assumes to be extra-territorial in its application, it seems to carry "universal jurisdiction". For instance, a religious fundamentalist group commits an act of terrorism in Sri Lanka. Such an act can be prosecuted pursuant to section 1 read with other provisions in the ATA 2000 of the UK. The entire commission of the said act of terror has taken place in Sri Lanka, which is a foreign State, and it is irrelevant whether such religious fundamentalist group is a proscribed organisation or not in Sri Lanka or in the UK, and the ingredients and the characterization of the offence of terrorism is purely based on the UK law, and it is irrelevant what Sri Lanka law is with regard to the act. The UK law seems to attract universal jurisdiction, rather than any other form of jurisdictional reach, and the proposed ATA must clearly have a provision which grants such universal jurisdiction.

Take this example. Chechniyan rebels in Russia[21] attacks a cinema and kills innocent civilians - an incident similar to The Moscow theatre hostage crisis (In the past similar incident happened, and is known as the 2002 Nord-Ost siege).[22] Assume that one terrorist ends up in Sri Lanka. Sri Lanka should have universal jurisdiction to prosecute such a terrorist irrespective of Sri Lanka's political affiliation. It is in Sri Lanka's best political interests that an anti-terrorism law with universal jurisdiction is formulated, and in line with the ATA of the UK. However, whether Sri Lanka prosecutes such international criminal or not is the country's policy decision – and the laws should not be crippled in advance to limit Sri Lanka's sovereign reach.

21 See Kramer, Mark. "Guerrilla Warfare, Counterinsurgency and Terrorism in the North Caucasus: The Military Dimension of the Russian-Chechen Conflict." *Europe-Asia Studies*, vol. 57, no. 2, 2005, pp. 209–90.

22 See Snetkov, Aglaya. "The Image of the Terrorist Threat in the Official Russian Press: The Moscow Theatre Crisis (2002) and the Beslan Hostage Crisis (2004)." Europe-Asia Studies, vol. 59, no. 8, 2007, pp. 1349–65.

Overly Broad Nature of Offences Relating to Terrorism

The writer is aware the popular criticism on the overly broad nature of offences relating to terrorism.[23] However, a close inspection of the applicability of the offences built on clause 3 does not create such abuse in the long term, and given the multilayered structure of the proposed ATA for the offences that I explained, it is very unlikely such an abuse may take place in a final conviction from a court of law – in fact, the inevitable observation is that the offences are very restrictive in application. However, the abusive nature of the proposed ATA is mainly in part X of the Act, which in the short-term, can lead to arbitrary arrests.

Conclusion

It may be true that in the short term abusive procedure can be used as a weapon of suppression – or at least the possibility exists given the dehumanised nature of the law enforcement bodies; but, in the long-term, given the "over-structured" and "circumambulatory "nature of the offences I explained earlier, the proposed ATA may cause a structural collapse when come to applying the law to combat global terrorism, especially if Sri Lanka is to follow the 'definition based terrorism approach' which has a "human rights bias" – an approach which the UK/USA laws have not followed, or is weary about, to say the least.

23 See generally, Greene, Alan. "The Quest for a Satisfactory Definition of Terrorism: R v Gul." The Modern Law Review, vol. 77, no. 5, 2014, pp. 780–93.,.

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Empowering Women Domestic Workers' Rights in Sri Lanka: A Legal Analysis in the Stand Point of Sustainable Development

Yasodara Kathirgamathamby*

Janaha Selvaras**

Danushka Manoj***

Abstract

An inclusive growth in terms of sustainable development includes ending poverty and other deprivations to go hand in hand with strategies to improve health and education, reduce inequality and spur economic growth whilst working on climate change and preserving oceans and forests as per the 2030 agenda for sustainable development by United Nations in 2015. Among these 17 goals, which make an urgent call for action, goal No-5 –gender equality emphasizes the need to eliminate discriminatory treatment against women as they have been subjected to gender discrimination despite the fact that they play a major role in all fields including economic development. Considering the prominent contribution by women, international law has guaranteed protection for women against inequality and discriminatory treatment. This includes labour rights of women. However, still women of certain groups have been deprived of their labour rights. In the light of this context, the objectives of this paper are to examinine the legal protection assured for domestic women workers under international law and Sri Lankan law, and to analyze how to guarantee them to the domestic women workers

*LL.B (Hons.),LL.M,PhD Senior Lecturer in Law, Department of Legal Studies, The Open University of Sri Lanka
**LL.B (Hons.), LL.M Senior Lecturer in Law,Department of Legal Studies, The Open University of Sri Lanka
***LL.B (Hons), LL.M, MPhil, Attorney-at-law, Senior Lecturer in Law, Department of Legal Studies, The Open University of Sri Lanka

in Sri Lanka that align with the Sustainable Development Goals (SDGs). The scope of research is limited to the inward migration of workforce and domestic workforce within Sri Lanka. This study adopts the qualitative research method and under which respective International legal frameworks and Sri Lankan laws were examined, interpreted and analyzed. Drawing upon comparative study with international law, the study proposes concrete recommendations for legal reforms, policy interventions, and institutional mechanisms that align with the SDGs. These recommendations incorporate areas such as legal recognition of domestic work, minimum wages, improved working conditions, statutory benefits, access to social protection, capacity-building programs, and awareness campaigns that contribute to Decent Work and Economic Growth (SDG 8), SDG 5 (Gender equality), and SDG 10 Reduced Inequalities), and SDG 16 (Peace, Justice, and Strong Institutions). In conclusion, this legal analysis serves as a call to action for policymakers, legislators, civil society organizations, and other stakeholders to prioritize the rights of women domestic workers in Sri Lanka in alignment with the SDGs.

Keywords: *Gender equality, Empowering Women, Domestic women Workers, Rights in Sri Lanka, Sustainable Development Goals*

Introduction

Globally, 83% of domestic workers are women.[1] Domestic work is also primarily done by women in Sri Lanka, where it is essential to the economy of the country. However, these workers face numerous challenges, including limited legal protection, exploitative working conditions, and a lack of recognition for their contributions, that hinder progress. This study provides an overview of the legal framework governing domestic workers in International law and Sri Lankan Law, identifying key gaps and shortcomings that undermine the realization of goals . The term domestic worker is defined under International Labour

1 UN Women, Progress of the world's women, http://progress.unwomen.org , accessed 28 May 2023.

Organization (ILO) Convention No. 189. As per Article 1(b) of the convention, a domestic worker means "any person engaged in domestic work within an employment relationship". However, this definition does not explicitly mention the above types of domestic workers. Domestic workers may work full time or part time Swithin the country or overseas. Nevertheless, this paper confines the study only to women (including girl children) domestic workers and adopts a working definition for domestic women workers as "women worker who performs full time work residing in the household of the employer within the country". This study intends to investigate the rights of women domestic workers in Sri Lanka in the light of attaining inclusive growth and sustainable development. International frameworks continue to address the women domestic workers' rights through international human rights instruments and international labour organization conventions. It is unfortunate that the national legal framework of Sri Lanka falls short in addressing critical issues, including minimum wage regulations, working hour limits, social security benefits, and the right to form trade unions of domestic women workers. Thereby, this hinders the progress towards sustainable development goals such as SDG 8[2] and SDG 5[3]. By examining the interplay between gender inequality, social exclusion, and economic disparities, this analysis sheds light on the obstacles women domestic workers face in accessing justice and legal remedies, which obstruct progress towards SDG 10[4] and SDG 16[5].

There has been little discussion of the need for legal protection for domestic women workers, despite the fact that the issue has been raised in numerous international scholarly publications. However, academic research on Sri Lanka's domestic workers'

2 Decent Work and Economic Growth
3 Gender Equality
4 Reduced Inequalities
5 Peace, Justice, and Strong Institutions

legal protection is scarce. Consdering the gap, this study seeks to add originality to research by exploring the issues of domestic workers' rights under national law and domestic workers' rights for women, with an emphasis on inward labor migration for domestic employment. This paper consists of four parts. Part I and Part II examine the status of domestic women workers at International and national levels respectively. The Part III is an analysis on empowering women domestic workers rights in Sri Lanka.The last part concludes the paper with a few recommendations with a special mention of calling on Sri Lanka to ratify and adopt international instruments on labour rights and standards of domestic women workers.

Research Methodology

This research adopts a normative research method. Relevant legislations, international conventions are used as primary sources. General comments of treaty bodies, United Nations (UN) reports, and journal articles have been used as secondary data.

International Legal Framework Relating to Rights of Domestic Women Workers.

A. Human Rights Conventions

Although the international human rights legal framework requires that workers' rights have to be guaranteed, less attention is given to domestic women workers. Their basic rights are not properly guaranteed under international human rights law. This part attempts to analyze the extent existing legal provisions extend protection for the women domestic workers.

The Universal Declaration of Human rights (UDHR,1948), International Covenant on Civil and Political Rights (ICCPR, 1966), International Covenant on Economic, Social and Cultural

Rights (ICESR, 1966), UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), and Child Rights Convention (CRC, 1989), and Migrant Workers Conventions are covered in this section.

The above human rights instruments recognize the overarching principles of equality and non- discrimination. These core principles are important to address gender inequality and ensure the rights of domestic women workers.

The state parties are legally bound to fulfill legal obligations. They require the state not to exercise discrimination based on sex in all fields including employment. Hence, the International Human Rights IHR instruments emphasize the SDG–5 that is gender equality. The CEDAW defines what gender equality is. According to Article 01 of the CEDAW "for the purposes of the present Convention, the term " discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, as basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." According to this definition domestic woman workers should not be discriminated based on sex in all fields including employment.

The right of everyone to the enjoyment of equal and satisfactory working conditions, the right to form trade unions and join them, and the right to enjoy social security, including social insurance and maternity leave are primarily recognized under article 7 to 10 in the ICESCR. The term 'everyone' includes women domestic workers too.

Article 11 of the CEDAW obliges the State Parties to eliminate

discrimination against women in the field of employment. Article 32 of the CRC recognizes the right of the child to be protected from economic exploitation and from performing any work. In addition to the above convention UN Convention against torture[6] is also relevant in terms of treatment of domestic workers. States are required to take legislative, institutional arrangements to prohibit torture and other kinds of treatment by the employers.

The UN has adopted The International Convention on Migrant Workers and their familes in 1990 (IMCW). This convention addresses the issues migrant workers face. In this context, it is to be noted although the basic human rights conventions prohibit gender inequality in all fields, there are no particular provisions that cover domestic women workers who performs full time work residing in the household of the employer within the country.

Further to this, the Committee on ICESCR recognizes domestic work as formal employment and places emphasis on their labour rights. This committee also highlights that domestic work must also to be treated as other forms of work and domestic workers should enjoy protection and benefits as other workers.

B. International Labour Organisation Conventions

To date, the body of ILO contains 173 conventions, 6 protocols and 167 Recommendations. Of them there are 11 fundamental labour instruments. These fundamental ILO conventions protect the labour standards and rights in terms of freedom of association and protection of the right to organize (No.87), collective bargaining, 1949 (No.98), and to suppress the use of forced or compulsory labour, 1930 (No.29), also the abolition of child labour and to ensure minimum age for admission to employment of work 1973 (No. 138). Additionally, prohibition and elimination of the worst forms of child labour and discrimination in the field of employment

6 UNCAT,1984

and occupation with the special emphasis on equal remuneration for men and women workers for work 1951 (No. 100) are included. Whilst these above mentioned ILO conventions ensure the protection of labour standards and rights they also declare the principle of inequality in workers and among the workers as men and women with the diligent application of intersectional approach. The ILO's vision of equality among men and women promotes equal opportunities for both to be employed in decent work with conditions of freedom, equity, security and human dignity and this has been reflected through its conventions namely; the Equal Remuneration Convention (No. 100), Discrimination (Employment and Occupation) Convention (No. 111), Workers with Family Responsibilities Convention (No. 156) and Maternity Protection Convention (No. 183).

In addition, the domestic workers rights convention 2011, C189. has been adopted to protect the rights of domestic workers. Despite the significant contribution of domestic workers to the global and domestic economy, they are continued to be undervalued. Highlighting the fact that the domestic legal frameworks of the countries, specifically the developing countries, fail to accommodate the fundamental principles and rights at work in terms of domestic workers.[7] Member states of these conventions are upon ratification legally bound to incorporate the listed labour standards and rights into their domestic contexts to ensure protection of labour rights including the equal treatment and non-discrimination.[8] It is to be

7 Namely; (a) freedom of association and the effective recognition of the right to collective bargaining;(b) the elimination of all forms of forced or compulsory labour;(c) the effective abolition of child labour; and(d) the elimination of discrimination in respect of employment and occupation)

8 As an example, refer, Article 8 and 9 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). Accordingly, Article 8 (2) states as 'The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention' and Article 9 (2) stipulates as 'In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the

mentioned that as a matter of well-established principle, the ILO Conventions may not be ratified subject to reservations.

Sri Lankan Legal Framework on Women Domestic Workers

According to the 2016 Labour Force Survey, there were a total of 80,771 domestic workers, with 66,195 being women and 14,575 being men.[9] Despite the fact that the domestic workers' contribution is significant to the labor force, domestic workers in Sri Lanka have never received legal recognition, except for two outdated laws enacted before independence. (Registration of Domestic Servants Ordinance No. 28 of 1871 (Amended in 1936) and the Chauffeur Regulation Ordinance No. 23 of 1912.

Section 24 of the Domestic Servants Ordinance 1871 (Amended in 1936) broadly uses the term "domestic servants" and provides a definition of "servant" that contains workers employed on a monthly basis or receiving monthly wages. This definition encompasses a range of positions, including head servants, under servants, female servants, cooks, coachmen, horse-keepers, and house and garden servants. As a result, domestic work remains largely invisible within the informal sector, primarily performed by women from disadvantaged backgrounds and persistently undervalued.[10]

The Industrial Disputes Act No. 43 of 1950 specifically acknowledges domestic workers as a distinct category. The Act primarily focuses on the prevention, investigation, and resolution of industrial disputes and related matters. Section 33 subsection 3 of the Act pertains to awards issued by a Labor Tribunal in cases where employment involves roles such as personal secretary, personal clerk, personal attendant, chauffeur, domestic servant, or any other

armed forces or the police enjoy any right guaranteed by this Convention.
9 ILO 2020.
10 Ibid.

designated position similar to those mentioned. This provision recognizes domestic workers as a recognized group of workers who possess the right to initiate legal action in a Labor Tribunal to address disputes arising from their employment agreements. The legislation acknowledges that in cases of disputes, the Labour Tribunal's decision should include the option of compensating domestic workers instead of reinstating them. Since the Industrial Disputes Act covers individuals working in any capacity, regardless of whether their contract is implied or expressed, domestic workers are able to get redress under this law.

Except Employees' Trust Fund Act No. 46 of 1980, other laws such as Workmen's Compensation Ordinance No. 19 of 1934 Ordinance, Wages Boards Ordinance No. 27 of 1941, Trade Unions Ordinance 14 of 1935, Employees' Provident Fund Act No.15 of 1958, Employment of Women, Young Persons, and Children Act No. 47 of 1956, Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 15 of 1954, Factories Ordinance No. 45 of 1942, Ordinances and Acts do not give a a specific reference to domestic workers.

Sections 5 and 7 of the Payment of Gratuity Act No. 12 of 1983 explicitly exclude domestic servants and personal chauffeurs employed in private households from the applicability of the Act.

Section 345 of the Penal Code punishes sexual harresment at work place. Hence, domestic workers are able to make complaints under this section.

According to Article 14 (1) of the Constitution[11] of Sri Lanka, all citizens have the constitutional right to participate in any lawful occupation, profession, trade, business, or enterprise. However, in terms of domestic women worker this provsiosn is far from reality.

11 1978 Constitution of Sri Lanka

The Proposed Employment Act of 2019 is a remarkable progressive step as it specifies that the domestic workers in the Act, acknowledges the existence of "unwritten employment contracts" on par with written contracts. However, it is worthy to note that oral contracts are considered based on certain conditions. Hence, there is a poissibilty of excluding oral contracts of domestic workers.

The National Policy for Decent Work 2006 emphasizes the need to enhance legal protection and enforcement mechanisms for domestic workers and the National Policy on Eliminating Child Labour specifically focuses on eradicating all forms of child labor and including domestic child workers.

In S. S. Wijedeera V S. K. Babyhamy(1973) a 'domestic servant' approached the Labour Tribunal seeking redress for the termination of her employment without pay. The court acknowledged the domestic worker's entitlement to wages.

National Action Plan to promote and protect human rights 2018 includes provisions for the rights of domestic workers. Additionally, the Cabinet granted approval to include 'domestic worker' in the definition of a 'worker' under the Industrial Disputes Act and the Employees' Provident Fund and Employees' Trust Fund Acts. This recognition categorizes 'domestic workers' as a distinct worker category.[12] However this has not been translated into a legislation yet.

It is important to note that Sri Lanka has not yet ratified Convention No. 189 or taken steps to formalize domestic work. Despite the international framework provided by the Convention and Recommendation, domestic work in Sri Lanka remains unregulated

12 Jayasekera, S. 2018. "National Action Plan to Bring Domestic Workers under Country's Labour Law." Daily Mirror [online]. Available at: https://www.pressreader.com/sri- lanka/dailtmirror-srilanka/20180314/282359745231486, [Accessed 24 May 2023].

and lacks the necessary legal recognition and protection.

An examination of labor and employment laws and judicial decisions reveals that there is no clear recognition of domestic workers. This lack of recognition does not give an avenue for domestic workers to enjoy their basic rights .

Analysis on Empowering Women Domestic Workers Rights in Sri Lanka

Sustainable development and domestic women workers rights are two important interlinked aspects of social progress and gender equality. Recognizing and protecting rights of domestic women workers is essential for gender equality which is one of the SDGs established by the UN. Further, Sustainble development aims to ensure that economic growth benefits all members of society, including marginalized group such as domestic women workers. Moreover, protecting rights of domestic women workers contributes to women empowerment.

Similarly, labour rights and standards that are ensured and promoted by the ILO also are a reflection of human rights. As the specialized agency of United Nations, the ILO includes the human rights standards set by the United Nations Charter (1945) and the Universal Declaration of Human Rights (1948). The UN's Call to Action for Human Rights promotes the international labour standards as part of the human rights norms and standards which keeps the basis of the 2030 Agenda. The interconnection between the ILO standards and the SDGs also sets a background for gender rights and equality between men and women. Together these, show that the successful implementation of women domestic workers rights at the national level will indicate the accomplishment of attaining the SDGs through the mandates of its ILO obligations.

Addressing the rights of domestic workers is essential in achieving

the SDGs, as the majority of domestic workers in Sri Lanka are women. By ensuring decent work conditions, fair wages, social protection, and access to education and healthcare, the rights of domestic workers can be protected, empowering them to participate fully in society and contribute to economic development. The Sri Lankan government has to ratify the ILO convention 189 which addresses the rights of domestic workers.

Sri Lanka has ratified all the fundamental the ILO conventions, except Conventions Nos. 155 and 187 which fall under occupational safety and health. However, Sri Lankan labour legislation, except Industrial disputes Act, does not fully recognize women domestic worker in the term 'worker'. This non-recognition continues to negatively impact on women domestic workers including the girl children. In this context, the ratification and incorporation of ILO C-189 will bring a legal definition for the term 'domestic work'[13]

It is also evident from the discussion that the Shop and Office Employees Act which is the domestic framework to draw the requirement of the written contract of employment, does not cover domestic workers. In addition to this, the Sri Lankan laws which deals with wages and minimum wage rate do not ensure protection for wages and minimum rate of wage for domestic workers.[14] Ratification of C-189 would fill this gap and create a legal enactment for this purpose[15] and it will also introduce legally recognized working hours and holidays for domestic workers in Sri Lanka.[16]Moreover, this international commitment, will also pave the way to ensure health and safety provisions for the domestic workers under the Factories Ordinance and the Shop and Office

13 Article 1 and 6 of the ILO Convention no 189

14 Wages Boards Ordinance, National Minimum Wage of Workers Act No 3 of 2016

15 Article 11

16 Article 10 (The Shop and office Employees Act does not cover); Weekly Rest (Industry) Convention of 1921 No 14 and Weekly Rest (Commerce and office) Convention of 1937 No 106 also emphasizes a day off per work and Sri Lanka is a member state to these. However, the scope of these conventions do not favour domestic workers.

Employees Act which currently does not cover domestic workers.[17]

Certain ILO conventions provide freedom of association and right to organize.[18] However, the domestication of Article 3 of the C-189 which will provide a clear background for the right to association and organize in terms of bargaining powers of domestic women workers. In addition, ILO C 189 includes provisions in terms of women maternity benefits, sexual harassment free environment and mechanism for settling disputes.[19] Focusing on girl women children, the Employment of Women, Young Persons and Children Act No 47 0f 1956 defines the person under 14 years as a child. The Shop and Office Employees Act adopts the similar definition for a child for the purpose of the Act. However, the international arrangement is different from the domestic provisions. For example, Article 4 of the ILO Convention 2011 on Domestic Workers provides the minimum age as 18. Equally, Article 03 of the Minimum Age Convention No 138 is also given similar provisions. Implementation of above provisions in Sri Lanka would bring adequate protection for girl children who serve as domestic workers.

Conclusion and Recommendations

The above discussion reveals that although the international human rights conventions ensure the principle of gender equality and non-discrimination in general in all fields including employment they do not pay adequate attention on domestic women workers as defined in this paper. Migrant domestic workers' rights are given

17 Articles 5 and 13

18 Example includes Article 3 of the Freedom of Association and Protection of the Right to Organize Convention 1948 No 87 provides that the employee or employer of any category can enjoy the freedom of Association and right to organize.

19 Currently the national laws which ensure the maternity benefits such as Shop and Office Employees Act and The Maternity Benefits Ordinance are silent on their application for domestic women workers.

more responsiveness than workers who engage in domestic work within the country. Similarly the existing domestic laws also give less consideration for the domestic women workers.

Based on the analysis this paper suggests that role of domestic women workers should be explicitly recognized under international human rights law. A separate instrument has to be adopted by the UN to protect the domestic women workers. Sri Lanka has to take legal measures to include minimum wages in sectorial basis. When the minimum wages for the domestic workers are decided, the nature of the job should be taken into account. Further, working conditions and other statutory benefits should be extended to women domestic workers. A complaint mechanism should be designed for women domestic workers. This mechanism should include both work related issues and violence against women workers.

Sri Lanka should conform to its international obligations under ILO. As a response, it should domestically implement the labour standards and rights it conceived by the ratification. For an example, Maternity Protection Convention 1952 C.103 is ratified by the Sri Lankan government but still the domestic laws are not amended accordingly. Sri Lanka should realise the changes and needs occurring and pressing local society and should ratify relevant international labour organization conventions to bring international labour standards and rights into the under valued and marginalized labour community who serves for its development. In this light this paper strongly recommends the ratification of C189 by Sri Lanka. Sri Lanka should also specially focus on the protection of girl children as domestic workers as the incidents often occur in the country show that the minor girl children are harassed and abused at their work place. Hence, to protect them, working age as of Sri Lanka should be raised to 18 from the age of 14. In the end Sri Lanka should fulfill the core principles of ILO in protecting the rights of domestic women workers, freedom of

association, and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation.

This empowerment will contribute to overall wellbeing of the domestic women workers. To achieve the gender equality and promote domestic women workers rights states, employers, CSOs and individual should take joint efforts. There is still a significant gap between policy and practice. Enforcement of labor laws remains a challenge, and many domestic workers are unaware of their rights or lack the means to assert them. Limited access to education and skills training further hampers their prospects for upward mobility and economic empowerment.

Further , this paper also recommends the following for enhancing the women domestic workers' rights with the SDGs, they are; legal Reforms including strengthen and enforce existing labor laws, ensuring comprehensive protections for women domestic workers, including fair wages, regulated working hours, social security benefits, and protection against abuse and discrimination, awareness and education including conduct awareness campaigns to inform women domestic workers about their rights, entitlements, and available support services. Collaborating with civil society organizations to provide training and capacity-building programs for women domestic workers, empowering them with knowledge and skills to advocate for their rights, social dialogue and stakeholder engagement including the fostering collaboration between the government, employers, trade unions, and domestic worker organizations to establish mechanisms for social dialogue, collective bargaining, and addressing grievances. Involving women domestic workers in policy-making processes to ensure their voices are heard and their needs are adequately represented and strengthening support services are provided including the

establishment of accessible and reliable support services, including counseling, legal aid, and helplines, specifically tailored to the needs of women domestic workers. These services should be available in multiple languages and culturally sensitive to ensure inclusivity.

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The Correlation between Cultural Relativism and the Universality of Human Rights: An Analysis based on Diverse International Views and Standpoints

Fathima Rasha*

Abstract

Human rights are the entitlements of human beings and standards of human life through which dignity and freedom of humans are protected. Human rights are considered to be grown from various social norms, religious, political, and legal philosophies. However, when it comes to recognition of human rights, the question arises whether human rights have to be recognized with a universal value or by giving due regard to cultural values. Trying to find an answer to this, we shall look at whether human rights pre-existed the culture or culture pre-existed the human rights. It can be argued that norms such as dignity, equality and justice existed beneath the cultural values and just because such norms were not labeled 'human rights' in such cultures, it cannot be contended that cultures have no reference to human rights. At the same time, it can also be argued that, since morality is standardized differently in different cultures there is a high probability of cultural practices overriding the basic threshold of human dignity. Therefore, this article considers and compares cultural relativism and universality of human rights in the light of specific important expressions and standpoints of states and related actors made in the global sphere, to arrive at a conclusion.

Keywords: *human rights, universality, cultural relativism, social integration, cultural diversity.*

*LLB .Hons, University of Jaffna, Lecturer (Temporary), Department of Law, University of Peradeniya

law.faculty@kdu.ac.lk

Human rights are rights we have, simply because we exist as human beings - they are not granted by any state.[1] These universal rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status.[2] They range from the most fundamental - the right to life - to those that make life worth living, such as the right to food, education, work, health, and liberty.[3] The 'universality' of these rights is often debated against 'cultural relativism'.

Universality of human rights means that human rights must be the same everywhere and for everyone.[4] By virtue of being human, every individual is entitled to inalienable rights and freedoms that are indivisible, interrelated and interdependent. These rights ensure the dignity and worth of the human person and guarantee human well-being. Universalists argue rights are not created by humans but inherently born with them. Hence, they believe, human rights treaties recognize the rights that pre-existed and do not create them. Article 2 (2) of ICCPR states, State Parties are to take the "necessary steps... to adopt such laws or other measures as may be necessary to give effect to the rights *recognized* in the present Covenant." Article 2 (1) of ICESCR states, States are to undertake steps, individually and through international assistance and cooperation, with a view to achieving progressively the full realization of the rights *recognized* in the Covenant. In both of these provisions the term 'recognized' is significant as the rights are not tended to be created but being recognized of their existence. In contrast to this, article 9 of the Sri Lankan constitution refers to the rights as having been *granted by the constitution*, which is not correct from the point of view of universality and the inherent

1 'What are human rights?', What are human rights? | OHCHR, Accessed 21 May 2023 4.00 pm
2 Ibid
3 Ibid
4 'Universality and diversity – Special Rapporteur in the field of cultural rights', Universality and diversity | OHCHR, Accessed 20 May 2023 10.15 am

nature of human rights, where rights are not granted by anyone to anyone but come along with us inherently since we were born.

Cultural relativism is the assertion that human values, far from being universal, vary a great deal according to different cultural perspectives.[5] Cultural relativists argue that Human Rights shall be understood according to the cultures. And this theory holds that culture is the principal source for validating a moral right. For instance, article 16 (1) of the fundamental rights chapter in Sri Lankan constitution states, all existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this chapter.[6] Thereby accordingly, the personal laws which had discriminatory provisions that prevailed before the enactment of the constitution were considered lawful even though it went against substantial provisions of fundamental rights. Personal laws in Sri Lanka have vividly been woven around religious norms and cultures of different communities.[7] Relativists argue, even though international human rights standards are set universally; such human rights cannot be enforced practically without a medium called culture and social norms. And the principle of cultural relativism further holds, since one can realize his personality through his own culture, human rights cannot be realized by a person in an absence of his cultural relevance. And it's expressed by relativists that culture contributes

5 Cultural relativism in terms of human rights can be defined as the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society. Fernando R. Tesón, International Human Rights and Cultural Relativism, 25 VA. J. INT'L L. 869 (1985), Available at: https://ir.law.fsu.edu/articles/30

6 Article 170 of the constitution defines 'existing law' as any law and written law, respectively, in force immediately before the commencement of the Constitution which under the Constitution continues in force.

7 For example, under Thesawalamai law in Sri Lanka the property rights of married women are restricted where it is mandatory for her to obtain husband's permission for any transaction regarding her property. This violates the right to equality clause enshrined in Article 12 of the constitution but yet the provision is still held valid in accordance with article 16 of the constitution.

to better realization of human rights and human personality.

The contradiction in cultural relativism arises when cultural values and norms vary from one to another and from time to time. As no culture can be evaluated superior to another and no norms from time to time can be evaluated for its supremacy, the problem arises as to through which values human rights are to be given effect. And next the contradiction between universality and cultural relativism appears when practices which are traditionally deep rooted in cultures are against fundamental values of being a human. There prevails a threshold of values, going below of which will end up in loss of human identity and personality. If such values or qualities are taken away from humans, humans will be reduced to nothing. For example, in 1987 An Indian girl Roop Kanwar of 18 years of age committed 'Sati', a tradition where the widowed wife kills herself in the pyre of her husband. She was a university student, and her marriage was insisted on by her parents. Even though it was not evident whether sati was committed voluntarily or under pressure, this incident led to a large social outcry. When Human Rights activists protested against the tradition of 'sati' many people from the Rajput community came out for the tradition claiming 'sati' is a significant part of their culture. Those who stood for 'sati' made the young girl a symbol of devoted wife and erected a shrine to honour her too. They branded human rights defenders as 'western imperialists' who have forgotten old Indian tradition over western ones.

The idea of cultural relativism contends that the main social unit is community and not individual. There is the community or the society they live in, which gives the individuals their personal identities. In that case, if it's morally right to the community they live in to impose its own will on an individual without his or her consent, whether such impositions should be still upheld when

it ends up harming human beings is the question. However, in the above issue of 'sati' in India, the fundamental norm of right to life was upheld at the end by the Indian government enacting the Rajasthan Sati Prevention Ordinance in 1987. Section 2(c) of the ordinance defined 'sati' as the burning or burying alive of any widow along with the body of her deceased husband or any other relative or with any article, object or thing associated with the husband or such relative; or any woman along with the body of any of her relatives, *irrespective of whether such burning or burying is claimed to be voluntary on the part of the widow or the women or otherwise.* This act prevented the commission of 'sati' and all the acts coercing, forcing or glorifying it.

Yet again, the big question arises here, whether the relationship between cultural relativism and universality of human rights is *always* hostile and contradictory.

Universal standards of human rights were usually challenged by communist states which are of the view that in the international human rights law, European interests have been privileged.[8] The Declaration of the 1993 *Asian regional meetings in Bangkok for the World Conference on Human Rights* set out that,

"While human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."[9]

Accordingly, from time to time, states and other stakeholders have expressed both cultural relativist and universalist ideologies in the

8 D. Otto, Rethinking the 'Universality' of Human Rights Law, Human Rights Quarterly (1998) at 5.

9 Declaration, Regional Meetings for the Asia of the World Conference on human rights, Para.

global arena, despite being attacked either by uniform approach to human rights or notions on right to culture respectively. Scholars have maintained that the cultural relativist fracture has its main expression in Asian countries whereas universality has its strong foundation in the West.

Now if we are to analyze the inter-relationship between the principles of 'universality of human rights' and 'cultural relativism', some specific important views expressed by universalists and cultural relativists in the global sphere come into play.

Universal Periodic Review (hereinafter UPR) is a mechanism adopted by the UN Human Rights Council emerged from the 2005 UN Reform process.[10] It is to periodically examine the Human Rights performance of all 193 UN Member states. Certain important views of cultural relativism and universality and a vivid idea about their approach to human rights have been expressed by the countries in their UPR reports.

China:

China has stated in its November 2008 UPR report, that it respects universality and indivisibility of human rights but however,

"Given differences in political systems, levels of development and historical and cultural backgrounds, it is natural for countries to have different views on the question of Human Rights. It is therefore important that countries engage in dialogue and cooperation based on equality and mutual respect in their common endeavor to promote and protect human rights."[11]

10 A process established by General Assembly Resolution 60/25 of 3 April 2006.

11 Human rights council working group on the universal periodic review fourth session Geneva, 2-13 February 2009, National report submitted in accordance with paragraph 15 (a) of the annex to human rights council resolution 5/1 china, A/HUMAN RIGHTSC/WG.6/4/CHN/1 of 10 November 2008. Para. 6.

Further the report went on to contend that, as the People's Republic of China was founded in 1949 and the Chinese people won national independence and liberation, since then the Chinese people have become the masters of the country in the true sense, and a fundamental social and political system for the promotion and protection of human rights has been established."[12]

Although the differences in backgrounds and cultures were recognized in the Chinese statement above, ultimately it is looked forward to arriving at a middle ground through dialogues about the ways to implement human rights. And apparently, the universal and the relativist approaches to human rights cannot be singled out in order to achieve a greater objective. Since the implementation of human rights is verily a human affair and cultural and social identity of humans cannot be alienated from them, the radical universal approach to human rights cannot penetrate the social system unless mutual understanding and compromises are met.

And furthermore, according to *Breslin, Shaun* and *Taylor*, the Western world had developed human rights to respond to 'state-society' relationships under the capitalist economy; but in China looking at the political and ideological history, they had achieved

12 Human Rights Council Working Group on the Universal Periodic Review Fourth session Geneva, 2 -13 February 2009 Advance unedited version compilation prepared by the office of the high commissioner for human rights, in accordance with paragraph 15(b) of the annex to human rights council resolution 5/1 - People's Republic of China (including Hong Kong and Macao Special Administrative Regions (HKSAR) and (MSAR)), A/HUMAN RIGHTSC/WG.6/4/CHN/2 of 16 December 2008;
Human Rights Council Working Group on the Universal Periodic Review Fourth session Geneva, 2-13 February 2009 summary prepared by the office of the high commissioner for human rights, in accordance with paragraph 15 (c) of the annex to human rights council resolution 5/1 - People's Republic of China (including Hong Kong and Macao Special Administrative Regions (HKSAR) and (MSAR)), A/HUMAN RIGHTSC/WG.6/4/ CHN/3 of 5 January 2009; A/HUMAN RIGHTSC/11/25* (Reissued for technical reasons) 5 October 2009, 2-33;
Human Rights Council Decision 11/110 Outcome of the Universal Periodic Review: China, 17 June 2009.

the harmony in the state-societal relationship under Confucianism.[13] In the Confucian ideal of harmony, for the proper functioning of the society, a tremendous weight has been imposed on interpersonal harmony, such as the harmony between ruler and minister, between parent and child, between husband and wife, between siblings, and between friends etc.[14] This arrives at a conclusion that there had been no need for individual guarantees for protection from the state since the harmony is already achieved. However, China is now leaning towards accepting universal standards of human rights about which there is deflecting international criticism that it is moving to a more humane plateau where instead of respecting human rights, they put on a façade to placate the international human rights regime.[15]

Vietnam:

The February 2009 UPR report of Vietnam speaks about a history of struggles for national independence and freedom, and that the people of Vietnam have always treasured the *sacred values of human rights, notably the right to self-determination, the freedom to decide one's own fate and the right to live in dignity*.[16] The report goes on to contend that *human rights cannot be detached from national independence and sovereignty.*[17] Vietnam considers *national independence as a condition and basis for the protection*

13 Ibid

14 Li, Chenyang. "The Confucian Ideal of Harmony." Philosophy East and West, vol. 56, no. 4, 2006, pp. 583–603. JSTOR, http://www.jstor.org/stable/4488054. Accessed 14 June 2023.

15 Cmiel, K. The Recent History of Human Rights. The American Historical Review 109, no. 1, (2004): 117-135.

16 Human rights council working group on the universal periodic review fifth session Geneva, 4-15 may 2009, National report submitted in accordance with paragraph 15 (a) of the annex to human rights council resolution 5/1 - Viet Nam, A/HUMAN RIGHTSC/ WG.6/5/VNM/1 of 16 February 2009, Para. 7.

17 Human rights council working group on the universal periodic review fifth session Geneva, 4-15 may 2009, National report submitted in accordance with paragraph 15 (a) of the annex to human rights council resolution 5/1 - Viet Nam, A/HUMAN RIGHTSC/ WG.6/5/VNM/1 of 16 February 2009, Para. 59-60.

of human rights. Vietnam, having a colonial and enslaved past, and being victim of many wars of aggression, realizes that *human rights have universality characterizing each society and community.*[18]

The above expression is impactful and to be noted from where the notions hail. Certainly, a state's history, roots and its road to independence has played a role in how the particular state conceives the notion and standards of human rights. The above expression strongly interlinks sovereignty and self-determination with protection of human rights. Sovereignty itself can be seen as a human right hailing from the right to choose and the right to privacy. Clearly the state intends to be free and dignified first to give effect to the furtherance of human rights. This reminds of the notion that the creation of human rights being a normative response to oppression. Oppression is being subjected to unjust and cruel exercise of power, specifically when those who are in power are very dominant leading to the people being unable to even protect their own basic interest to live and lead a life with liberty. And thereby it is contended that the desperate position of humans under oppression led them to recognize their fair interests as individual and collective rights, from where onwards the human rights regime started to grow. Hence the origins of human rights are also tracked back to human experiences of oppressions and related social backgrounds in certain legal philosophies. Thus, it becomes a big question now as to how the universal standards of human rights may be held high, separated from the cultural elements in human lives, where the culture itself has paid a way to the recognition of human rights.

18 Human rights council working group on the universal periodic review fifth session Geneva, 4-15 may 2009, National report submitted in accordance with paragraph 15 (a) of the annex to human rights council resolution 5/1 - Viet Nam, A/HUMAN RIGHTSC/WG.6/5/VNM/1 of 16 February 2009, Para. 61.

Singapore:

The state of Singapore has always been standing on its own, when it comes to perceiving international standards of human rights. The country being economically strong and stable, its international ties and global influence have been constant through the means of trade, media and tourism. Even though in the West it is conceived that the wealth and openness of a country can be easily coupled with fulfillment of civil and political rights, Singapore has been distinct in pursuing economic development and avoiding increased political freedoms and rights along the way. For instance, in Singapore there exist restrictions on right to freedom of expression and assembly, right to privacy and the state still exercises canning as a corporal punishment.

Whenever the confrontations arose between Singapore's approach and confirmation to international standards of human rights, Singapore has unapologetically tried justifying its actions by referring to Asian culture, another way of life.[19]

If we look at the roots of Singapore, the Singaporean society cannot be called wholly and purely Asian. There exist prominent influences from colonization. Yet, it tends to uphold the so-called Asian approach to human rights, putting forward its 'will to differ' amidst the Western universalists.[20] Singapore strongly believes that cultural diversity plays a big role in the human rights equation and it does not want to be homogenized giving itself into Western interpretation of human rights. Such 'will to differ' and relativist ideologies can be received well as far as they serve the richness of the culture and go in line with the inherent rights confirmed underneath the cultural elements.

19 Simon S.C. Tay, Human Rights, Culture, and the Singapore Example, McGill Law Journal, vol 41 no 4, 1996 CanLIIDocs 35, 745
20 Ibid

It is also often argued that Singapore has gone for a trade-off of human rights which is otherwise be called 'The *Lee Kuan Yew* Hypothesis' of rights and development', according to which certain human rights would necessarily be traded-off in order to achieve economic development and prosperity.[21] This contention has too been counter-argued that the Asian view of human rights puts emphasis not on individual rights which are the so-called Western constructs but rather on 'duties.[22] Without considering the restriction on civil and political rights as oppressions the state emphasizes to look at it as a consequence of a failure of duties or responsibilities that come along with the rights. And it is contended that the rights can be earned by the individual by fulfilling their duties. In such ways, the perceptions of and approaches to human rights differ from Western ideologies which considers right as self-evident and not earned;[23] Or in other words it can be said, the Asian view of human rights has a developmental basis where basic social and economic needs such as food, education, shelter come before the political rights.[24]

With the state views and standpoints discussed above on universality and cultural relativism of human rights, for further analysis on the interconnection of the same, we shall now move on to certain important views expressed at the UN General Assembly Third Committee's 73rd session, held on 23rd October 2018 involving social, humanitarian and cultural rights over country-specific mandates, for situations in Myanmar and the Democratic People's Republic of Korea.[25]

21 A. Sen, "Freedoms and Needs: An Argument for the Primacy of Political Rights" The New Republic (10 January 1994) 31
22 B.I. Schwartz, The World of Thought in Ancient China (Cambridge, Mass.: Belknap Press, 1985)
23 Ibid
24 E. Jones, "Asia's Fate: A Response to the Singapore School" [1994] National interest 18.
25 Seventy-Third Session, 29th & 30th Meetings, GA/SHC/4241, 23 October 2018.

The committee opined that cultural sensitivities and relativist arguments do not absolve states from their fundamental human rights obligations. Special Rapporteur in the field of cultural rights at the 73rd session of the General Assembly *Karima Bennoune* emphasized; tradition is often invoked to justify the status quo not to rectify the prevailing encumbrances into human rights. The parties of the committee expressed that human diversity should not be a threat to universal rights but a reality and resource to protect and promote human rights. The atrocities of Nazi camps are a result of misconception of 'culture' and ignorance about cultural diversity and universal human rights. The special rapporteur continued to contend,

"Cultural diversity and universal human rights are mutually reinforcing and interlocking; one cannot be used to override or justify the violation of the other. Cultural relativism which uses culture to take away rights rather than *amplify -them is- destructive and the exclusions from rights protection it creates are grave."*[26]

Further it was contended in the committee session that the Convention on the Elimination of All Forms of Discrimination against Women is the human rights instrument which contains most reservation clauses, many of them based on culturally relativist arguments. It is thus surprising to have relativist arguments finding their way into UN resolutions. The parent document of universality of human rights, the Universal Declaration of Human Rights (hereinafter UDHR) states in article 27,

26 Statement by Karima Bennoune, Special Rapporteur in the field of cultural rights at the 73rd session of the General Assembly, 'Relativist Claims on Culture Do Not Absolve States from Human Rights Obligations, Third Committee Expert Says as Delegates Denounce Country-Specific Mandates, Relativist Claims on Culture Do Not Absolve States from Human Rights Obligations, Third Committee Expert Says as Delegates Denounce Country-Specific Mandates | UN Press , Accessed 25 May 2023 12.30 pm

"Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."

Accordingly, the UDHR has identified *culture itself as a universal human right*. Therefore, *universality of human rights and cultural diversity are cross fertilizing factors* that do not undermine one another. Universality shall not be an idea that belongs to any country, culture, region or religion. In the words of Special Rapporteur *Karima Bennoune,* UDHR is not an imposition of the values or cultures of any one region of the world, but rather a foundational challenge to entrenched systems of racial and sexual discrimination that were prevalent in the world.[27]

In line with these arguments, it is also to be noted that the regional mechanisms of human rights can also be in a way construed as a reflection of cultural relativism. For example, the preamble of the European Convention on Human Rights starts with the phrase, "We the *like-minded people*..." which refers to the individuality and commonality of the Europeans. And the Human Rights charter of Africa is named as "African Charter on Human and *People's Rights*" where the term 'people's rights' is directly linked to the nationhood of Africa and its pluralistic communal and glans system. The respective charter did not want to concern human rights in isolation, without giving due regard to their unique essence of culture. Hence the emphasis of various regional conventions differs based on the backgrounds and context of various regions. Such mechanisms even though can be perceived to be in support of cultural relativism, they cannot be held offensive to universality

27 Statement by Karima Bennoune, Special Rapporteur in the field of cultural rights at the 73rd session of the General Assembly (23 October 2018),
Statement by Karima Bennoune, Special Rapporteur in the field of cultural rights at the 73rd session of the General Assembly | OHCHR, Accessed 26 May 2023 5.15 pm

since the ultimate objective of regional mechanisms is to give effect to and integrate universal standards of human rights into the societies by using different means and methods suitable to their respective regions.

Thereby, there are both radical and moderate stances in cultural relativism and universality. Radical cultural relativism would hold that culture is the sole source of the validity of a moral right or rule. Radical universality would hold that culture is irrelevant to the validity of moral rights or rules, which are universally valid.[28] Radical cultural relativism may lead to violations of human rights; whereas the radical notion of universality of human rights may lead to lack of social integration and implementation of human rights and violations of cultural rights of people. Since 'human nature' is a social as well as a natural product, radical ends of both of these theories are inapplicable. A proper balance and moderation between these two approaches can definitely ensure better recognition and implementation of human rights. That is because although human rights are considered universal and are of universal validity, when it comes to protection of human rights all that is needed will be efficient social integration and enforcement. By that virtue, as contended by Special Rapporteur *Karima Bennoune, universality about human rights shall be construed as about human dignity and not about homogeneity.*[29] Accordingly, cultural diversity shall be duly utilized as a strength and opportunity for better realization of human rights and shall not be considered hostile to the same. And in due course, progressively in the long term, the notion of

28 Donnelly, Jack. "Cultural Relativism and Universal Human Rights." Human Rights Quarterly, vol. 6, no. 4, 1984, pp. 400–19. JSTOR, https://doi.org/10.2307/762182. Accessed 14 June 2023.

29 Statement by Karima Bennoune, Special Rapporteur in the field of cultural rights at the 73rd session of the General Assembly (23 October 2018).
Statement by Karima Bennoune, Special Rapporteur in the field of cultural rights at the 73rd session of the General Assembly | OHCHR, Accessed 26 May 2023 9.30 pm

human rights can itself become a ‘culture’ where awareness and education about the subject is widespread and well-integrated within societies.

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