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EDITORIAL NOTE

The Faculty of Law proudly presents the Issue II of the Volume 02 of the Law Journal KDU (KDULJ) completing second year of publication. The continuous publication of the KDULJ in two consecutive years under trying circumstances can be considered as a great achievement of the Faculty of Law, KDU. It is indicative of the desire, dedication determination of the Faculty to gift the legal fraternity and academia a compilation of quality research work.

KDULJ comprises peer-reviewed articles opening the doorways to local and international scholars and experts specializing in different fields of Law to share their knowledge and disseminate the valuable research findings. Researchers contributed their work under diverse themes the field of Law and produced new knowledge useful for many generations of legal professionals and academics.

The current issue contains nine research articles full of factual discussions, comparative studies and in-depth legal analyses. Readers will see a combination of different subject areas and the competence of authors in bringing forth the best. Now, the KDULJ is globally recognized and indexed in the renowned databases such as HeinOnline. It is a testimony to standards achieved by the KDULJ within a short period of time.

Editorial Committee is grateful to the valuable contribution made by the Advisory Committee members, Manuscript Editors and to the members of the Academic Staff of the Faculty of Law for the tremendous support given for the successful publication of the Issue II Volume 2 of the KDULJ.

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Protesting Against Protest Laws - Enabling a Legally Assured Fundamental Right to Peaceful Assembly in Sri Lanka

Chiranthi Senanayake¹ and Rehan Perera²

Abstract

Sri Lanka's post-independence track record on guaranteeing the constitutionally provided freedom of peaceful assembly (interchangeable with the right to protest) has been tainted with suppression of non-violent assemblies by police forces violating the *de minimis* rule of intervention, use of disproportionate force by national security forces which has resulted in the gunning of peaceful protestors, and the politicisation of the emergency regulations process. A key reason for this reality is the inefficaciousness of the archaic laws governing this freedom, and the absence of accountable legal and institutional frameworks for practically providing the right to peaceful assembly for the citizens. It is the main thesis of this research that the existing laws must be restructured and streamlined to provide for a legally assured fundamental right to assembly. To substantiate this thesis, the essay first identifies key shortcomings in the existing laws and institutional frameworks, to which it provides three immediate legal developments which must take place to provide for a protected freedom of peaceful assembly in Sri Lanka.

Keywords: *Peaceful assembly, National security forces, Freedom, Right to protest*

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Introduction

The historical development of the international human rights system has led to a normalisation of legally assured fundamental freedoms within national jurisdictions. The qualitative standard of living has become the facilitated access to human rights, whilst derogation from such a rights-based approach is viewed as an offence against humanity and a direct counter to the continued authority of governments. While the Western hemisphere of the world battles with the dilemma of political correctness and the right to offend, in the Eastern part of the world; specifically in Sri Lanka, the right to freely exchange ideas and the right to peacefully assemble and protest against the orthodoxies of the day seems to be a codified idea, riddled with chinks in its armour. Such inadequacies have slowly but surely built a culture of fear of expressing ideas that contradict the leviathan of government, lest the innocent dissenter suffers consequences for doing so, and has further entrenched the power of the police to control what is criminalized as “unlawful assembly”. From the outset one must observe the obvious: the national laws governing the right to peaceful assembly are counterproductive in guaranteeing this freedom. Hence, this essay identifies the specific problems in the existing laws and institutional frameworks governing the right to peaceful assembly. Thereafter, it purports the key actions which must be taken to address the lacunas and inefficiencies in the present laws.

The Fundamental Rights Mirage Known as The Right to Peaceful Assembly

The right to freedom of expression and thereby, the right to peaceful assembly is the lifeblood of a society of liberty, yet a pervasive authoritarian culture continues to gain footing on the rocky slope that is the laws of Sri Lanka’s fundamental right to peaceful assembly. Although the fundamental right to peaceful assembly is contained within Art 14 (1) (b) of the Constitution of Sri Lanka³ and although Sri Lanka is a party to the International Covenant on Civil and Political Rights (ICCPR), which provides for the rights to freedom of peaceful assembly and association, there are various issues restricting the ability of a citizen to rightfully protest.

The primary restriction is contained within Art 15(2) of the Constitution⁴

³The Constitution of The Democratic Socialist Republic of Sri Lanka 1978.

⁴Ibid.

which permits the restriction of freedom of expression in the interests of racial and religious harmony or as per Art 15(7)⁵, even more vaguely, in the interests of national security, public order, and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. Additionally, the freedom to peaceful assembly could even be withheld from members of the armed forces, police and other forces in exercise of this right according to Art 15(8)⁶.

What seems to be the greatest issue among these restrictions is their vague and arbitrary nature which permits the State to use it as a tool of suppression of any dissent against a political agenda. In other words, the government has been able to use increasingly emboldened police as its watchdog and evade any responsibility for harm caused by using the excuse of such restriction. Why? Quite simply because a dissenting public gave offence to the government of the day. Certainly, the judicial arm of the country has defined the right to freedom of expression theoretically. A central case is that of *Joseph Perera v. Attorney General*⁷ where the court stated that the freedom of speech and expression means the right to express one's convictions and opinions freely by word-of-mouth, writing, printing, pictures, or any other mode. The application of such a right was apparent in *Amaratunga v. Sirimal*⁸ where protestors were drumming and clapping to create noise as a part of a protest against the government and the court ultimately held that drumming and clapping was a part of the right to freedom of speech and expression. Nonetheless, the inconsistent usage of such laws were prevalent throughout the year spanning 2021 and, even more pertinently, today.

As an example, one may point to the P2P March ('Pottuvil to Polikandy' March)⁹ where Tamil and Muslim citizens from the Northern and Eastern Provinces assembled on the streets during the period of 3 February 2021 to 7 February 2021. They attempted to address multiple issues, including

⁵ Ibid.

⁶ Ibid.

⁷ *Joseph Perera Alias Bruten Perera v The Attorney General And Others* [1992].

⁸ *Amaratunga v. Sirimal and Others (Jana Ghosha Case)* [1993].

⁹ *Mahendran Thiruvarangan, 'The P2P march and beyond, re-imagining resistance amidst ethnic polarisation', <<https://www.themorning.lk/the-p2p-march-and-beyond-re-imagining-resistance-amidst-ethnic-polarisation/>> accessed 25 April 2022.*

the continuing militarization of the North and the East, the ban on burying the Covid-19 infected remains of Muslims, justice for the families of the disappeared, and the continuing detention of Tamil political prisoners. There were a series of court orders issued against these protests, including the Kalavanjikudi Magistrates Court on 1 February 2021 ordering to “prohibit protests planned in support of the accusation of human rights violations at the Geneva sessions”. The Public Security warned of arrests and even threatened that the police had the protester’s photographs and their vehicle numbers. Funnily enough, the Sri Lanka Freedom Party (SLFP) organizing an Independence Day rally¹⁰ in Jaffna with the slogan ‘One Country, One Race’ faced no such interruptions.

What constitutes a valid restriction in terms of ‘religious or racial’ harmony or in terms of ‘public order’ is not without abuse and creates a double-standard in favour of the Leviathan that is the government. The Rule of Law (RoL), which maintains many concepts of constitutionalism within it, is infringed by such practices. A.V. Dicey’s¹¹ understanding of the RoL maintained principles such as equality before the law and a system of checks and balances on the usage of power. The right to free speech is inherent in such a system as no man can be considered above the law. The practical effects of the current legislation certainly does not reflect the RoL as once conceived.

What is also common among these protest restrictions is the near unchecked power granted to policemen in controlling assemblies. A simple example are the events that transpired at the Black Lives Matter Solidarity¹² protests in June 2020 where in the Police arrested 53 protesters in June 2022 led by the Frontline Socialist Party for allegedly violating a court order preventing them from holding a protest in solidarity with the Black Lives Matter protests taking place around the world. The police clearly used serious force in arresting the protestors who simply stood by peacefully or resisted arrest, as evidenced by video recordings and television footage. This was later justified by Jaliya Senaratne (police spokesperson) who explained that they

¹⁰ ‘SLFP supporters parade ‘One Country, One Nation’ posters in ‘Independence Day’ rally across Jaffna’, <<https://www.tamilguardian.com/content/slfp-supporters-parade-one-country-one-nation-posters-independence-day-rally-across-jaffna> > accessed 20 April 2022.

¹¹ A.V. Dicey, ‘Introduction to the Study of the Law of the Constitution’, 1885

¹² Kalani Kumarasinghe, ‘Sri Lanka Cracks Down on Black Lives Matter Solidarity Protest’, <<https://thediplomat.com/2020/06/sri-lanka-cracks-down-on-black-lives-matter-solidarity-protest/>> accessed 24 April 2022.

were simply trying to prevent the spread of COVID-19. Another example of this is the Mass Rally¹³ organized by the Samagi Jana Balawegaya (SJB) in November 2021 for the purpose of criticizing current economic issues. The police while failing to obtain a court order to prevent the protests from taking place still proceeded to place spike traps on roads to prevent buses from reaching Colombo for the protests. Even more recently the protests in Mirihana¹⁴ on the 31st of March 2022 against the Rajapakshe regime and the protest in regards to the petrol shortage at Rambukkana¹⁵ on 19th April 2022 gave the police all the excuse they needed to commit police brutality on a larger scale, even going so far as murdering an innocent. Such malicious intention may even permeate in more subtle ways such as the barricades¹⁶ set-up by the police outside the Fort President's Palace which had concealed spikes with black tarpaulins as a precaution against protestors.

One may even make note of how the Unlawful Assembly law contained in Sec 138 of the Penal Code (PC)¹⁷ of Sri Lanka is unfairly tipped against the protestor. It is noteworthy that even from the get-go that a negative connotation is attached to the very idea of assembly by its people and contributes to a culture of fear surrounding dissent. This section provides that an unlawful assembly is an assembly of 5 or more persons if the 'common object' is to overawe by using criminal force any Central/State Government or Parliament, to oppose performance of legal process, to carry out mischief, to deprive any person of any incorporeal right or to use criminal force to compel someone to do any illegal act. Sec 140 PC¹⁸ sets the punishment out for this as being imprisonment which may extend to 6 months, a fine or both. The extended version of this is within Sec 141 PC¹⁹ which would punish

¹³ Zulfick Farzan, 'SJB Protest: Police use Spike Strips to prevent buses from entering Colombo', <<https://www.newsfirst.lk/2021/11/16/sjb-protest-police-use-spike-strips-to-prevent-buses-from-entering-colombo/>> accessed 21 April 2022.

¹⁴ Sarasi Wijeratne, 'Police brutality amidst allegations of orchestrated violence at Mirihana protest', <<https://counterpoint.lk/police-brutality-amidst-allegations-orchestrated-violence-mirihana-protest/>> accessed 27 April 2022.

¹⁵ Kamanthi Wickramasinghe, 'Unrest in Rambukkana: State level contradictions galore as victims await justice', <<https://www.dailymirror.lk/recommended-news/Unrest-in-Rambukkana%3A-State-level-contradictions-galore-as-victims-await-justice/277-235614>> accessed 26 April 2022.

¹⁶ Zulfick Farzan, 'Spikes on Barricades? Sri Lankan authorities position lethal barricades around President's Office', <<https://www.newsfirst.lk/2022/04/24/spikes-on-barricades-sri-lankan-authorities-position-lethal-barricades-around-presidents-office/>> accessed 22 April 2022.

¹⁷ Penal Code An Ordinance To Provide A General Penal Code For Ceylon.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

people with a weapon offence at an unlawful assembly with imprisonment extending to 2 years, a fine or both.

The primary problem with this law is the difficulties associated with determining who can be held vicariously liable for the acts of other members of an unlawful assembly. Sec 146 PC²⁰ provides that if an offence is committed by any member of an individual assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. Where is the line drawn though? Dr. Gour²¹ explains that all persons who take part in an unlawful assembly are guilty of that offence, although mere bystanders and those who are simply curious will not be. Further, he expresses a note of caution that in an assembly of a large number of persons where some resort to violence “it need not necessarily mean that every one of the persons present actually shares the opinions, intentions or objects of those who misbehave or resort to violence”.

Ultimately, this is a matter of interpretation from case to case and could be unfairly tipped against an innocent party who can only orally maintain his innocence. The ability of the courts to impose wide interpretation on this idea of vicarious liability was apparent in ***Sirisena Ranawaka and Others v. The Attorney-General***²² where the court held the appellants were clearly members of the unlawful assembly the common object of which was to cause hurt to Heen Banda and the fact that all of them did not enter the house made no difference to their liability. It was determined that once the accused is found to be a member of an unlawful assembly the extent of their participation is immaterial.

Granted, theoretically the case of ***K.A. Andrayas v. The Queen***²³ maintained that mere membership of an unlawful assembly, without more, does not render each member of that unlawful assembly criminally liable for an offence committed by some other member thereof. The Crown must prove such liability beyond a reasonable doubt. However, in many protests it is the

²⁰ *Ibid.*

²¹ H.S. Gour, ‘Penal Law of India’ [2018].

²² *Sirisena Ranawaka and Others v. The Attorney-General* [1985].

²³ *K.A. Andrayas v. The Queen* [1964].

so-called 'little man' who campaigns for rights, which in many instances, is to simply obtain a reasonable standard of living. His ability to protect himself against an oppressive and restrictive police and access to legal counsel to defend himself through the criminal justice system pales in comparison to the leviathan of the State. Therein, the theoretical burden of proof is merely a turnstile which could be easily bypassed under this vague, possibly suppressive law.

The Civic Struggle 2022: A Demonstration of The Unprotected Right to Peaceful Assembly

The 2022 Civic Struggle in Sri Lanka which is colloquially referred to as *The Aragalaya*, is a contemporary politico-legal development which exemplified significant shortcomings in the protest law of the Country whilst fostering advocacy spaces for a protected right to assembly within and outside the courtroom. It is paramount to reflect on selected legal events surrounding *The Aragalaya* to reflect on some of the specific developments on the legal standpoint pertaining to protesting.

On the 02nd of June 2022, the Supreme Court refused to hear a fundamental rights petition filed by Mr. Mohamed Husli Hameen²⁴, a civil engineer, who was an active participant of the People's Struggle in the 'Gota Go Gama' in the Galle Face Green, seeking an injunction restraining the government from taking action to evict the protesters. The Supreme Court ultimately sided with the State Counsel who explained that the construction of stages and other structures on the protest site hinders the movement of civilians as well as the staff of the Presidential Secretariat, including the President. On the other hand, it is commendable that the Colombo Fort Magistrate rejected the police request presented on the 07th of July 2022²⁵, to prevent protesters gathering near President Gotabaya Rajapaksa's official residence in Colombo, ahead of the major anti-government protest.

²⁴ 'FR petition seeking an order not to remove structures set up at GotaGoGama dismissed', <https://www.dailymirror.lk/breaking_news/FR-petition-seeking-an-order-not-to-remove-structures-set-up-at-GotaGoGama-dismissed/108-238273>

²⁵ 'Court rejects police request against protests in vicinity of President's House', <<http://www.adaderana.lk/news/83486/court-rejects-police-request-against-protests-in-vicinity-of-presidents-house>>

Amidst the controversy of the subsequent 09th of July protest during which the protestors stormed the Presidential Palace²⁶, so was the response of the state authorities in curtailing the “violent” anti-government protest. Despite the subjective morality of ousting the eighth Executive President of Sri Lanka, through organised civic action, RoL necessitates that any protestor suspected of committing acts of violence and public property destruction in the name of freedom of assembly, would be penalised through due procedure. In violation of this necessary RoL standard, the consequent government deployed the Sri Lankan Security Forces in the dead of the night on the 22nd of July 2022, to forcibly disperse people from the *Gota-Go-Gama* protest site and assaulted protesters in central Colombo, injuring more than 50 people and arresting at least 9 others²⁷. This use of force was despite a public pledge by the protestors of evacuating the protest site later in the same day.

Such a suppressive approach towards the 2022 Civic Struggle is continually apparent from the actions of the incumbent state authorities, despite the vocalisation of strong criticism by international human rights actors. An apt example of this is the arrest and detention of frontliners of the protest in the past few weeks without adherence to due process under the Prevention of Terrorism Act (PTA)²⁸; a highly contested legislation for its obsolete and unethical provisions on arrest and detention for national security purposes. The brief analysis on the state response to the 2022 Civic Struggle strengthens the main thesis of this study on the need to systematically reform the protest law in Sri Lanka. The following section will deliberate on key points of change in the law to achieve such a reform.

Changing Narratives: From Unlawful Assembly to a Legally Assured Right to Peaceful Assembly

In a status quo where the right to peaceful assembly has become a peremptory human right codified in core international human rights conventions such as the International Covenant on Civil and Political Rights

²⁶ Alys Davies & Simon Fraser, 'Sri Lanka: Protesters storm President Gotabaya Rajapaksa's residence', <<https://www.bbc.com/news/world-asia-62104268>>

²⁷ Human Rights Watch, 'Sri Lanka: Security Forces Assault Peaceful Protesters', <<https://www.hrw.org/news/2022/07/22/sri-lanka-security-forces-assault-peaceful-protesters>>

²⁸ Prevention of Terrorism Act 1979

(ICCPR)²⁹, the archaic laws constitutionally recognising a right to peaceful assembly but practically curtailing this right under the ‘unlawful assembly’ umbrella, require immediate reformation. The succeeding analysis will academically advocate for three key legal developments in the peaceful assembly laws of Sri Lanka, needed for a legally assured fundamental right.

The inherent vulnerability of environments of assembly to violence and politicisation, requires clearly defined limitations on instances in which assemblies can be criminalised and/or dispensed under the domestic law of Sri Lanka. Due to this, the first proposition is to couple the limitations set out in Article 15(3) and (7)³⁰ applicable to the entrenched freedom of peaceful assembly and to reword such limitations in line with the concept of ‘legitimate aims’. An international precedent on this concept is set out in ***S.A.S. v. France***³¹ where the European Court of Human Rights argued that every legislation limiting the exercise of a universal freedom must set out clear goals which justify such limitations as being necessary for the existence of a democratic society. As per Article 15(3), a limitation on the enjoyment of the fundamental right to peaceful assembly are the domestic laws set to preserve racial and religious harmony in the Country. Article 15(7) sets out grounds such as ‘national security’ and ‘public morality’ as being of greater legal priority, which must prevail when in conflict with the freedom for peaceful assembly. On a first level of analysis, it is argued that racial and religious harmony interests provided for in Article 15(3) are automatically covered under Article 15(7) because racial and religious harmony is a prerequisite for public security and policy. This permits for an amalgamation of the two provisions on the basis of legal redundancy.

On a second level it is observed that there is a legal misinterpretation when transferring from Article 15(3) and 15(7) limitations, to the concept of ‘common object’ under Section 138 of The Penal Code of Sri Lanka³². The exhaustive list of common objects defined in the section pertain to governance, protection of RoL and provision of selective individual freedoms.

²⁹ *International Covenant on Civil and Political Rights (adopted 16 December 1966) Art 21.*

³⁰ *(n 1) Art 15(3), 15(7).*

³¹ *S.A.S. v. France, application n° 43835/2011, the Grand Chamber (GC) of the European Court of Human Rights (the European Court, ECtHR)*

³² *The Penal Code of Sri Lanka 1883 Sec 138.*

This leaves out grounds such as public health and morality recognised under Article 15(7) of the 1978 Constitution. Furthermore, as seen by the case facts of *Bandaranaike v Jagathsena & Others*³³ such criminalising circumstances has been expansively interpreted by courts to include behaving in a manner which constitutes an act of insult towards the incumbent president of the Country. Therefore, there is a disconnect between the constitutionally provided limitations on the right to peace assembly, and the supportive laws which practically limit such a freedom under the offence of unlawful assembly.

In light of both these levels of analysis, it is proposed that a specific, non-exhaustive list of limitations pursuing 'legitimate aims' must be introduced to Article 15 of the present constitution or into the fundamental rights (FR) chapter of a new constitution to be adopted in Sri Lanka. Adopting the advisory opinion of Article 19; an international human rights organisation defending the freedom of expression, protests may be constitutionally limited in exceptional circumstances under five legitimate aims, namely, national security, public safety, public health, public morals and public order³⁴. Furthermore, the connective *mens rea* element of 'common object' under the offence of unlawful assembly, which was defined in *The Queen v H. Ekmon*³⁵ must be strictly interpreted by the courts as an objective violating one or more of the aforementioned legitimate aims.

The second proposition is introducing a national legislation supportive of Article 14 (1) (b)³⁶ which pertains to the exercise of the freedom of peaceful assembly and the intervention of security forces to contain gatherings which violate the legitimate aims identified in the previous suggestion. Undoubtedly, such an Act would replace the Penal code, Criminal Procedure Code (CrPC)³⁷ and Police Ordinance (PO)³⁸ provisions governing the offence of unlawful assembly. Hence, the proposed Act would streamline all laws surrounding freedom of peaceful assembly, rectify all conflicts with emergency law and

³³ *Bandaranaike v. Jagathsena And Others [1984]*, Sri Lanka Law Reports Volume 2, Page No. 397.

³⁴ Article 19, 'The Right to Protest: Principles on the protection of human rights in protests', 12 - 13, <https://www.article19.org/data/files/medialibrary/38581/Right_to_protest_principles_final.pdf> accessed 30 April 2022.

³⁵ *The Queen v. H. Ekmon*, New Law Reports Volume, 67- 49.

³⁶ (n 23) art 14(1)(b).

³⁷ *Criminal Procedure Code No.15 of 1979*.

³⁸ *Police Ordinance No.41 of 1984*.

laws pertaining to terrorism by serving as the superseding law, and provide the enforcement mechanism to the constitutional guaranteed right. The suggestion to introduce such a national statute is supported below by academic conversation on possible general principles embodied by the Act and the matters it should provide for.

The first provision of the Act should be specific legal definitions on key components of the right to peaceful assembly, such as the constituents of an ‘assembly’, grounds for deeming an assembly ‘unlawful’, and the concept of ‘proportionate intervention’. The need for specificity in such components is captured in the UN Human Rights Committee Expert Commentary on Article 21 of the ICCPR³⁹ (The Commentary). Paragraph 06 of the commentary presents an expansive interpretation to the term ‘assembly’ where such an action can include online demonstrations and expressions in private spaces. Furthermore, governments are obligated to provide equal protection to all such assemblies under the Article 21 liberty⁴⁰. When comparing this with the numerical implied definition on the term ‘assembly’ which is available in Section 138 of the Penal Code, it becomes apparent that the present approach to freedom of assembly is entirely restrictive. Another apt example of the need for specificity is found in Paragraph 31 of The Commentary where the “block(ing) or hinder(ing) of internet connectivity”⁴¹ is not seen as a ‘proportionate intervention’ because many activities associated with peaceful assemblies take place online. The silence of existing ‘unlawful assembly’ laws and the Public Security Ordinance (PSO)⁴² on the subject of online activities related to peaceful assemblies, has permitted recent Governments to consistently block social media during times of civil protests⁴³. Both these examples evidenciate the need for specific legal definitions pertaining to key components of the right to peaceful assembly.

Secondly, the Act should delegate authority for intervention in times of

³⁹ *United Nations Human Rights Committee, General comment No. 37 (2020) on the right of peaceful assembly (article 21), International Covenant on Civil and Political Rights* <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>> accessed 29 April 2022.

⁴⁰ *ibid* para 06.

⁴¹ (n 32) para 31.

⁴² *Public Security Ordinance No.25 of 1947.*

⁴³ See Peony Hirwani, ‘Sri Lanka reverses ‘completely useless’ ban on social media amid protests’ *Independent UK* (United Kingdom 03 April 2022) <<https://www.independent.co.uk/asia/south-asia/sri-lanka-curfew-social-media-blocked-b2049853.html>> accessed 27 April 2022.

unlawful assembly to identified public institutions and offices, and provide exact directives on what constitutes proportionate intervention. An observable shortcoming in the present laws governing peaceful assembly is the sheer variety of actors with legitimate authority of intervention. Such actors range from the President who is empowered by Section 06 of The PSO⁴⁴ to delegate power to 'such authorities and persons' to impose emergency regulations curtailing public gatherings during times of public crisis, to the Magistrate who possesses authority under Section 95 of The CrPC⁴⁵ to disperse assemblies which are deemed unlawful. The involvement of various government agents exercising administrative discretion when intervening in circumstances of peaceful and unlawful assemblies, has led to a track record of suppression of civic demonstrations. Additionally, since protective principles such as 'legitimate restrictions' and 'non-discrimination' are not directly integrated into and protected by the existing laws pertaining to peaceful assembly, whether or not an intervention is deemed proportionate and just is determined reactively by a court when a FR petition is made. This reactive approach to facilitating the freedom of peaceful assembly is strongly discouraged by international persuasive precedent set out in cases such as Castillo Petruzzi et al. v. Peru⁴⁶. Here, it is stated that the law must actively promulgate norms and facilitate the development of practices which are necessary to protect the freedoms (including that of peaceful assembly) guaranteed to citizens. Therefore, the Act should codify the delegation of legitimate authority to government entities to intervene in circumstances of unlawful assemblies, along with just principles and directions on intervening proportionally.

The third provision is to codify tests and standards pertaining to the exercise of freedom of peaceful assembly and indictment under 'unlawful assembly', which have developed through judicial interpretation. Such a codification would enable a direct application of law rather than an absolute reliance on judicial discretion and circumstantial analysis by police at the point of arrest. For example, Samy and Others v Attorney-General⁴⁷ sets forth that the mere presence of an individual at the scene of the unlawful assembly

⁴⁴ (n 35) sec 6.

⁴⁵ (n 30) sec 95.

⁴⁶ *Castillo Petruzzi et al. v. Peru. Judgment of May 30, 1999, Series C No. 52, Para. 207.*

⁴⁷ *Samy And Others v. Attorney-General (Bindunuwewa Murder Case) [2007], Sri Lanka Law Reports, Volume 2, Page No.216.*

does not automatically make them a participant of such an assembly, under the principle of presumption of innocence. This precedent could be codified through the proposed Act into a standard of ‘intentional contribution to unlawful assembly through action or omission’. Such codifications of tests and standards will set forth a benchmark for facilitating the right to peaceful assembly and determining the culpability for unlawful assembly, thereby preventing arbitrary arrest and possible indictment of by-standers. The afore-provided propositions on the composition of a national statute governing the freedom of peaceful assembly, are merely an overview and cannot be deemed as an exhaustive list of provisions for the proposed Act.

The third legal development in the law on civic demonstration in Sri Lanka is introducing an expedited process of FR petitioning against unlawful interventions to the right to peaceful assembly. Though Article 126(5) of the Constitution⁴⁸ requires the Supreme Court to dispense a FR petition within two months, in 2017 there were approximately 3000 pending FR cases with the Supreme Court⁴⁹ and approximately 26% of FR cases filed took between one and two years to complete⁵⁰. Key reforms to the law such as the introduction of ‘epistolary jurisdiction’ has simplified the application process to the Supreme Court considerably. Yet, the duration taken to table a trial is unsuitable to counter an undue intervention to the right to peaceful assembly, which is an immediate need. Therefore, it is proposed that a preliminary ‘Shorter Trial Scheme’ (STS) be introduced to the FR petition process to enable the release of a judgement within two to five days on key matters such as: a) should the citizen be released with or without bail? b) is the citizen permitted to continue exercising his right in the contended circumstances with or without specific limitations? and c) should the relevant government authority hold, reform or strengthen the intervention. At this shorter trial, the judge may determine if a more comprehensive hearing on the matter is needed, and this hearing can take place whilst the verdict of the STS is observed for the duration of the longer trial. This STS becomes extremely relevant in cases of online demonstrations of civil dissent and

⁴⁸ (n 1) art 126.

⁴⁹ Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka (A/HRC/35/31/Add.1 23 March 2017) Para 82.

⁵⁰ D. Samararatne, *Judicial Protection of Fundamental Rights in Sri Lanka: State of Human Rights (Law and Society Trust 2018)* 137.

prolonged protests in a designated site.

The three legal developments academically lobbied for in this section can be recognised as immediate points of reform which must be adopted to provide for a legally assured right to peaceful assembly in Sri Lanka. Post to such measures, long term action ought to be adopted to improve the overall sensitivity of the legal system towards protecting this fundamental human right.

Conclusion

The international standard for providing for the evolving human need to demonstrate objection and dissent through peaceful assembly, is legally assuring a corresponding right under the domestic law of a country. This requires the national law to adopt three key steps. The first is the conceptual provision of entrenching a fundamental right to peaceful assembly through suitable inclusions in the constitutional mechanism. Secondly, a country must supplement the constitutionally protected right to peaceful assembly with institutional guarantees and enabling legislation. The third step is to specify the limitations on this right with due adherence to established principles of fairness and justice, to avoid the politicisation, misinterpretation and abuse of such limitations. A study on the existing laws governing the right to peaceful assembly makes it apparent that Sri Lanka has completed the first step of conceptual provision. Though the national legal system has nominally taken the second and third steps, the efficacy of these measures in guaranteeing the freedom of peaceful assembly is low due to the archaic, vulnerable and uncoordinated nature of the laws in place. Recognising legal assurance as the best defence against an unlawful prohibition of the right to peaceful assembly, this essay justifies the need for restructuring the law and legal framework relating to this fundamental freedom and proposes directives on achieving a streamlining of these laws.



Revisiting the Anti-ragging Legislation in the Higher Education System of Sri Lanka: A Comparative Analysis with the Indian Legal Framework

Roshani Neluwapathirana¹

Abstract

Ragging or hazing is a widespread phenomenon in many higher educational institutions all over the world. Disguised in the form of familiarisation of new entrants, the severe forms of ragging often involve direct and indirect physical and psychological harm to new students, often causing human rights violations to the victims. Despite the wide range of legislative, institutional, and administrative efforts taken by the governments and authorities to curb the violent forms of ragging, the practice is still prevalent in many countries and Sri Lanka is not an exception. The objective of this study is to analyse the adequacy of existing legislation in two jurisdictions, namely, Sri Lanka and India to combat the menace of ragging in higher educational institutions and provide suggestions to strengthen the legal framework of Sri Lanka for combating ragging. A doctrinal research approach was adopted in the study and the data were gathered using primary and secondary sources. The study reveals that both Sri Lanka and India comprise stringent laws to combat ragging, however, the practice of ragging is still prevalent in different violent and adapting forms. The study analyses and compares the constitutional protection, special laws, and important institutional policies available in Sri Lanka and India to combat ragging and observes certain lacunae in the existing mechanisms. Based on the comparison of two legal regimes, The paper provides suggestions to strengthen the legal framework of Sri Lanka in order to combat ragging, by drawing from the positive aspects put forward by India, the neighbouring jurisdiction towards the same.

Keywords: *Ragging, Human Rights, Higher Education, Universities, Constitution*

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Introduction

Ragging in the South Asian culture or hazing in the western context can be noticed as a tradition of violence prevailing in many educational institutions across the world disguised in the form of familiarising new students. Believed to be initiated in educational institutions as a set of ice-breaking activities aimed at familiarizing freshers with a sub-culture, ragging has gradually evolved as an unofficial ritual in higher educational institutions in many countries, involving verbal, physical, psychological, and sexual harassment and thereby causing grave human right violations. There is a wide range of legislative, institutional, and administrative measures taken by the governments and higher educational institutions to curb the menace of ragging. However, the practice of ragging is still prevalent in the higher educational settings of many countries, including Sri Lanka and India, irrespective of such measures.

Recognizing that ragging in Sri Lanka involves cruel, inhuman, and degrading treatment and that the society has failed to address its root causes, the Supreme Court of Sri Lanka warranted that those raggers deserve severe punishments and justified the punishments outlined in the country's first ever Anti-ragging Bill in 1998². However, most of such ragging-related stories are rarely unfolded to the authorities due to various reasons, leading to a culture of impunity and the preparators go unpunished. Only a few extreme cases of ragging are reported and redressed while many cases go unreported. As observed by Fernando, J. in the case of *Priyangani Navaratne and Others v. Chandrasena*, ragging is easily done, but difficult to prove; victims are afraid to complain because reprisals are likely; those in authority often fear getting involved, whether by intervening, reporting, or otherwise³. Due to such fears and lack of confidence in justice, victims are mostly reluctant to seek redress irrespective of the availability of laws to combat ragging and victim protection. This has formed an encouraging environment to spread the violent momentum.

Against this backdrop, this paper analyses the contemporary legal framework in Sri Lanka and India in terms of combating the menace of ragging in state universities and evaluates their effectiveness as tools for eradicating this brutal and uncivilised sub-culture from the university system. Having observed the

² 'The Sunday Times Plus Section' (*Sundaytimes.lk*, 2022) <<https://www.sundaytimes.lk/980426/plus5.html>> accessed 25 April 2022.

³ (1998) 1 Sri L.R. at 170

prevailing lacunae of the existing mechanisms in the Sri Lankan jurisdiction, it also goes on to propose recommendations to strengthen the legal framework of Sri Lanka in order to combat ragging, by comparing the same with the Indian legal framework, where applicable.

Ragging: Definitions, Prevalence and Consequences

The term “ragging” could be applied to any unruly behaviour that involves mocking or treating any student offensively so as to cause nuisance, frustration or feelings of fear to adversely affect his or her state of mind. This may take various forms from mild entertaining activities such as formal introduction, dress-code ragging, playing the fool to extreme and violent forms of verbal, physical or psychological torture, sexual abuse or drug abuse.

As per the Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act No.20 of 1998 in Sri Lanka, ragging is defined as any act which causes or like to cause physical or psychological injury or mental pain or fear to a student or a member of the staff of an educational institution.

Findings of the UGC-UNICEF study published in March 2022 on the issues of ragging, sexual and gender-based violence in the Sri Lankan university system have unfolded that ragging in today’s context has led to a systematic ‘pre-enrolment conditioning’ where the new entrants are conditioned to support ragging even before their entrance to the universities. Indicating the brutality and harassment associated with ragging, the above survey sample has revealed shocking statistics with regard to the practice of ragging; about 51.2% of students were exposed to verbal harassment, about 34.3% of students were subjected to psychological violence, about 23.8% had experienced of physical abuse while 16.6% were subjected to sexual harassment. The situation in other Asian countries is no better either. For instance, neighbouring India has reported a total of 1070 and 1016 ragging cases in 2019 and 2020, respectively. Although there was a decline in the ragging complaints reported in 2020 due to the closure of educational institutions consequent of the Covid-19 pandemic, 219 and 511 online ragging cases had been reported in India in the year 2020 with an increase of the same up to 511 cases in 2022. Thus, the practice of ragging has currently emerged as a vicious cycle annually surfaced in different forms at every new student intake, where the victims turn into perpetrators in the following

year, making it hard to sweep away from the higher education settings.

Ragging is associated with physical, behavioural, emotional, and social problems among victims. Various incidences of ragging-related suicides, violence, physical injuries, sexual abuse, and psychiatric illnesses have also been reported. While many victims survive with long-lasting physical or emotional scars as consequences of victimisation, ragging-related deaths have also been reported from time to time. The perpetrators, if found guilty, are subject to the punishments imposed by the courts and other respective authorities.

Special Legislation to ban ragging: The Anti-ragging Act

The Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act, No.20 of 1998 (Hereinafter sometimes referred to as the “Anti-ragging Act”) is a distinguished legislative piece in Sri Lanka in terms of ragging. The Act put forth various forms of acts under the definition of ragging ranging from mental pain or fear to physical injuries caused to students or staff members of educational institutions while setting strict punishments for offenders⁴. A comprehensive range of offences including ragging, criminal intimidation, hostage-taking, wrongful restraint, and unlawful confinement committed within and outside of educational institutions are covered by the Act. All the offences are made cognizable offences by the Act⁵ enabling the authorities to arrest the perpetrators without a warrant.

Under the provisions of the Anti-ragging Act, the committers, or participants of ragging within or outside of an educational institute are subjected to rigorous imprisonment for a term not exceeding two years, after a summary trial before a Magistrate. In a case of sexual harassment or grievous hurt specified in the Penal Code, imprisonment can be extended up to ten years. The victims are also entitled to compensation of an amount determined by the court⁶.

The cases of criminal intimidation committed to a student or a staff member⁷, Hostage-taking⁸, wrongful restraint⁹ and unlawful confinement¹⁰ have also

⁴ Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act No. 20 of 1998 (Anti-ragging Act 1998), s 17

⁵ Anti-ragging Act 1998, s 11

⁶ Anti-ragging Act 1998, s 2 (1)

⁷ Anti-ragging Act 1998, s 3

⁸ Anti-ragging Act 1998, s 4

⁹ Anti-ragging Act 1998, s 5

¹⁰ Anti-ragging Act 1998, s 6

been declared as offences by the Act which can be punished by way of rigorous imprisonment. Sexual harassment or grievous hurt during ragging or hostage-taking are non-bailable offences of which the accused cannot be released on bail except by the discretion of the high court judge, according to the provisions of section 14 of the Bail Act¹¹. Forcible occupation and damage to property of educational institutes are also punishable with rigorous imprisonment of not exceeding ten years or a fine or both¹². Any person causing mischief to the property of an educational institution under the Act can be subjected to imprisonment for a term not exceeding twenty years and a fine of five thousand rupees or three times the amount of the loss caused to such property, whichever amount is higher¹³. The court also has the authority to issue expulsion orders for students and dismiss staff members convicted of an offence under the Act, based on the gravity of the offence¹⁴.

In contrast, there is no uniform national anti-ragging law in India. However, several states in India have enacted their own legislations on ragging, in response to severe forms of ragging incidents. Tamil Nadu was the first state in India to introduce its own anti-ragging law in 1997. Thereafter, the Government of Maharashtra enacted the Maharashtra Prohibition of Ragging Act, 1999 and established ragging or abating it as a criminal act punishable with imprisonment and a penalty¹⁵. Maharashtra Anti-ragging Act empowers educational institutions for investigating the allegations, suspension, and dismissal of the accused students from the institution while holding such institutions accountable for abating the acts of ragging in case of its failure to properly investigate the ragging-related complaints¹⁶. Currently, Indian states of Tripura, Karnataka, Andhra Pradesh, Kerala, Assam, West Bengal, Himachal Pradesh, Uttar Pradesh, Goa, and Jammu Kashmir have also enacted their own state-specific ragging Acts.

Although Sri Lanka is privileged to have a unique piece of national legislation exclusively imposed on combating ragging which can be recognized as a comparative positive aspect of the Sri Lankan legal framework, the number

¹¹ Anti-ragging Act 1998, s 9

¹² Anti-ragging Act 1998, s 7 (1)

¹³ Anti-ragging Act 1998, s 7 (2)

¹⁴ Anti-ragging Act 1998, s 8

¹⁵ Maharashtra Prohibition of Ragging Act 1999, s 4

¹⁶ Maharashtra Prohibition of Ragging Act, 1999, s 7

of ragging cases annually reported indicates that the law has taken a back seat¹⁷. This is mainly due to two main reasons: the punishments laid down by the Anti-ragging Act are always observed to be inactive in terms of their enforcement and, the existing law is not updated with the provisions to combat new forms of violence which have emerged in par with the technological advancements. Therefore, it is high time to amend the Anti-ragging Act with a firm view of strengthening law enforcement and addressing the new forms of violence such as cyberbullying, online voyeurism, and non-consensual distribution of intimate videos/images.

The Universities Act

The Universities Act No.16 of 1978 in Sri Lanka, inter alia, includes provisions related to the establishment, maintenance, and administration of universities and Higher Educational Institutions and connected matters¹⁸. The Vice-Chancellor of a university, with the consent of the University Council, is granted the authority to prohibit certain persons from entering or remaining within the precincts of the university in instances where the presence is undesirable, with an opportunity of being heard¹⁹. Such a prohibition must remain in force until revoked by the same authority. The Act also requires the courts to accept a written certificate issued by a Vice-Chancellor as evidence of the facts until the contrary is proved²⁰. Any person disobeying such prohibition shall be guilty of an offence which can be punishable with a fine for each day of his stay²¹.

Institutional Policies

University Grants Commission of Sri Lanka (hereinafter sometimes referred to as the "UGC"), the apex body of the University system in Sri Lanka, has issued several circulars from time to time in order to facilitate the implementation of the Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act, No.20 of 1998. UGC Commission circular No.919 dated 15 January 2010 titled 'Guidelines to be Introduced to Curb the Menace of Ragging in the Universities or Higher Education Institutions' includes a set of instructions on preventing gender-related discrimination including ragging, and the procedures

¹⁷ 'A Bottom-Up Approach Needed To Eradicate 'Ragging' | Daily FT' (*Ft.lk*, 2022) <<https://www.ft.lk/news/A-bottom-up-approach-needed-to-eradicate-ragging/56-702037>> accessed 25 April 2022.

¹⁸ Preamble of the Universities Act No. 16 of 1978

¹⁹ Universities Act No. 16 of 1978, s 131(1)

²⁰ Universities Act No. 16 of 1978, s 131(2)

²¹ Universities Act No. 16 of 1978, s 132

to be followed in an event of ragging. Circular No. 946 dated 10.02.2011 has been issued with a set of common guidelines to be followed in dealing with student disciplinary matters and imposing punishments.

The Vice-Chancellor of a university is thereby empowered to impose an Out of Bounds Declaration on students in a case of misconduct or indiscipline exposed through a fact-finding mission, prohibiting such students the access to the university. It also empowers authorities to record the punishments in the student's personal file and the student record book. The Commission Circular 12/2019 has been issued by the UGC to introduce some strategies/actions to be implemented by the universities through developing by-laws to combat Ragging and Sexual and Gender-Based Violence (SGBV). Under the circular, the university authorities are required to take adequate measures to protect the witnesses of ragging and SGBV incidents under the Assistance to and Protection of Victims of Crime and Witnesses Act, No.04 of 2015. The Commission Circular No.04/2020 issued on 10.08.2020 requires Higher Education Institutes to report the complaints on ragging and SGBV with the actions taken for such complaints by the institution, within seven days upon receiving such complaints.

Similarly, The University Grants Commission of India (UGC India) has also issued Regulations on Curbing the Menace of Ragging in Higher Educational Institutions in the year 2009 (as amended in 2016). The UGC of India provides a much wider definition of the term "Ragging" which includes following acts committed within and outside the educational institution and also within public and private transportation.

- a. Any verbal/written or physical conduct by any student /students which has the effect of teasing, treating or handling with rudeness a fresher/ any other student.
- b. Indulging in rowdy or indiscipline activities by any student/ students which causes or is likely to cause annoyance, hardship, physical or psychological harm, or to raise fear or apprehension thereof in any fresher or any other student.
- c. Asking any student to do any act which such student will not in the ordinary course do and which has the effect of causing or generating a sense of shame, torment or embarrassment so as to adversely affect the

- physique or psyche of such fresher or any other student.
- d. Any act by a senior student that prevents, disrupts or disturbs the regular academic activity of any other student or a fresher.
 - e. Exploiting the services of a fresher or any other student for completing the academic tasks assigned to an individual or a group of students.
 - f. Any act of financial extortion or forceful expenditure burden put on a fresher or any other student by students
 - g. Any act of physical abuse including all variants of it: sexual abuse, homosexual assaults, stripping, forcing obscene and lewd acts, gestures, causing bodily harm or any other danger to health or person.
 - h. Any act or abuse by spoken words, emails, posts, or public insults which would also include deriving perverted pleasure, vicarious or sadistic thrill from actively or passively participating in the discomfiture to fresher or any other student.
 - i. Any act that affects the mental health and self-confidence of a fresher or any other student with or without an intent to derive a sadistic pleasure or showing off power, authority or superiority by a student over any fresher.
 - j. Any act of physical or mental abuse (including bullying and exclusion) targeted at another student (fresher or otherwise) on the ground of colour, race, religion, caste, ethnicity, gender (including transgender), sexual orientation, appearance, nationality, regional origins, linguistic identity, place of birth, place of residence or economic background.

Educational institutes in India are kept mandated by UGC regulations to take measures to curb the menace of ragging including providing separate hostel facilities to newcomers, regular raids by anti-ragging squad and submission of affidavits by all senior students and their parents not to indulge in ragging.

Furthermore, Certain government bodies have also set up their own Institute Specific Regulations on ragging. For instance, the All-India Council for Technical Education (AICTE) has created the "All-India Council for Technical Education (Prevention and Prohibition of Ragging in Technical Institutions, Universities including Deemed to be Universities imparting technical education) Regulations,

2009” under Section 23 and Section 10 of the AICTE Act,1987. Similarly, the Medical Council of India has made the “Medical Council of India (Prevention and Prohibition of Ragging in Medical Colleges/Institutions) Regulations, 2009” under Section 33 of the Indian Medical Council Act,1956.

Constitutional Protection over Ragging as a Human Rights Violation

No one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment, according to Article 5 of the Universal Declaration of Human Rights²². 1978 Constitution of the Democratic Socialist Republic of Sri Lanka, though includes no specified provisions for combating ragging or protecting victims, as the Supreme Law of the Country, has granted validity for universally accepted human rights through Chapter III of the Constitution. Accordingly, Article 11 of the Constitution mandates that no person shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment²³. This, as a fundamental right, is absolute in nature and cannot be restricted or in-fringed under any circumstance.

Sri Lankan case law also provides wide interpretations of the meaning of torture. The interpretation given to Article 11 of the Constitution by Justice Amarasinghe in the case of *WWK de Silva v. Chairman, Ceylon Fertilizer Corporation*²⁴ is of relevance in the cases of ragging. There, Amarasinghe J was in the opinion that the torture or cruel, inhuman, or degrading treatment or punishment contemplated in Article 11 of the Constitution is not confined to the real of physical violence and it would embrace the sphere of the soul and mind as well²⁵.

Victims are entitled to file a fundamental right application in the Supreme Court in case of such a fundamental right violation committed by an executive or administrative action as per the provisions of Articles 17 and 126 of the Constitution. This enables the aggrieved party to name the respective educational institution as a respondent party for the omission of its responsibility to have sufficient measures to ensure students’ protection. Thus, Ragging, inter alia, if involves in any form of torture, cruel, inhuman, or degrading treatment, would amount to a violation of human rights and fundamental rights of victims under Article 11 of the Sri Lankan Constitution.

²² Assembly, U.G., 1948. Universal declaration of human rights. *UN General Assembly*, 302(2), pp.14-25.

²³ Article 11 of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka

²⁴ *WWK de Silva v. Chairman, Ceylon Fertilizer Corporation* (1989) 2 Sri L R 393

²⁵ *ibid* per Amarasinghe J pp 404-405

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No.22 of 1994 gives effect to the International Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment and, by bringing the torture into the purview of the Criminal Procedure Code of Sri Lanka, it declares torture a crime which is cognizable and non-bailable²⁶. The Act which states that any person who tortures any other person shall be guilty of an offence²⁷, further expands the protection safeguarded by Article 11 of the Constitution. It extends the scope of Article 126 of the Constitution in terms of imposing the liability on the preparators, by enabling the victims to impose the liability on private individuals for the torture or other cruelties committed in the name of ragging.

Indian constitution too has no expressed constitutional provisions in terms of ragging. However, the fundamental rights section of the Indian Constitution of 1950 includes the Right to Equality, the Right to Life and Personal Liberty, and the Right against Exploitation which can be made directly applicable for the cases of ragging. Article 21 of the Constitution which guarantees the right to life and personal liberty is of particular importance in this regard. The right to life and personal liberty in Indian Constitution which provides for comprehensive protection over human rights violations has been further extended by Indian courts through Judicial interpretations. For instance, in the case of *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*²⁸, the right to life has been extended up to the right to live with human dignity and all that goes along with it, and inter-alia the right of freely moving about and mixing and mingling with fellow human beings. Hence, the depreciation of such fundamental rights by way of ragging, empowers the victims to file a writ petition to the Supreme Court²⁹ or to the High Court³⁰ in India.

Although the right to life is not expressly guaranteed in the Sri Lankan Constitution as a fundamental right, the Sri Lankan Courts, in several instances have attempted to establish the right to life through case law by interpreting the same within the purviews of other fundamental rights enshrined in the Constitution. For instance,

²⁶ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994 (The Torture Act 1994), s 2(4)

²⁷ (The Torture Act 1994), s 2(1)

²⁸ AIR 1981 SCC 746: *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*

²⁹ Article 32 of the Indian Constitution 1950

³⁰ Article 226 of the Indian Constitution 1950

in the case of *Rathnayake Tharanga Lakmali v Niroshan Abeykoon*³¹, the right to life was established through Article 11 and 13(4) of the Constitution. However, the absence of the right to life as an explicit provision in the Sri Lankan Constitution set barriers in its fundamental rights jurisprudence. Thus, the explicit inclusion of the right to life in the fundamental rights chapter of the Sri Lankan Constitution is of much importance to strengthen the prevailing law.

Applicability of the Penal Code

Although the Penal Code of Sri Lanka has not specifically included the term “Ragging”, physical torture or sexual harassment associated with ragging can be defined as punishable offences under the following provisions of the Penal Code. Section 345 of the Penal Code defines sexual harassment as an unwelcome sexual advance by words or action used by a person in authority, in a workplace or any other place. Section 311 of the Penal Code includes several kinds of hurt within the scope of the grievous hurt; a) emasculation; (b) permanent privation or impairment of the sight of either eye; (c) permanent privation or impairment of the hearing of either ear; (d) privation of any member or joint; (e) destruction or permanent impairment of the powers of any member or joint; (f) permanent disfigurement of the head or face; (g) cut or fracture, of bone, cartilage or tooth or dislocation or subluxation, of bone, joint or tooth; (h) any injury which endangers life or if’ consequence of which an operation involving the opening of the thoracic, abdominal or cranial cavities is performed; (i) any injury which causes the sufferer to be in severe bodily pain or unable to follow his ordinary pursuits, for a period of twenty days either because of the injury or any operation necessitated by the injury³².

Similarly, no expressed provisions are included in the Indian Penal Code for ragging. However, several provisions in the Indian Penal Code can be availed by a victim to register a First Information Report (FIR) with the Police. The offences of which such FIR can be instituted include Obscene acts and songs³³, punishment for voluntarily causing hurt, voluntarily causing hurt by dangerous weapon or means, punishment for voluntarily causing grievous hurt, voluntarily causing grievous hurt by dangerous weapon³⁴, Wrongful Restraint³⁵, Wrongful

³¹ SC/ FR Application 577/2010

³² Section 311 of the Penal Code

³³ Indian Penal Code (1806), s 294

³⁴ Indian Penal Code (1806), s 323-326

³⁵ Indian penal Code (1806), s 339

Confinement, Punishment for Wrongful Restraint, Punishment for Wrongful Confinement and Section³⁶, Punishment for culpable homicide not amounting to murder³⁷.

The Raghavan Committee which was appointed by the Ministry of Human Resources Development (MHRD) under the Supreme Court's directives, in its report submitted in 2007, recommended inclusion of the offence of ragging as a special section under the Indian Penal Code³⁸. Based on its recommendations, an interim order has been issued by the Supreme Court of India making educational institutions obligatory to register a First Information Report (FIR) with the Police to report every ragging-related or abating incident on an immediate basis³⁹.

The above analysis depicts that Both Sri Lanka and India, in their respective Penal Codes do not expressly recognize a criminal offense called ragging but the justice is made accessible for a victim through several other provisions and definitions included therein. However, the explicit inclusion of ragging as a criminal offence under a specific section in the Penal Code of Sri Lanka, by taking Raghavan Committee recommendations as a model will further strengthen the existing Sri Lankan law on ragging. Further, having observed that many ragging complaints in Sri Lanka are internally settled case-by-case without forwarding to the Police, it is suggested to make it obligatory for Sri Lankan educational institutions to file official First Information Reports (FIR) with the police for every ragging-related incident or complaint observed or reported. It will ensure the functioning of all cases through the criminal justice system.

The Rules of Locus Standi

According to Article 126 of the Sri Lankan Constitution, only the aggrieved party or his/her Attorney at Law is allowed to apply to the Supreme Court for relief or redress, in case of an infringement or an imminent infringement of a fundamental right. Stringent adherence to this condition can be manifested by reviewing the case law such as *Somawathie v. Weerasinghe and others*⁴⁰ where the right of any person other than the aggrieved party or his/her Attorney-at-Law was denied vindicating the fundamental rights of the aggrieved person.

³⁶ Indian penal Code (1806), s 340-342

³⁷ Indian penal Code (1806), s 506

³⁸ Raghavan Committee Recommendation Report. Human Resource Development Ministry, Government of India.

³⁹ The Supreme Court of India Order May 2007

⁴⁰ [1990] 2 Sri L.R.

In contrast, Indian Courts have taken a much-liberalized approach in such instances. Article 32 of the Indian Constitution allows any member of the public to maintain a petition on behalf of a person or a class of persons who is unable to approach the Court for relief due to poverty, helplessness, or disability or socially or economically disadvantaged position⁴¹. *Hussainara Khatoon V Home Secretary, State of Bihar*⁴² and *People's Union for Democratic Rights v. Union of India*⁴³ are some landmark cases that showcase the innovations made by Indian Courts under the aegis of public interest litigation. Over the time, Sri Lankan Courts have also procedurally relaxed the locus standi (or standing) rule to a certain extent which can be manifested in the cases such as *Sriyani Silva v. Iddamalgoda, Officer-in-Charge, Police Station Paivaala and Others*⁴⁴. However, when compared with India's innovative processes such as epistolary jurisdiction which enables individual judges to act on letters written by or on behalf of aggrieved people, Sri Lankan law is still bound by the constitutional provisions which require identifying the "aggrieved party". These boundaries, similar to all human rights violations, are common to ragging victims, as well and hence, prevent the ability of concerned parties to represent the victim. Therefore, it is recommended that constitutional amendments are necessary to broaden the rules of standing.

Judicial Activism

Indian case law provides many examples that the Indian judiciary, to a great extent, has exercised judicial activism, particularly in the context of the protection and preservation of human rights. This is particularly seen in the case of *Vishaka v State of Rajasthan (1997)* where the Indian Supreme Court held that, in the absence of effective measures to protect against sexual harassment under the domestic laws, recourse may be made to the International Agreements and their norms to give a purposive interpretation to Articles 14, 15 19(1)(g) and 21 of the Indian constitution for providing safeguards against sexual harassment.

In the case of *Vishwa Jagriti Mission through President vs. Central Government, through Cabinet Secretary*⁴⁵, the Supreme Court has laid down broad guidelines for educational institutes to curb ragging including initiation

⁴¹ *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

⁴² AIR 1979 SC 1360

⁴³ AIR 1982 SC 1473

⁴⁴ SC NO. 471/2000 (FR), 2003

⁴⁵ 2001 (3) SCR 540.

of anti-ragging movements right after advertising admissions, watching ragging prone Zones, the inclusion of details of ragging involvements in perpetrators' migration certificates, awareness of students and guardians on the forms of ragging with the institutional approaches to combat them and the punishments, and building confidence on freshers not to tolerate but report ragging incidents.

In the case of *Thiruvananthapuram Government Engineering College vs State of Kerala*⁴⁶, the Supreme Court of India emphasised the need of dealing with ragging incidents, seriously. Arijit Pasayat, CJ observed that the practice which was intended to be in good faith and to provide untainted fun has now been characterized as physical torture with a sadistic tendency and sexual perversions and it was clear that ragging, which was originally thought of to be a mere joke, has crossed bounds of decency and had entered the arena of physical and mental torture which needed to be dealt with iron hands.

*Pon Navarasu/ John David Ragging Case*⁴⁷ which involved the murder of first-year student by seniors was a crucial ragging-related case which paved the path to criminalizing ragging in Tamil Nadu and issuing the first ever state-specific anti-ragging law in India by Tamil Nadu government.

In *University of Kerala V. Council, principals, Colleges, Kerala & Others*⁴⁸, the Supreme Court has expressed displeasure on ragging incidents reported from educational institutions and issued directions for supplementing and strengthening the existing orders to combat ragging.

However, such a great level of judicial activism is not observed in the existing Sri Lankan legal context due to the restrictions placed by Article 80 (3) of the Constitution which prohibits the judicial review of validly enacted laws. Hence, it is recommended to introduce sufficient constitutional safeguards to uphold the independence of the judiciary and the rule of law enabling the judges to exercise judicial activism in order to make justice accessible to victims.

The Institutional Obligation

Educational institutions owe a duty of care and obligation in terms of student safety and wellbeing. In many universities, measures for student Safety and

⁴⁶ [WP (C) 656 of 1998; 2000 (2) KLT 11]

⁴⁷ Inspector of Police, Tamil Nadu vs John David on 20 April 2011.

⁴⁸ [2009] INSC 284

prevention of ragging are included in prospectuses and student handbooks. Such representations can be considered as implied terms of the university-student contract and the failure to prevent ragging can hence be defined as a breach of that contractual obligation. Failure to prevent ragging is contrary to the UGC Regulations, too. Any negligent failure of a university employee may also be sufficient to impose the personal liability on the employee as well as the vicarious liability on the university on the basis that the employee acts in the course of employment. All these arguments justify the avenues for a ragging victim to utilize private actions against universities. However, neither India nor Sri Lanka has not yet taken firm actions to expressly recognize the private liability of the respective educational institutions for the failure to prevent ragging practices in their vicinity. Therefore, based on the rebuttable presumption that the Institutional failure or the omission to take sufficient measures to prevent ragging resulted in causing such human rights violations, the Anti-ragging Act could further be strengthened by explicitly imposing the private liability upon the relevant academic institution for the ragging practices occurred in its premises. Similar accountability shall be vested upon the respective staff of the academic institution who is delegated with the duty to take reasonable care of the students' safety, property, and student disciplines. the UGC Regulations could also be amended to explicitly provide for these causes of action.

Conclusion

Ragging is a deep-rooted tradition commonly observed in many higher educational institutions all over the world, including Sri Lanka. Having observed that the various legislative, institutional, and administrative measures imposed by policymakers have not been successful to curb ragging in the Sri Lankan higher education setting, this research paper suggests some suggestions to strengthen the existing legal framework of Sri Lanka in terms of curbing ragging, by comparing the same with its neighbouring counterpart, the Indian legal system. The study acknowledges the relevance of the Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act, No. 20 of 1998 (the Anti-ragging Act) as a strong legislative weapon to combat ragging in Sri Lanka. However, by observing its over-stringency and obsolescence, it is suggested to amend the Anti-ragging Act to suit the contemporary context. Further suggestions include the explicit inclusion of the right to life as a fundamental right in the Sri Lankan Constitution and the explicit provisions for

ragging in the Penal Code. The study also emphasizes the necessity of imposing the private liability upon the respective educational institution for its failure to take preventive measures on human rights violations. Making it obligatory for Sri Lankan educational institutions to file official First Information Reports (FIR) with the police for every reported or observed ragging incident is also suggested to ensure that all cases flow through the criminal justice system. Moreover, it warrants a relaxation of constitutional provisions in terms of representative standing in the Sri Lankan legal regime. Having observed the instances of judicial activism exercised in the Indian courts, and the constitutional restraints over the judicial review in Sri Lanka, the study also recognizes the need to uphold the independence of the judiciary and the rule of law in Sri Lanka, as well, in order to promote freedom, equality, and justice.



Effectiveness of the Debt Recovery Laws in Sri Lanka with Special Reference to Recovery of the Non-Performing Assets (NPL) of the Banking Industry

Mayanthi Perera¹

Abstract

Debt recovery is an area where delays in the law have become acute. Lacunas are seen especially when these laws are implemented. In Sri Lanka, it is quite common to see the complete judicial process of debt recovery taking one or two decades in deciding a case from the date of filing of the case in the original court until the decision of the final appeal by the Supreme Court. As a result of these delays and inefficiencies banks struggle to recover what is lent, and the non-performing assets increases, causing the non-performing ratios in the bank to increase which result in the bank being compelled to restrict and limit its credit supply to borrowers, finally resulting in credit supply contraction. Stemming at the macroeconomic level, high none performing levels are seen in countries that are experiencing slow economic growth, less market confidence, disturbance of credit allocation, higher demand for loans from borrowers, and a large reduction in available credit supply. Therefore, it is important to have a stable banking sector with low non-performing loans where banks have the ability to recover their lending in a timely manner resulting in improved performance and a positive impact on the economy. The object of this study is to therefore examine the legislative provisions currently available for debt recovery in the banking industry and the existing judicial process pertaining to debt recovery and assess the impediments, legal and extra-legal, for the efficient recovery of a non-performing debt thereby suggest recommendations for law and operational framework. In order to accomplish the above objectives of this study, the secondary information is used in the methodology and the qualitative approach is pursued to gather the secondary information. The qualitative analysis on available sources will help to answer the research questions. Existing legislative measures in Sri Lanka, judicial decisions, published and unpublished scholarly articles, journal articles, news reports and web-based data would be gathered through desk research which will be utilized in achieving the objectives of this

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study. Such data will be critically evaluated for the purpose of finding answers for research questions. The conclusion will be drawn through a systematic comparative analytical method and recommendations will be made accordingly.

Keywords: *Debt Recovery Laws, Nonperforming Loans, Banking industry, Court Decisions and Credit cycle*

Introduction

The Sri Lankan banking industry comprises 24 licensed commercial banks and 6 licensed specialized banks. The essential role of a bank's credit as an input to produce goods and services places a bank in an influential position in the economy. This means that any inefficiencies of credit allocation or recovery are significantly felt in the economy². Therefore, the lending function of a bank plays a vital role in the development of a country's economy. Banks are financial intermediaries, an institution that operates between a saver who deposits money and a borrower who obtains a loan. Unless the financial institutions can recover the amount lent with interest, the institutions would not be able to continue carrying on their duties. This makes debt recovery an important area in banking and finance.

When banks are unable to recover the money lent to their customers which is referred to as a loan default, credit cycle³ of the bank is disturbed. Loan default results in reducing the quality of assets held by the bank, a customer loan is considered an asset of a bank however when defaulted the loan becomes a liability to the bank resulting in reduction of assets held by the bank. When a loan is defaulted it's classified as a non-performing loan (NPL). A non-performing loan means a loan where the payment is delayed and unlikely to be paid by the borrower. A bank must maintain adequate provisioning according to the applicable accounting standards to ensure the future repayment of depositors. This results in an increase in the cost of funds for the bank.

The lending function is one of the most important financial services provided by a bank which helps the country's economic growth and stability. Banks suffer losses due to high NPL ratios⁴. When banks struggle to recover what is

² Shaffer 2004 journal of money, credit and Banking 36(3) page 585-592

³ A credit cycle describes the phases of access to credit by borrowers.

⁴ Eric Jing " Impact of high non-performing loan ratios on bank lending trends and profitability" (2020) page 10

lent, the non-performing assets increases, causing the non-performing ratios (NPL ratios) in the bank to increase and the bank to restrict and limit their credit supply to borrowers, resulting in credit supply contraction. Stemming at the macroeconomic level, high NPL levels are seen in countries that are experiencing slow economic growth, less market confidence, disturbance of credit allocation, higher demand for loans from borrowers and a large reduction in available credit supply. Therefore, it is important to have a stable banking sector with low non-performing loans where banks have the ability to recover their lending in a timely manner resulting in improved performance and a positive impact on the economy⁵.

Debt recovery is an area where delays in the law have become acute. Further, there are several areas where lacunas are seen especially when these laws are implemented. In Sri Lanka, it's quite common to see the complete judicial process on debt recovery taking one or two decades in deciding a case from the date of filing of the case in the original court until the decision on the final appeal of the Supreme Court. In the research carried out by qualitative analysis of the existing legislative measures in Sri Lanka, judicial decisions, published and unpublished scholarly articles, journal articles, news reports and web-based data the author is made to understand the main contributor to the delays is the lack of knowledge of the judiciary in understanding the scope of the law relating to debt recovery, lack of the judiciary in taking bold decisions to overlook the technicalities to achieve the objective of the statute, unavailability of punishment for a legal professional who intentionally acts in a manner to defeat the object of the statute by delaying the litigation. Infrastructure inadequacies such as unavailability of a specific courtroom allocation for these forms of legal action, shortcomings of court record rooms resulting in misplacement of court records, attitudes of court officials (court registrars/fiscals) as well as the dishonorable behavior in court officials and legal professionals have contributed to the efficient application of the debt recovery laws and mechanism in Sri Lankan courts.

The delays and inefficiencies result in banks and other lending institutions having to spend additional money as well as time in recovering the debts. At times the borrowers who are honestly struggling to pay due to loss of

⁵ Supra foot note no 4

income are also affected as they are forced to engage in long legal battles while spending additional money on lawyers and law firms, as there is very limited legal infrastructure available in Sri Lanka for quasi-judicial settlements through tribunals or alternate settlement methodologies. This finally impacts the economy of the country as debt recovery inefficiencies result in the bank's struggling to recover the lending resulting in higher non-performing loans (NPL), lower credit availability and lower profitability which negatively impact the country's economy.

Debt recovery laws in Sri Lanka

In the early days, the Common Law of Sri Lanka was Roman-Dutch Law, but English Law applies to all maritime and commercial matters. Consequently, much confusion and delays have arisen as to the applicable law in commercial disputes including debt recovery.

In the early part of 1980's many representations were made to the authorities that the delays in procedures caused the cost of borrowing to go up, it was argued the delays resulted from outdated legislation as well as procedural deficiencies. The borrowers on the other hand used to take undue advantage of these legal systems and procedures to deliberately evade payment of their dues. The impact of this situation on the demand for loanable funds was grave.

By about 1983, there had been further representations made to the government regarding the acute slowness of debt recovery procedure in the country. Against this background, the Minister of Justice in 1983 has appointed a committee for the specific purposes of inquiring into the delays in the debt recovery process and its adverse effects. Accordingly, the Wimalaratne Committee named after Justice Wimalaratne who was the head of the Committee (which was also known as the DRC-Debt Recovery Commission) has handed over its report to the Minister in 1985⁶.

There was widespread opposition to the recommendations made by the committee especially coming from the BAR association which resulted in a delay in implementing the recommendations made by the committee.

However, by that time the International Bank for Reconstruction and

⁶ B. P. Gamarachchi "Patate Execution ; Its impacts on the debt recovery by banks and recent developments" (2008) 237

Rehabilitation (IBRD-the World Bank) and the Asian Development Bank (ADB) started exerting pressure on the Government of Sri Lanka through their long-term loan negotiations to ensure that the debt recovery procedures be strengthened and modernized. As a result, fourteen statutes relating to debt recovery were in principle approved by the cabinet in the early part of 1990. The main statutes are mentioned below.

I. Regular action under the Civil Procedure Code (CPC)

Currently, District courts⁷ have original jurisdiction to decide cases that arise out of monetary transactions. The only exception is when the amount outstanding is over Rs 5 million in which event the jurisdiction to decide such cases are vested in the Commercial High court.⁸ The procedure for the recovery of a debt where the debtor makes default is laid down in the Civil Procedure Code hereinafter referred to as CPC.

II. Debt Recovery (Special Provisions) Act No. 2 of 1990.

This Act was enacted to facilitate the acceleration of recovery of debts by banks. In its long title, the law states “An Act to provide for the regulation of the procedure relating to debt recovery by lending institutions and for matters connected therewith or incidental thereto.” Debt Recovery Act introduced a non-summary procedure as an expedited process with the issuing of Decree Nisi in the first instance. The defendant is required to furnish reasonable and sufficient security for satisfying the decree to continue with the defense. This is to avoid law delays due to the defense wanting to delay the judgments for technical reasons and taking advantage to delay a settlement.

III. Recovery of loans by banks (Special Provision) Act No 4 of 1990 Also known as the Parate Act

This Act gave the right of Parate Execution which was earlier limited to Peoples Bank, Bank of Ceylon and other state owners to all commercial banks and extends this right in respect of both

⁷ Judicature Act 2 of 1978 s.19 discusses the jurisdiction of the District Court. “Every District Court have unlimited original jurisdiction in all civil... matters. Monetary transactions fall under civil action therefore the original jurisdiction for monetary transactions fall under District Courts.

⁸ High Court of the provinces (special provision) Act No 10 of 1996 states “It has jurisdiction to hear civil actions where the cause of action has arisen out of a commercial transaction in which the debt, damage or demand exceeds five million Sri Lankan rupees.”

immovable and movable property. It gives the right to the board of directors of any commercial or other specified banks by resolution in writing to authorize any person to sell by auction any property mortgaged to the said bank and to take possession of such property and thereafter, to manage and maintain such property until all monies due to the bank have been fully paid.⁹

IV. Mortgage Act No 6 of 1949

The current law and procedure under which a financial institution holding a mortgage can realize its security as specified in this Act. This Act reflects principles of Roman-Dutch Law. It specifies the procedure a mortgage bond requires to be executed in relation to movable and immovable property and spells out the recovery action that can be instituted for the enforcement of security by financial institutions. Registration of the mortgage bond, issuing of Lis pendance, auctioning process are few areas included in the Act.

Limitations of a few Debt Recovery Laws and infrastructure.

Some provisions of the substantive and procedural laws as well as the infrastructure for the recovery of debt currently applicable mentioned above require amendments and further clarity for the fulfillment of its objective, few areas of the debt recovery law which contribute to delays and judicial interpretations of its applicability are discussed below.

The Civil Procedure Code (CPC) is one of the main legislations that requires amendment.

Serving of summons to execution of the writ requires to be re-looked at and amended to be in line with modern-day needs. One clear example of same is the Sec 218(f) of the CPC which allows the Garnishee order to be served in seizing the salary only allowing Rs500/- for the expenses. During the time CPC was enacted even though the amount was adequate for day-to-day living, looking at the current cost of living this is an insignificant amount and not sufficient to survive at least for one day. There are occasions when the defendants leave the employment due to same resulting in lending institutions failing to recover the debt after a lengthy legal process.

⁹ Dr Wickramaweerasoriya "the Development of Banking Law in Sri Lanka A Critical Assessment" Economic review April/May 2011 page 25

The Section. 6(2) of the Debt Recovery Act states the conditions which are needed to be fulfilled prior to courts granting of leave however we see judges in lower courts tending to grant leave to defendants allowing to appear and defend the case simply when an affidavit is filed seeking leave to defend. Clarity on prima facie sustainable defenses needs to be mentioned in the statute to avoid such defenses.

Higher court Judicial decisions have always addressed this concern, especially in the cases ***Kiran Atapattu V Pan Asia Bank Limited***¹⁰ It was held that “Section 6(2) does not permit unconditional leave to defend the action. The minimum requirement is the furnishing of security.”

Further in the case ***Metal Packing Ltd and Another V Sampath Bank Limited***¹¹ it was held inter alia the defendants have merely denied Plaintiff’s case. Mere denial is not sufficient when they have failed to respond to the letter of demand sent by plaintiff demanding the said sum. In business matters, in certain circumstances, the failure to reply to a letter amounts to an admission of a claim made therein”

In ***Sunil Ramanayake V. Sampath Bank Ltd.***¹², Wijeyaratne J discussed the ambit of the section 6 of DRA. As; “(1) the defendant shall not appear or show cause against the order unless he obtains leave from the court. Leave to appear and defend must be granted upon the defendant paying into court the sum mentioned in the decree or furnishing reasonable and sufficient security for satisfying the decree. Plaintiffs claim on its merits but merely set out objections of a technical nature. If a defendant is granted leave unconditionally on this type of technicality and evasive denial, then the purpose of this Act will be brought to naught”.

In ***Zubair V. Bank of Ceylon***¹³ ...Court held: ‘In Debt Recovery matters, it would not be correct for the courts to hold against the intention of the legislature on technicalities

Also, according to the Debt Recovery Act, a final decree is also treated as a Writ of Execution; however courts tend to follow the execution procedure of a regular action using the special forms provided in the Civil Procedure Code.

¹⁰ SLR 2005 Vol 2 Page 276

¹¹ SLR 2008 Vol 01 page 356

¹² SLR 1993 Vol 1 page146

¹³ [2000] 2 SLR page 187

This requires to be further elaborated in the Act itself.

Parate Act it is a clear deviation from the Common Law, the exercise of judicial powers, equal protection of the law, the law relating to the procedures and the principles of natural justice. Any debt recovery procedure should seek to balance the interest of both lenders as well as the borrowers. Accordingly, the mortgagee becomes the claimant as well as the judge which empowers and strengthens one party to a transaction, which primarily involves at least two. The Act clearly lacks any provision relating to decision making, there are no restrictions or limitations placed on the financial institution which results in wide discretion for the lending institution in passing the resolution by its board of directors. This is an area that needs to be expanded and amended in the statute to achieve a just and fair outcome.

In an early case, *Mendis V The Ceylon State Mortgage bank*¹⁴ Parate Execution was described as ‘deplorable and harsh remedy’ by the Supreme Court. However, both judges who heard and decided the appeal (Basnayake CJ and Pulle J.) stated ‘the fact that a legislative measure intended to benefit the subject had in its operation, in that case, produced a result which, though not illegal, was revolting to one’s sense of justice and fair play.’ Basnayake CJ, observed: ‘The plaintiff has suffered a cruel fate at the hands of the State lending institution whose aid he sought. No private moneylender would have been permitted by the courts to act in the way the defendant bank had done.’

The recent amendment to the Act by Recovery of Loans by Banks (special provision) Amendment Act No 1 of 2011 brought in a requirement of Rs 5 million as the minimum lending limit to qualify for the board resolution. If the amount of the loan granted is below 5 million, Parate execution is not available to the financial institution. This is considered to be a limitation for the speedy recovery through Parate Action and requires a further amendment to the law.

Further another area where additional amendments to the Act are required is the applicability of the law relating to a mortgagor of the property. The mortgaged property could be seized and sold in terms of the provisions of the Act only where such properties are mortgaged by the persons to whom the loan is granted, it is seen that in instances where the mortgagor has not benefited

¹⁴ (1959) Volume LXI NLR page 385

from the loan but merely guaranteed the loans and provided the mortgage only to secure the guarantees, courts have decided that banks have no recourse to the Act. This limits the financial institution's ability in granting facilities by accepting mortgagors as there is no recourse according to the act on the mortgagors.

In the more recent past courts have interpreted the provisions of the Act in line with the complexity of lending institutions on the modern needs of its debtors. Four landmark cases were decided by the Supreme Court in interpreting the provisions of the Parate Execution Powers.¹⁵ In the **HNB case** the ruling of the Supreme court states as 'These appeals are from orders of the Court of Appeal refusing interim relief in applications for writs of certiorari to quash resolutions of the Boards of Directors of banks authorizing the sale of property mortgaged by guarantors not being to whom loans have been granted that come within the purview of Act No 4 of 1990. Since the impugned resolutions have been made in excess of statutory power the petitioners would be entitled to writs of certiorari to quash the resolutions. The order made by the Court of Appeal refusing interim relief is set aside. Interim relief is granted as prayed for and the Court of Appeal will enter judgment based on proceedings findings.' Majority judgment permitted granting of interim relief as prayed for in the petition of relief and directed the Court of Appeal to enter judgment accordingly.

However, Justice Shirani A Bandaranayake a member of the five bench panel dissented and gave a dissenting judgment. Justice Bandaranayaka referred to the judgment of the Court of Appeal dated 29.10.2003 where it refused to grant interim relief as prayed by the applicant, restraining the respondent banks from taking any step to 'parate execute' the properties connected and staying the sale by the third party (the auctioneer) by public auction. The dissenting judgment was in favor of granting special leave to appeal to the Supreme Court.

There were developments subsequent to this case and in one decided case¹⁶ the first and second respondents who were the managing director and director respectively of Nalin Enterprises Private Limited had mortgaged some of their personal properties with the bank in order to obtain certain banking facilities to

¹⁵ *Chelliah Ramachandran and another V Hatton National Bank (HNB) & 3 others* (S.C. Appeal No 5), *V Anandasiva and 12 others as Petitioners V Hatton National Bank & 3 others* (S.C Appeal No 5), C. Ukwatte and another as Petitioners Vs DFCC Bank (S.C.Spl.LA No 31/2004), *M. Karunawathie and 5 others V DFCC Bank and another* (S.C.Spl.LA No 32/2004)

¹⁶ *Hatton National Bank V Samathapala Jayawardene, Peththa Thantrige Ariyawathie Jayawardene and another* -SLR (2007) Vol 1 page 181

the said company. The company has failed in making payments to the bank as per the agreements. The bank has adopted a resolution to sell the properties in terms of Section 04 of the Act. At this stage, the plaintiffs–respondents urged that in terms of the judgment in the case of *Ramachandra and others V Hatton National Bank*¹⁷ property mortgaged by a third party who is not a borrower cannot be sold by way of Parate execution.

The Supreme Court lifting the corporate veil, in this case, stated that the first and second respondents, being the managing directors and a director of the said company could not distance themselves from the company as they have benefited from the facilities made available to the company. Directors will not be able to seek compensation under the aforesaid landmark case.

Lack of provision in the Mortgage Act in relation to interim action relating to perishable movable assets such as stocks is an area that requires amendments to the Act. Even if the lending institution is made aware of the debtor misusing the stocks and changing its form the lending institutions are not able to bring in an interim relief.

Also, Mortgage (Amendment) Act No 3 of 1990 deals with the renunciation of the mortgagor which in effect the mortgagor agrees with the lending institution to hold other property and make them liable to be sold in execution of a decree in an action upon the mortgage (he renounces benefits given by s.46) There is confusion arising out of the above provision as it has not elaborated whether the other properties of the mortgagor can be held and created more complication in law. Thus, it is another section of the Act that requires further clarification.

Practical difficulties in applying the Debt recovery laws in Sri Lanka

Sri Lanka has enacted several legislations on debt recovery and has taken steps in amending the legislation to suit the needs of the country from time to time. Amidst these enactments and amendments still, debt recovery is an area where delay in laws has become acute. There are lacunas seen especially when these laws are implemented. This results in the judicial process relating to debt recovery taking over a decade for a conclusion via the judicial system. The inadequacy of the provisions of laws and the lack of knowledge of the judiciary

¹⁷ (2006) 1 Sri L.R. 393 at page 399,

in understanding the scope of the law relating to debt recovery law are the main contributors to these delays, Further reluctance of the judiciary in taking bold decisions in overlooking the technicalities to achieve the objective of the statutes mainly contributes to the law delays in lower courts.

Insufficient remuneration for the court staff resulting in them engaging in bribery and corruption and intentionally delaying the court procedure and no proper disciplinary code to punish those who are found guilty of such acts also contribute to the delays. The unavailability of punishment for a legal professional who intentionally acts in a manner to defeat the object of the statute by delaying the litigation is evident. Infrastructure inadequacies such as legal loopholes in enacted legislature, limited courtroom with no special allocation for this form of debt recovery action, shortcomings of court record rooms resulting in misplacement of court records, no proper code of ethics for court officials are a few other reasons for the court delays.

As aforementioned delays and inefficiencies negatively impact the banks and other lending institutions as they are compelled to incur high costs in recovering the debts. Borrowers at times intentionally delay the legal process as a measure of delaying the repayment. Some other borrowers who are honestly struggling to pay due to loss of income are also affected as they are forced to engage in long legal battles while spending additional money on lawyers and law firms as there is very limited legal infrastructure available in Sri Lanka for quasi-judicial settlements through tribunals or alternate settlement methodologies.

Finally, the economy of the country is impacted as the debt recovery inefficiencies result in banks struggling to recover the lending resulting in higher non-performing loans (NPL) lower credit availability, and lower profitability, which negatively impacts the country's economy. In the current financial environment, the stability of the banking industry is vital for the economic development of the country and recovering debts and reducing non-performing loans is of utmost importance. Therefore, improving this situation is vital and urgent for the banking industry and the economy.

Recommendations to enhance the effectiveness of Debt Recovery laws and their infrastructure.

It is imperative that there be a substantial improvement in the effectiveness

and delays in the litigation process relating to debt recovery in this respect amendments to the current substantive and procedural laws as well as infrastructural changes are affected as an urgent need. A few common recommendations for the same are mentioned below.

Summons to be served by the postman and acknowledgment in form of a postcard to be filled and given to the postman. The office of Fiscal is one of the most corrupt institutions in the administration of justice which causes significant delays for the court system, therefore serving of summons/ notice to be made using other means abolishing the fiscal intervention during the debt recovery process.

Better disciplinary measures to be introduced for court officials (for example fiscals, record keepers, registrars and other administrative staff). Along with a Code of Ethics introduced which outlaws the acceptance of bribes and corruption. Gifts and Entertainment policies should be implemented to record all benefits received by the court officials and checked by superiors.

Incentive schemes for court officials should be implemented so that these officials will refrain from accepting bribes and other unlawful payments as a quid pro quo for implementing the court process.

In relation to claims up to Rs. 1,000,000/- it may be appropriate to consider an alternative dispute resolution process. At present times Sri Lanka has a system of mediation boards¹⁸. For the more effective resolutions of small claims up to Rs. 1,000,000/= it may be worth exploring implementing a system of mediation which have been quite effective in jurisdictions such as USA¹⁹, Singapore²⁰ and Hong Kong²¹ It may also be appropriate to have a system of Small Claims Tribunals²² similar to such tribunal's operating in Hong Kong.

To overcome the long delays in deciding cases it is recommended that in the District Courts there should be two court sittings, one in the morning and the

¹⁸ Mediation Board Act no 72 of 1988 amended by Act No 9 of 2016.

¹⁹ U.S.A has established court ordered and court sponsored mediation systems under some of its mediation is mandatory Ten states of Columbia have adopted uniform Mediation Act and each state has made its own laws for mediation. Some US jurisdiction have had procedures that allow for the conversion of a settlement agreement in to an arbitral award.

²⁰ Singapore set up the mediation centre in 1997.

²¹ HK SAR has done judicial procedure reforms emphasizing use of mediation for settlement of disputes. The mediation centre of HK

²² Small claims tribunal rules Honk Kong (Cap 338 S.36)

other in the afternoon presided over by two different judges. The long delay in the backlog of cases can also be reduced if the Judicial Service Commission gives a direction to the District judges not to give long dates when re-fixing cases.

Training, especially for judges deciding debt recovery cases, could be undertaken by the Judges' Institute²³ experts and specialists in both commercial transactions and debt recovery can be invited to give lectures to enhance the knowledge of the judicial officers.

The substantive law was drafted to eliminate the delays of the law and prevent the debtors from using the loopholes in the law to create delays in court. The amendments to the initial enactment have clarified most of the unclear areas and reduced the minimum value for filing an action. Judiciary has also in certain cases stood by the essence of the law and made judgments accordingly. This is more seen in decisions of the higher court. A recommendation would be to educate all judicial officers on the importance of this law and its applications and to train the court officials in the practical application of the law. This would reduce the cases filed under this action being routed to the regular activities such as the defendant being allowed to answer the plaint without showing proper cause or on a technical defect of the plaint being used as a ground to grant leave to proceed.

Conclusion

Debt recovery remains a major concern faced by the Banking industry. Due to the inefficiencies of the legal systems, the resolution of disputes takes many years, sometimes over two decades. This results in banks struggling to recover the dues it owes from their customers, which in turn disturbs the credit cycle in a bank Sri Lanka being a developing country that is also classified as a lower-middle-income country has a gross domestic product (GDP) of USD 80.71²⁴ in 2020 according to World Bank data. Moreover, Sri Lankan NPL Ratio²⁵ stood at 4.9% in Dec 2020, compared to 4.7% in the

²³ Judges Institute in Sri Lanka was established by Act 46 of 1985. The management consists of 5 members including the Hon. Chief justice and two supreme court judges appointed by the President. The provisions to this institute are allocated by the ministry.

²⁴ Central Bank of Sri Lanka "National Accounts"< www.cbsl.lk>accessed on 20 March 2022

²⁵ Non-performing loan is a bank loan that is subject to late repayment or is unlikely to be repaid by the borrower in full.

previous year. This shows the importance of the stability of the banking industry and the need for the control of the NPLs.

Proper credit evaluation and an efficient debt recovery process are the main tools in controlling the NPL ratios of the banking industry and thus this paper was done to discuss in detail the legal reforms required for the effective operation of the Debt recovery in Sri Lanka in the form of substantive as well as procedural law reforms along with the change of infrastructure, the mindset of the organizations as well as practitioners of law. These changes are paramount in achieving proper control of the none performing loans (NPL) of the banking industry which enables the positive development of the country's economy.



Seen but not Addressed: Inefficacy of the Present Legal Framework on Invasive Alien Plant Species in the Face of Looming Biodiversity Extinction in Sri Lanka

Tharushi Gamage¹

Abstract

Invasive Alien Plant Species (IAPS) are non-native plants, introduced deliberately or unintentionally outside their natural habitats where they become established, proliferate, and spread, presumably at the expense of indigenous species causing significant harm to the biodiversity of a country. The distribution of IAPS is reckoned to be one of the major drivers of biodiversity loss and native species extinction and endangerment in the world, second only to direct habitat destruction. Sri Lanka being one of the 36 global bio diversity hotspots, is now at a high risk of deterioration of its habitat quality due to IAPS, which will ultimately end up affecting the long-term survival of the island endemic. In such a context, this paper attempts to evaluate Sri Lanka's efforts at controlling and managing the spread of IAPS through legislation while emphasizing how the many sectoral policies and obsolete legislations touching on IAPS remain unclear, disjointed, and largely unenforced in the present. The paper further aims to evaluate the effectiveness of existing legal frameworks on IAPS in India and Nepal, drawing necessary attention to relevant International Standards as well. On a conclusive note, the paper proposes that a well-coordinated institutional mechanism for effective control of IAPS in the country is urgently needed.

Keywords: *Loss of Biodiversity, Invasive Alien Plant Species, Water Hyacinth Ordinance, Plant Protection Act, Invasive Alien Species Act*

¹LL.B (Colombo)

1. Introduction

Invasive Alien Plant Species (IAPS) are non-native plants, introduced deliberately or unintentionally outside their natural habitats where they become established, proliferate and spread, presumably at the expense of indigenous species causing notable damage to bio diversity.² They have increased drastically over the past few decades, spreading leads to the homogenization of urban flora, and altering the genetic diversity. More than 38 plant species appear to have become dominant and invasive, causing a significant threat to the native biota of Sri Lanka while greatly impacting the agro-ecosystem of the country as well³. They have been mostly introduced to Sri Lanka by the lucrative trade of ornamental and aquatic plants⁴. As of now, Horton Plains National Park is overrun with common gorse (*Ulex europaeus*) while forests and other sub montane have been invaded by autograph tree (*Clusia rosea*) and wet zone marshes by water hyacinth (*Eichhornia crassipes*) and Giant Salvinia (*Salvinia molesta*). Bundala National Park, a wetland of international importance under the Ramsar Convention has now been invaded by *Kalapu Andara*⁵.

Under the Constitution of Sri Lanka,⁶ government⁷ as well as every person⁸ should protect nature and conserve its riches. Keeping in line with the Constitutional directives and the International Conventions that the country has been a signatory, it is the duty of the responsible stakeholders to enforce the law effectively. Several legislations have been enacted to govern the entry and spread of IAPS, yet remain woefully inadequate and obsolete⁹.

This paper, therefore, has been compiled with the intention of identifying the key legal instruments and policies which address the issue of Invasive Alien

² Robert Bartz, Ingo Kowarik, 'Assessing the Environmental Impacts of Invasive Alien Plants: A Review of Assessment Approaches' (Neobiota, 15 March 2019) 69.

³ Kalyani Prematilleke, Sudheera Ranwala, Lian Jenna Wong and Shyama Pagad 'Global Register of Introduced and Invasive Species, Sri Lanka - Version 2.7, Invasive Species Specialist Group ISSG. Checklist Dataset' (GBIF, 21 October 2020) <<https://doi.org/10.15468/hv9zht>> accessed 15 February 2022.

⁴ Sayuni Maskorala, 'Unnoticed and Untracked' *Ceylon Today* (Sri Lanka, 24 October 2020) <<https://ceylontoday.lk/news/unnoticed-and-untracked>> accessed 15 February 2022.

⁵ Andrea Egan, Shyara Bastiansz, 'Alien invasion: Protecting biodiversity by controlling invasive species in SL' (The GEF, 17 July 2017) <<https://www.thegef.org/news/alien-invasion-protecting-biodiversity-controlling-invasive-species-sri-lanka>> accessed 15 February 2022.

⁶ The Constitution of The Democratic Socialist Republic of Sri Lanka, 1978.

⁷ *ibid*: art. 27(14)- State shall protect, preserve and improve the environment for the benefit of the community.

⁸ (n 7) art. 28(f)- Fundamental Duty of every person in Sri Lanka to protect nature and conserve its riches.

⁹ M Kurukulasuriya *et al*, 'Invasive Alien Fauna in Sri Lanka: National List, impacts and regulatory Framework'.

Plants while assessing whether such provisions are adequate for the effective management of IAPS. The paper also briefly discusses the effectiveness of existing legal frameworks in different South Asian Countries (India and Nepal) while drawing sufficient focus on the relevant International Standards as well. The paper concludes by proposing several recommendations to ensure the productive management of IAPS and to counter their increasing toll on natural resources and society.

1.1. Plant Protection Act No. 35 of 1999

The main legal enactment that has directly assisted in eradicating and controlling the entry and spread of IAPS in Sri Lanka is the Plant Protection Act No.35 of 1999, which came into force by repealing the preceding Plant Protection Ordinance of 1905¹⁰. Several provisions have been incorporated to prevent the entry of any organism that may become a pest or invasive, or potential threat to the plant life. The term “organism” has been defined under the Act to encompass plants, while pests have been broadly defined to include weeds¹¹.

In terms of Section 12(2) of the Act, the Minister may make regulations for restricting or prohibiting the importation into Sri Lanka of any plant, plant products and for restricting or prohibiting the entry points at which they may be landed¹². When the Director General of Agriculture has reasons to believe that a pest is being harbored on any premises, he can direct officials to inspect the premises and order to take action to eradicate it¹³.

Notwithstanding the repeal of the Plant Protection Ordinance, every regulation made under the repealed Ordinance will be in force as long as it is consistent with the provisions of this Act¹⁴. One such regulation is the Gazette notification made under the Plant Protection Ordinance to prohibit the importation of any aquatic plant into the country¹⁵.

Furthermore, any person without lawful authority or excuse who contravenes any provision of this Act or any regulation made thereunder shall be guilty

¹⁰ Buddhi Marambe, ‘Invasive alien fauna in Sri Lanka: National list, impacts and regulatory framework’ 448.

¹¹ Plant Protection Act No.35 of 1999, s 15.

¹² (n 17) s 12(2) (b).

¹³ (n 17) s 4(1); s 4(2).

¹⁴ (n 17) s 13(2).

¹⁵ Gazette Notification No.165/2 dates 02 November 1981.

of an offence under this Act¹⁶. Such person who is found guilty of an offence shall be liable on conviction before a Magistrate to imprisonment of either description to a term not less than one month and not exceeding six months or to a fine not less than ten thousand rupees and not exceeding one hundred thousand rupees, or to both such fine and imprisonment¹⁷.

Regardless of these provisions, several traders who are driven by commercial avarice are often seen continuing illegal methods in importing such plants to the country unbeknownst to the government. Such violations need to be addressed through a central framework that is receptive to detecting and conducting pre-risk assessments and post-risk assessments for restricted ornamental plants, presumably under a revised and upgraded enactment. However, this Act lacks provisions to deal with a species that has already been brought into the country legally, but is potentially invasive or has already become invasive¹⁸.

1.2. Water Hyacinth Ordinance No.09 of 1909

Water Hyacinth (*Japan Jabara*) was introduced to Sri Lanka, owing to its horticultural value. A few years after its deliberate introduction, Water Hyacinth Ordinance was enacted in 1907, indicating the possible long-term detrimental effects of IAPS¹⁹. The Ordinance clearly stipulates a prohibition on importation or possession of water hyacinth while imposing a further duty on the landowners to destroy the plant growing on any property belonging to them²⁰.

The Ordinance enables to declare any other noxious plant or weed to come under the purview of this enactment by an order made by the Minister in charge of Agriculture²¹. Such declaration would make it illegal to import any such plant, seeds, or other parts. When an order is made declaring a plant under this Ordinance, the Customs Department can destroy such plants if detected during importation²². This Ordinance introduces a simple yet effective way to deal with any real or potential invasive that is already in Sri

¹⁶ (n 17) s 10(1).

¹⁷ (n 17) s 10(2).

¹⁸ JAI Kumarasinghe, 'Silent Threat to Sri Lanka's Biodiversity: Laws relating to Invasive Alien Species' (KDU Law Journal 2017).

¹⁹ Buddhi Marambe, *et al.* "Human dimensions of invasive alien species in Sri Lanka" *The Great Reshuffling: Human Dimensions of Invasive Alien Species*. IUCN, Cambridge (2001) 135-144.

²⁰ Water Hyacinth Ordinance No.09 of 1909, s (3), s (4).

²¹ (n 12) s 7(1); s 7(2).

²² (n 12) s 6.

Lanka or is likely to be imported to the country²³. However, the Ordinance is archaic and remains unrevised.

1.3. Fisheries and Aquatic Resources Act No.02 of 1996

This Act intends to provide for the management, regulation, conservation and development of the fisheries and aquatic resources of Sri Lanka²⁴. The Minister in charge of the subject of Fisheries and Aquatic Resources, in consultation with the Minister in charge of the subject of Trade, can prohibit or regulate the import of any aquatic resource into Sri Lanka by regulations²⁵. The term “aquatic resources” has been broadly defined to include aquatic flora as well and thereby conceivably allowing the Act to regulate the entry of IAPS into the country as aquatic plants.

It appears that these legislative enactments provide considerable legal support to act against the introduction of IAPS. Nonetheless, the interests and scopes of these enactments are inadequate and do not meet the total requirement of acting against IAPS²⁶. The present laws are sectoral in nature and thus can be used only in relation to specific types of invasive plants.

1.4. The Prevention of Mosquito Breeding Act No.11 of 2007

This Act provides provisions for the prevention of mosquito breeding, for the eradication of places of mosquito breeding and for connected matters. Pursuant to its sections, it is the obligation of the proprietor or occupier of any premises to remove shrubs and undergrowth, other than those grown for food or ornamental purposes, that have become a breeding place for mosquitoes²⁷. Correspondingly, the owner or occupier of any premises must remove and destroy Water Lettuce (*Pistia stratiotes*) and any other water plant or other plants which may facilitate the breeding of mosquitoes.²⁸ According to Section 3(1)(g), the Competent Authority can, by written notice, order the removal of any plant that affords breeding conditions to mosquitoes or the Water Lettuce to be destroyed. Thus, it appears that this Act could be used to destroy any of

²³ Buddhi Marambe and Jagath Gunawardene, 'Institutional Coordination, Legal Regime and Policy Framework for Management of Invasive Alien Species in Sri Lanka' *Invasive Alien Species - Strengthening Capacity to Control Introduction and Spread in Sri Lanka* (2010) 63-76.

²⁴ Fisheries and Aquatic Resources Act No.02 of 1996, Preamble.

²⁵ (n 25) s 30.

²⁶ (n 15).

²⁷ The Prevention of Mosquito Breeding Act No. 11 of 2007, s 2(g).

²⁸ *ibid* s 2(h).

the invasive plants that have been found to be conducive to the breeding of mosquitoes.

1.5. Invasive Alien Species Act 2021 and Other Policies

Considering the importance of implementing relevant legal instruments to manage IAPS, a bill entitled Invasive Alien Species Act 2021 will be introduced soon and the new draft bill will include a risk assessment mechanism which will be conducted when introducing foreign plants to the country²⁹.

Similarly, under the National Environment Policy 2003, environmental management systems are encouraged to be flexible so as to adapt to changing situations including invasive species³⁰. It also identifies that, effective measures must be adopted to guard the entry into Sri Lanka of noxious, invasive species (of plants, animals and micro-organisms) and environmentally harmful genetically modified organisms in order to conserve the biodiversity within the country.

2. International Regulatory Framework on IAPS

The Convention on Biological Diversity (CBD) is the only global instrument to provide a comprehensive basis for measures protecting all components of biodiversity against those non-native species that are invasive, by calling on member governments to prevent the introducing, controlling or eradicating those which threaten ecosystems, habitats or species³¹. Sri Lanka being a signatory to CBD is directly obliged to establish and maintain means to regulate, manage or control the risks entailing the introduction of IAPS³².

Furthermore, the International Plant Protection Convention is aimed at taking action to prevent the spread and introduction of pests of plants and plant products and to promote appropriate measures to control them³³. Resolution VIII/18 (invasive species and wetlands) adopted under Ramsar Convention also urges State Parties to address the problems posed by IAS in wetland ecosystems

²⁹ Hiranyada Dewasairi, 'New Act to stop Invasive Plants' *Sunday Morning* (Sri Lanka, 29 December 2020) <<https://www.themorning.lk/new-act-to-stop-invasive-plants/>> accessed 17 February 2022.

³⁰ National Environmental Policy and Strategies (Ministry of Environment and Natural Resources, 2003).

³¹ CBD, art. 8(h).

³² Bhagya Jayarathne, Sudheera Ranwala, 'Research on Invasive Alien Plants in Sri Lanka: An Analysis of Past Work' (2010).

³³ C Shine, 'Invasive species in an international context: IPPC, CBD, European Strategy on Invasive Alien Species and other legal instruments' <<https://onlinelibrary.wiley.com/doi/10.1111/j.1365-2338.2007.01087>> accessed 15 February 2022.

in a decisive and holistic manner³⁴. Even under United Nations Convention on the Law of the Sea, Parties are required to prevent, reduce or control the pollution of the marine environment resulting from the intentional or accidental introduction of non-native species to a particular part of the marine environment, leading to significant and harmful damages thereto³⁵.

2.1. Regulatory Frameworks governing IAPS in other South Asian Countries

(a) India

In recent years, the number of invasive species and their abundance in other South Asian countries such as India and Nepal have been increasing rapidly. India being one of the “megadiverse” with a diversity of ecological habitats,³⁶ has now identified over 80 IAPS in the country³⁷. Invasive growth of grass *Paspalum distichum* has changed the ecological character of large areas of Keoladeo National Park reducing its suitability for certain waterbird species including the Siberian Crane. Similar occurrences have been reported from Kanjli wetlands and Ropar wetlands³⁸.

The threat of IAPS gaining entry into India is being addressed under the Destructive Insects and Pests Act 1914 and the Plant Quarantine (Regulation of Import into India) Order, 2003, which calls for the prohibition on import of commodities with contamination of weed/alien species³⁹. However, the increasing number of new incursions into the country indicate that the current biosecurity regulations are either not implemented properly or they lack proper provisions to prevent invasions⁴⁰.

(b) Nepal

Lying at the cross-road of six floristic provinces of Asia, Nepal is no different from India⁴¹. There are 219 species of alien flowering plants native to Nepal,

³⁴ (n 3).

³⁵ UNCLOS, art.196.

³⁶ Convention on Biological Diversity. (2005) “India’s Third National Report”.

³⁷ Achyut Kumar Banerjee, ‘We know the problem of Alien Invasive Species but are we doing enough to solve it’ (Monogbay, 4 August 2021) <<https://india.mongabay.com/2021/08/commentary-we-know-the-problem-of-alien-invasive-species-but-are-we-doing-enough-to-solve-it/>> accessed 15 February 2022.

³⁸ The Ramsar Convention on Wetlands (2006) “The annotated Ramsar List: India.”

³⁹ Plant Quarantine Order 2003, Schedule VIII.

⁴⁰ Kavita Gupta and KV Sankaran, ‘Forest Biosecurity System and Processes: An Indian Perspective’ (Frontiers for Global Change, 30 September 2021).

⁴¹ Bharat Babu Shrestha “Invasive Alien Plants in Nepal’ (ResearchGate, March 2016).<https://www.researchgate.net/publication/298058333_Invasive_Alien_Plant_Species_in_Nepal> accessed 15 February 2022.

26 of which have been reported to be invasive with negative environmental impacts, including agricultural production⁴². Case studies have shown that the impacts of IAPS in Nepal, range from habitat degradation to endangered wildlife⁴³. 44% of the habitat of endangered one-horned Rhinoceros in Chitwan National Park has been negatively affected by *Mikania micrantha* by suppressing regeneration of trees⁴⁴. The country has established many sectorial legislations including Plant Protection Act of 1972; Aquatic Life Protection Act of 1961; Seed Act of 1988; Water resource act of 1992; The Forest Act of 1993, and the National Parks Agro biodiversity Policy 2008 to regulate and eliminate invasive species of germs, pests and weeds in crops⁴⁵.

Regardless of the numerous provisions stipulated under the Plant Protection Act of 2007 to regulate the import of plants, other pertinent national Acts remain silent on the issue⁴⁶. Accordingly, the absence of a dedicated legislative and institutional framework is apparent to be seen as a major cause in aggravating the problem.

Relatedly, the Seed Act of 1988 in Nepal also developed a National Seeds Board to implement policies relating to the seeds and to provide necessary assistance to the Government of Nepal to deal with the introduction of grasses/ forage seeds⁴⁷. Nonetheless, the act does not seem to address issues in relation to seeds which could be invasive in foreign soils, thus making the said Act silent on the adverse impact of IAS.

3. Recommendations and Conclusion

Although the National Policy, Strategies and Action Plan on IAS in Sri Lanka, emphasizes the need to establish effective legislation to address the issue of IAPS, the existing legal setup working on IAPS in isolation will not assist

⁴² Tiwari Sagendra *et al.* 'An Inventory and Assessment of Invasive Alien Plant Species of Nepal. IUCN-The World Conservation Union, Nepal' (2005).

⁴³ *Ibid.*

⁴⁴ Binu Timsina, Bharat Babu Shrestha *et al.*, 'Impact of *Parthenium hysterophorus* L. invasion on plant species composition and soil properties of grassland communities in Nepal' (Science Direct, 2011) *Flora* 206: 233–240.

⁴⁵ Kabita Kumari Shah *et al.*, 'Invasive Alien Plant Species: A Threat to Biodiversity and Agriculture in Nepal' (2020).

⁴⁶ Mohan Siwakoti, Bharat Babu Shrestha, (2014) 'An overview of legal instruments to manage invasive alien species in Nepal. In: *Proceedings of the International Conference on Invasive Alien Species Management*.

⁴⁷ (n 39) 280.

the country's aim⁴⁸. Presently, different legislations look into the issue on a sectoral basis, and some invasive species do not garner due consideration. Therefore, it is necessary to adopt a new enactment to deal with invasive species with one focal point that can coordinate, facilitate and strengthen the role of the different institutions while making periodical revision of such legislation mandatory⁴⁹. Further, the law must be broadened to encompass different types of harmful species including; those that are poisonous and have other possible detrimental effects on people and the environment⁵⁰.

One of the most significant barriers to the policy development and implementation on IAPS has been the lack of public awareness of the causes and consequences of such biological invasions. The knowledge base of IAPS appears to be rather meager and limited in the Sri Lankan context. However, the European Union has already acknowledged the active involvement of citizens in contributing to the successful implementation of the IAPS management. In accordance with the EU Regulation 1143/2014,⁵¹ citizens of European countries are encouraged to report sightings of Invasive Alien Species through the "Invasive Alien Species in Europe" smartphone App. The reported observations are validated by experts of the European Alien Species Information Network (EASIN) and are made available through the EASIN species occurrence maps⁵². This method has been proved to be effective in promoting people's engagement in IAPS management and countering their increasing toll on natural resources and society⁵³.

Furthermore, the responsible authorities in Sri Lanka must be vigilant in taking appropriate measures in preventing the entry of IAPS through the newly emerging threat of ornamental and aquatic plant trade. A central framework must be created to function in a more coordinated way to rapidly respond to detecting banned aquatic plants and conducting pre-risk

⁴⁸ Voluntary Peer Review of The Revision and Implementation of The National Biodiversity Strategic Action Plan 2016-2022 of Sri Lanka.

⁴⁹ Devaka Weerakoon, Siril Wijesundara, 'Invasive Alien Species – Strengthening Capacity to control Introduction and Spread in Sri Lanka (Biodiversity Secretariat, Ministry of Environment 2010).

⁵⁰ K Gupta, 'Role of Regulatory Measures in controlling spread of plant pests' (CBS Publishers 2005).

⁵¹ Regulation (EU) 1143/2014 on Invasive Alien Species, entered into force on 1 January 2015.

⁵² European Alien Species Information Network (European Commission, 2022). <<https://easin.jrc.ec.europa.eu/easin/CitizenScience/BecomeACitizen>> accessed 19 February 2022.

⁵³ Report from the Commission to the European Parliament and the Council on Review of the application of Regulation (EU) 1143/2014 on Invasive Alien Species (2021). <https://ec.europa.eu/environment/pdf/nature/invasive_alien_species_implementation_report.pdf> accessed 17 February 2022.

assessments and post-risk assessments for restricted ornamental plants to minimize threat levels.

In conclusion, it must be the duty of the Sri Lankan government to ensure that IAPS prevention, and control are fully incorporated in national legislations and national wetland and biodiversity policies and strategies in Sri Lanka, while applying the Ramsar Guidelines to review the laws and institutions, promoting the conservation and wise use of wetlands⁵⁴. The law should also establish clear institutional accountabilities, comprehensive operational mandates, and effective integration of responsibilities regarding actual and potential threats from IASP while ensuring that such legislation provides for the necessary administrative powers to respond rapidly to emergencies, such as detection of potential IAPS⁵⁵.

⁵⁴ Prevention and Management of Invasive Alien Species: Proceedings of a workshop on Forging Cooperation throughout South and Southeast Asia (2003).

⁵⁵ IUCN Guidelines <<https://www.iucn.org/theme/species/publications/guidelines>> accessed on 15 February 2022.



Emerging Challenges in Regulating E-Commerce: The Sri Lankan Context

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Abstract

The development of IT regime has significantly contributed to the transformation of traditional approaches towards the digitalized regime. Commercial engagements are not an exception on this regard. The e-commerce transactions are steadily growing in the modern world. The growth of e-commerce in Sri Lanka is posing significant legal and regulatory challenges. The paper attempts to study and highlight deficiencies in the present legal frameworks regulating e-commerce in Sri Lanka. Content analysis of Electronic Transaction Act No.19 of 2006 (as amended) and other relevant legislations revealed, the existing framework recognizes e-contract, e-signature, and e-documents. Still, certain drawbacks are unsettled in practice. In addition, areas like privacy and data protection, intermediary liability, security, and consumer protection are left unaddressed in the current regulatory frameworks. This study primarily intends to explore the pros and cons of the Legal Framework of Sri Lanka related to the electronic commerce regime. Further, the paper approaches international standards as a comparative perspective, finally the paper suggests key suggestions for policy and decision-makers to overcome challenges and strengthen the framework.

Keywords: *E-Commerce, Electronic Transaction Act, Sri Lanka.*

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Introduction

The advent of 'Information and Communication Technology' has an effect on almost all the spheres of human life and buying and selling of goods and services is not an exception to it. Electronic Commerce (E-Commerce) has gained popularity over traditional commerce because it offers versatility and advantages to businesses and customers. It can be simply defined as, 'the buying and selling of goods and services over the internet'. E-Commerce has transformed the traditional market into a digital market and the global business community is rapidly moving among Business-to-Business (B2B), Business-to-Consumer (B2C), and Consumer- to- Consumer (C2C) transactions².

Consumers of e-commerce have increased steadily since 2010 all over the world. In 2019, retail e-commerce sales worldwide amounted to 3.53 trillion US dollars and e-retail revenues are projected to grow to 6.54 trillion US dollars in 2022³. In Sri Lanka also, E-Commerce has been witnessed consistent growth. As Visa International suggested in 2018, the Sri Lankan e-commerce regime had significant growth of 34% for one year, as of July 2018⁴ and it's been expected that the Annual domestic e-commerce sales value is expected to grow up to \$400 million by 2022⁵.

Furthermore, due to the rapid growth in the e-commerce industry, many Sri Lankan businesses have converted their physical business platform to an online platform. For example, when considering the online shopping in 'Daraz', out of the total online shoppers in Sri Lanka, 85%⁶ claim to have

² Abdul Gaffar Khan (2016) ;, 'Electronic Commerce: A Study on Benefits and Challenges in an Emerging Economy', Global Journal of Management and Business Research: B Economics and Commerce Volume 16 Issue 1 Version 1.0 Year 2016, Pp.20

³ [online] Available: <https://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/>

⁴ Daily News, 'Sri Lanka's e-commerce segment records 34% growth' (Daily News.lk, 26 November 2018) [online] Available:<https://www.dailynews.lk/2018/11/26/business/169414/%E2%80%98sri-lanka%E2%80%99s-e-commerce-segment-records-34-growth%E2%80%99> [Accessed on 9 June 2021].

⁵ Daily News, 'SL e-commerce to hit US\$ 400 mn by 2022', 7 September 2018

⁶ AdaderanaBiz; 'The trends and growth of Sri Lanka's e-commerce industry: an overview of Daraz e-commerce Index'; [online] Available:<http://bizenglish.adaderana.lk/the-trends-and-growth-of-sri-lankas-e-commerce-index/> [Accessed on 9 June 2021].

shopped on 'Daraz'⁷. Furthermore, domestic e-commerce websites⁸ have established global partnerships that accommodate the import of goods through websites to supply to the domestic market. For Example, 'Alibaba' bought the entire share capital of Rocket's South Asian e-commerce platform⁹.

Despite the development of e-commerce worldwide, it is always coupled with more challenges than a traditional commercial transaction due to the complex feature of the internet and e-commerce¹⁰. In addition, as cyberspace facilitates commercial transactions worldwide, the number of cross-border disputes has also increased¹¹. Due to these emerging challenges, many countries are grappling with finding effective mechanisms in regulating e-commerce regimes.

In recent times, global attention was drawn in making separate guidelines and policies for regulating e-commerce. Several threats, including information disclosure, online privacy, payment security, online fraud, and many more similar issues, have penetrated the digital sphere. In Sri Lanka, Electronic Transactions Act No.19 of 2006 (as amended) is the primary piece of legislation regulating the e-commerce sphere along with few other Laws¹². Though the Electronic Transactions Act was drafted with the international standards laid down by the UNCITRAL Model Law, many practical drawbacks were experienced in the last fifteen (15) years.

The paper primarily aims to critically analyze the emerging challenges to the Sri Lankan e-commerce regime and the adequacy of Legal responses in countering them. In doing so, the study inspects the Sri Lankan legal

⁷ The Western province owns the largest online order share with 50% whilst Central and North Western provinces follow with 10% and 9% order shares respectively. Colombo and Gampaha lead the District wise order share with 31% in the former and 15% in the latter. [online] Available at: <http://bizenglish.adaderana.lk/the-trends-and-growth-of-sri-lankas-e-commerce-industry-an-overview-of-daraz-e-commerce-index/> [Accessed 23 July. 2021].

⁸ Domestic e-commerce market is estimated to be around USD 40-7- million and is expected to grow by 3 percent in the near future. See Supra note 36.

⁹ See Supra note 36.

¹⁰ B.A.R. Ruwanthika Ariyaratna(2019), 'Are Consumers Safe in Online? A Critical Analysis of Sri Lankan Legal Regime on Online Consumer Protection'; The Junior Bar Law Journal (2019) ; Pp. 3-4.

¹¹ Aura Esther Vilalta (2011); 'ODR and E-Commerce'; Online Dispute Resolution Theory and Practice; Eleven International Publishing; Pp.125-126.

¹² Computer Crimes Act No. 24 of 2007; Consumers Affairs Authority Act No.9 of 2003 (CAAA); Unfair Contract Terms Act, No. 26 of 1997 (UCTA) ; Payment and Settlement Systems Act, No. 28 of 2005 and the Payment Devices Frauds Act, No. 30 of 2006.

frameworks that regulate the e-commerce sphere and examines to what extent the framework is effective in practice. Further, it explores the International standards and developments in facilitating electronic commerce, including international conventions. Finally, the objective of the paper is to suggest feasible recommendations for an effective legal framework that enables access, performance, and dispute resolution of e-commerce through a domestic legal framework.

1. International Legal Frameworks on E-Commerce

1.1 UNCITRAL model law on E-Commerce (1996).

The Information Technology regime compelled the nations to reform their Laws following the trends and challenges of the digital sphere. That includes the validity, enforceability, and admissibility of the electronic data messages¹³. Due to the challenges, nations have amended or supplemented existing laws to address these issues and facilitate the electronic commerce regime. Such upgrade encouraged enabling the use of paperless communication and fostering efficiency in international trade¹⁴.

The international frameworks and harmonization are essential in e-commerce due to the nature of the internet and e-contracts, frequently flowing cross-border. In achieving that, the initiatives of the United Nations Commission on International Trade Law (UNCITRAL) are remarkable¹⁵. After a series of attempts since 1984, In December 1996, the General Assembly of the United Nations endorsed a model law on electronic commerce developed by the United Nations Commission on International Trade Law (UNCITRAL). The Model Law facilitated e-commerce by prescribing providing a set of internationally acceptable rules to the states and thereby contribute to removing legal obstacles and increasing legal predictability for electronic commerce¹⁶.

The Model Law has been divided into two parts. Part I relates to the general provisions¹⁷ relating to e-commerce, it addresses the three principles of non-discrimination, technological neutrality, and functional equivalence. The Part

¹³ United Nations (2006); 'United Nations Conference on Trade and Development'; Information Economy Report 2006; The Development Perspective; Pp.2-3; [online] Available at: https://unctad.org/system/files/official-document/sdteecb20061ch8_en.pdf [Accessed 03 July. 2021].

¹⁴ *ibid.* Page 299-300.

¹⁵ *Ibid.* Page 5-6.

¹⁶ [online] Available at: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce

¹⁷ Article 1 to 15 of the Model Law; [Accessed 13 July. 2021].

II of the Model Law deals with specific provisions for e-commerce in certain areas. Specifically, it prescribes the instances related to ‘Carriage of Goods’¹⁸. It furnishes and extends the application of the provision in contracts related to the ‘Carriage of Goods’ by specifying different situations¹⁹ and attributability of electronic communications as valid transport document²⁰.

Standards of rules laid down by the UNCITRAL model law are widely accepted and adopted by many member states. As UNESCAP suggested²¹, about Seventy (70) jurisdictions have enacted their national Laws in accordance with the standards of Model Laws. Sri Lanka incorporated the guidelines in the National context in 2006, with the Electronic Transaction Act No.19 of 2006 (as amended)²².

1.2. The UNCITRAL Model Law on Electronic Signatures (MLES) (2001).

Building on the success of the Model Law as a precedent for national law reform, UNCITRAL adopted The Model Law on Electronic Signatures (MLES) in 2001. The model Law primarily intended to enable and facilitate the use of electronic signatures by establishing criteria of technical reliability for the equivalence between electronic and hand-written signatures. Primarily, it addressed the concerns on ‘e-signatures’ on authentication and integrity. In doing that, it proposed to assist States in establishing a modern, harmonized, and fair legislative framework to effectively address the legal treatment of electronic signatures and give certainty to their status²³. In facilitating ‘E-Signatures’, MLES addresses a concern raised in the Model Law on E-Commerce of 1996.

The article 7 of the Model Law on E-Commerce (1996) states,

‘(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:

(a) a method is used to identify that person and to indicate that person’s approval of the information contained in the data message; and

¹⁸ Article 16 and Article 17 of the Model Law.

¹⁹ Article 16 of the Model Law.

²⁰ Article 17 of the Model Law.

²¹ UNESCAP; ‘UNCITRAL legal instruments for e-commerce and paperless trade’; [online] Available at: - https://www.unescap.org/sites/default/files/2_UNCITRAL%20texts%20for%20e-commerce%20and%20paperless%20trade_Luca_1.pdf [Accessed 03 July. 2021].

²² Electronic transactions (amendment) Act, no.25 of 2017.

²³ Article 1 to 12 of Model Law (MLES)

(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.'

The MLES facilitated as a 'subsidiary piece of instrument' laying down specific criteria to be met by a particular form of an electronic signature to achieve the standard as reliable under Article 7. The MLES contributed in setting the standards for the electronic records' requirements of governments and regulatory authorities²⁴. The MLES contains provisions favoring the recognition of foreign electronic signatures based on a principle of substantive equivalence that does not take into account the place of origin²⁵. About Thirty (30) states adopted MLES in their domestic legal framework.

1.3. United Nations Convention on the Use of Electronic Communications in International Contracts (UN ECC) (2005).

The Electronic Communications Convention addresses the issues that remained unsolved even after two UNCITRAL Model Laws discussed above. The convention aims at facilitating the use of electronic communications in international trade by assuring that contracts concluded, and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents²⁶.

It enables cross border paperless trade by:

- i. Validating the legal status of electronic transactions by ensuring functional equivalence of 'writing,' an 'original' document, and 'signature',
- ii. Preventing technology discrimination, enabling cross-border recognition of electronic signatures, and
- iii. Permitting automated message systems all forms of e-contracts with the ability to correct input errors²⁷.

In addition, the convention proposed specific standards and rules that were overlooked by the two model laws. That includes, rules related to

²⁴ Ibid.

²⁵ Jayantha Fernando (2020); 'Digital Transactions & Electronic Transactions Act & UN eCC'; E-Sri Lanka Project.

²⁶ [online] Available at: https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications

²⁷ United Nations Convention on the Use of Electronic Communications in International Contracts (UN ECC); Article 1 and 2.

the 'invitation to make offers' in a contract²⁸, use of automated message systems in the electronic communications²⁹, consequences of 'Input errors' in the automated message systems³⁰, etc.

Sri Lanka took part in the negotiation & drafting of the UN ECC (2001-05). While about Fifteen (15) countries are party to the convention, more than 15 states have enacted the substantive provisions of the Convention domestically³¹. Sri Lanka ratified the convention on 7th July 2015 as the first country in South Asia and the second country after Singapore in Asia and Pacific Region (APEC). It entered into force in Sri Lanka on 1st February 2016. Though the Electronic Transaction act of Sri Lanka is primarily based on the UNCITRAL Model Law of 1996, it was amended in October 2017, following the standard of the Electronic Communications Convention (UN ECC)³².

1.4. Summary.

The complex nature of e-commerce, which has no geographical limitations, compelled the upgrading of the legal systems. Initiatives of the United Nations Commission on International Trade Law (UNCITRAL) resulted in various international instruments that set out minimum standards in the international harmonization of e-commerce laws. Though those laws have no binding force over the states because of their 'Soft' nature, states reformed their legal systems, including Sri Lanka, ensuing those standards.

2. Legal frameworks on e-commerce in Sri Lanka

While e-commerce is remarked as a significant evolution of the business and commercial sectors, due to the unique features and involvement of technology, the wider community realizes the urge for new Laws to regulate the e-commerce sphere. The complexity of the spectrum, particularly on the mode of entering the contracts³³, payment methods, and dispute resolution arising out of e-commerce, are a few genres around which new Laws are required.

²⁸ UN ECC; Article 11.

²⁹ UNECC; Article 12.

³⁰ UNECC; Article 14.

³¹[online] Available at:https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications/status

³² Verite Research Sri Lanka (2019); 'Challenges Faced by Sri Lankan e- Commerce Providers'; Country Update Sri Lanka. Pp.2-3.

³³ Special modes of entering into the contracts prescribed by dialfferent existing Laws. Such as Section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840 (As amended) which mandates Deeds affecting immovable properly should be executed before a notary and witnesses.

Although the technological advancement has been considered in the law making in Sri Lanka, the traditional or classic challenges remain redundant on many occasions. Scholars cite, reluctance of the courts in recognizing intangible rights as 'goods'³⁴, Precedents held intangible things cannot be the subject of theft or misappropriation³⁵ and unwillingness of the court in admitting 'Computer Evidence' in the proceedings³⁶ are few of the drawbacks in the recognition of the electronic commerce in the legal realm. These prompted the Sri Lankan legal system in refining the legal framework towards new laws to regulate the widespread e-commerce evolved with the expansion of the market. In Sri Lanka, the following legal frameworks are relevant in regulating e-commerce transactions.

2.1. Electronic Transaction Act No.19 of 2006 (As amended) (ETA).

The Electronic Transactions Act No.19 of 2006 is based on the standards established by United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce (1996) and Model Law on Electronic Signatures (2001). The Act applies to all business and commercial transactions that are electronic in nature, other than those specific areas that have been excluded by the Act³⁷.

Electronic Transaction Act enacted in Sri Lanka with the prime objectives of,

- i. To facilitate domestic and international electronic commerce by eliminating legal barriers and establishing legal certainty,
- ii. To encourage the use of reliable forms of electronic commerce,
- iii. To facilitate electronic filing of documents with government and to promote efficient delivery of government services by means of reliable forms of electronic communications, and
- iv. To promote public confidence in the authenticity, integrity and reliability of data messages and electronic communications³⁸.

³⁴ Justice Saleem Masroof (2007); E-Commerce & E-Governance Some Pertinent Issues; Bar Association Law Journal [2007] BALJ Vol. XIII at Pp.1.

³⁵ In *Nagaiya v Jayasekera* (28 NLR 467) it was held, 'The Electricity since it's intangible, it's not falling under the purview of the 'Property' to fulfil the 'Theft' as defined in Section 366 of Sri Lankan Penal Code'.

³⁶ Observed in *Benwell v Republic of Sri Lanka* (1978-79) 2 Sri LR 194.

³⁷ Section 23 of the Electronic Transaction Act (ETA) excluded the application of this Act to the wills or other testamentary dispositions, powers-of-attorney, sale or conveyance of immovable property, trusts (excluding constructive, implied, and resulting trusts), Bills of Exchange, telecommunication licenses, etc.

³⁸ ETA; Section 2.

The Act was enacted with VI chapters and twenty-six (26) sections to achieve the objectives mentioned above. Chapter I consisted of the General Provisions, Chapter II recognized the Legal Validity of the data messages and other Forms of e-communication. As a way forward step, Section 7 of the Act provides for the legal recognition of Electronic Signatures. Significantly, Section 7 to Section 10 laid down the foundation towards the Electronic Governance.

Chapter III is relevant to the context of e-commerce as it addresses Electronic Contracts. The Act recognized the legal validity of the e-contracts for the first time in Sri Lanka³⁹ as it stated,

'A contract shall not be denied legal validity or enforceability on the sole ground that it is in electronic form'⁴⁰.

The provision expanded the application of the traditional rules related to the contract into the electronic environment. In applying the traditional rules related to the offer & acceptance and facilitating the application to the different parties to the contract, Provisions⁴¹ of Chapter III established specific rules.

Chapter IV lays-down the rules on Certification Service Providers (CSPs), and Chapter V prescribes Rules on Evidence.

The evidence related to the Contemporaneous Audio and Video Recording⁴² and Computer Evidence⁴³ in Sri Lanka is governed by the Evidence (Special Provisions) Act No.14 of 1995. However, the ETA expressly⁴⁴ excluded the application of the Evidence Ordinance (Special Provisions) Act to any transaction to which Electronic Transaction Act applies. ETA provides⁴⁵ a specific regime for the admissibility of any data message, electronic document, electronic record, or Communication under the act to avoid various shortcomings.

Though the act was commented as one of the comprehensive pieces of the

³⁹ ETA; Section 11.

⁴⁰ Ibid.

⁴¹ ETA; Section 12 to Section 17.

⁴² Section 4 of Evidence (Special Provisions) Act No.14 of 1995.

⁴³ Evidence (Special Provisions) Act; Section 5.

⁴⁴ ETA; Section 22.

⁴⁵ ETA; Section 11.

statute when it was enacted, it was refined with an amendment⁴⁶ in 2017. This amendment was brought with the objectives to (i) provide greater legal certainty to e-commerce providers in the country, (ii) ensure the validity of electronic contracts, and (iii) facilitate cross-border trade⁴⁷.

However, the act is silent in relation to the 'Dispute Resolution and Settlement' procedures. Therefore, the traditional Resolution and Settlement process is adopted to resolve disputes arising from e-commerce Transactions. The procedure is regulated in Sri Lanka with the Judicature Act No.2 of 1978 (as amended) as Substantive Law and Civil Procedure Code No.2 of 1889 (as amended) & High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 as the primary Procedural Laws.

2.2. Computer Crimes Act No.24 of 2007 (CCA).

The Computer Crimes Act was enacted in 2007 to identify computer crimes and provide the procedures for the investigation and prevention of such crimes⁴⁸. Though the CCA does not apparently provide any e-contracts provisions, some of the provisions could be utilized to enhance protection and security around the electronic contracts. For an instance, the act recognizes the unauthorized disclosure of information as a computer crime⁴⁹.

While the illegal interception of data was first recognized as an offence in Sri Lanka under the Telecommunication Act in 1996, Section 8 of the CCA provides illegal interception of data as an offence. Likewise, CCA is relevant and closely connected with the e-contracts as it facilitates the protection of users in cyberspace with the basic privacy data protection arising out of the electronic transactions. Still, it is criticized that the protection granted under the CCA is insufficient to counter all the modern threats of cyberspace⁵⁰. In addition, as Sri Lanka has no consolidated or specific laws on data protection up to the date, a new Data Protection bill is in the process⁵¹.

⁴⁶ Electronic Transactions (Amendment) Act, No.25 of 2017.

⁴⁷ Ibid.

⁴⁸ Preamble of the Computer Crimes Act (CCA)

⁴⁹ CCA; Section 10

⁵⁰ Vishni Ganepola (2017). 'Effectiveness of the Existing Legal Framework governing Cyber-Crimes in Sri Lanka', Pp. 3-5.

⁵¹ Draft Bill for an Act to Provide for the Regulation of Processing of Personal Data (2019) [online] Available at: https://www.dataguidance.com/sites/default/files/data_protection_bill_3-10-2019_-_amended_draft_final_-_ld_release.pdf

2.3. Consumers Affairs Authority Act No.9 of 2003 (CAAA).

Consumers Affairs Authority Act was brought into the force with the main objectives of,

- i. Establishing the consumer affairs authority (CAA),
- ii. Promoting effective competition and the protection of consumers, and
- iii. Establishing consumer affairs council⁵².

It is the primary legal framework for consumer protection in Sri Lanka. Discussing the Consumer Affairs Authority Act is essential in an e-commerce sphere. Due to the nature of the higher complexity of the online environment and the 'weaker bargaining' power of the consumers, their rights are often challenged⁵³. Scholars pointed out that enhancing consumer confidence and safeguarding consumer rights are necessary for the sustainable digital commerce⁵⁴.

However, the Act defined the term 'Consumer' as,

'Any actual or potential user of any goods or services made available for consideration by any trader or manufacturer'⁵⁵.

Though the definition is 'broad and general', it's argued that the absence of specific reference to the 'online consumers' become redundant⁵⁶. Therefore, to expand the application of the Act in the online environment, the provisions should be refined accordingly with more clarity on this aspect.

The Part II of the act prescribes provisions related to the deals with the Regulation of trade; it is hardly found any provision, which confers any authority on CAA to regulate online trading⁵⁷. Therefore, it is apparent that though the CAA does have certain authority and powers in regulating, determining, and ordering trade practices in Sri Lanka. Due to the absence

⁵² Consumer Affairs Authority Act, No.9 of 2003; Long Title.

⁵³ OECD Recommendation (2016); 'Consumer Protection in E-commerce' [online] Available at: <https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf> [Accessed 03 July. 2021].

⁵⁴ B.A.R. Ruwanthika Ariyaratna (2019); 'Are consumers safe in online? A critical analysis of Sri Lankan Legal Regime on Online consumer protection'; The Junior Bar Law Journal (2019).

⁵⁵ Consumer Affairs Authority Act, No.9 of 2003; Section 75.

⁵⁶ Perera WC (2018) , "Beware If You Are a 'Digital Consumer'- Intangible Digital Goods and Consumer Protection in Sri Lanka," 11th International Research Conference ; (General Sir Kotelawala Defence University - 2018); Conference Proceedings; Pp.19.

⁵⁷ Ibid.

of 'online trade regulations' it's futile to apply the provisions into the 'e-commerce' businesses.

The role of the CAA Act and Consumers Affairs Authority is duly essential in the e-commerce sphere. The scope of the act and the provisions should be refined accordingly to the expansion of the application in the digital platforms. Further, though the CAAA adopts its dispute resolution mechanism through Consumer Affairs Authority and Consumer Affairs Council, it seems redundant in applying them into the E-Commerce Disputes due to the previously mentioned shortcomings of the act.

2.4. Unfair Contract Terms Act, No.26 of 1997 (UCTA).

In the commercial transactions, Contractual terms are often set out in standard forms, which are used for all contracts of the same kind, and only varied so far circumstances of each contract require. But the use of standard terms has been exploitation or abuse of the superior bargaining power of commercial suppliers when contracting with such consumers⁵⁸. The supplier could draft the standard terms in ways highly favorable to himself, both through clauses that excluded or limited his liability for failure to perform or for defective performance and by provisions, which conferred right on him under the contract⁵⁹.

Therefore, a statutory intervention has become increasingly essential to protect the 'consumers' who have inferior bargaining power known as. Unfair Contract Terms Act, No.26 of 1997 is one of the outcomes satisfying this urge. The act was enacted incorporating similar standards laid down by the Unfair Contract Terms Act 1977 of the United Kingdom.

The objectives of the Act are pertinent in e-commerce since most of the contracts arising out of the e-commerce regime require the consumers to accept (By clicking on 'I accept') the terms of performance rather than a 'Mutual Bargaining of Contractual Terms.' Mostly, Terms of Contracts, including 'Exemption Clauses' are not adequately communicated to the consumers and understood by them.

⁵⁸ Steve Hedley (2009); 'The Unfair Contract Terms Act: Wider Still and Wider?'; Published online by Cambridge University Press: 16 January 2009. Pp 32-33.

⁵⁹ The Law Commission and The Scottish Law Commission (2002); Unfair Terms in Contracts: A Joint Consultation Paper; [online] Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp166_Unfair_Terms_In_Contracts_Consultation.pdf [Accessed 03 July. 2021].

On such occasions, the consumers are statutorily protected against unreasonable exclusion clauses through the provisions of the Unfair Contract Terms Act, No.26 of 1997 (the UCTA). The UCTA was enacted to impose limits on the extent to which civil liability for breach of contract, negligence or breach of duty can be avoided by means of contract terms and otherwise⁶⁰. While the scope of the Act extended to the e-commerce environment, Section 4 of the Act specifically refers to the 'Consumers'⁶¹. The provision provides, where a party relying on any term excluding liability with reference to a contract, valid to the extent such term satisfies the test of 'Reasonableness'⁶². Also, the Act protects 'Consumer' against a contract term imposes an obligation on a person dealing as a consumer to indemnify any other person, shall have effect only in so far as such contract term satisfies the requirement of reasonableness⁶³.

In determining whether a term is 'reasonable,' though Act doesn't define precisely what 'reasonable' means but sets out guidelines.

The UCTA provides, Courts will usually consider,

- a. The information available to both parties when the contract was drawn up.
- b. Whether the contract was negotiated or in standard form?
- c. Whether the buyer had the bargaining power to negotiate better terms?⁶⁴

In addition to these provisions, the Act regulates and prescribes the standard tests for the avoidance of liability for negligence⁶⁵ and 'Guarantees' which exclude or restrict liability arising out of the contractual obligations⁶⁶. Further, the Act attempts to secure the consumers against the contractual terms, which exclude or restrict liability for breach of obligations attached to the specific consequences arising from Sale and Hire Purchase⁶⁷.

⁶⁰ Long Title, Unfair Contract Terms Act, No.26 of 1997.

⁶¹ Section 4 of the Act Provides, (1) 'This section applies as between parties to a contract where one of the parties deals as consumer or on the other's written standard terms of businesses'.

⁶² Ibid.

⁶³ Unfair Contract Terms Act, No.26 of 1997 (the UCTA); Section 5.

⁶⁴ UCTA; Section 10.

⁶⁵ UCTA; Section 3.

⁶⁶ UCTA; Section 6.

⁶⁷ UCTA; Section 7.

2.5. Summary

In responding to the challenges of the e-commerce regime in Sri Lanka, Electronic Transaction Act plays a significant role. While the ETA predominantly applies to the e-commerce regime, few other Laws are also relevant to the context. It includes The Computer Crimes Act, which enshrines the protection and security of the digital platforms, The Consumers Affairs Authority Act enacted with the objective of protecting 'Consumers' and Unfair Contract Terms Act which set-out the standards on terms of contract. However, these number of pieces of Laws addressing the issues arising out electronic commerce sphere, the 'Dispute Resolution and Settlement' mechanisms are traditionally approached by the procedural and substantive laws that generally apply to the civil disputes in the Sri Lankan landscape. Few other laws such as the Payment and Settlement Systems Act, No.28 of 2005 and the Payment Devices Frauds Act, No.30 of 2006 are also related to e-commerce in Sri Lanka.

3. Emerging Challenges of E-Commerce

Though the expansion of electronic commerce in modern commercial transactions resulted in enacting modern laws to govern the e-commerce panorama, due to the rapid growth of the internet, it is still posed with significant challenges on the laws relating to electronic commerce. In the Sri Lankan context, though the Electronic Transaction Act No.19 of 2006 (amended) is one of the comprehensive pieces of legislation, still it gives rise to specific practical difficulties in its implementation⁶⁸. In addition, many scholars comment many of the loopholes of the act⁶⁹. These deficiencies in the legal system caused challenges in the e-commerce regime⁷⁰. Such as,

3.1. Threats to Privacy and Data protection.

Though the digital disruption is built into e-commerce's business model, as a grey side it has proved that mounting scrutiny of big data, which has fueled

⁶⁸ DMRA Dissanayake (2015); 'Strengthening ICT Law Regime to facilitate E-Commerce and M-Commerce Transactions: A Sri Lankan Perspective'; Proceedings of 8th International Research Conference, KDU, Published November 2015. Pp.28-29.

⁶⁹ K.A.A.N.Thilakarathna & Nisanka Jayarathne (2020) ; 'The Legal Regime Governing The Information Communication Technology In Sri Lanka' ; Manurawa Law Journal ISSN 1800-055X Vol. Iv.

⁷⁰ Justice Saleem Masroof (2006); 'Electronic Transactions in the Modern World: An Analysis of Recent Sri Lankan Legislation'; Law College Law Review 2006; Pp.110-112.

the industry's rapid growth⁷¹. Studies pointed out many data breaches⁷², including from the most prominent corporate portals.

Especially, numerous times Facebook⁷³ was subject to data breaches, including the data from 533 million people in 106 countries was published on a hacking forum in 2019⁷⁴. These incidents created certain shock waves among the e-commerce consumers since these platforms are involved with a significant amount of sensitive data. As Humby's quote says, 'Data is the new oil'⁷⁵, the demand for data is at its peak around the globe, particularly in the internet space.

Many of the businesses around e-commerce collect a variety of information regularly about their customers to understand their clients better, improve their business processes, and target special offers. It's not an alien practice because, before the arrival of the internet, companies used to track physically the purchases made by individuals. But now, on certain occasions, the company sells the data to third parties or uses it for other purposes other than what they collected⁷⁶. Sometimes, those data are subject to breaches such as hacking and fell into the wrong hands. For example, 'Ebay' one of the biggest global e-commerce platforms affected by a cyber-attack in 2014 in which 145 million customers' personal details were stolen by hackers⁷⁷. These bitter experiences mandated the consumers of e-commerce for better protection over their data and privacy.

⁷¹ Chemi Katz (2019); 'How Data Privacy Will Reshape the Future of E-Commerce'; [online] Available at: <https://www.mytotalretail.com/article/how-data-privacy-will-reshape-the-future-of-e-commerce/#comments-container> [Accessed 03 July, 2021].

⁷² bbc.com.; 'British Airways breach: How did hackers get in?' [online] Available at: <https://www.bbc.com/news/technology-45446529> [Accessed 03 July, 2021].

⁷³ At the End of 2018 that Facebook, the one of the Major Social Media, which violated the privacy measurements and supplied large amount of data to some companies such as Amazon, Microsoft and Netflix. Facebook's announcement in late April of 2019 that it had set aside \$3 billion to \$5 billion to settle claims that it mishandled users' personal data suggested a strong consensus by federal regulators that the social media giant needed to be held accountable.

⁷⁴ See-'Facebook downplays data breach in internal email'; [online] Available at: <https://www.bbc.com/news/technology-56815478#:~:text=Data%20from%20533%20million%20people,previously%20reported%20leak%20in%202019> [Accessed 03 July, 2021].

⁷⁵ Arthur Charles & Editor- Technology (2013); 'Tech giants may be huge, but nothing matches big data'. The Guardian. ISSN 0261-3077. [online] Available at: <https://www.theguardian.com/technology/2013/aug/23/tech-giants-data> [Accessed 03 July, 2021].

⁷⁶ Peter P. Swire (2003); 'Trustwrap: The Importance Of Legal Rules To Electronic Commerce And Internet Privacy'; Hastings Law Journal (Vo.54) (2003) Pp.848-850.

⁷⁷ Independent.ie;'Seven things you need to know about the eBay cyber-attack'; [online] Available at: <https://www.independent.ie/business/technology/seven-things-you-need-to-know-about-the-eBay-cyber-attack-30301233.html> [Accessed 03 July, 2021].

As a response to this challenge, many countries around the world brought their own pieces of 'Data Protection Laws' to address this challenge. United Kingdom's General Data Protection Regulation (GDPR) is a good example.

Though many international instruments recognized the 'Right to Privacy'⁷⁸, it is not guaranteed as a fundamental right in the Sri Lankan constitution. Still, the amended⁷⁹ Article 14A the Constitution prescribes 'privacy considerations' as an exception against exercising the right of access to information⁸⁰. The exception can be presumed as the recognition of 'Privacy' in the Constitution. In addition, a number of cases⁸¹ address that the individual's right to personal space were respectively recognized as to be respected and secured.

There are no consolidated or specific laws on data protection in Sri Lanka other than a few industry-specific data protection-enabled legislations⁸². Still, since these legislations, including Electronic Transactions Act, have not adequately defined/addressed the term 'data', it further emphasizes the need for a law related to data protection to secure privacy in cyberspace.

The absence of the provisions leads to deleterious consequences, which threaten consumer privacy and data protection in Sri Lanka⁸³. In addition, in cross-border transactions, the contracting parties are reluctant to enter contracts due to the absence of 'Data Protection and Privacy Laws' in Sri

⁷⁸ Universal Declaration of Human Rights Article 12, United Nations Convention on Migrant Workers Article 14, UN Convention of the Protection of the Child Article 16, International Covenant on Civil and Political Rights, International Covenant on Civil and Political Rights Article 17; regional conventions including Article 10 of the African Charter on the Rights and Welfare of the Child, Article 11 of the American Convention on Human Rights, Article 4 of the African Union Principles on Freedom of Expression, Article 5 of the American Declaration of the Rights and Duties of Man, Article 21 of the Arab Charter on Human Rights, and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Johannesburg Principles on National Security, Free Expression and Access to Information, Camden Principles on Freedom of Expression and Equality.

⁷⁹ Section 2 of the Nineteenth Amendment to the Constitution.

⁸⁰ Article 14A (2) of the Constitution states, 'No restrictions shall be placed on the right declared and by Article, other than such prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary'.

⁸¹ See-Nadarajah v Obeysekera 52 NLR 76 (1971); Sinha Ratnatinga v The State, [2001] 2 SLR 172 ; Hewamana v Attorney General 1999 ICHRL 31:8 March 1999.

⁸² Manjula Sirimane & Nadine Puvimanasinghe (2021); ' Sri Lanka - Data Protection Overview'; [online] Available at: <https://www.dataguidance.com/notes/sri-lanka-data-protection-overview>[Accessed 10 June. 2021].

⁸³ Sumathi Dharmawardena; 'Privacy And Data Protection-Key To Development Of Electronic Commerce'; [online] Available at:<https://www.lawnet.gov.lk/privacy-and-data-protection-key-to-development-of-electronic-commerce/> [Accessed 10 June. 2021].

Lanka⁸⁴.

As given attention to this issue, The Data Protection Bill is in the process, with the objectives of,

- i. Safeguard the rights of individuals, and
- ii. Ensure consumer trust in information privacy in online transactions.

As a supplement to the Proposed Data Protection bill, A draft for the Cyber security bill is in the process and in final stage to provide a comprehensive framework to prevent and manage cyber security threats and incidents effectively and protect critical information infrastructure.

The proposed Bill of Data protection will aid in securing the data and privacy of the users through cyberspace. However, as the bill has not come into force, the practical difficulties and lacunas would be identified when it does. Particularly enforcement of the bill, compliance, and regulatory measures would be a few of the challenges the digital commerce platforms and consumers may face shortly.

3.2. Absence of E-Consumer protection.

Emerging Information and Technology rendered immense benefits to the consumers, especially when it comes Business to Consumer (B2C) transactions. On the other hand, due to the complex nature of the internet, online consumers are compelled to expose severe violations of their consumer rights other than offline consumers⁸⁵. Several international instruments stress down consumer protection in digital platforms.

Mainly, United Nations Guidelines on Consumer Protection in 2016 (UNGCP) prescribes as,

'A level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce'⁸⁶

Those e-consumers should be adequately secured as equal to offline consumers.

⁸⁴ Supasini P & Soorya B (2019); 'The Necessity of the Cyber Privacy Law to Enhance the Economic Growth in Sri Lanka'; Proceedings of 12th International Research Conference, KDU, Published November 2019.

⁸⁵ Aijaj Ahmed Raj and Wazida Rahman (2016); 'E-commerce Laws and Regulations in India: Issues and Challenges'; Pp.3-4

⁸⁶ United Nations Guidelines on Consumer Protection (UNGCP) ; Guideline 5

Also, the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999 ensures the same⁸⁷.

But in Sri Lanka, as discussed in the previous chapter, there are no regulations or policies to foster consumer privacy and protection in the e-commerce sector. Due to the narrative definition of the 'Consumer' and the absence of express authority to regulate online trade and services, the Consumer Affairs Authority Act becomes futile in securing consumer's rights in the e-commerce sphere. Neither Sri Lankan consumer protection law and electronic transactions law, nor any other legislation has specifically addressed the online consumer rights in Sri Lanka⁸⁸. Therefore, on the other hand, from the consumer rights perspective, Sri Lanka E-Commerce is in great danger in cyberspace.

3.3. Challenges of implementing E-Signatures.

The e-signature was recognised and introduced⁸⁹ into Sri Lanka with the Electronic Transaction Act No.19 of 2006. Subsequently, Act No. 25 of 2017 amended it. Generally, it opens the door to the e-world, but in practice, it has failed to create a secure legal system⁹⁰.

The Act, as it is amended, defines the e-signature as,

*'data in electronic form, affixed to logically associated with a data message, electronic document, electronic record or communication which may be used to identify the signatory in relation to the data message, electronic document, electronic record or communication and to indicate the signatory's intention in respect of the information contained therein'*⁹¹.

While the act empowers⁹² the Certification Service Providers (CSPs) to issue various types of electronic signatures in accordance with such criteria and

⁸⁷ The principle 1 of the OECD Guidelines provides, 'Consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce'.

⁸⁸ R. N. K. Chandrawansa (2020); 'The Need for Reforming the Sale of Goods Ordinance of Sri Lanka: A Comparative Analysis'; Research Article OUSL Journal 2020 Vol. 15, No. 01, (pp. 67-82); DOI: <http://doi.org/10.4038/ouslj.v15i1.7487>

⁸⁹ ETA; Section 7

⁹⁰ Dilini T. Samayawardena & D.M. Thimalee M. Sachindrani (2018); 'Legal Issues On Electronic Transactions: SL Vs. EU'; Conference Proceedings; 3rd Interdisciplinary Conference of Management Researchers 23rd – 25th October 2018 – Sabaragamuwa University of Sri Lanka.

⁹¹ ETA; Section 26

⁹² ETA; Section 19

guidelines⁹³, there are several difficulties regarding Certification Authority (CA) and Certification Service Providers (CSPs) under this act. The act does not insist on license and even accreditation of Certification Service Providers (CSPs) and leaves them optional. In practice, regulating these CSPs would be challenging since there are no license mechanisms like India⁹⁴ under our act. These drawbacks lessen the public trust and confidence on authenticity of the 'e-signatures' in Sri Lanka⁹⁵. Thus, though the act itself recognises the electronic signatures, due to the owing practical barriers, it seems redundant. In Sri Lanka, all banks and legal institutes still request physical signatures even in the presence of e-signatures.

3.4. Challenges related to the Performance of Contracts.

While the e-contracts significantly vary from a traditional one as the buyer or consumer cannot feel and touch the product in real-time, many challenges arise from the electronic transactions. It may occur on quality, performance, brand, color, size, price, quantity, and many more⁹⁶. Rather than traditional commerce, the buyer primarily relies on the seller's contract terms in the e-contracts (as Unilateral Contracts). Therefore, the clauses are frequently in favor of the sellers. Due to the absence of any regulatory authority (such as Consumer Affairs Authority), they are unfair or restricted trade practices on most occasions. As a result of this, E-Commerce face numerous challenges, including Receiving goods not suitable for his purpose, inadequate cooling-off period, issues related to the return and refund, defective goods, and few more.

Dispute Resolution and Settlement measures.

As discussed above, because of the absence of any special dispute settlement mechanisms in the Electronic Transaction Act of Sri Lanka, traditional civil dispute settlement mechanisms were adopted to resolve the disputes arising from e-commerce transactions. More particularly, Dispute Resolution methods are primarily based on Traditional Litigation (Court Litigation) and Alternative

⁹³ ETA; Section 24

⁹⁴ In India, Section 21-26 of Indian Information Technology Act 2000 provides for procedure for licensing of service providers in India. There are several elaborating provisions for investigations of contraventions of the Act and also provides sanctions stringent penalties.

⁹⁵ Kariyawasam, K. (2008). The growth and development of e-commerce: an analysis of the electronic signature law of Sri Lanka. *Information & Communications Technology Law*, 17(1), 51-64. <https://doi.org/10.1080/1360083080188930>

⁹⁶ 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, [online] Available at: http://www.americanbar.org/publications/communications_lawyer/2015/january/click_here.html [Accessed 9 March. 2021].

Dispute Resolution (ADR) methods, including arbitration, mediation, collective Agreements, and Industrial Courts⁹⁷.

The traditional practice of Litigation has expanded the scope through recognition and enforcement of foreign judgment⁹⁸ and facilitating oral or documentary evidence for the proceedings in other jurisdictions⁹⁹ to promote international cooperation. Still, due to the reasons such as certain pecuniary limitations, time-consumption, inconvenience, and expenditures, traditional litigation practice has lost its paramount interest among the parties to settle-down disputes.

But as an effective alternative, Alternative dispute resolution (ADR) practices are fairly approached by the parties because of the benefits such as not requiring a great deal of time, ease the duties, amicable settlements, Less formality in procedures, and a few more. Arbitration is the most common ADR method in Sri Lanka, significantly to resolve commercial disputes. Arbitration is one of the most successful ADR practices in both the National Level and International arena. Particularly after the New York Convention¹⁰⁰, which is one of the most successful¹⁰¹ commercial treaties in International Trade, it recognized the universal arbitration awards and thereby facilitated the development of the International Arbitration to a great extent. Sri Lanka has also been a signatory to the Convention since 1958. Thereby, it's able to validate foreign arbitral awards. Sri Lanka regulates the Arbitral procedures through the Arbitration Act No.11 of 1995.

It was the first Arbitration law in South Asia that was inspired by a draft of the Swedish Arbitration Act and the UNCITRAL¹⁰² Model Law on Model Law on international commercial arbitration¹⁰³. In addition, the procedural rules of the ICLP, Sri Lanka National Arbitration Centre, and International Chamber of Commerce are also used in arbitrations conducted in Sri Lanka¹⁰⁴.

However, in the present context, due to the reasons of a Limited number of

⁹⁷ Ariyaratna, Ruwanthika. (2020). 'Consumer Dispute Resolution in B2C E-commerce in Sri Lanka: A Comparative Legal Analysis'.

⁹⁸ Reciprocal Enforcement of Judgments Ordinance No.41 of 1921.

⁹⁹ Mutual Assistance in Civil and Commercial Matters Act No.39 of 2000.

¹⁰⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

¹⁰¹ For now, 165 countries are parties to the Convention as in August 2020 Ethiopia joined as 165th.

¹⁰² UNCITRAL Model Law on International Commercial Arbitration, 1985.

¹⁰³ Justice Saleem Marsoof; 'Arbitration Procedure, Law and Facilities in Sri Lanka' - Chapter 25; 'Arbitration in Commonwealth Countries - An Anthology'; published by Dr. Ashwinie Kumar Bansal of India; Pp. 780-781.

¹⁰⁴ D.L. & F. De Saram (2018); 'Litigation and enforcement in Sri Lanka: overview'. [Online] Available at:[https://uk.practicallaw.thomsonreuters.com/w-017-0989?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-017-0989?transitionType=Default&contextData=(sc.Default)&firstPage=true) [Accessed 03 June. 2021].

Arbitration centers¹⁰⁵, delays in the enforcement of arbitral awards¹⁰⁶, higher cost of Arbitration and reducing priority and interest of the Arbitrators, the Arbitration mechanism is losing the interest among the parties¹⁰⁷.

Therefore, it's observed as the Litigation and ADR mechanisms are futile in bringing adequate dispute settlement. Consequently, it can be suggested, the ADR method could be refined and developed as an Online Dispute Resolution (ODR) platform to overcome the struggle. Online dispute resolution undertakes disputes that are partially or fully settled over the Internet¹⁰⁸. While the E-Commerce is partially or fully entered and performed in the digital platform, resolving disputes from such a contract seems feasible at ODR platforms, as they are quicker and cheaper.

Summary

The transformation from paper to the digital screen is a giant leap in commerce. It's a combination of several small steps. However, Sri Lankan legal frameworks recognize and address various concerns about e-commerce, in practice, due to the complex nature of the internet and e-contracts, many challenges have arisen. In overcoming them, the Laws should address different aspects of the internet and regulate the access, performance, and dispute resolution of e-contracts more pragmatically.

4. Conclusion

This paper attempts to highlight the gap and further emphasizes the urge for adequate laws to respond to the emerging challenges in the e-commerce regime. The study demonstrates that due to the emerging challenges in the digital sphere, the Laws regulating the e-commerce sphere have become fruitless in facilitating and promoting electronic commerce in Sri Lanka. Adopting international standards in the national context through various pieces of legislation will boost the flow of the e-commerce sphere of the

¹⁰⁵ In Sri Lanka, there are Three major institutes functioning as arbitration centers-the Sri Lanka National Arbitration Centre (SLNAC), the Institute for the Development of Commercial Law and Practice (ICLP) and, CCC-ICLP Alternative Dispute Resolution (ADR) Centre.

¹⁰⁶ It takes an estimated enforcing a contract in Sri Lanka takes a protracted 1318 days via arbitration. See-https://data.worldbank.org/indicator/IC.LGL.DURS?year_high_desc=false

¹⁰⁷ Dr. Harsha Cabral (2019); Practice of Commercial Arbitration in Sri Lanka; Junior National Law Conference 2019.

¹⁰⁸ Mohamed S Abdel Wahab; M Ethan Katsh; Daniel Rainey (2012); 'Online dispute resolution: theory and practice: a treatise on technology and dispute resolution'. The Hague: Eleven International Publishing; 2012. Pp.357

country. Significantly, while the Data Protection Bill of Sri Lanka is almost finalized, once the act comes into force, the Privacy and Data Protection in the e-commerce sphere will be enhanced at least with a minimum standard.

Still, the online trading regulations should be brought up as a step forward to govern the e-commerce platforms registered in Sri Lanka. In addition, practical issues related to the e-signature and Certification Service Providers (CSPs) should be rectified with amendments and regulations. Finally, as a crucial point, Sri Lanka should rethink about the present dispute resolution mechanisms for e-commerce disputes. Since the public vastly prefers e-commerce as a platform where they can save much time, the paper suggests it is the right time to progressively step up into online dispute resolution (ODR) with the facilitation of technology. Due to the Covid'19 pandemic, Sri Lanka has successfully facilitated the first-ever virtual hybrid international arbitration via digital platforms¹⁰⁹. Therefore, it's not a massive challenge, and this is the right time to move forward. These suggestions will boost the e-commerce panorama in Sri Lanka and promote digital commerce with trust, authenticity, and reliability.

¹⁰⁹ Wtc.lk; 'Sri Lanka holds first hybrid international arbitration hearing' [online] Available at:<https://wtc.lk/2020/09/16/sri-lanka-holds-first-hybrid-international-arbitration-hearing/> [Accessed 18 May 2021].



Investor-State Arbitration in ICSID and Sri Lanka: A Critical Appraisal

Niroshika Liyana Muhandiram¹

Abstract

Sri Lanka's strategic location in the Indian Ocean has enticed foreign traders and investors to invest in the country since ancient times. The country's experience before investor-state arbitration has not been positive, as the government of Sri Lanka has twice been held liable for breaching bilateral investment treaty (hereinafter as BIT) obligations in *Asian Agricultural Products Ltd. V Sri Lanka* and *Deutsche Bank AG v Sri Lanka*. The *Mihaly International Corporation v Sri Lanka* was decided in favor of the state as the criteria of jurisdiction were unable to be satisfied. Hence, the purpose of this study is to analyze the reasons that placed Sri Lanka in a disadvantageous position before investor-state arbitration. This appraisal is much significant as two more cases are pending before the International Centre for Settlement of Investment Disputes (hereinafter as ICSID) against Sri Lanka, namely, *KLS Energy v Sri Lanka*, and *Eyre and Montrose Developments v. Sri Lanka*. The study evaluates the reception of international law by Sri Lanka's judiciary in light of the experience of Sri Lanka before ICSID together with relevant domestic decisions. The study concludes by identifying a way to balance investors' interests with the host state's interests for the necessary effectuation of the investment agreements within and outside the territory.

Keywords: *bilateral investment agreements, host state's interest, Investor-state arbitration, investor's interests, jurisdiction*

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The ICSID and Investor-State Arbitration

Most of the Investor-state arbitral cases are filed before the ICSID.² The Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (hereinafter, the ICSID Convention) is the constituent instrument of the ICSID. The purpose of the ICSID Convention is, *inter-alia*, to facilitate international cooperation for economic development by establishing facilities for international conciliation or arbitration to which contracting states and nationals of other contracting States may submit if they so desire³. The ICISD is an independent international organization having legal personality⁴ but, structurally linked to the International Bank for Reconstruction and Development. (hereinafter as the World Bank).⁵

Initially, there were no cases registered with the ICISD, and between 1966 to 1996 only 35 cases were registered under the ICSID. However, with the proliferation of BITs in the 1990s, the number of investor-state claims increased, and as of now 640 arbitration cases and 10 conciliation cases have been registered under the ISCID⁶. According to Article 25(1) of the ICSID Convention, the ICSID has jurisdiction upon legal disputes arising out of an investment between the contracting states if the parties have consented to resolve their disputes in accordance with the ICSID Procedure. In addition to that, satisfying the criteria for jurisdiction is also subject to the definition of the investment in the disputed BIT⁷. Significantly, the Additional Facility Rules of 1978 allows nationals of non-state parties to bring investor-state claims against either a state party or a non-state party⁸. As Sri Lanka has ratified the ICSID Convention on October 12th, 1967, foreign investors can easily bring a claim against the Government of Sri Lanka (hereinafter as the GOSL) based on the provisions of BIT. Any dispute would be mainly governed in accordance with the rules of law decided by the parties, and in the absence of such rules, rules of contracting parties and rules of international

² *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, UNCTAD, 2007

³ The Preamble to Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, 17 UST 1270, TIAS 6090, 575 UNTS 159

⁴ ICSID Convention, Article 18

⁵ ICSID Convention, Article 2,4,5

⁶ The ICSID Case Load-Statistics(Issue-2018-1) International Centre for Settlement of Investment Disputes,2018

⁷ Rudolf Dolzer & Christopher Schreure, *Principles of International Investment Law*,(Oxford University Press, 2012) at 6-78

⁸ Additional Facility Rules, Article 2

law would be applicable⁹.

Sri Lanka and ICSID

Except for the BIT between Sri Lanka and China, all of Sri Lanka's BITs recognize the ICSID as the forum for investor-state arbitration¹⁰. According to Sri Lanka China BIT, unsettled disputes are submitted to an international arbitral tribunal established by both parties¹¹. Investors can bring disputes against the GOSL before international arbitral tribunals without exhausting the local remedies.

The country's experience before the ICSID has not been pleasant, as the GOSL has twice been found guilty of violating international law obligations on foreign investment. Due to the investors' failure to satisfy the jurisdictional requirements, those two claims were unsuccessful. The two cases decided against the government are *Asian Agricultural Products Ltd. V Sri Lanka*¹² (hereinafter, *AAPL V Sri Lanka*) and *Deutsche Bank AG v Sri Lanka*¹³. (hereinafter, *Deutsche Bank v SL*) The *AAPL* case is significant as it marks the first-ever case filed by a foreign investor against a State under the auspices of the ICSID. *Mihaly International Corporation v Sri Lanka*¹⁴ is the case decided in favor of the state before the ICSID. The *Mihaly case* was dismissed by the tribunal as the relationship that the parties had (as the exchange of letters) and pre-investment expenditures made by the claimant were not considered within the meaning of 'investment' under the SL-USA BIT. The case was thus dismissed because the panel lacked the jurisdiction to hear it.

AAPL V Sri Lanka

The AAPL was a Hong Kong Corporation that established a joint venture named Serendib Sea Food Ltd to cultivate and export shrimp to Japan from Sri Lanka. The dispute arose during the civil war in 1987, in which the

⁹ ICSID Convention, Article 42(1)

¹⁰ SL-Australia BIT, Article 13(2)b; SL-BLEU BIT, Article 10(1); SL-Czech Republic BIT, Article 8(2); SL-Denmark BIT, Article 8(2); SL-Egypt BIT, Article 8 (2); SL-Finland BIT, Article 9(1); SL-Germany BIT, Article 11(1); SL-India BIT, Article 10(3)a; SL-Indonesia BIT, Article VIII(3); SL-Japan BIT, Article 11; SL-Netherlands BIT, Article 8(1); SL-Norway BIT, Article 9(1); SL-Pakistan BIT, Article 10(1); SL-Swiss BIT, Article 9(1)

¹¹ SL-China BIT, Article 13 (3)

¹² (1990) ICSID Case No. ARB/00/2

¹³ (2012) ICSID Case No. ARB/09/02

¹⁴ (2002) ICSID Case No. ARB/00/2 (This case will not be discussed in detail as it was dismissed by the tribunal)

investor's shrimp farm was destroyed and killed more than 20 employees in the course of counter-insurgency operation by the security forces¹⁵.

The AAPL claimed that Article 2.2 of the UK-Sri Lanka BIT(extended to Hong Kong), which dealt with 'full protection and security' prescribed a strict liability standard and did not require establishing that the state had acted with fault¹⁶. The tribunal, however, rejected this argument, holding that the words "shall enjoy full protection and security" of Article 2 must be interpreted in accordance with the common use that custom has affixed to them.

The claimant also relied on the MFN provision of the treaty (Article 2(2) and stated that the Swiss- Sri Lanka BIT does not provide for a 'war clause' or 'civil disturbance' as an exemption to the MFN, thus, it is more preferential to the investors. Hence, they viewed that the MFN clause in Swiss-Sri Lanka is more preferential than in the SL-UK BIT. However, this claim was not successful. The tribunal held that in the absence of 'a war clause' or civil disturbances', the SL-Swiss BIT does not provide a strict liability standard for the losses suffered due to property destruction. Accordingly, the court decided that the claimant was unable to prove that the Swiss-Sri Lanka BIT contained more preferential treatment than the SL-UK BIT¹⁷.

Nevertheless, the tribunal found that the State was liable for the damage resulting from the investment as a consequence of "war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot" under Article 4(1). Based on the generally accepted rules of international law, it was held that the state was unable to provide due diligence obligation under the minimum standard of customary international law¹⁸. The reason was that the government was unable to undertake precautionary measures to resolve the situation peacefully before launching the armed attack¹⁹. The court went on to state that BITs are not closed legal systems but, have to be seen in a wider juridical context, including customary international law and domestic law. The majority decided that the amount of compensation

¹⁵ (n. 11). Para 79

¹⁶ *Ibid*(para.45-53)

¹⁷ *Ibid*,(Para 54-55)

¹⁸ *Ibid*,(Para 67)

¹⁹ *Ibid*,(Para 72-86)

should sufficiently reflect the full amount of the investment lost consequent to the said destruction and awarded US \$ 460,000/- as compensation.

However, Justice Samuel K.B. Asante in his dissenting opinion contended with the majority opinion and emphasized that the Sri Lankan government had undergone a formidable security situation and grave national emergency in which the Tamil Tigers had established their control of the area surrounding the farm in Batticaloa District since early 1986. When there was no strong evidence as to whether Sri Lankan security forces destroyed the farm, he viewed that it could not be argued as to excessive force had been used to destroy the Tamil Tigers. He further stated that the general rule of customary international law was that the host state was not liable for losses or damage sustained by a foreigner due to war, armed conflict, insurrection, revolt, riot, a national emergency, or other civil disturbances. Hence, Justice Samuel contended that the GOSL was not liable for the damages.

Deutsche Bank v Sri Lanka

Deutsche Bank v Sri Lanka is the second arbitral case decided against GOSL on the provisions of expropriation and fair and equitable treatment. The Ceylon Petroleum Corporation (hereinafter CPC) entered into oil hedging agreements with several foreign and local banks in 2007 and 2008., In this case the disputed agreement was the agreement entered into with Deutsche Bank in July 2008. The Sri Lankan government used hedging as a means of avoiding the negative impact of rising oil prices. According to the Agreement, both parties agreed to US\$ 112.50 as the strike price of one barrel of Dubai crude oil. If the oil price was higher than the strike price, the Deutsche Bank had to pay the CPC and the CPC would have had to pay the Deutsche Bank if it had been less. When the price of oil rose in July 2008, the Deutsche Bank made the payment of US \$ 35 523.81. Subsequently, the oil price began to fall, and the CPC paid more than US \$ 6 million by November. The Sri Lankan government had discussions with Deutsche Bank to restructure the agreement as there was a fall in oil prices in the world market.

Meanwhile, several fundamental rights petitions were filed in the Supreme Court (hereinafter the SC) of Sri Lanka alleging that their right to equality has been violated, which is guaranteed under Article 12(1) of the Constitution

by not letting the public to enjoy the benefit of the low oil price in the world market²⁰. Concerning the investor-state disputes which have been filed before the ICSID against Sri Lanka, domestic cases were involved only relating to the Deutsche Bank Case. The SC issued an interim order halting the payment to the bank and the Central Bank of Sri Lanka initiated an investigation²¹. The Court did not refer to the international obligation arising from the investment agreement. The capacity of the Chairman of the CPC was questioned and identified as an act of ultra-virus. Then, the Bank initiated an investor-state claim against Sri Lanka based on the SL-Germany BIT, alleging that the interim order of the SC had amounted to expropriation under the BIT. Following that, the Supreme Court issued a final order terminating all fundamental rights cases and vacated all interim orders, determining that the Executive had not acted in accordance with the Court's ruling. Because the CPC was unable to provide the oil to the public at the low price.

The arbitral ruling is significant because it addressed issues including the CPC's power to engage into contracts, the state's responsibility for the CPC's conduct, and the definition of "investment." The tribunal has given a broad asset-based definition to the notion of investment in this case when determining whether a hedging arrangement constitutes an investment. The panel viewed that heading as a claim to money that had been utilized to generate economic benefit for Sri Lanka and as legal property with an economic value for Deutsche Bank.

Referring to Article 4(2) of the SL-Germany BIT on expropriation, the court relied on the sloe effect test, accepting that the effect of a particular severity must not necessarily require economic loss, even substantial interference with rights can also be quantified as compensation. The police power argument made by Sri Lanka was rejected adopting the proportionality test and decided that Sri Lanka does not have extensive discretion to interfere with investments in the exercise of "legitimate regulatory authority"²².

²⁰ S.C.(FR) 535/2008 and S.C.(FR) 536/2008. Case No. 535/2008 was brought against Hon. A.H.M. Fowzie, Minister of Petroleum and Petroleum Resources Development; Ceylon Petroleum Corporation; Ashantha de Mel, Chairman of CPC; Sumith Abeyesinghe, Secretary to the Treasury; Hon. G.L. Pieris, Minister of Export Development, and International Trade; Hon. Minister of Finance; The Monetary Board of Sri Lanka; and The Attorney General. , Case No. 536/2008 was brought against the Hon. A.H.M. Fowzie, Minister of Petroleum and Petroleum Resources and Development, Ashantha de Mel, Chairman of CPC, and others.

²¹ See Case No (FR) 535/2008 and SC(FR) 536/2008

²² (n.12) para 522

In conclusion, the tribunal awarded more than the US \$ 68 million as compensation against Sri Lanka.

Pending cases before the ICSID against Sri Lanka

Currently, two cases are pending at the ICSID against Sri Lanka. KLS Energy, a Malaysian investor, filed a case in 2018 at the ICSID for a cancellation of a wind and solar hybrid power plant project in Jaffna by the government in which the claimant had invested²³. The case has been made under the Malaysia- Sri Lanka BIT, claiming US \$ 150 million. According to the available sources, the Ceylon Electricity Board (hereinafter as CEB) had approved the project and signed a 20-year power purchase agreement with the investor²⁴. But, the CEB claims that KLS Energy has not honored its investment claim and thus, canceled it in 2016. The investor alleges that the CEB was delaying the project despite having invested US \$ 22 million.

In 2016, Eyre and Montrose Development (Pvt) Ltd sought remedy from the ICSID under the UK- Sri Lanka BIT for re-acquisition of land close to the Parliament complex in Kotte(near Colombo), where it was earlier decided to construct a hotel²⁵. However, this matter is still pending before the ICSID.

The Reception of International Law through Sri Lankan Judiciary

Before analyzing how the domestic courts have dealt with matters relating to foreign investment, it is pertinent to deal with the judicial approach towards international law obligations in general.

Sri Lanka's position regarding the applicability of international law to domestic law through the judiciary has been slowly moved from rigid interpretation to liberal interpretation. Concerning customary international law, the country follows the monist approach, and consequently no enabling legislation is needed²⁶. However, concerning international treaties, the country has followed the dualist approach since independence to incorporate international treaties into the domestic sphere²⁷. In *Leelawathie*

²³ *KLS Energy Lanka FdnBhd v Sri Lanka*, ICSID Case No ARB/18/39

²⁴ <<http://www.dailymirror.lk/105243/KLS-Energy-and-CEB-blame-each-other-over-halted-solar-hybrid-plant-in-Jaffna>>last visited on 01April 2022

²⁵ *Raymond Charles Eyre and Montrose Developments (Private) Limited v Sri Lanka*, ICSID Case No ARB/16/25

²⁶ See *Attorney General v. Sepala Ekanayake*(Supreme Court, 1982)

²⁷ Ceylon Order-in-Council (1946) Articles 45 and 4 (2)

*v. Minister of Defense and External Affairs*²⁸ it was decided that, though the Universal Declaration of Human Rights contains the highest moral authority, it has no binding force as it is not a legal instrument and forms no part of the law of this country²⁹. This position was taken to its culmination in the case of *Singarasa v Attorney- General*³⁰. Though the dualist countries had moved towards monism in the matters involving human rights, in Singarasa case, the Chief Justice viewed that,

“The resulting position is that the petitioner cannot seek to vindicate and enforce his rights through the H.R.C. at Geneva, which is not reposed with judicial power under our Constitution. The Supreme Court being the highest and final Superior Court of record in terms of Article 18 of the Constitution cannot set aside or vary its order on the basis of the findings of the H.R.C. in Geneva; which is not reposed with any judicial power under or in terms of the Constitution”³¹

Accordingly, he opined that, a treaty or a covenant has to be implemented by the exercise of legislative power by the parliament as the dualist theory underpins our (Sri Lanka’s) Constitution.

However, this stance was relaxed gradually, and in *Tikiri Banda, Bulankulame v The Secretary, Ministry of Industrial Development* (famously known as the *Eppawala Case*),³² the Supreme Court referred to the concept of sustainable development and inter-generational equity drawn from the Stockholm Declaration and Rio Declaration. Justice Amarasinghe stated that,

“Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way 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, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of

²⁸ 68 N.L.R. at 488-9 (1965)

²⁹ *Ibid.*, p. 490

³⁰ SC. Spl(LA) 182/99

³¹ *Ibid*

³² 3 Sri LR 243 (2000)

record and by the Supreme Court, in particular, in their decisions.”³³

In *Manohari Pelaketiya v H.M. Gunasekara and others*³⁴ where sexual harassment experienced by a female teacher was challenged, the Supreme Court linked the international treaty obligations emanating from the Convention on the Elimination of All Forms of Discrimination against Women in interpreting the fundamental rights guaranteed under the Constitution. Similarly, in *Ravindra Gunawardena Kariyawasam v Central Environmental Authority* (hereinafter as the CEA),³⁵ a recently decided case, (famously known as, Chunnakam case) the court was guided by the principles of the Rio Declaration, especially the Polluter Pays principle, ordering the thermal power station in Chunnakam to pay compensation to the people.

The Response of the Domestic Judiciary relating to Foreign Investment-related Matters

Recent judicial decisions involving cases involving foreign investments have taken a pro-state approach rather than a pro-investor approach. For instance, cases like *Eppawala* and *Chunnakam* have subtly informed the people that foreign investors degrade the ecological balance of the state or exploit its natural resources. Therefore, stringent investment project clearance procedures are needed to regulate the investors.

In the *Eppawala* case, a dispute arose between foreign investors and GOSL relating to the phosphate deposit in Eppawala, Sri Lanka. The proposed foreign investment agreement was questioned by potential adversaries, the residents of Eppawala, which included cultivators, landowners, and also the chief incumbent of a temple. The Supreme Court was of the view that sustainable development has to be the policy of the government in economic development. As the investment activities had not been initiated, the rights of the investors were not discussed in this case.

In the *Chunnakam* Case, the petitioner filed a fundamental rights petition before the Supreme Court alleging that the Northern Power Company (the power plant) had contaminated the groundwater in the Chunnakam area in the Jaffna peninsula, making it ‘unfit for human use. The thermal power

³³ *ibid*

³⁴ SC/FR/No. 76/2012

³⁵ SC/FR/141/2015

plant was a foreign investment. As it was proved that the power plant had been operated negligently without exercising due diligence, the court held that the statutory authorities like the Central Environment Authority and Board of Investment had failed in monitoring the power plant. The Court has further noted that the BOI and the CEA have violated the right to equality of the residents of Chunnakam. The Court referred to the 'precautionary principle', 'the polluter pay principle', the public trust doctrine, and 'sustainable development' in justifying its decision. However, it cannot be assumed that this determination would lead to an investor-state dispute as the power plant was permitted to continue under the intense monitoring mechanism of the BOI and the CEA.

Relating to the Deutsche Bank matter, it was contended in *Wegapitiya v A.H.M. Fowzie*³⁶ that, CPC did not have the authority to enter into a Hedging Agreement with the Deutsche Bank and the Chairman of CPC had no authority to execute such agreements without any authority of the board of directors. In November 2008, *inter alia*, the Court issued an interim order suspending all payments by the CPC to Deutsche Bank and also suspending the chairman of the CPC for alleged misconduct. Further, it ordered the Monetary Board to continue its investigations and fix the oil price. In January 2009, the Court issued the final order terminating all fundamental rights applications and vacated all its interim orders, deciding that the Executive had not acted in accordance with the ruling of the Court. Chief Justice S.N. Silva noted that it was unproductive to rule on the matter when the executive had failed to obey the court orders. This was a slap for the CPC and the government as reverting the ruling of the SC made them pay back millions of dollars to foreign banks.

The interim orders were analyzed at the ICSID and it was found that they had violated the fair and equitable treatment and expropriation clause of the BIT. In the first interim order, the Court viewed as follows,

“[t]he petitioners have established a strong prima facie case that these transactions have not been entered into lawfully: that they are not “arms-length transactions”; that they are heavily weighted in favor of the Banks; that they are to the detriment of [CPC] and

³⁶ S.C. (FR) No. 535/2008.

through that to the people of Sri Lanka; that they amount to an abuse of statutory authority which denies the people the equal protection of the law”³⁷

Nonetheless, the Court did not assess the rights or the legitimate expectations of the investors. As hedging agreement is an international obligation, both parties must respect its obligation and national law cannot be used as an exemption to defeat its national obligations³⁸. However, the Supreme Court failed to underline this, which ultimately resulted in another investor-state arbitration case against Sri Lanka.

Further, concerning the administration of justice in Sri Lanka, the delay in executing the law has tended the people to lose faith and confidence in the judicial system of the country. According to the ministry, there were 5,890 cases in the Civil Appellate High Courts, 4,817 cases in the Court of Appeal, and 3,486 cases in the Supreme Court³⁹. Regardless of whether the parties are natives or foreigners, it typically takes 20 to 30 years to resolve a land dispute⁴⁰. If the case is relating to a land, the litigants or parties to the dispute may no longer be living when the dispute is resolved. This situation is the same as in criminal cases. Due to a lack of sufficient staff and infrastructure, the district courts, magistrate courts, and court of appeal have to handle a large volume of cases. Further, the allocated time to settle investment-related dispute through local judicial remedies is mentioned as a maximum of 12 months in Sri Lanka’s BITs which is not realistic. The delay in the administration of justice has inclined foreign investors inter alia, not to resort to local remedies.

Hence, it can be argued that though Sri Lanka is bound by the decisions of investor-state arbitration, when incorporating international law into a domestic context, the country still follows the dualist approach. Investment agreements were not referred to in the investment-related judgments by the judiciary of Sri Lanka.

³⁷ *ibid*

³⁸ Vienna Convention on the Law of Treaties. 1969, 1155 UNTS 331, Article 27

³⁹ <<http://www.ft.lk/ft-view/Justice-delayed/58-652015>>-last visited on 01 April 2022

⁴⁰ <<http://www.dailymirror.lk/article/Truth-behind-Law-s-Delay-117949.html>> last visited on 01 April 2022

Balancing the Public Interest in Investment Treaty Arbitration

Investor-state dispute settlement (hereinafter as ISDS) is the most effective international remedy available to the investor, and it also helps the host state to attract more foreign investors⁴¹. ISDS operates with the consent of the host state and home state, not with the consent of the private investor. The investment tribunals rule on governmental actions and measures that have adversely impacted on investment⁴².

When regulatory measures taken by the government are struck down by the arbitrators who are foreign nationals, criticisms have been made even against ISDS for its democratic deficit, confidentiality and secrecy, lack of independence, and lack of judicial review power⁴³. If a system curtails democratic principles such as accountability, and transparency, while letting people be inaccessible and structurally isolated from public input, that system creates a democratic deficit⁴⁴. It is argued that reviewing such actions by a tribunal would interfere with state power and the public interest because state rules are representations of public will that are approved by publicly elected representatives⁴⁵.

On many occasions, tribunals have been reluctant to examine the motivation behind the host state's state measures⁴⁶. Moreover, as in commercial arbitration, neither pleadings nor the hearings make available to the public, and final decisions that are largely based on commercial principles are released to the public when only the consent of the parties is given⁴⁷. Specifically relating to the two cases pending before the ICSID against Sri Lanka, the author was unable to find reliable facts as the documents are not

⁴¹ Rudolf Dolzer and Christopher Schreure, *Principles of International Investment Law*, Third Edition (Oxford University Press, 2012) at 236

⁴² *ibid*

⁴³ Bernali Chaudry, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit", *Vanderbilt Journal of Transnational Law*, Vol.41, no. 775 (2008) at 785-789, Also see Kingsbury, B., & Schill, S., (2010) 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - The Concept of Proportionality', in S Schill (ed), *International Investment Law and Comparative Public Law*, at 114

⁴⁴ *Ibid*, at. 785

⁴⁵ *Ibid*, at 778

⁴⁶ *Cia del Desarrollo de Santa Elena SA v. Costa Rica*, 1 ICSID (World Bank) 96 (17 February 2000), *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* ICSID Case No. ARB (AF)/00/2, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000)

⁴⁷ Benali (n.42) at 786

accessible on the UNCTAD website⁴⁸. In general, arbitrators parallelly work as counsel of another case, they are concerned about their reappointment as arbitrators and not about the effects of the judgment on the public at large⁴⁹. Therefore, the independence of tribunals has been subjected to much criticism⁵⁰. The exit of Bolivia and Ecuador from ICSID is justified by them based on these factors⁵¹. Even the UNCTAD 2015 report suggests abandoning the ISDS system as an option for reformation to have a balanced approach.

In order to avoid the aforementioned drawbacks of the ISDS, the ICSID has made several changes to their system⁵². The ICSID now publicizes cases on its website which have been registered under it with a short description⁵³. Although publication of pleadings and awards are still subject to the consent of parties, the ICSID has amended its rules to allow for the prompt publication of excerpts of the tribunal's legal reasoning⁵⁴. Further, it permits persons other than the parties to attend the hearing of the tribunal with the consent of the parties⁵⁵.

A Way Forward to Sri Lanka

One important feature of the ICSID Convention is that its decisions are not subject to appeal. Article 53 of the Convention states that the award shall be binding on the parties and shall not be subject to any appeal or any other remedy except those provided for in this Convention. This mandatory nature of the decisions demands that host states should take precautionary steps to mitigate the risk of litigation. As the BIT is considered as a self-contained regime⁵⁶ the BIT should itself be able to properly balance the interests of the investors and the regulatory power of the host state⁵⁷. As the matters relating to arbitration are largely based on commercial principles and

⁴⁸<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/198/sri-lanka/respondent>>last visited on 01May 2021

⁴⁹ Benali (n.42) at 786-787

⁵⁰ *Ibid.*

⁵¹ World Investment Report 2015

⁵² Mary Footer, "BITS and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment", *Michigan State Journal of International Law*, vol.18,no.1(2005), at 36

⁵³ OECD Working paper on international investment, Working Paper no 2004/4

⁵⁴ ICSID Rules, Article 37

⁵⁵ The ICSID Rules, Rules 32 and 37

⁵⁶ (n.11) at para 21

⁵⁷ Kingsbury &Schill, (n. 42) at 75

decided by private arbitrators who worked as legal counsels, the BIT should be able to reserve some policy space for the host state to legitimize their regulatory power⁵⁸. Otherwise, the investor-state mechanism would have more potential to be biased towards investors.

Mitigating this potential risk, modern BITs provide space within the BIT for the host state to legitimize its regulatory power so that arbitrators would be able to interpret the explicit provisions of the BIT. These BITs are designed to strike a reasonable balance between the foreign investor and the host country⁵⁹. Although many traditional BITs are not well equipped to provide guidance for tribunals, modern BITs have attempted to reflect public concerns of the host state in preamble, expropriation provisions, or in general exception clause or in the separate provision on environment, health, labor rights or in any other provisions as performance requirement clause. This trend can be widened through the modification of existing BITs or drafting modern BITs when states initiate bilateral investment relations.

In *AAPL V Sri Lanka* case, the disputed UK-Sri Lanka BIT does not contain even an essential security exception that provides space for the host state to legitimize its measures that purposed to ensure essential security interests. If the State had foreseen the consequences of contractual obligations of the treaty at the time of drafting or if the treaty provided proper latitude for the public interest of the host state in the expropriation clause or security exemption clause, the decision would have been changed.

Similarly, the German-Sri Lanka BIT also represents the elements of traditional BITs and not provided proper latitude for the host state to legitimize its lawful actions taken for the public interest. Not only the situation is same as Malaysia- Sri Lanka BIT and the UK-Sri Lanka BIT, but with all other Sri Lanka's BITs. None of the BITs contains a general exception clause to provide policy space for the host state to legitimize such regulation. If so, it can exempt the violations of other treaty commitments if it purposed the public interest.

Further, when the Deutsche Bank matter was decided by the Supreme Court, delivering the interim order, international obligations that have been arisen based on the BIT or the Hedging Agreement were not seriously taken into

⁵⁸ Bernali (n.42) at785-789

⁵⁹ World Investment Report (n.15) at 121-163

consideration and it allowed the CPC to suspend the Contract entered with the Bank.

Therefore, it is suggested that Sri Lanka should revisit all BIT commitments providing proper latitude for the host state to legitimize her state measures taken for the public interest. Both *KLSenergy* and *Eyre Montrose Development* cases would also be decided against the country if the jurisdiction is satisfied as the disputed BITs are also more prone to protect the interests of the investors.

Conclusion

As it is explored, the experience of Sri Lanka before the ICSID has not always been advantageous to Sri Lanka. Arbitration becomes more challenging for States like Sri Lanka if the BITs do not adequately represent both the interests of investors and the host state. Although the application of international obligations in domestic cases is progressive in the area of human rights and environmental rights, investment treaty obligations are not yet embodied through juridical decisions. In contrast, the contested BITs in the *AAPL* and *Deutsche Bank* cases failed to adequately protect the host state's interests, and consequently, the government was defenseless before the ICSID. Many countries, including India, Colombia, Chile, Peru, Japan, Korea, Singapore and Taiwan have refined and revisited their BITs to provide proper latitude for the host state to exercise regulatory power. The current BITs must therefore be reviewed promptly in order to take advantage of the island's geographic location and also to prevent another investor-state claim against the GOSL.



The LGBT Community in the Eyes of Sri Lankan Law

Janethree Kulawardhana¹

Abstract

This research paper is an in-depth study on the laws about the LGBT community in Sri Lanka. The history of LGBT relationships dates all the way back to ancient Egypt, where this was strongly opposed. Sri Lanka was a non-conservative society. However, after being colonized by the British the Sri Lankan society adapted to the new laws legislated resulting in the criminalization of rights of the LGBT community. While Sri Lanka is still following the laws imposed by the British the UK has legalized them. Despite the 1978 constitution of Sri Lanka not guaranteeing complete protection for the LGBT community, the present Sri Lankan government has claimed otherwise. This paragraph explains the various methodologies used by the author to gather relevant data to complete the aim of this research paper. This research paper was based on semi-structured interviews. These interviews were conducted with two people from the LGBT community who are in the ages of 20s. The author completed an ethical consideration form before conducting the interviews with the two interviewees as this topic is a sensitive topic. Moreover, their identities will be hidden for privacy purposes. However, two more interviews were held with academics; one from the medical field and the other from the legal field. The reason to choose academics from those fields was that they are two especially important sectors that every human including the LGBT community needs complete access to. Further, the author also referred to international conventions, domestic criminal law provisions, fundamental rights, and the jurisdictions of the United Kingdom and India to complete this research paper. This research paper will answer the question of whether the LGBT community in Sri Lanka is treated equally under the eyes of the law through the above-mentioned interviews. Therefore, it could be re-conducted that the Sri Lankan legal system does not treat the LGBT community on equal ground.

¹ LL.B Reading (APIIT)

Keywords: *LGBT community, Rights of the LGBT people, existing legal regime, lesson to learn from, reforms.*

Introduction

Homosexual relationships date all the way back to 2400 BC as with evidence by the words in the joint tomb of Khnumhotep and Niankhkhnum, the Egyptian royal servants which stated, “joint in life, joint in death.”² Even though this was an unacceptably opposed subject in the distant past, with the development of technology and the evolution of humankind many changes in the legal, social and political fields have resulted in creating anti-discriminatory countries globally. Therefore, many states have adapted and progressed towards accepting and legalizing lesbian, gay, bisexual, and transgender (LGBT) relationships and even marriages. However, certain countries including Sri Lanka still have a discriminatory attitude toward the LGBT community refusing to change the respective legal provisions.

The vast mix of cultures and traditions of Sri Lanka which originated from the ‘Thambapanni’ times are still practiced in the modern era. However, many such cultural boundaries have been illegalized by law. One of the famous marriage practices was the ‘Eka gei Kema’ concept which partially falls within polygamous marriages³. Although, pioneer civilians of Sri Lanka had open and free lifestyles in terms of love, intimacy, and marriage these practices will be considered an offense under the current law.⁴ These are exemplary examples proving that certain concepts that were present back in time have been made illegal after colonization.

The current attitude of society towards the LGBT community derives from the British concept of heterosexual marriages. The British colonial implemented laws criminalizing the actions of the LGBT community via the Penal Code of 1883⁵ which was contrary to the practices that were present at that time⁶.

² The Legacy project, ‘Khnumhotep and Niankhkhnum aka overseers of the manicurists – nominee’ (*The legacy project*, 2020) <<https://legacyprojectchicago.org/person/khnumhotep-and-niankhkhnum-aka-overseers-manicurists>> Accessed 13 December 2021.

³ WTA Leslie Fernando, ‘Marriage and the family life’ (*Daily News online*, 2021) <<http://archives.dailynews.lk/2005/03/22/fea09.htm>> Accessed 13 December 2021.

⁴ Ibid.

⁵ Penal Code Ordinance No 2 of 1883 (Sri Lanka)

⁶ Lola García- Ajofrín, ‘The law on which the sun never set’ (*Outriders*, 30 Dec 2020) <<http://outride.rs/en/377-the-law-on-which-the-sun-never-set/>> Accessed 14 December 2021.

This homophobic trend eventually became stronger and led to a change in society's attitudes, resulting in the evolution of the Sri Lankan culture. The technological advancements in the world have supported this mindset by the creation of negativities like discrimination, based on differences of people building minority communities such as the LGBT.

The social pressure released by a cluster of unfavorable opinions in the society combined with the law offers no protection to these minority groups, hoping to gain justice and fairness. This research paper is an in-depth study of the laws pertaining to the LGBT community in Sri Lanka. This paper aims to identify any loopholes in domestic criminal law and the human rights related to the LGBT community by interpreting different international conventions and treaties and comparing the laws of the United Kingdom and India. Restricting a human choice and tying up the rights based on external differences will be sharply explored and, an analysis of whether the LGBT community in Sri Lanka is treated equally in the eyes of law will be attempted to be answered.

Laws pertaining to the LGBT community in Sri Lanka-Criminal aspect

During the colonial era, many Sri Lankan customary practices fell apart as the societal habits of the British and the Lankans were divergent. As per Christian moralists, homosexuals have always been considered a sin.⁷ Hence, the religious perspective of the British played a key role in legislating laws against the pre-existing homophobic culture in Sri Lanka.⁸ Therefore, society adapted to the ideologies of the British accepting them as the evolution of Sri Lanka's multiculturalism norms⁹.

Section 365 of the Penal Code of Sri Lanka 1883 states that "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment."¹⁰ The term "against the order of nature" in a practical sense means that it is a usual activity that is predictable. Hence, this Section is only supportive of all activities which should be 'natural'. Investigating the term 'natural' in a

⁷ Paul Sands, 'The deadly sin of Pride' (Baylor University 2022)

⁸ *ibid.*

⁹ Lola García- Ajofrin, 'The law on which the sun never set' (*Outriders*, 30 Dec 2020) <<http://outride.rs/en/377-the-law-on-which-the-sun-never-set/>> Accessed 14 December 2021.

¹⁰ Penal Code Ordinance No 2 of 1883 (Sri Lanka), hereinafter 'Penal Code'.

deeper outlook means only peno-vaginal intercourse is considered natural which indirectly conveys that it is only for the purpose of reproduction, which could only occur between a man and woman. Under this argument, it can be further said that the use of condoms and birth control pills by heterosexuals is also unnatural as they are used to prevent pregnancy. Furthermore, sexual cravings are a fundamental need of each individual after they arrive at a particular age. Therefore, this law imposed restricts sexual intercourse between heterosexuals, and hence the manufacturing of all birth-controlling instruments should be banned as it will not be a useful product under the stated section.

Section 365A of the Penal Code states that “any person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence, and shall be punished”¹¹. Even though, the section states ‘any person, it is practically impossible for the state to carve the borderline and involved in every couple’s life especially in private, to monitor the physical contact between partners. However, if this method is implied then this section contradicts the Human right to private life. Although, it is not explicitly identified as a fundamental right under the 1978 constitution Articles 14(c) Freedom of association¹² and 14(e) freedom either by himself or in association with others, either in public or private¹³ will be in breach. Hence, it is unfair for this section to be imposed only on same-sex couples. In the case of ***Galabada Payagalage Sanath Wimalasiri v Officer in Charge***¹⁴ two people were accused of having oral sex in a car park and after a few appeals, they were given fine and 2-year imprisonment by the Supreme Court of Sri Lanka stating that sodomy and buggery are indecent activities and will continue to be a crime in Sri Lanka¹⁵. However, there was no clear ruling on the benchmark of ‘Gross Indecency’. Moreover, if the above case was between a heterosexual couple, it is questionable if the court would convict or acquit the accused persons. Thus, there is an

¹¹ *ibid.*

¹² Constitution of Sri Lanka 1978, Article 14 (c).

¹³ Constitution of Sri Lanka 1978, Article 14 (e).

¹⁴ *Galabada Payagalage Sanath Wimalasiri v Officer in charge police station- Maradana* [2009] SC SPL LA No.304 (Sri Lanka).

¹⁵ *ibid.*

imbalance as to which pathway the court will take upon heterosexuals and whether the fundamental rights under Article 14 will be in breach.

Homosexuality is not openly categorized but falls under ‘Unnatural Offences’ and ‘Gross Indecency’ automatically falls into an open discussion¹⁶. There are technical terms that have no clear explanation as to which is the practical pathway¹⁷. Even though the Sri Lankan justice system has not reported many cases of homosexual convictions after 1948, the Sri Lankan police and society threaten, harass, and pester these people¹⁸. Therefore, the police and other organizations backed by these laws take it as an opportunity to address these minority groups as perverts and criminals¹⁹.

Further, Section 399 of the penal code of Sri Lanka proves that a person is said to ‘cheat by personation’, which directly aims at the transgender community in Sri Lanka based on misleading the public²⁰. In 2020, an individual was denied access to a bar in Colombo simply because she was identified as a transgender woman through her looks. In fact, this is not the only instance this has happened in Sri Lanka²¹.

Therefore, it is understandable that the domestic criminal laws have loopholes within the legal system as identified and elaborated above.

The International Human Rights Perspective on LGBT and the available local fundamental rights

This section of the paper will be focusing on the scope of Human rights available for the LGBT community from an international perspective. Sri Lanka has ratified many international instruments such as the International Covenant on Civil and Political Rights (ICCPR)²², the Convention on the

¹⁶ Judit Kolbe and Malene Solheim, ‘Hydropower-The effect of climate change mitigation on Human Rights’ (*Global Human Rights Defence*, 21 Dec 2021) <<https://ghrd.org/discrimination-against-the-lgbtq-community-in-sri-lanka/>> accessed 15 December 2021.

¹⁷ *ibid*.

¹⁸ Judit Kolbe and Malene Solheim, ‘Hydropower-The effect of climate change mitigation on Human Rights’ (*Global Human Rights Defence*, 21 Dec 2021) <<https://ghrd.org/discrimination-against-the-lgbtq-community-in-sri-lanka/>> accessed 15 December 2021.

¹⁹ *ibid*.

²⁰ Penal Code (n 9).

²¹ Shihara Maduwage, ‘The morning’ (*Manudam mehewara*, 4 Oct 2020) <<https://www.themorning.lk/why-diversity-training-is-paramount-for-companies/>> 28th June 2022.

²² International Covenant on Civil and Political Rights.

Elimination of All Forms of Discrimination Against Women (CEDAW)²³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁴. In this section of the paper apart from the mentioned instruments, The Universal Declaration of Human Rights (UDHR) and the European Convention on Human Rights will also be used to address the gaps in the law relating to the LGBT community.

Article 1 of the UDHR states that all human beings are born free and equal in Dignity and Rights²⁵. This Article highlights that every person should be treated equally, despite any external factors²⁶. Similarly, Article 12 (1)²⁷ of the 1978 constitution states that all persons are equal before the law and are entitled to the equal protection of the law²⁸. Even though this has been expressed in the constitution unlike in the ***Galabada Payagalage Snath's case***²⁹ in the case of ***Amerasinghe v Daluwatta***³⁰ which was also an allegation against homosexuality the case was dismissed under procedural irregularities³¹. Even though this is one rare case in Sri Lanka where a homosexual was charged, it breached the right to equal protection of the law under Article 12(1) as similar cases were decided otherwise under extremely different and unjustifiable reasonings. Further, Article 26³² of the International Convention on Civil and Political Rights (ICCPR) states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law³³. This means that international bodies like the ECHR, UDHR, and the ICCPR which Sri Lanka agrees to guarantee the protection of the LGBT community.

Article 2 of the UDHR States the similar right that Article 12(2)³⁴ of the Sri Lankan Constitution states that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, or any such

²³ The Convention on the Elimination of all Forms of Discrimination Against Women.

²⁴ International Covenant on Economic, Social and Cultural Rights.

²⁵ Universal Declaration on Human Rights, Article 1.

²⁶ *ibid*.

²⁷ Constitution of Sri Lanka 1978, Article 12 (1).

²⁸ *ibid*.

²⁹ See note 13.

³⁰ *Amerasinghe v Daluwatta* [2001] C.A 128/98.

³¹ *ibid*.

³² International Covenant on Civil and Political Rights, Article 26.

³³ *ibid*.

³⁴ Constitution of Sri Lanka 1978, Article 12 (2).

grounds³⁵. Although, 'any such grounds' does not explicitly recognize the LGBT community according to Sri Lankan activist Rosanna Flamer Caldera the government has accepted the LGBT community under the stated wording³⁶. According to the Outright Organization, even though the Sri Lankan government has repeatedly stated that the LGBT community is protected under the 1978 constitution, there is a doubt whether systemic discrimination is being upheld as recent leaders have openly wrangled about the LGBT community³⁷.

Article 6 of the UDHR states that everyone has a right to recognition as a person in front of the law³⁸. Article 13(3)³⁹ of the 1978 constitution states that every person is entitled to a fair trial in a competent court. Taking back the example of the case *Amerasinghe v Daluwatta*⁴⁰ this was not a fair trial when comparing it with *Sanath's* case⁴¹. Therefore, these human rights are recognized in the UDHR or even the ECHR the Sri Lankan Supreme Court interpreting the laws of the European Convention on Human Rights (ECHR) in judging LGBT cases will solely depend on the social mindset of the judges. This point is well proven by the judgment of the Akkaraipattu Magistrate judge who ordered to conduct a psychiatric evaluation on the two women who were not involved in any misconduct yet rather just in love⁴². Furthermore, as stated above the right to freedom of expression under Articles 14 (c) and (e) is also violated in contradiction to Section 365 A of the Penal Code of Sri Lanka.

However, the International Gay and Lesbian human rights commission (IGLHRC) showed that the Lesbian Bisexual and Transgender (LBT) population

³⁵ Human Rights Watch, Sri Lanka: forced anal exams in homosexuality prosecutions' (*Human rights watch*, 20 Oct 2021) <<https://www.hrw.org/news/2020/10/20/sri-lanka-forced-anal-exams-homosexuality-prosecutions>> Accessed 28 December 2021.

³⁶ Outright International, 'Sri Lanka government says LGBT rights are constitutionally protected' (*Outright international*, 20 Oct 2014) <<https://outrightinternational.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>> Accessed 28 December 2021.

³⁷ Outright action international, 'Sri Lanka government says LGBT rights are constitutionally protected' (*Outright action international* June 2019) <<https://web.archive.org/web/20190620225217/https://www.outrightinternational.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>> Accessed 12 Jan 2022.

³⁸ Universal Declaration of Human Rights, Article 6.

³⁹ Constitution of Sri Lanka 1978, Article 13 (3).

⁴⁰ See note 28.

⁴¹ See note 13.

⁴² Safira Fazal, 'The morning' (*Manudam mehewara*, 28 June 2022) <<https://www.themorning.lk/indo-slesbian-couple-seeking-matrimony-released/>> 02nd July 2022.

in Sri Lanka suffered increased numbers of sexual, emotional, and physical violence at home and in public with no legal support⁴³. The Convention on Elimination of All Forms of Discrimination (CEDAW) aims to ensure protection over social and cultural issues pertaining to women. The Shadow report presented to the 66th session of CEDAW in 2017 states that Sri Lanka has not offered any statistics to understand the disadvantages faced by the LGBT community⁴⁴. However, in 2016 Sri Lanka progressed to accepting gender recognition for the transgender community to legally obtain the Identity Card⁴⁵. Therefore, it can be established that even though there are certain slips, the rights are protected to a certain extent.

Comparing the criminal view and the Human rights view, the Sri Lanka laws are contradictory to one another. One reason for the criminal law being unclear is because those laws were implemented back in the 1880s almost 140 years ago. The historical roots back then do not have clear-cut evidence as to certain justifications. Additionally, those perceptions of the pioneers do not suit the modern era. Moreover, certain justification and accepted human rights through international instruments are not implemented in domestic courts despite having some of them in the constitution identified as a fundamental right as stated above. Hence, the intersection between the two laws does not balance and hence, the laws pertaining to the LGBT community in Sri Lanka are not stable.

Article 16 of the Sri Lankan Constitution states that all written and unwritten law that existed prior to the 1978 constitution is valid and operative⁴⁶. This means that even though the rights of the LGBT community are protected under the Sri Lankan constitution the laws that criminalize homosexuality and transgender that were imposed before 1978 are still applicable. Therefore, there is a clear overlap of laws in Sri Lanka.

⁴³ Outright International, 'Violence: Through the lens of lesbian, bisexual and trans people in Asia.' (*Outright international*, 6 May 2016) <<https://outrightinternational.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>> Accessed 30 December 2021.

⁴⁴ Equal Ground, 'Human Rights violations against lesbian and bisexual women in Sri Lanka: A shadow report (July 2016)' <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/LKA/INT_CEDAW_NGO_LKA_24294_E.pdf> Accessed 10 January 2022.

⁴⁵ Judit Kolbe and Malene Solheim, 'Hydropower- The effect of climate change mitigation on Human Rights' (*Global Human Rights Defence*, 21 Dec 2021) <<https://ghrd.org/discrimination-against-the-lgbtq-community-in-sri-lanka/>> Accessed 30 December 2021.

⁴⁶ Constitution of Sri Lanka 1978, Article 16.

Furthermore, Sri Lankan society discriminates against the LGBT community under physical, structural, and cultural bounds⁴⁷. Physical harassment is medical practitioners forcing anal and vaginal examinations to obtain evidence to prove homosexual misconduct. Moreover, the court had ordered several men to take the test for Human Immunodeficiency Virus (HIV) without consent⁴⁸. Under structural discrimination, domestic violence against homosexuals is high. The lack of respect and acceptability in society prevents them from reaching out to the relevant authorities resulting in an increase in suicidal rates⁴⁹. Culture is one of the main excuses for discrimination against the LGBT community. Society has imposed certain gender roles on every person. For instance, a role of a mother should always be done by a female which directly aims at the LGBT community by disregarding two gay men trying to raise a child. Therefore, it directly discriminates against the LGBT community who will not be able to meet these criteria⁵⁰.

Application v Reality

According to the findings from an interview with a 21-year-old law student, a Sri Lankan, whose gender identity is transgender and sexual orientation is homosexual, described discrimination as, “where people have distorted it as an instrument to impair inhabitants who are different from that of an accepted standard human being, especially in Sri Lanka.” He further elaborated that it is from an early age that parents and teachers instill in young children that if you are born a girl, you will always be a girl or vice versa. As Sri Lanka does not have any provisions protecting the LGBT community and their rights, he expressed that it is the responsibility of Sri Lankan Parliamentarians to take the initiative in educating the public and the schools to educate the children. He further stated that, even though he did not face any discrimination in the legal or medical sectors, he has faced many challenges at clothing stores simply

⁴⁷ Human Rights Watch, ‘Sri Lanka: forced anal exams in homosexuality prosecutions’ (*Human rights watch*, 20 Oct 2021) <<https://www.hrw.org/news/2020/10/20/sri-lanka-forced-anal-exams-homosexuality-prosecutions>> accessed 15 December 2021.

⁴⁸ *ibid*.

⁴⁹ Global Human Rights Defence, ‘Hydropower- The effect of climate change mitigation on Human Rights’ (*Global Human Rights Defence*, 21 Dec 2021) <<https://ghrd.org/discrimination-against-the-lgbtq-community-in-sri-lanka/>> Accessed 19 December 2021.

⁵⁰ Human Rights Watch, Sri Lanka: forced anal exams in homosexuality prosecutions’ (*Human rights watch*, 20 Oct 2021) <<https://www.hrw.org/news/2020/10/20/sri-lanka-forced-anal-exams-homosexuality-prosecutions>> Accessed 28 December 2021.

because he purchased clothing from the men's section⁵¹.

"I feel lucky that I was born as a citizen of this beautiful island surrounded by a rich ecosystem which enhances the natural beauty and the multicultural background. The multiethnic environment was the place I learned to accept differences, but today I am living far away from this land because the laws are discriminatory against my kind". A 26-year-old graduate in civil engineering who is a homosexual stated this in the interview. Moreover, she said because of her sexual orientation she had to move to Australia to live a peaceful life with her wife. "My parents accepted me and my relationship, but my country did not" When a group of open-minded leaders step up and amend the law, my wife and I can come back to Sri Lanka and live with our loved ones peacefully⁵².

A 30-year-old doctor working at government hospitals in Sri Lanka stated that The LGBT community consists of normal people with sexual interests that are out of the norm. As a doctor, I do not see any abnormality being one, it is just people trying to live their lives. I have seen the LGBT community putting an effort to be accepted as friends, be treated kindly, be loved, and live a normal life. Therefore, I believe in the strength they have, despite millions of judging eyes in the world. Their rights should be fulfilled, and society should protect their needs; she further elaborated. Even though I have not had patients who are part of the LGBT community, I remember a time my senior doctor, who was in his 50s, treated a transgender woman with a downgraded mindset which was a depressing instance in my career⁵³.

A 62-year-old Attorney at Law stated that she does not agree with the LGBT community being in society their behavior is unnatural and unethical which damages the culture. She strongly believes in the advice given to her as a child. Despite her personal view, she also stated that once she accepted a case of a gay client and did justice to him simply because the law accepts every human as innocent until proven guilty. However, she also admitted that following this case, she realized that he was no different and therefore has changed her cultural attitude and has later proceeded with probono

⁵¹ Name withheld, Student, (zoom call, 02 January 2022).

⁵² Name withheld, Civil Engineer, (zoom call, 02 January 2022).

⁵³ Karieshini Peiris, Doctor, National hospital (zoom call, 30 December 2021).

services to the LGBT community⁵⁴.

Laws Relating to the LGBT Community in the UK

Even though the United Kingdom (UK) has a positive approach toward the LGBT community today, historically it has always been a complicated subject especially with the majority being Christians. Earlier, homosexual relationships were a criminal offense that was punishable by death under the Buggery Act 1533 which was endorsed by King Henry VIII under the beliefs of sin, conjugal love, and straight and narrow which are teaching of the Holy Bible⁵⁵. In the case of *Alan Turing*,⁵⁶ although he was the main reason for the UK to shorten the war with Germany which saved many lives, he was convicted for gross indecency. As punishment, he was given chemical castration which reduces his need for sexual activities in exchange for prison. Even though Alan was a mastermind mathematician, his personal life's preferences caused him to be punished⁵⁷. The Wolfenden Committee Report was established in 1957 as a result of the increased number of homosexual activities post World War II⁵⁸. 10 years after this report, England and Wales legalized homosexuality if it was consensual and in private between two men above the age of 21, by the Sexual Offences Act 1967⁵⁹. The United Kingdom then worked towards accepting every minority group by identifying the rights of the transgender community in the 1970s and allowing them to obtain legal documents like passports and driving licenses⁶⁰. The case of *Goodwin v UK*⁶¹ established that transgender rights were recognized under

⁵⁴ Padmini Kondapperuma, Attorney-at-Law, Private practitioner (zoom call, 30 December 2021).

⁵⁵ Steven Dryden, 'A short history of LGBT rights in the UK' (*British Library*, 2020) <<https://www.bl.uk/lgbtq-histories/articles/a-short-history-of-lgbt-rights-in-the-uk>> Accessed 2 Jan 2022.

⁵⁶ Katie O'Malley, 'Alan Turing: why was the code breaker convicted and pardoned for his sexuality?' (*Independent*, 15 July 2019) <<https://www.independent.co.uk/life-style/alan-turing-new-ps50-banknote-gay-codebreaker-mathematician-sexuality-pardon-a9005086.html>> accessed 2 Jan 2022.

⁵⁷ Katie O'Malley, 'Alan Turing: why was the code breaker convicted and pardoned for his sexuality?' (*Independent*, 15 July 2019) <<https://www.independent.co.uk/life-style/alan-turing-new-ps50-banknote-gay-codebreaker-mathematician-sexuality-pardon-a9005086.html>> accessed 2 Jan 2022.

⁵⁸ John Wolfenden, 'Wolfenden committee report' (1957) <<https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/collections1/sexual-offences-act-1967/wolfenden-report-/>> Accessed 10 Jan 2022.

⁵⁹ Sexual offences Act 1967.

⁶⁰ Yaiza Derbyshire Vieira, 'Trans people can now change the gender on their passport without a medical letter- government announces' (*Independent*, 15 July 2019) <<https://www.independent.co.uk/life-style/alan-turing-new-ps50-banknote-gay-codebreaker-mathematician-sexuality-pardon-a9005086.html>> accessed 2 Jan 2022.

⁶¹ *Goodwin v United Kingdom* (1996) 22 EHRR 123.

the Gender Recognition Act 2004⁶². Further, by 2010 gender reassignment was also recognized under the Equality Act 2006⁶³ except in Northern Ireland which accepted this provision in 2020.

Even though many believe that homosexuality was a concept that was introduced by the Western countries to their colonies, it is homophobia that the colonial countries adopted from the Western countries. After Sri Lanka became a colony of the British certain laws were implemented to prevent existing customs like homosexuality within the country. However, while the British started progressing in building a free and fair environment, Sri Lanka still follows the provision of the Penal Code of Sri Lanka 1883.

Law Relating to the LGBT Community in India

India is a country that is respected for the broad cultures and traditions practiced within the state. It has similar characteristics to Sri Lanka regarding LGBT laws since it was never illegal in India before the invasion of the British.⁶⁴ The Kama sutra which was published in the 4th century A.D can be identified as one of the best examples to prove that India too had practices such as homosexual relationships as it vividly explains the physical pleasure between males and males. Further, Indian poets like Isha and Rangin openly wrote about homosexual relationships in the same effect they wrote about heterosexual relationships⁶⁵. Hence, the homophobic approach was introduced by the British. Section 377 of the Indian Penal Code criminalizes homosexual relationships while Articles 14 and 21 of the Indian Constitution guarantee equal protection. The Indian constitution adopted a similar outlook as the Sri Lankan contradiction between the human rights view and the criminal law view⁶⁶.

However, after 150 years of hardships faced by the LGBT community in India

⁶² Gender Recognition Act 2004.

⁶³ Equality Act 2006.

⁶⁴ Camille-Maya Jayanthi Lemesie, 'The evolution of the perception and acceptance of the LGBT community in India' (*Voices of the Youth*, 10 Dec 2020) <<https://www.voicesofyouth.org/blog/evolution-perception-and-acceptance-lgbtq-community-india>> Accessed 5 Jan 2022.

⁶⁵ Camille-Maya Jayanthi Lemesie, 'The evolution of the perception and acceptance of the LGBT community in India' (*Voices of the Youth*, 10 Dec 2020) <<https://www.voicesofyouth.org/blog/evolution-perception-and-acceptance-lgbtq-community-india>> Accessed 5 Jan 2022.

⁶⁶ Zainab Patel, 'The long road to LGBT equality in India (United Nations in India 2021)' <<https://in.one.un.org/blogs/the-long-road-to-lgbt-equality-in-india/>> Accessed 6 Jan 2022.

the case of *Navtej Singh Johar & Ors. v. Union of India*⁶⁷ then Secretary, Ministry of Law and Justice became the leading light in finally legalizing the LGBT rights by decriminalizing all the provisions of the Indian Penal Code pertaining to the LGBT community in 2018. Chief Justice of India at the time Mr. Deepak Mishra stated that the court identified criminalizing carnal intercourse" to be "irrational, arbitrary and manifestly unconstitutional" definitely does help that "the choice of whom to partner, the ability to find fulfillment in sexual intimacies and the right not to be subjected to discriminatory behavior are intrinsic to the constitutional protection of sexual orientation and deprived that every person of the LGBT community is also entitled to equal protection under the law⁶⁸. Further, Section 399 of the Sri Lankan Penal Code has stated it the same way under section 419 of the Indian Penal Code In, 2014 under the case of *NALSA vs. Union of India*⁶⁹ *it was held that the rights of transgender people are protected by the Indian constitution.*

India is a country that has many roots in terms of language, religion, race, and other external factors. The intertwining of these roots takes a much wider perspective that cannot be simplified because of the different rituals and customs that have been practiced within Indian history. However, despite India having a much more complex situation the country the law abolished the homophobic aspect instilled in the country by the British. India's complexities are broader than Sri Lanka because of the land extent and the higher population. Therefore, India has faced more challenges to overcome legalizing the LGBT community rights compared to Sri Lanka and they have granted equal rights to all the LGBT community while Sri Lanka is still struggling in overcoming its challenges.

Recommendations

As a result of this research paper, Sections 365 and 365 A of the Penal Code of 1883 in Sri Lanka should be reviewed, and same-sex relationships should be legalized. It should be ruled specifically that there be no discrimination based on sexual orientation and gender identity. There is a need to include

⁶⁷ *Navtej Singh v Johar & Ors v. Union of India* AIR 2018 SC 4321; W. P. (Crl.) No.76 of 2016; D. No.14961/2016 (India).

⁶⁸ *ibid.*

⁶⁹ *National legal services authority v Union of India* (2014) 5SCC 438(India).

the group LGBT in Article 12(2) of the 1978 Sri Lankan constitution. Moreover, an accomplishment of national laws and policies should be legislated all around the country to guarantee the protection of the LGBT group while eradicating domestic violence faced by LGBT women in the Sri Lankan society. The governmental authorities should take reasonable steps to educate the society from an early age to prevent social discrimination and impede forced marriages of the LGBT community with hetero sexual to prevent and hide their identity. Strong awareness programmes under this topic should be formulated. Governmental officials such as police should be more responsible in dealing with the LGBT community by enhancing professionalism and always practicing it by all people within any community. Also, initiations such as creating school-level awareness programmes throughout the country to ensure that the discriminatory mindsets amongst the society could be minimized from initial stages. Finally, implementing well-organized programmes for adults, to respect and recognize the LGBT community in Sri Lanka could gradually give the society a sense of acceptance.

Conclusion

Sri Lanka is a country in which concepts like LGBT were practiced in the past but later drifted adapting to a homophobic environment. It is necessary to repeal the penal code's provision which criminalizes LGBT relationships because those laws were implemented over 130 years ago. Even though Section 365 and 365 A criminalize the actions of the LGBT community, the Supreme Court recognized contemporary thinking that sex that happens between homosexuals with consent should not be criminalized⁷⁰. Furthermore, the provision that guarantees protection of the LGBT community to a certain extent in the 1978 constitution should be extended and the community should be included under article 12(2) of the constitution. Article 16 of the Sri Lankan constitution should be removed from the constitution as it creates a clash between the criminal law aspect and the human rights view of the Sri Lankan legal system. Article 16 does not provide a suitable law for the current fast-moving world and its legal innovations in this era. Sri Lanka should adopt and incorporate the international perspective of human rights

⁷⁰Outright action international, 'Sri Lanka government says lgbt rights are constitutionally protected' (*Outright action international* June 2019) <<https://web.archive.org/web/20190620225217/https://www.outrightinternational.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>> Accessed 12 Jan 2022.

laws into the Sri Lankan system to build a much fairer and just environment in the legal field. As for the interview findings, the younger generation is more willing to accept the LGBT community than the older generation. Additionally, the fact that Sri Lanka as a country should legalize the rights of the LGBT community was pointed out. It is right and a choice to decide gender identity and sexual orientation oneself and it cannot be tied up just because of a law or alternative public views. The international jurisdiction of the United Kingdom revolutionized the ancient laws in Sri Lanka by criminalizing certain practices which were present, but today while Sri Lanka is still following the 130 years old law, the UK has progressed in legalizing not only LGBT relationships but also LGBT marriages and even taken further steps to grow. India, on the other hand, has a much more rich and diverse culture and ethics compared to Sri Lanka, they have faced many more challenges and have progressed to legalize LGBT relationships today enjoying the rights of every person in society. It is necessary that Sri Lankans also break free from this shell to come out openly about their orientation and it is the duty of the country's legal and political sector to take the initiative to progress. The current Sri Lankan laws do not treat the LGBT community equally as per the clash in the law of Sri Lanka.



A Critical Analysis on the Adequacy of the Existing Legal Framework for Safeguarding E-Consumer Rights in Sri Lanka

Shaveen Sachintha¹

Abstract

With the rapid growth of e-commerce, people tend to engage with e-transactions more. As a result of the complex nature of online transactions, consumers are facing severe challenges, and their privacy and data protection rights are being violated continuously. Therefore, sufficient measures must be taken to safeguard the rights of e-consumers. In this paper, the Author analyzes the legal instruments of Sri Lanka which can be utilized to protect the rights of e-consumers. However, when considering the existing legal framework of Sri Lanka related to the protection of e-consumer rights, it is evident that Sri Lanka has not facilitated sufficient protection for the customers on an e-platform. It can be understood by the fact that no legal instrument accords express protection for online consumers. Therefore, the Author discusses challenges that e-consumers are facing in e-transactions and certain instances where consumer rights become problematic. Moreover, the author compares and contrasts the existing legal framework in Sri Lanka with legal frameworks of developed and developing jurisdictions to suggest appropriate recommendations to Sri Lankan law. Finally, the author discusses the initiatives taken by Sri Lanka in order to safeguard the interests of e-consumers. The author uses the qualitative approach and mainly relies upon secondary data.

Keywords: *E-Consumer, Consumer Rights, Consumer Protection, E-Contract, Data Protection, Electronic Transactions, Online Privacy.*

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Introduction

When analyzing the existing legal framework of Sri Lanka, there is no any express legal basis regarding online consumer protection. Information technology and consumer law related legal frameworks provide implied legal protection for e-consumer rights. Importantly, the Electronic Transaction Act² (ETA) and the Computer Crime Act³ (CCA) were enacted to strengthen the legal certainty of the e-commerce sector and penalize the violations in cyberspace. Consumer Affairs Authority Act⁴ (CAAA) was enacted to address the issues in commercial trade and to protect consumer rights, though there is no any specific indication about online consumers. However, it is questionable whether these existing laws adequately address the protection of e-consumers.

In 2019, the Data Protection Bill was presented to overcome the challenges in personal data and privacy protection. The Bill seeks to establish a “Data Protection Authority” and encourage online consumers to engage with e-commerce. Moreover, in 2019, the Cyber Security Bill was presented and it is concerned with the strengthening of the payment security on e-platforms. Further, it establishes a “Cyber Security Agency” to protect essential services from cyber-attacks. Importantly, the Sri Lankan parliament enacted the Data Protection Act aiming to promote a digital economy while preserving the privacy of individuals in 2022. However, the Cyber Security Bill is not incorporated to Sri Lankan legal framework yet.

- Protection of e-consumer rights under the existing legal framework of Sri Lanka

According to Section 3 of ETA, the validity and enforceability of electronic records were legally recognized, and records cannot be ignored just because it is in e-form. Moreover, admitting the legal recognition of e-signature under Section 7 enhances the public confidence in e-commerce⁵. Importantly Section 11 certifies the legal validity and enforceability of e-contracts and paper-based contracts.

² The Electronic Transactions Act No. 19 of 2006

³ The Computer Crime Act, No.24 of 2007

⁴ The Consumer Affairs Authority Act No.09 of 2003

⁵ Kariyawasam K, “The Growth and Development of e-Commerce: An Analysis of the Electronic Signature Law of Sri Lanka” Information & Communications Technology Law Journal, (2008).

Although the ETA affirms online transactions are recognizable and accepted, it fails to provide any specific legal basis for the protection of e-consumer rights. The ETA is silent regarding personal data and privacy protection in e-transactions⁶. Furthermore, it failed to provide any regulatory mechanism to protect online consumers when they enter into e-contracts.

The preamble to the CCA sets out the objectives of the Act as identification of computer crimes, providing procedures for crime investigation and prevention of such crimes. Therefore, penalization of violations in cyberspace gives some protection to online consumers. Sections 8 and 10 provide basic safeguards for personal data and privacy protection by recognizing the illegal interception of data and unauthorized disclosure of information as computer crimes.

Although there is apparent protection, these provisions are not adequate to address data and privacy protection issues in e-transactions. Importantly, when the consumer deals with technological applications like cookies, spam, web bugs etc. this protection is obviously insufficient⁷.

As the major consumer protection legal framework of Sri Lanka, the CAAA established the Consumer Affairs Authority to safeguard the general protection of consumers and traders. According to Section 75, the interpretation to the word 'Consumer' does not make any special reference to consumers of online trading. But the interpretation of the term 'Service' includes field of Information Technology and Communication. Although it can be argued that the interpretation implies 'online consumers', the law needs more clarification regarding this definition.

The CAAA does not impose any obligation upon sellers to disclose relevant information such as the identity of the seller, geographical address, arrangement of payment, delivery performance etc. Moreover, the law does not address the withdrawal rights of the online consumers called as 'Cooling Off Period'⁸. Although Part II of the CAAA broadly address the regulation of

⁶ Madugalla KK, "Right to Privacy in Cyberspace: Comparative Perspectives from Sri Lanka and Other Jurisdictions," Kelaniya International Conference on Information and Technology (University of Kelaniya 2016).

⁷ Marsoof A, "Privacy Related Computer Crimes; A Critical Review of the Computer Crimes Act of Sri Lanka" (2007) 5 Law College Law Review 1

⁸ Cooling off period means the consumer will be given withdrawal rights to leave the contract without paying any compensation within a certain time period.

trade, it failed to confer any authoritative power specifically on Consumer Affairs Authority to regulate online trade. Further the Act does not address new concepts like contracts relating to digital contents⁹ and the Consumer Affairs Authority and Consumer Affairs Council are not adequate to resolve disputes in online trading platforms.

In 2020, the Consumer Affairs Authority raided '*Kapruka*', an online retail store upon consumers' complaints regarding violations of maximum retail prices by utilizing the given powers under the CAAA¹⁰.

Moreover, the Unfair Contract Terms Act¹¹ can be applied to mitigate the arbitrariness of sellers imposing terms on e-contracts as they wish. Part VI of the Telecommunication Act¹² also provides some implied protection to the online privacy of e-consumers.

According to the Data Protection Act of Sri Lanka, the Ministry of Digital Infrastructure and Information Technology is required to establish a Data Protection Authority to deal with privacy protection in online or offline media. Moreover, the Authority's power and functions are expressly listed in the Act. Importantly, the Authority is empowered to receive complaints regarding unauthorized or harmful personal data processing. Even without receiving a complaint, if the authority anticipates that there may be a violation of personal privacy, the Authority is able to commence an investigation under the legal framework of the Act.

The requirements and procedure of the investigation process and powers of the chairman and members of the authority during the investigation process were expressly stated in the Act. After the investigation process, the authority shall produce directives to both parties and, by considering the nature and gravity of the violation, the Authority shall file a case before a Court of Law. When the Authority issues directives with regard to any complaint, all the parties relating to complaint are bound by such directives. If any person fails to adhere to the directives of Authority without any legitimate excuse, such

⁹ Perera WC, "Beware If You Are a 'Digital Consumer'- Intangible Digital Goods and Consumer Protection in Sri Lanka," (General Sir John Kothalawala Defence University 2018).

¹⁰ Consumer Affairs Authority Raids Kapruka Office for Violating Regulations and Unethical Business Practices <<https://www.asianmirror.lk/news/item/31064-update-consumer-affairs-authority-raids-kapruka-office-for-violating-regulations-and-unethical-business-practices>> accessed 25 April 2022

¹¹ The Unfair Contract Terms Act 26 of 1997

¹² The Sri Lanka Telecommunications Act, No. 25 of 1991

person shall be guilty of an offence. However, it is clear that the existing legal frame work of Sri Lanka does not adequately address the issues of online consumers. Importantly, Section 3 of the Civil Law Ordinance¹³ permits the adoption of English common law, rules of equity and certain statutes in the absence of Sri Lankan legislation. Therefore, the protection of e-consumer rights under English Law can be concerned for safeguarding the e-consumer rights in Sri Lanka to some extent.

Due to the major drawbacks in the legal system and the complex nature of online trading, consumers' rights are severely violated. Therefore, it is important to discuss some stages where the consumer rights have become problematic in the online medium.

- The instances where e-consumer rights become problematic

Basically, we can identify three stages where consumer protection issues arise and consumer rights would be affected in an e-platform.

- Pre-purchasing Stage - Information Asymmetry
- Purchasing Stage - Online Privacy / Payment Security
- Post Purchasing Stage - Cross-Border Consumer Complaints / Redress Mechanism

Information Asymmetry means one party to the contract possesses greater material knowledge than the other party in an economic transaction. In online trading, consumers deal with unknown sellers and vendors. Consumers know only the information which are disclosed by sellers. Asymmetric information may lead to fraudulent consequences and the consumer may be misled because of the insufficiency of information¹⁴.

Online Privacy is one of the major areas where consumer rights would be violated. During the registration and ordering process in online trading, consumers are required to provide personal information such as name, email address and credit card number and so on. Importantly, when consumers engage in online transactions, their IP Addresses¹⁵ can be captured and this can be used to gather

¹³ The Civil Law Ordinance No.5 of 1852

¹⁴ Asymmetric Information by ANDREW BLOOMENTHAL (para.7)

¹⁵ An IP address is an address assigned to a computer that is connected to the Internet. Using an IP address, one computer can request or send information to the other.

the information regarding online activities of consumers¹⁶.

E-consumers make their payments electronically in internet-based shopping and banking. Therefore, several issues have arisen regarding Payment Security in online platforms¹⁷. In cyberspace there are thousands of viruses and malicious software used to attack online payment systems by capturing banking passwords. As an example, the *Zeus Trojan*¹⁸ was used to attack mobile banking payment systems.

In online shopping, consumers cannot physically inspect the goods and they have to pay before receiving the order. That is why a Redress Mechanism should be established to safeguard consumer rights. The redress mechanism deals with consumers' right to express dissatisfaction, the right to make complaints and receive feedback and compensation¹⁹. The absence of a proper redress mechanism would undermine the consumer rights and trustworthiness of e-commerce.

Cross-Border Consumer Complaints arise when the consumer makes a complaint against the e-seller who is overseas. When the seller does not provide relevant information like the identity of the seller, geographical address, delivery performance etc., it would be a challenge to the consumer to make a complaint. Usually, a contract will be governed by the country's law where the goods are supplied. It will be more problematic to the consumer if legal action has to be taken in the Courts of the seller's country.

- Comparison with other jurisdictions

Different countries have taken various steps to overcome the above issues and safeguard e-consumers rights on e-platforms. I will analyze how the legal frameworks of the United Kingdom and South Africa deal with e-consumer rights protection.

The United Kingdom as a developed country has taken major steps to safeguard

¹⁶ Internet Privacy in E-Commerce: Framework, Review, and Opportunities for Future Research-Conference: Hawaii International Conference on System Sciences, Proceedings of the 41st Annual

¹⁷ Bogdan-Alexandru Urs, 2015. "Security Issues and Solutions In E-Payment Systems," FIAT IUSTITIA, Dimitrie Cantemir Faculty of Law Cluj Napoca, Romania, vol. 9(1), pages 172-179

¹⁸ V. Goyal, Dr.U.S.Pandey, S. Batra,"*Mobile Banking in India: Practices, Challenges and Security Issues*" *International Journal of Advanced Trends in Computer Science and Engineering*, pp. 56-65.

¹⁹ Edwards, L., and Wilson, C. 2007. "Redress and Alternative Dispute Resolution in = *EU Cross-Border E-business Transactions*," *International Review of Law, Computers & Technology*", pp. 315-33.

the e-consumer rights. They were bound to follow the Consumer Rights Directive²⁰ of the European Union. Therefore, the United Kingdom introduced Consumer Contract Regulations²¹ (CCR) and Consumer Rights Act²² (CRA) by adhering to the directive.

The CRA provides a very broad interpretation to the word ‘consumer’ where both offline and online consumers rights are subjected to protection. Importantly, suppliers are strictly required to disclose the relevant information to consumers under Sections 10 and 11 of the CRA. Moreover, Schedules 1 and 2 of CCR also provide that traders must disclose the information to the consumer, especially the identity of the trader and his geographical address. In Sri Lanka, there are no such requirements and Section 26 of CAAA merely states that traders should display the price list.

In order to secure the personal data of consumers, the United Kingdom introduced separate legislation called Data Protection Act²³. It requires the data controllers to use such sensitive data lawfully and fairly. Moreover, Section 27(4) of the Act for prohibited retaining such data more than necessary. Section 20 of the CRA ensured the consumers’ right to reject the goods by granting cooling-off period.

Moreover, the United Kingdom introduced an Alternative Dispute Settlement Mechanism for online consumers under Regulation 2015²⁴. Section 19A of Regulation 2015 required the online traders to use the alternative dispute settlement procedure. In Sri Lanka, there is no such dispute settlement mechanism and e-consumers have to complain to Consumer Affairs Authority which has not been conferred with any specific authority to deal with e-transactions.

South Africa as a developing country has taken some salutary steps to overcome the issues relating to consumer rights and safeguard those rights. In South Africa, the Electronic Communication and Transaction Act (ECTA)²⁵ and the Consumer Protection Act²⁶ (CPA) are prominently dealing with the rights of online consumers.

²⁰ Directive 2011/83/EU on Consumer Rights.

²¹ the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

²² The Consumer Rights Act 2015 became law on 1 October 2015.

²³ Data Protection Act 1998

²⁴ The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015

²⁵ Electronic Communications and Transactions Act, 2002. No. 25 of 2002.

²⁶ Consumer Protection Act No. 68 of 2008

The ECTA contains a separate chapter that is completely associated with consumer protection in e-platform. Section 42(1) affirms that the Chapter VII of the Act specifically applicable to online transactions. Importantly, Section 43 required the suppliers to provide all relevant information to consumers, and the consumer was granted the right to review the entire transaction and withdraw from the transaction. Moreover, under Section 43(5), the supplier is required to utilize a sufficiently secure payment system, otherwise he will be liable for damages under Section 43(6). Section 44 of the Act certified consumers' withdrawal rights by providing a cooling-off period. In the ETA of Sri Lanka, even though there are some implied provisions regarding consumer rights protection, it does not specifically cover the broader area of e-consumer rights like the ECTA of South Africa.

In order to safeguard the data and privacy of online consumers, the Protection of Personal Information Act²⁷ was enacted. It provides certain procedures to protect the privacy and data of e-consumers. Moreover, Chapter VIII of ECTA and Sections 11 and 12 of CPA impose certain regulations to protect e-consumer privacy in e-platform.

The CPA of South Africa further ensured the fundamental rights of online consumers. It recognized different kind kinds of consumer rights such as the right to disclosure and information, rights to fair and responsible marketing, the right to demand quality goods and quality service and so on. Under Section 41, sellers are prohibited from providing misleading/ fraudulent representations as to goods. Section 48 prohibited the seller to incorporate unreasonable terms into the contract. If there is any violation of rights, consumers can refer the dispute to the National Consumer Tribunal²⁸, Provincial Consumer Court²⁹ or to National Consumer Commission³⁰.

As a country, Sri Lanka does not have an effective National Privacy Policy to safeguard the privacy of people either online or offline. When we consider countries like Australia, Canada, United Kingdom, it is clear that they have expressly recognized National Privacy Policy either by statutory law or by regulations of relevant authorities. Moreover, India as a developing country,

²⁷ Protection of Personal Information Act 4 of 2013

²⁸ Section 69(a) of the Consumer Protection Act -2008

²⁹ Section 69(c)(i) - (iii) of the Consumer Protection Act -2008

³⁰ section 69(d) of the Consumer Protection Act -2008

in 2011 published by a Gazette “Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules” which recognized the five major national privacy policies in India³¹.

According to IAPP³², National Privacy Policy is an internal document of the country which regulate and lay down basic principles of how a ‘Data Fiduciary’ process, use and disclose data of ‘Data Principle ‘obtained by way of website or application. Although Sri Lanka has few implied statutory provisions, there is no any express legal frame work or National Privacy Policy. Therefore, I hereby recommend that the Sri Lankan Government and proposed ‘Data Protection Authority’ should take necessary steps to formulate the National Privacy Policy of Sri Lanka.

When the government formulates the National Privacy Policy of Sri Lanka, the following key principles should be taken into consideration.

- Collection - The National Policy must address how the personal data should be collected through online or physically for legitimate and fair purposes within the territory of Sri Lanka.
- Use and Disclosure - The National Policy must address how the duly collected data is utilized, processed or disclosed within the territory of Sri Lanka or outside. It is important to regulate that data can only be used for any legitimate purposes for which such data is collected.
- Data Security - The National Policy must enumerate the basic steps and means that should be taken to protect data from misuse and unauthorized access or disclosure.
- Accountability - The National Policy must address the responsibilities of relevant authorities regarding protection and promotion of security of personal data.

In the Sri Lankan legal framework, it is clear that we cannot find broader legal protection for e-consumer rights like in the UK and South Africa. However, some initiatives are taken by Sri Lanka to safeguard the interests of local e-consumers.

In 2018, Sri Lanka attempted to update e-commerce consumer protection laws

³¹ G.S.R. 313(E) dated 11 April 201

³² International Association of Privacy Professionals

covering the pre-purchase stage, purchase and post-purchase³³. Although, the government agreed to update the law on e-commerce according to ITC, it was not implemented.

When comparing the Data Protection Law of Sri Lanka with Singapore, they established a Personal Data Protection Commission to deal with the protection of individual privacy. It also possesses identical powers and functions as Sri Lankan Authority. But unlike in Sri Lanka, Singapore established a separate body called “Data Protection Appeal Committee”. Where any individual is dissatisfied with the decision of the Commission, he/she can appeal to Appeal Committee before going to court. In the United Kingdom “The Information Commissioner” was established under Data Protection Act, 2018. This statutory body also functions similarly to, and possesses identical powers to the Sri Lankan Authority. Moreover, the Data Protection Act of the United Kingdom describes the international role of the Information Committee to provide proper safeguards to the privacy of individuals which should be included in the Sri Lankan Act. However, the adoption of the Data Protection Act into Sri Lankan legal framework can be considered as a major step of safeguarding personal information of e-consumers.

Recommendations and Conclusion

This paper thoroughly discusses the inadequacy of the Sri Lankan legal framework to safeguard the e-consumer rights and the instances where consumer rights would be problematic on e-platforms. Moreover, it was analyzed how the existing law should be updated and amended by referring to the United Kingdom, South Africa and well-updated legal frameworks of other jurisdictions. Therefore, the Sri Lankan government should take immediate steps to ensure the e-consumer rights by strengthening the legal framework and the right to the protection of personal information should be guaranteed as a constitutional right of Sri Lanka.

E-consumers also should take some precautions when they deal with e-platforms. The Government should conduct awareness programs and e-consumers should be given instructions as to how their rights can be violated on e-platforms and how they can be protected from those violations. Then

³³ Sri Lanka updating e-commerce consumer protection laws < <https://economynext.com/sri-lanka-updating-e-commerce-consumer-protection-laws-11436/> > accessed 25 April 2022

e-consumers also will have some responsibility not to engage with 'Risky Online Activities'.

Information Technology and Consumer related laws of Sri Lanka only provide implied protection for e-consumer rights. However, when we compare the Sri Lankan legal framework with the legal frameworks of the United Kingdom and South Africa, it is obvious that mere implied protection will not be adequate to safeguard consumer rights on e-platforms. As a result of this inadequate legal protection, e-consumers are facing severe challenges and their rights are being violated continuously. Although the Sri Lankan government has taken some initiatives to strengthen the legal framework on e-consumer protection like enacting a legislation on privacy protection, they are yet to be implemented. Therefore, Sri Lanka has a major task to strengthen the legal framework on e-commerce and enhance consumers' protection and confidence on e-transactions.



An Analysis of The Legal Effect of The Phrase “Likely To Mislead” In The Law Governing Trademarks in Sri Lanka

Sivanesan Pradinath¹

Abstract

This paper aims to analyze the multi-facet tests adopted by courts in Sri Lanka and the UK to figure out whether a mark is “likely to mislead the public”. To examine the judicial and statutory approaches toward misleading trademarks, this study elucidates the most recent scholarly contributions by employing a systematic literature review method. The findings of this study reveal that, even though the statutory framework provided numerous provisions to tackle the issue of misleading marks, they do not clearly articulate the grounds under which a mark becomes misleading. Therefore, the author recommends certain legal and factual criteria to distinguish a mark from a misleading mark. This paper offers relevant information to entrepreneurs, traders, and stakeholders for effective use of the trademarks, and it creates new avenues for future research in the field of the trademark. To the best of the author’s knowledge, the contents of this research paper are original, and no part of this work is copied from other works.

Keywords: *Trademarks, Misleading Marks, Similar Marks, UK Trade Mark Registration Act of 1875, Intellectual Property Act, No. 36 of 2003.*

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INTRODUCTION

Until the enactment of the 1979 Code of Intellectual Property Act, all our trademark legislation was based on the corresponding English enactments. Thus, our first trademark law, the Trade Marks Ordinance of 1888, is a reproduction of the UK Patents, Designs, and Trade Marks Act 1883. The Trade Marks Ordinance 1925 was essentially the same as the UK Trade Marks Act 1905, and our Trade Marks Act 1964 was based on the UK Trade Marks Act 1938.

Trade Marks Ordinance 1888

Section 15 (2) of the Trade Marks Ordinance 1888, reproducing section 72 (2) of the UK Patents, Designs and Trade Marks Act 1883, provided that,

“The Registrar shall not register concerning the same goods or description of goods a trademark having a such resemblance to a trademark already on the register for such goods or description of goods as to be calculated to deceive².”

The phrase “calculated to deceive” was interpreted in *Lukmanjee v. Aktiebalage*.³ In that case, the applicant wanted to register a mark consisting of three cups, with the words “Three Cups” above and “Safety Matches” below, in a certain colour scheme, for safety matches. The opponent had registered a mark with the identical layout and colour scheme, except for their device, consisting of three stars with the words “Three Stars”. Lascelles A.C.J. held that in testing the proposed mark,

“The Court must not merely look at the marks as they stand side by side, but to the appearance, they would present in actual use when fairly and honestly used. (*Johnston v. Orr-Ewing*.) When the essential particulars consist partly of words in the English language, regard may be had to the fact that the article may be sold in a market where the purchasers cannot read English characters. (*Ibid*). But the most important principle is that the mark must be looked at as a whole, and regard must be had for what has been termed ‘the net impression.’ (*The Taendstikker case*.)”⁴

² Section 15 (2) of the Trade Marks Ordinance 1888, reproducing section 72 (2) of the UK Patents, Designs and Trade Marks Act 1883

³ (1911) 14 N.L.R. 414.

⁴ (1928) 30 N.L.R. 161.

Applying these principles to the facts, Lascelles A.C.J. concluded that the applicant's mark **regarded as a whole** was calculated to deceive purchasers into the belief that they were buying goods bearing the opponent's trademark.

However, in *Cheseborough Manufacturing Co. v. Kudhoos*,⁵ the Supreme Court held that the issue of whether the respondent's mark so resembled the applicant's mark as to be calculated to deceive, in terms of the 1888 Ordinance, had to be determined by comparing the two marks in question **as they appear on the register**. The court held that the District Judge had erred by relying on the similar appearance and get-up of the **bottles and labels** on which the respective marks had been affixed. Fisher C.J. held that such factors were relevant to a *passing-off* action, but not to the present action, which was like an action for infringement:-

“We have nothing to do therefore with the get-up, and must look at the two marks in question **as they appear on the register** and then form an opinion as to whether the mark of the appellant so resembles that of the respondent that ordinary purchasers purchasing with ordinary caution are likely to be misled.”⁶

Merchandise Marks Ordinance No.13 of 1888

The Merchandise Marks Ordinance, No. 13 of 1888 created the offence of trademark infringement. Section 2 provided that (emphasis is added),

“2. (1) Every person who:-

(b) falsely applies to goods any trademark or any mark so nearly resembling a trademark as to be **calculated to deceive**; or shall, subject to the provisions of this Ordinance, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Ordinance⁷.

“Section 2 (2) Every person who sells or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trademark or false trade description is applied, or to which any trademark or mark so nearly

⁵ (1932) 34 N.L.R. 231.

⁶ Fisher C.J, *Cheseborough Manufacturing Co. v. Kudhoos*, (1932) 34 N.L.R. pg 163

⁷ Section 2 (1) of the Merchandise Marks Ordinance, No. 13 of 1888

resembling a trademark as to be **calculated to deceive**, is falsely applied, as the case may be, shall unless he proves.

- (a). that having taken all reasonable precautions against committing an offence against this Ordinance he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trademark, mark, or trade description; and
- (b). that on demand made by or on behalf of the prosecutor he gave all the information in his power concerning the persons from whom he obtained such goods or things; or
- (c). that otherwise, he had acted innocently,

shall be guilty of an offence against this Ordinance.⁸

In the leading case *Sahib v. Muthalip*,⁹ the appellant was convicted under section 2 (1) (b) with, inter alia, falsely applying to certain sarongs a mark so closely resembling the respondent's registered trademark as to be calculated to deceive. Both marks consisted of two concentric ovals, with the word "Moulana" printed in capitals across the inner oval in the respondent's mark, while the appellant's mark had the words "MD Masthan" and "Madras" written in the space between the two ovals, the middle being left blank. In addition, in use, the respondent's mark had the words "Trade Mark" above the two ovals and the word "Registered" below, while the appellant's mark had the word "Trade Mark" printed above the two ovals and the word "Palayakat" printed below.

Macdonell C.J. made the following comments on the meaning of the phrase "calculated to deceive" in section 2 (1) (b) of the Ordinance:-

"To establish that a mark is calculated to deceive it is not necessary to show that there was any intent on the part of the person using the mark to deceive anyone, though this may be an element in the question. What is meant is that there is something in the mark itself, something objective, which is apt to deceive."¹⁰

⁸ Section 2 (2) of the Merchandise Marks Ordinance, No. 13 of 1888

⁹ (1933) 35 N.L.R. 48.

¹⁰ Macdonell C.J. in *Sahib v. Muthalip* (1933) 35 N.L.R. 48

Macdonell C.J. went on to cite with approval *Re Christiansen's Trade Mark* and *Re Lyndon's Trade Mark* for the proposition that the comparison should not be confined to how the marks would appear on the register, but how they would appear when fairly used in the trade. Applying these tests to the case before him, the learned judge held that the accused's mark was calculated to deceive¹¹.

Trade Marks Ordinance 1925

*Abdul Cader v. The Madras Palayakat Company, Ltd*¹² applied sections 11 and 19 of the Trade Marks Ordinance 1925, which succeeded the Trade Marks Ordinance 1888. The new Ordinance in turn essentially reproduced the UK Trade Marks Act 1905. Section 11 of the Trade Marks Ordinance 1925 enacted that,

"It shall not be lawful to register as a trademark or part of a trademark any matter, the use of which would because of its being calculated to deceive or otherwise be disentitled to protection in a court of justice or would be contrary to law or morality, or which in the opinion of the Registrar or the court is likely to offend the religious or racial susceptibilities of any community, or any scandalous design."¹³

Section 11 reproduced section 11 of the UK Trade Marks Act of 1905 with the addition of the words "or which in the opinion of the Registrar or the court is likely to offend the religious or racial susceptibilities of any community."

Section 19 reproduced section 19 of the same Act with a difference as regards the date in the case of old marks. It provided that:-

"Except by order of the court or in the case of trademarks in use before the twenty-fifth day of March, one thousand eight hundred and eighty-nine, no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register concerning such goods or description of goods or so nearly resembling such a

¹¹ Ibid footnote 9

¹² (1933) 35 N.L.R. 129.

¹³ Section 11 of the Trade Marks Ordinance 1925

trade mark as to be calculated to deceive¹⁴.”

In the *Abdul Cader* case¹⁵, the appellant’s mark consisted of the words “MSMA”, “60X60”, and “MADRAS”, arranged in a particular format, for sarongs. The opponent’s registered mark, for the same goods, was identical, except the word “MPCOY” appeared in place of “MSMA”. The opponent however had no exclusive use of the letter X and the number 60.

Citing English authority, Maartenz A.J. said that the question of whether the two marks are so similar as to be calculated to deceive should be determined by comparing the **leading characteristic of each**. This involves looking at the marks as a whole, **without disregarding the word 60X60, whether it is common to the trade or not, or the word MADRAS**. Maartenz A.J. found that the leading characteristics of both marks were essentially the same—even the words in initials both began with the letter M. Therefore, “the idea which would remain with any person seeing them apart at different times” would be the same, and registration was refused¹⁶.

In *Lipton, Ltd v. Rawther*¹⁷, the appellants applied for the registration of a trade mark in respect of tea, consisting of the device of a man-of-war of the cruiser type with the words “ENTERPRISE BRAND” below. The application was opposed by the respondents on the ground that the device sought to be registered so nearly resembled their registered device as to be calculated to deceive. The respondents’ trade mark was registered in respect of the same goods and the essential particulars of the mark were the device of a steamship with the words “STEAMSHIP BRAND”. It was established that the respondents’ tea had become known as “ship brand” tea.

The appropriate test to be applied was stated by Dalton A.C.J. as follows:-

“The practical rule to be applied in this connection is not to look at the marks as they stand side by side since they will never be put before any customer purchasing goods in that way. He can only contrast the mark on the goods offered to him with his recollection of the mark used upon those he is seeking to buy, that is a mark

¹⁴ Section 19 of the Trade Marks Ordinance 1925

¹⁵ *Abdul Cader v. The Madras Palayakat Company, Ltd* (1901) A. C. at 308.

¹⁶ *Ibid* 14 at page 310

¹⁷ *Lipton, Ltd v. Rawther* (1933) 35 N.L.R.129

as seen and remembered in actual use and not necessarily in the form as it may appear on the Register.”¹⁸

Referring to the two marks, Dalton A.C.J. held that,

“What would be prominently present to all would be the fact that a ship was represented... There is ground, I think, for the statement that the ship is the portion of the whole device that is most distinctive, and support for the allegation that the mark if allowed to be registered might well come to be called the ship mark and tea sold with this mark upon it to be known as the ‘Ship Brand’ tea. If that is so, it would have the effect, under the circumstances, of deceiving the public.”¹⁹

Some decisions have attached importance to the fact that the intended consumers may be illiterate persons unable to differentiate between distinguishing characteristics which were in the English language. Thus in *Veeravagoopillai v. Saibo*,²⁰ the appellant applied for the registration of a trademark, in respect of flour, called the Hanumar brand consisting of the figure of a monkey in a standing position. The respondents had registered a trademark in 1913, also in respect of flour, called the Pahlwan, consisting of a strong man in a standing position holding up a pair of dumbbells. The respondents’ mark was known in the trade as the “man mark.”

Akbar J. held that,

“There is no doubt that if the two figures are placed side by side, points of difference will be noted at once. But that is not the test applicable to cases of this nature. One has to consider the reactions of the appellant’s trademark on the minds of the public who buy such a common everyday necessity of life as flour, that is to say, goods which will in many instances be bought by persons who are illiterate, and who will have in their minds the picture of the outline of a man in a standing position.”²¹

The learned Judge also considered the effect of the respondents’ mark

¹⁸ Ibid footnote-18 .at page 133

¹⁹ Lipton, Ltd v. Rawther (1933) 35 N.L.R.at pg 130-131

²⁰ Veeravagoopillai v. Saibo (1934) 36 N.L.R. 317

²¹ Ibid footnote-19. at pg 320

becoming known in the trade as the “man mark” although that name was not part of the trade mark registration. Having referred to an English case, Akbar J. held,

“Here too it is the public which has given the name ‘man mark’ to respondents’ trade mark, although the word used by them in their trade mark was ‘Pahlwan’, and the name given by the public was due to the figure of a man in a standing position selected by them in their design... In the words of Kerly on Trade Marks, ‘when the goods of a particular trader have become known by a name derived from his trademark, **any other mark which would be likely to suggest the use of the same name** for the goods on which it is used so resembles the former as to be calculated to deceive. So that it will be seen that the Registrar was wrong in his first ground for allowing the registration of the appellant’s trademark.”²²

Similarly, in the case of *Subbiah Nadar v. Kumaravel Nadar*,²³ the competing marks were in respect of beedies. The Privy Council held that,

“It is in evidence that most of the people who purchase beedies are illiterate and are unlikely to make a close examination of labels on the beedies which they purchase. Their Lordships have no hesitation in holding that the general effect on the mind of anybody dealing in beedies would be to confuse the beedies sold under the marks and labels of the defendants with those sold under the plaintiff’s trademark... In their Lordships’ opinion, the marks are calculated to lead to confusion and deception ...”²⁴

The above cases may be contrasted with *Hollandia and Anglo-Swiss Condensed Milk Co. v. The Nestle and Anglo-Swiss Condensed Milk Co.*,²⁵ which was decided under the 1888 Trade Marks Ordinance. The appellants and respondents were manufacturers of condensed milk. The respondents’ trademark, registered in 1893, was the figure of a maid with a pail on the head and another in her hand, and their condensed milk was known as

²² Veeravagoopillai v. Saibo (1934) 36 N.L.R at pp 319 -320

²³ Subbiah Nadar v. Kumaravel Nadar (1946) 47 N.L.R. 241

²⁴ Ibid footnote 22. at pg 245

²⁵ (1928) 24 N.L.R. 396

the “Milkmaid Brand.” The appellants sought to register their mark, which consisted of a female figure carrying a bunch of flowers in one hand and a sword in the other enclosed in an oval with five medals above the figure, and the words of guarantee in thick letters across it and the word, “Hollandia,” displayed beneath.

The District Judge had refused the application, on the ground that the use of a female figure by the appellants, though it may not mislead an intelligent and cautious purchaser who knew English, might deceive an unwary purchaser in Ceylon. De Sampayo J. held that,

“In my opinion, too much emphasis has been placed on the so-called unwary purchaser and the alleged local name ... I do not think that these people are so unwary as the respondents suppose them to be. They are, generally speaking, very shrewd, and able to see that they get what they want, and not anything else ... If the appellant’s brand of condensed milk comes into the market, it is just as likely that these people will give it a name too, such as the ‘Five Medal’ milk. In any case, I do not think that the likelihood of any confusion has been established.”²⁶

Mohideen v. Registrar of Trade Marks was a contest between two marks for tea. The proposed mark consisted of two hornless rams facing each other in a gambolling attitude, with the words “TWO RAMS” above. The registered mark had two bearded goats with curved horns standing almost erect against a box with the legend “Marque Depose”, and above was a circle with a lotus with the letters “SIT” in its centre. Interpreting the criterion “calculated to deceive” in our Ordinance, Basnayake A.C.J. accepted the English approach that “calculated” did not signify intention, but merely “likely.” Enlarging further, he said,

“We think the test to apply is **not whether** if a person is looking at the two trademarks side by side there would be a possibility of confusion; but **whether** the average person who sees the appellant’s trademark **in the absence of** the registered trademark and view **only of his** general recollection of the registered trademark would

²⁶ *Hollandia and Anglo-Swiss Condensed Milk Co.v. The Nestle and Anglo-Swiss Condensed Milk Co* (1928) 24 N.L.R. at pg 403

mistake the appellant's trademark for the registered trademark."²⁷

Trade Marks Act 1964

The next development was the Trade Marks Act 1964. As in the case of its predecessors, this was essentially based on the then-current UK legislation, in this case, the UK Trade Marks Act 1938. Sections 12 and 13 correspond to sections 11 and 12 of the UK Act. There was however one peculiarity in our provisions - section 12 retained the criterion "calculated to deceive," while section 13 (1) adopted the approach of the 1938 UK Act, "likely to deceive or cause confusion." Section 5 of the 1964 Act, which was identical to section 4 of the UK Trade Marks Act 1938, recognized infringement.

However, the 1964 Act is only of academic importance because it never came into force, as the Minister never published the requisite Order.

Code of Intellectual Property Act 1979

The next milestone was the enactment of the Code of Intellectual Property Act, No.52 of 1979. Trademarks were covered in Part V, which was titled "Marks, Trade Names and Unfair Competition". The Part was based on the "Model Law for Developing Countries on Marks, Trade Names, and Acts of Unfair Competition" adopted by the World Intellectual Property Organization (WIPO).

Sections 99 and 100 contained the absolute and relative grounds of refusal, respectively. These sections adopted a comprehensive approach. The criterion "calculated to deceive" of the old law was finally replaced by the criterion "likely to mislead the public," in sections 99 (1) (f) and (k) and 100 (1) (a) to (d). In addition, this criterion was also part of the test of infringement of a registered mark, contained in section 117 (2) (a). However, it is clear from the long line of judicial authority, both in Sri Lanka and in the UK, cited above, that this change does **not** involve a change **in the meaning** of the criterion.

*Suby v. T Suby Ltd*²⁸ was decided by the Court of Appeal soon after the 1979 Act came into force. The proposed mark featured the bust of a youth in a certain attire with sprigs of tea leaves below and the words "Cowboy Brand".

²⁷ *Hollandia and Anglo-Swiss Condensed Milk Co.v. The Nestle and Anglo-Swiss Condensed Milk Co* (1928) 24 N.L.R. at pg 537

²⁸ (1980) 2 S.L.R. 65 (C.A.)

The registered mark had a boy in another attire with sprigs of tea leaves and the words “Boy Brand Trade Mark” above. Both marks were for tea for export to the Middle East. Rodrigo J. reviewing the authorities noted how the original criterion, “calculated to deceive”, was interpreted as “likely to deceive or cause confusion” by English and Sri Lankan courts. He then made an important observation,

“The Act of 1979 uses the words ‘likely to mislead the public ...

This, in my view, does not substantively alter the law.²⁹”

According to Rodrigo J., the issues in this type of case should be looked at from a “business and common-sense point of view”³⁰ turning to the marks before him, Rodrigo J. first compared them side by side. Next, he looked at them separately interrupted by one hour. Both times, the dominant impression of the two marks was the image of the boy. Regarding the differences in ornamentation he said, “The differences do not quite catch the eye and, in my view, they will fade away from the memory in a short time³¹.” Accordingly, registration was withheld by the Court.

The criterion “likely to mislead” in section 117 (2) (a) was applied in *M S Hebtulabhoy & Company Ltd v. Stassen Exports Ltd*³². Here the appellants registered the mark “Rabea” in Roman characters, for tea which was exported to the Middle East, though in the first instance to Saudi Arabia. Respondents branded the mark “*Chai el Rabea*” written in Arabic onto their tea, which was exported to Egypt. The Court of Appeal had to decide whether this was likely to mislead the public under section 117 (2) (a).

Two important points regarding the meaning of the criterion were affirmed by the court. The first was that the criterion applied not only to the visual similarity of marks but also to **phonetic similarity**. Palakidnar J. cited authority from England and the Madras High Court for this approach. He continued,

“Examined in this manner, Rabea the mark of the appellant and Rabea the mark of the respondent are identical phonetically

²⁹ *Suby v. T Suby Ltd* (1980) 2 S.L.R. 65 (C.A.) at page 70

³⁰ *Ibid* footnote-28 at page 69

³¹ *Ibid* footnote-28 at page 72

³² (1989) 1 S.L.R.182 (C.A.)

speaking.”³³

The other point is regarding the meaning of “public” which forms an integral part of the criterion. The Trial Judge adopted the “destination formula,” holding that since the appellant exported to Saudi and the respondent exported to Egypt, there was no possibility of misleading the public as they were in two different places. This approach was rejected by Palakidnar J., who cited authority and said,

“In our view, it is an unwarranted and narrow view of the term ‘public’....The public is properly the public present, prospective, local and foreign - A buyer who belongs to the public at large, not excluding the consumer in Sri Lanka itself”³⁴.

As Palakidnar J. pointed out further, “If the trial Judge’s view on the destination is correct then one might expect a statutory requirement that the registered owner should declare his destination too in his application for a Trademark.” Accordingly, the respondent was held to have contravened section 117 (2) (a) and an injunction was issued.

However, in appeal, the Supreme Court reversed the decision of the Court of Appeal³⁵. The Supreme Court held that the Code was not considered to have extra-territorial effects, and its rights and prohibitions were confined to the limits of Sri Lanka. Therefore, the use outside Sri Lanka of a registered mark or infringing sign would not contravene section 117 (2) of the Code. In this case, though “Chai el Rabea” had been applied in Sri Lanka, since no sale or agreement to sell had taken place within Sri Lanka, infringement had not occurred.

*James Fernando v. Officer-in-Charge, SCIB, Negombo*³⁶ also dealt with section 117 (2) (a). One of the counts was that accused had copied the registered mark of the complainant used on the wrapper of beedis packed in bundles of 500. The registered mark had a figure of a man in Kandyan ceremonial dress with a lady. The accused’s mark had a fisherman and a fishing boat. Yet

³³ *M S Hebtulabhoy & Company Ltd v. Stassen Exports Ltd & another* at pg 188

³⁴ *Ibid* footnote 32 at pg 194

³⁵ *Stassen Exports Ltd v. M S Hebtulabhoy & Company Ltd* (SC Application No. 20/89; SC Minutes 31/3/1994).

³⁶ (1994) 3 SLR 35 (CA)

the colour scheme, get up and positioning of the figures and other words were very similar.

In the Court of Appeal, Ismail J. said, “The question of whether a mark is likely to mislead the public is a question of fact and a court is entitled to exercise its mind on this question in the absence of [evidence of] witnesses [representing] the public.” Also, “regard must be had to the class of persons to whom the goods are sold, as to whether they are, for example, illiterate persons.”

Ismail J accordingly found that the leading characteristics of the two marks were similar, and the conviction on this count was affirmed.

*Societe Des Produits Nestle S.A. v. Multitech Lanka (Pvt) Limited*³⁷ also dealt with section 117 (2) (a) of the Code. In this case, the plaintiff company had been selling its chocolate beans in Sri Lanka under the registered trademark of “Smarties” in a gaily-coloured cylindrical container or tube. The defendant company had started importing similar chocolate beans from Australia and packing and selling them as “sweeties” (an unregistered trademark) in a no less gaily-coloured oblong box. The plaintiff sued the defendant alleging *inter alia* that the defendant’s mark so nearly resembled the plaintiff’s mark that it was likely to mislead the purchasing public, thus violating the plaintiff’s rights under section 117 (2) (a).

Fernando J. held that,

“a case of this sort cannot be decided by simply totting up and weighing resemblances and dissimilarities, upon a side-by-side comparison: the issue is whether a person who sees one, in the absence of the other, and who has in his mind’s eye only a recollection of that other, would think the two were the same.

The Trial Judge had held that when the two marks are compared they can be identified as being distinct although there were certain similarities, and had proceeded to identify these in detail. Referring to this, Fernando J. held,

“In effect, he did a ‘side-by-side’ comparison, quite forgetting that a customer buying goods will not have the opportunity of comparing

³⁷ (1999) 2 SLR 298 (SC)

them in that way, but would depend on his recollection – so that it would be the ‘outstanding characteristics that are relevant. He brushed aside the similarities, which have been outlined earlier in this judgment; and treating the dissimilarities as being fundamental, he concluded that ‘A5’ and ‘A7’ were not, prima facie, identical or confusingly similar. He thus failed to apply the proper test, referred to in *Thiagarajah v. Majeed*³⁸

Intellectual Property Act, No.36 of 2003

The present law governing trademarks is contained in the Intellectual Property Act, No.36 of 2003. The criterion of “likely to mislead” in the 1979 Code of Intellectual Property Act is the criterion adopted by the new Act as well. The main provisions where it is contained are the absolute and relative grounds of refusal of registration of a mark (sections 103 and 104 of the Act, respectively) and the exclusive rights of the owner of a mark (section 121). The relevant provisions of section 121 provide that (emphasis is added),

“(2) Without the consent of the registered owner of the mark third parties are precluded from the following acts:-

(a). any use of the mark, or a sign resembling it in such a way as to be likely to mislead the public, for goods or services in respect of which the mark is registered or for similar goods or services in connection with which the use of the mark or sign is likely to mislead the public;...

(3) The application (whether by way of printing, painting, or otherwise) or the affixing in Sri Lanka by a third party, of a mark or any sign resembling such mark in such a way as to be **likely to mislead** the public, on or in connection with, goods in respect of which such mark has been registered (whether such goods are intended for sale in Sri Lanka, or export from Sri Lanka) shall be deemed to be an act prohibited under Subsection (2)³⁹.”

Accordingly, the same tests and factors relied on by the courts in previous decisions will be applicable under the present Intellectual Property Act.

Conclusion

The author has discussed several tests and factors that courts have relied on

³⁸ *Societe Des Produits Nestle S.A. v. Multitech Lanka (Pvt) Limited* (1999) 2 SLR 298 (SC)pp 306-307

³⁹ Section 121 (2) and (3) of the Intellectual Property Act, No. 36 of 2003.

to guide them in assessing competing claims between rival trademarks. To summarize, it is possible to set out the following approach in applying the criterion of “likely to mislead” in the present Intellectual Property Act, No.36 of 2003.

Firstly, the comparison should be made against the complainant’s registered mark, and not with any different mark that the complainant may have been using. However, in doing so, it is not necessary to be confined to the registered mark as it appears in the register. It is necessary to take account of the mark as it may appear when fairly used in the trade. In applying this standard, the following factors should be taken into account (inter alia):-

- a) the size of the article upon which the mark would appear
- b) the material upon which it is to be placed
- c) likely natural imperfections of the impressions
- d) natural effects of wear and tear on marked articles

A similar approach is taken concerning the defender’s mark, with the following difference depending on the type of the contest- i.e. whether it is an opposition proceeding against the registration of the defender’s mark, or whether it is a trade mark infringement action against the user of the defender’s mark. In the first case, the defender’s mark that should be compared with the registered mark is the mark that has been applied for registration.

However, in doing so, an account must be taken of how that mark is intended to be used, and how it will be used in the trade. In the second case (infringement action), the defender’s mark that should be compared with the registered mark is the actual mark used by the defender. In both cases, an account should also be made for the same factors, such as the natural effects of wear and tear on marked articles, as in the case of the registered mark.

Next, in making the comparison between the two marks as thus defined, the marks should be compared as a whole, including any elements that may be common to the trade. The comparison should be based on both the visual and phonetic similarity of the marks. In addition, the following factors

should be considered (inter alia):-

- a) the type of goods to which the marks are applied – if they are everyday goods, purchasers would not be expected to make a close comparison of the mark, while it would be the converse in the case of expensive, non-everyday goods.
- b) the intended purchasers of the goods – marks may be different from each other to educated persons but could be misleadingly similar to illiterate persons if the distinguishing characteristics are words or phrases in the English language.
- c) whether intended purchasers would be able to make a side-by-side comparison of the two marks – if not (as often is the case), allowance should be made for imperfect recollection and the effect of careless pronunciation and speech

The guiding principle is that all the surrounding circumstances must be taken into account by the court. The concept of “unfair competition” that was introduced to our law by section 142 of the Code of Intellectual Property Act, No.52 of 1979, and now found in section 160 of the Intellectual Property Act, may in future play a bigger role in disputes involving rival trademarks, than the resort to the criterion of misleading similarity that has been the benchmark of our trade mark law for more than a century.

Therefore, it is well advised for business enterprises to be aware that, in future, it may not be enough that their marks are not misleadingly similar to the registered mark of another enterprise, but that in addition, their use of their mark should be in keeping with accepted commercial ethics in the business community.