GENERAL SIR JOHN KOTELAWALA DEFENCE UNIVERSITY (KDU)

8th INTERNATIONAL RESEARCH CONFERENCE

Inculcating Professionalism for National Development

27 – 28 August 2015

Proceedings

Law

General Sir John Kotelawala Defence University
Ratmalana 10390
Sri Lanka
www.kdu.ac.lk

Editor in chief
Dr CL Goonasekara
Editors
Lt Col PH Premaratne
Ms BDK Anandawansa

ISBN Number: ISBN 978-955-0301-23-2

Other Proceedings of the Conference:

Defence and Strategic Studies	: ISBN 978-955-0301-17-1
Engineering, Built Environment and Spatial Sciences	: ISBN 978-955-0301-19-5
Computing	: ISBN 978-955-0301-20-1
Medicine	: ISBN 978-955-0301-22-5
Basic and Applied Sciences	: ISBN 978-955-0301-24-9
Allied Health Sciences	: ISBN 978-955-0301-21-8
Management, Social Sciences and Humanities	: ISBN 978-955-0301-18-8

Published by
General Sir John Kotelawala Defence University
Ratmalana 10390
Sri Lanka

Tel : +94 113 370105
E-mail : conference@kdu.ac.lk
Website : www.kdu.ac.lk

Publication December 2015

PATRON, CONFERENCE STEERING COMMITTEE

Maj Gen MP Peiris RWP RSP USP ndc psc, *Vice Chancellor*

PRESIDENT - STEERING COMMITTEE

Maj Gen JR Kulatunga RSP psc, *Deputy Vice Chancellor (Defence and Admininstration)* -

CONFERENCE CHAIR

Dr CL Goonasekara

CONFERENCE CO – SECRETARIES

Lt Col PH Premaratne
Ms BDK Anandawansa

STEERING COMMITTEE MEMBERS

Brig WPAK Thilakarathne psc
Col MGWWWMCB Wickramasinghe RWP RSP psc
Col PTR Makuloluwa
Lt Col YABM Yahampath RWP RSP psc
Lt Col P Vithanage
Lt Col PH Premaratne
Snr Prof TR Weerasooriya
Prof MHJ Ariyarathna
Prof AS Karunananda
Prof RP Perera
Dr SWP Mahanamahewa
Dr MM Jayawardana
Dr AH Lakmal
Dr TL Weerawardane
Dr RMNT Sirisoma
Dr CL Goonasekara
Ms BDK Anandawansa

PLENARY / TECHNICAL SESSION COORDINATORS

Defence	-Maj NC Karunarathne
	Mr S Satheesmohan
Engineering and Built Environment	-Mr M Vignarajah
and Spatial Sciences	Mrs S Pussepitiya
	Dr AR Rupasinghe
	Mrs RGN Lakmali
Medicine	-Dr AN Senanayaka
	Dr DH Jayasena
Basic and Applied Sciences	-Dr KMGP Premadasa
	Ms AMTN Adikari
Law	-Dr TB Abeyasekara
	Mr GIM Liyanage
Management, Social Sciences	-Ms DD Lokuge
and Humanities	Ms HMAGK Ekanayake
Allied Health Sciences	-Dr GU Jayaweera
	Ms BLC Samanmali
	Mr Nelumdeniya
	Dr KDKP Kumari
	Dr AWMKK Bandara
Computing	-Mr ADAI Gunasekara

EDITORIAL COMMITTEE

FOREWORD

The General Sir John Kotelawala Defence University successfully held its eighth International Research Conference (KDU IRC-8), on the 27th and 28nd August 2015. This year's conference was further expanded to gather professionals, researchers and academics from nine disciplines, namely, Defence and Strategic Studies, Engineering, Computing, Medicine, Basic and Applied Sciences, Allied Health Sciences, Law, Management, Social Sciences and Humanities, and Built Environment and Spatial Sciences, to disseminate their research findings/knowledge in their respective field. The conference drew together more than 400 scholars across the country and globe to present their research. The participation of professionals and academics from several Asian and Western countries, namely India, Pakistan, Singapore, Bangladesh, Malaysia, Maldives, USA, UK, Germany and Australia was a highlight at KDU IRC-8.

The inaugural ceremony of the two-day conference was held on the 27th August. The ceremony was attended by the chief guest of the event Dr. Wijayadasa Rajapaksha, the Hon. Minister of Justice and Minister of Buddhasasana, and many other distinguished invitees, including representatives from diplomatic missions, members of the Board of Management of KDU and guest speakers. During the session, the honorable chief guest delivered the key note address on the conference theme. As a multi-professional higher educational institute, KDU proposed 'Professionalization of professionals' as an important and timely topic to discuss in an international scientific forum such as the KDU International Research Conference. Hence 'Inculcating Professionalism for National Development' was selected as the theme of KDU IRC-8. During the key note address, it was highlighted that as a country embarking on various mega national development projects, it is important for Sri Lanka as a nation to identify the importance of professionalism among the country's stakeholders as well as amongst its trainers of professionals as essential for the production of better professionals geared towards achieving global standards.

The academic sessions of KDU IRC-8 were conducted in eight parallel sessions of plenary and technical sessions in the above mentioned disciplines. The technical sessions were held as oral and poster presentations of research papers submitted by academics, scientists and researchers from institutes throughout the country as well as from foreign countries. Altogether, oral presentations were conducted in fourty sessions; four sessions each under Defence and Strategic Studies, Engineering and Built Environment and Spatial Sciences, Computing, Medicine, Basic and Applied Sciences, Allied Health Sciences, and eight sessions each under Law, and Management, Social Sciences and Humanities. Plenary and poster presentations were held on the first day of the conference, whereas oral presentations were held on day-two of the conference.

The plenary sessions were highlighted with 36 guest lectures delivered by eminent international and national scientists/professionals, on faculty sub-themes. Two plenary sessions were conducted in Defence and Strategic Studies under the sub-theme *Inculcating Professionalism in Defence for National Development*. The plenary session of Engineering and Built Environment and Spatial Sciences was held under the sub-theme *Inculcating Professionalism in Engineering for National Development,* while the sub-theme of the Computing plenary session was *Application of Professional Practices in Computing for National Development*. The plenary session on Medicine was conducted under the sub-theme *Inter-Professional Education and Research Towards Quality Health*. The plenary session on Basic and Applied Sciences was held under the sub-theme *Pragmatic Research for Development and Prosperity*. The sub-theme of the plenary session of Allied Health Sciences was *Professionalism in Allied Health Sciences for a Healthier Nation,* while the plenary session on Law was conducted under the sub-theme *Inculcating Professional Ethics for Legal Practice.* The plenary session on Management, Social Sciences and Humanities was held under the sub-theme, *Professionalism for National Development in the Domains of Management, Social Sciences and Humanities*.

The popularity of KDU annual research conference among scholars across the country proved true at KDU IRC-8 as well, and it could go unnoticed that the response for call for research papers for KDU IRC has been annually on the increase. This is highly encouraging. The number of research papers received for KDU IRC-8 was 512, of which 450 abstracts were shortlisted and invited for full papers. After a rigorous review process of both abstracts and extended abstracts or full papers, a total of 306 research papers were accepted to present at the conference. These included 196 oral presentations and 110 poster presentations.

KDU IRC-8 can be deemed a tremendous success, owing to the great team effort by the academic, administrative and supporting staff who worked whole heartedly to organize the conference. Firstly I thank the Chairman and the members of the Board of Management of KDU without whose blessings KDU IRC-8 would not have become a success. The excellent leadership and support given by the Vice Chancellor, Major General Milinda Peiris provided impetus in the organization of the whole event. The invaluable contribution made by the Deputy Vice Chancellor (Defence and Admnistration) Major General Ruwan Kulathunga, as the president of the steering committee, greatly helped for the smooth organization and operation of the event throughout. I specially appreciate the guidance and advice extended by the Deputy Vice Chancellor (Academic) Prof. Thilak Weerasuriya and the Rector (Southern Campus, KDU) Brig Lal Gunasekara on different occasions. The role played by the deans of the faculties and the faculty coordinators was tremendous in the organization and conduct of the plenary and technical sessions. I am especially thankful to Prof. Jayantha Ariyaratne, the Dean, Faculty of Medicine, and his staff, the Assistant Registrar, Staff Officer, and all the academic and non-academic staff members, for their fullest support and blessings throughout the KDU IRC-8. My sincere gratitude is also extended to the reviewers and the editorial committee members of each faculty, who had to devote a vast amount of time in the selection of research papers and editing of the selected research papers respectively. The support extended by the Dean, Faculty of Graduate Studies, Brig Adeepa Thilakaratne and his staff, then the Dean of Faculty of Defence and Strategic Studies, Lt Col Chandana Wickramasinghe and his staff are also unforgettable. I am thankful to several personnel in various organizing committees of KDU IRC-8, Lt Col Manada Yahampath (Adjutant), Lt Col Priyankara Vithanage (CO Adminitsration), Maj Darshana Abeykoon (Assistant Adjutant), Mr Dayananda Siriwardana (Bursar), Mr Gladwin Canagasabey (Registrar), Cdr Shailendra Jeewakarathna (Deputy Registrar), Wg Cdr Jayalal Lokupathirage, Cdr Amila Amarawardena, Cdr Pradeep Gunathilaka, , Maj Ranjith Kulasiri, Lt Cdr Indika Thlakasiri, Lt (E) Indunil Fernando, for their tremendous effort in organizing the conference. The support by Mr Kithsiri Amarathunga (HOD, English), Dr. Namali Sirisoma (Chair, KDU IRC-7), Mr. Mangala Wijesinghe, Mr Anuradha Nanayakkara and Ms Savindri Weerakoon is also sincerely remembered. KDU IRC-8 is grateful to its sponsors Polytechnologies (Pvt) Ltd, Analytical Instruments (Pvt) Ltd, The Bank of Ceylon, and the Sri Lankan Airlines for their invaluable contribution to the event, and to the media who have projected the event towards success. My heartfelt gratitude is finally given to my two secretaries, Lft Col (Dr) Prasad Premaratne and Ms Krishanthi Anandawansa for their shoulder to shoulder commitment pertaining to all the affairs of KDU IRC-8.

Following the symposium held in August, KDU IRC-8 is blessed with the release of this publication on proceedings of the conference in eight separate books under the different disciplines. The current book contains proceedings of the symposium conducted under the discipline of Law. It contains the welcome address, Key note address, and all plenary speeches of Law session as full papers or transcripts, and full paper articles of all of the research papers presented at technical sessions of Law. I sincerely believe this publication would contribute, both locally and globally, to update knowledge of a wider community of researchers, academics and professionals.

Dr CL Goonasekara
Editor-in-Chief
(Conference chair 2015)

TABLE OF CONTENTS

WELCOME ADDRESS

Major General Milinda Peiris RWP RSP USP ndc psc
Vice Chancellor, General Sir John Kotelawala Defence University

Distinguished members of the audience, ladies and gentlemen, it is a great pleasure for me, as the Vice Chancellor of General Sir John Kotelawala Defence University, to deliver the welcome and introductory address of the KDU international Research Conference 2015.

First, I am greatly honoured and pleased to welcome Dr Wijeyadasa Rajapakshe, Hon Minister of Justice, who graciously accepted our invitation, despite his extremely busy schedule, to be the chief guest and the keynote speaker at this international research conference. Hon Sir, we are glad that we were able to find one of the most appropriate personalities in Sri Lanka – a true professional known for his credentials as an eminent legal expert and a seasoned parliamentarian best known for his honesty and integrity – to address this august gathering on the theme, *Inculcating Professionalism for National Development.*

Next, I warmly welcome the most distinguished invitees Mr B M U D Basnayake, Secretary to the Ministry of Defence and Chairman of the Board of Management of KDU – Mr D M R B Dissanayake, Secretary to the Ministry of Health – Mrs Kamalani De Silva, Secretary to the Ministry of Justice – the Chief of Defence Staff, Air Chief Marshal Kolitha Gunatilleke – Commander of the SL Army, Lt Gen Chrishanthe De Silva – Commander of the SL Navy, Vice Admiral Ravindra Wijegunaratne – Commander of the SL Air Force, Air Marshal Gagan Bulathsinghala – Additional Secretaries to the Ministry of Defence (Mr S Hettiarachchi, Additional Secretary Defence) – All other additional secretaries of Ministries - Your Excellencies of the Diplomatic Corps – Senior Officers – Gen Tan Sri Dato', Vice Chancellor, National Defence University, Malaysia – Lt Gen Chowdhury Hasan Sarwardy, Commandant, National Defence College, Bangladesh – Vice Chancellors of our fellow universities (Prof Ananda Jayawardane, University of Moratuwa, Prof Chandana Udawatte, Sabaragamuwa University, Dr TA Piyasiri, University of Vocational Technology) – Prof Rohan Gunararatna, renowned expert in security studies – other distinguished scholars and eminent personalities, especially those representing our friendly countries such as, Ambassador (retd) Mr.Sohail Amin, President Islamabad Policy Research Institute, Pakistan–Rear Admiral William C McQuilkin, Director, US Navy Strategy and Policy Division, Pentagon, USA – Dr Paul Kapoor, Centre for International Security and cooperation, Stanford University, USA – Dr N Sathiyamoorthy, Director, Observer Research Foundation, India – Maj Gen Muhammad Naeem Ashraf, National Defence University, Pakistan – and Col Mohomed Mukhthar, Maldivian National Defence Force, who will be addressing the Defence plenary session and other distinguish guests.

I also warmly welcome distinguished Professors and senior academics from Germany, Pakistan, UK, USA and Sri Lanka who will be chairing and addressing other plenary sessions, along with all the other foreign dignitaries and scholars present here today. Let me also welcome senior professors and academics of KDU, and all the presenters and participants whose contribution will be crucial for the success of this Research Conference. Finally, I would like to welcome all the media personnel present here and thank them in advance for a comprehensive coverage for this nationally important event.

Ladies and gentlemen, the desire and the need of the contemporary Sri Lanka is to reach new heights in its national development through a holistic approach, and the country has realized the importance of maintaining a steady economic growth in achieving this goal. The strategy envisioned for achieving the same is the industrial expansion with increased foreign investments and collaborations, which will generate a large number of new employment opportunities in the country.

In this backdrop, the theme of our conference, "Inculcating Professionalism for National Development" becomes extremely pertinent because a professional workforce is an essential prerequisite to achieve success in any sphere of work, and it is particularly so when we interact with international entrepreneurs, companies and organizations, and when we are engaged in competitive business in the world. The more professional we are the better would be the chances for success and victory over others.

Ladies and gentlemen, we in the armed forces in Sri Lanka experienced the value of professionalism when we were able to successfully conclude the humanitarian operations through the professional approach adopted

by the security forces, and since then we have been doing our best to inculcate professionalism in the personnel we train to take over the responsibility of national security of the country, and I am glad to mention that today we at KDU have been able to extend our expertise to train native as well as foreign youths with special focus on enhancing skills and inculcating attitudes that would pave the way for professionalism in their future careers in diverse fields.

Ladies and gentlemen, we believe that the national development of a country largely depends on the degree to which that country would facilitate the growth of professionalism in its workforce, encompassing even those engaged in so called blue collar jobs, which require manual labour. In this sense, the term professionalism needs to be understood in a broader perspective, and not in the restrictive sense that refers to the expertise in a few careers traditionally identified as "professions" such as medicine, engineering, law, management and so on. Why I say so is mainly because one's contribution to the national development of a country will depend on how well one does one's job and not on what job one does.

So, the nation should give the utmost priority for inculcating professionalism in its workforce through a concerted effort which involves necessary mechanisms especially in the domain of education. And it is the knowledge, attitudes and skills developed in individuals through formal, non-formal and informal education that would be the base for professionalism. We do have to identify the principals and ideals to be upheld in various professions to inculcatethem in those we groom for those professions, to produce men and women who love their professions and their service for their clients. It is in this respect that the responsibility on the part of the tertiary education system is paramount.

KDU as a state university has very clearly identified this responsibility, and it is committed to the task of bridging the gap between the need and the availability of a professional workforce or human resources to adequately support the national development effort of the country, and it is our humble belief that in doing so, KDU exerts a positive influence on other institutions in the country as well.

Ladies and gentlemen, I have the most humble pleasure in mentioning on this occasion that we have been able to bring about a positive change at KDU by first ensuring professionalism among our staff, which we thought was essential to produce graduates geared to achieve professionalism in their careers. So, during the last few years, KDU was able to attract some of the best academics, professionals, administrative officers, and clerical and other supporting staff giving priority for the need for professionalism in each job in the university, and we did so by vetting them through rigorous testing and interview procedures. The result was an overall growth in the professional outlook of the institution, which enabled us to attract increasingly larger number of students both local and foreign for our degree programmes each year. So, KDU could be considered as a microcosm where professionalism is used for its development, thereby sharing the national development effort of the country as well.

Professionalism cannot be inculcated through the mere provision of an academic qualification. We do need to develop the overall personality of an undergraduate by concentrating on improving an array of character traits such as discipline, positive attitudes to learning and work, sound communication and presentation skills, flair for research, desire for seeking new knowledge, and more importantly honesty and integrity. KDU attempts to inculcate these in its students through diverse programmes such as all kinds of sports activities and competitions, social functions, club activities, syndicate presentations, research studies, military training for officer cadets and appropriate industrial training for day-scholars to name a few. We strongly believe that such initiatives together with well-planned and well-implemented curricula that provide a high quality learning experience of international standard would pave the way for our products to easily achieve professionalism when they are exposed to the world of work.

Ladies and gentlemen, it is heartening to note on this occasion that the feedback we receive on the professional approach of our first batch of medical graduates serving their internship in various hospitals is extremely encouraging, and we are confidently looking forward to seeing the fruits of what we plant today – The large numbers of students reading for diverse degrees in our nine faculties will soon be making their way into their respective professional fields, and we are quite confident that they would certainly make their *alma mater* proud, wherever in the world they would be destined to serve. Of course the officer cadets we produce have been of the highest professional standards shouldering the tri-service responsibilities in national security and national development.

So, ladies and gentlemen, our commitment to professionalism and national development through higher education has been steady and consistent, and

this annual international research conference itself is a major contribution we make towards the same.

The objective is to lead the way in research and provide opportunities for researchers in diverse fields of specialization to showcase their progressive and insightful experiments and research and to sharpen their professional capacities.

Finally, let me once again welcome all the dignitaries, intellectuals, and participants both local and foreign, to this international research conference and wish that its deliberations would be highly productive in terms of individual as well as institutional accomplishments in knowledge generation and dissemination, and let me conclude by wishing that this two day International Research Conference would be a fruitful and memorable one for all presenters and participants alike.

Thank you

KEYNOTE ADDRESS

"Inculcating Professionalism for National Development"

Dr Wijeyadasa Rajapakshe, MP
Minister of Justice and Minister of Buddhashasana, Government of Sri Lanka

First of all, I warmly extend my heartiest gratitude to the organizers of this 8th international research conference of General Sir John Kotelawala Defence University scheduled to be guided with the theme of 'Inculcating Professionalism for National Development'. I also observe the importance of this theme, as timely for this country, as we are just passing a period of resurrection, like a phoenix emerging from the ashes. There is no need to emphasize what a difficult period of three decades we passed while fighting against the horrifying terrorism, undoubtedly the world worst and most brutal terrorist organization. It is only now that people have a sigh of relief after defeating the devastating terrorism by the patriotic and extraordinary brilliant defence force of ours. Indeed it is not an exaggeration to state that they display not only their brilliance in their respective professional performances but also in the overall discipline of which they were fine exponents.

Professionalism is not a new concept as it goes back to the origin of human civilization. As it was preached by the Buddha in "Agganga Suddha" in "Deeganikaya" when the state was formed first, the society was categorized in to three as – rulers, the rule and the jayakas which means once were engaged in the ecclesiastical activities. They were the present day members of the clergy. When it comes to Vedic philosophy namely rig, atharva, yajur and sama, believed to be written between 1700 to 1100BC, there had been a classification of the society into four carders popularly known as four-fold "Warna dharma" which led to the categorization of the society into four namely 'Brahamins, Shaththriya, Waishya and Shudras'. Such a categorization in a bygone era could be understood in terms of the activities that they were engaged in. With the passage of time this division resulted in the emergence of the caste system. According to Vedic philosophy the category of Brahmin comprised of those who were engaged in scriptural education and teaching while Shaththriya comprised of those who were engaged in all forms of state administration. Waishya means the people engaged in commercial activities. Shudra meant to be both semi-skilled and unskilled workmen who were considered to be forming the lowest strata of the society. Although the said classification of human beings appeared to have been based upon human activities yet it paved the way for the deep routine of the caste system which was inimical to the evolution and development of the society.

Specialty or skillfulness of a person had been admired even in one of the oldest books written in 'Mahabharatha' namely 'Bhagawath Geetha' said to have been written during the contemporaneous period of Vedic literature, which says that "Whenever there is Krishna, the master of all mystics and whenever there is Arjuna, the supreme archer, there will also certainly be opulence, victory and mortality". Even Ramayana highlights this moral truth encompassing required virtues of righteousness alias dhamma. The society that prevailed at the time of the enlightenment of the Buddha reflected this caste system. It was He who unleash the harmless revolution against that social discrimination and preached that 'A person becomes a noble or otherwise only by his deeds not by his birth'. Najajjawasalohothi, Najajjahothi Brahmano, Kamanthowasalo hothi, kammantha hothi brahmano.

Although Athens and Rome were considered the cradles of civilization in the occidental world, there human society had been classified into two broad divisions as masters and slaves with the former having full possession of the lives of the serves. That feudalistic system was so ingrained, that slaves were considered marketable. So much so that there were fast growing cities which gained momentum purely because of the sales of slaves. It is in such a scenario that Jesus Christ went to the extent of whipping money lenders and slave dealers in Jerusalem.

History records that during the time of that great emperor Dharmashoka who was considered the most righteous ruler in the world, there had been classification of human beings depending upon their skills and vocations they were pursuing. Mahawansha chronicles that when nun Sanghamiththa, daughter of emperor Asoka brought a sapling of the Sri Maha Bo Tree to Anuradhapura in 245 BC, she was accompanied by eight types of skilled persons in their respective fields such as farmers, sculptures, architects, irrigational experts, carpenters, blacksmiths, etc. Their advent to our country gave birth to professionalism. It is that professionalism which eventually enabled our country to be called the "Granary of the East". It is relevant to mention here that

irrigation, irrigational experts the world over pay glowing tribute to the irrigation system we had in Polonnaruwa era, where huge canal at only 1 inch slope for every one mile, which is undoubtedly a great irrigational feet that astonishes us even now. Today world still marvels that architectural skills displayed at Sigiriya rock and its environment built by King Kashyapa. To the eternal credit to our professionals, it must be said that the Dhagabas likes Ruwanwalisaya, Abayagiriya, Jetawanaramaya in Anuradhapura and constructional sites like Hatadhageya, Watadhageya in Polonnaruwa are to mention a few outstanding constructions of theirs. They bear ample testimony to the astonishing engineering skills of those professionals.

Although Polonnarauwa kingdom was the most prosperous era, the kings had to retreat to Dambadeniya due to South Indian invasions, which took place continually from Anuradhapura kingdom. As a result of such South Indian invasion into our country, the caste system which was prevalent in India got gradually inculcated into our Sinhala society. The consequences of it were the caste system taking hold our professionalism thereby leading the society to primitive level. In other words, during Dambadeniya era the caste system superseded professionalism with its attended evils. It is noteworthy that professionalism of the highest caliber prevails even in defence setup even during the period of Anuradhapura. When king Elara who invaded this country from South India was killed in a battle by king Dutugamunu, the latter ordered that due respect should be given to the deceased king Elara and that none should pass his tomb without paying due honours and respect. This amply demonstrates the supply in professionalism upheld even at war affairs. The prevalence of an advanced health service is proved by the fact that even some kings themselves were physicians. History records that king Buddhadasa was also a veterinary surgeon who cured a snake suffering from an ailment.

There are historical instances where kings had upheld the rule of law fairly and squarely in an exemplary manner. A case in point was king Elara passing a capital sentence on his own son for negligent riding of a cart causing a death to a calf. King Parakramabahu II in Dambadeniya was a great philosopher and a prolific writer and was bestowed with the honorary title "Kalikalasahithya Sarwaghghna Panditha" in recognition of his profound learning. That reminds us of what Aristotle in his wisdom said centuries ago. According to him an ideal ruler should be a happy blend of a philosopher and a king. At present no profession is immune to the influence of the west be it by law, medicine, science, engineering, architecture, education, defence, diplomacy, etc. Every branch or field of professionalism is now intertwined with a global setup as the globe has now shrunk into a global village. During the period prior to World War I, many Americans living in the country were moving to cities creating overcrowded conditions. There were number of radical solutions for solving some of their problems inter alia providing food, clothing, education and healthcare. It was in this new progressive era that a number of professions were organized in USA. Later on they started creating standards and criteria for qualifications of its members.

Professionalism is defined as the skill, good judgment and polite behaviour that is expected from a person who is trained to do a particular job well. Professionalism in its expanded vision includes rectitude, competence, steadiness, thoroughness, expertise, respectability, civility and probity, etc. In the preamble of the Charter introduced by the American college of physicians for medical professionalism in the new millennium, professionalism is the basis of medicine's contract with the society and it demands place in the interest of patients above those of the physicians setting and maintaining standards of competence and integrity and providing expert advice to society on matters of health. Hippocrates oath encapsulates all these virtues. The principals and responsibilities of medical professionalisms must be clearly understood by both the profession and the society. The essential components of this contract is the public trust. At present medical profession is confronted with an explosion of technology, changing market forces, problems in healthcare delivery, bioterrorism and globalization. Above all medical professionalism is meant for the ultimate goal of achieving patients' welfare.

A lawyer as a member of the legal profession is a representative of clients and officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer seamlessly asserts the client's position under the rules of adversary system and seeks results, advantages to the client but consistent with the requirement of honest dealing with others. In the early era, individuals were supposed to plead their own case. But in the 4th century they were permitted to seek the help of a friend who is skilled in oratory. Orators in the ancient Athens were later described as lawyers. But the rule was that they should render their service free and cannot charge any fee. Later Emperor Claudius abolished that rule and legalized advocacy as a profession and allowed to charge fees but subject to a ceiling. Roman advocates as well as judges were trained in rhetoric not in law. Later advocates were recognized by law and legal system was developed in and organizational structure. Notaries appeared in the later Roman Empire but they

were not law-trained, they were barely literate hacks who rapped the simplest transaction with mountains of legal jargon. After the fall of western empire the legal profession also collapsed but some professional canonized began to practice canon law as lifelong profession in itself. In 1231 French council mandated that lawyers should swear an oath of admission before practicing in Bishop's court. In 1237 similar oath was promulgated by a paper legatee in London. By 1250 nucleus of a new legal profession had clearly formed. In 1275 a statute was enacted prescribing punishment for professional lawyers guilty of deceit. Later on it was evolved as a Nobel profession and with expansion of European colonization legal profession had been gradually established in many parts of the world. In the field of law in our country the influence of the Dutch rule had been tremendous. In that we imbibe the principles of Roman Dutch law substantially which had their impact upon the whole gamete of disciplines. Although it was confined to the practicing court in our early era at present legal professionals dominate in various fields such as commercial venchers including companies, banks, insurers, secretaries, stock brokers, etc. Opportunities are been fastly expanded in the international commerce too. At the same time lawyers shall uphold the professional standard and act in the fearless advocacy within the established canals of service. Recent surveys indicate deep decline of professional ethics in almost all the professions all over the world. Every professional worth calling one should rise head and shoulders above amateurism and should be an exponent of the elegant and finer points of professionalism, whatever the profession he represents. The golden thread that runs through the fabric of diplomacy is in this professionalism pure and simple. The role of professionalism played in national and international diplomacy cannot be obscured and still less denied. Lamentably our country has paid a heavy toll for departing from well established norms and principles due to lack of professionalism especially in the diplomatic arena during the recent past.

We are now in the process of surmounting that sorry state of affairs. If a person is not endowed with the required qualities of a particular profession he represents he may behave like a bull in a China ware shop. A true professional should never take anything for granted which mental condition arises from senses of complacency. The efficacy of professionalism looms very large even in war affairs. The unique example of it was the six-day war fought by Israel against Arab in 1967. The one night general Moshe Dayan, ministry of defense, celebrating Israel victory said that he won the war because of strict professionalism he brought into play. Laxity in the adherence to professionalism could cause enormous and incalculable harm as was proved in Hitler's case. His eccentric habit of getting up late in the morning was exploited by the enemies who knew that German forces would not be able counterattack forthwith due to non availability of précised order from the commanders. It is also pertinent to remind that Winston Churchill, Prime Minister of UK who fought for World War II displayed a remarkable professionalism which enables him to galvanize the British nation to have the mindset to face the war. At present diversification of professions in its vague has made specialization a must. Today major profession has a cluster of semi skill professionals, for an example, the medical profession has its offshoots such as nursing technicians, laboratory analysts and therapists, etc, which have become an intregal part of the main profession. These phenomena necessitates the conducting of research in all fields as every innovation, minor it may be, would still contribute its share to the upliftment of the society. By looking at subject to be dealt with in this conference I am all the more pleased as they cover of wide range of diversified fields such as Medicine, Law, Engineering, Computing, Education, Political Science as well as current political issues of diplomacy, defense, maritime security, terrorism, nuclear terrorism and weapons, international trade and national reconciliation and conflict resolution, power and energy to mention of few. I should like to avail myself this opportunity to wish all of you greater success and many more accomplishments in all your future endeavors.

Thank you very much.

Plenary Session

Inculcating Professional Ethics for Legal Practice

Session Summary

The plenary session on Law was carried out on the sub theme of *'Inculcating professional ethics for legal practice'* and the session was chaired by Dr Wijeyadasa Rajapakse, MP, PC Hon Minister of Minister of Justice and Buddhasasana.

Presentation by Dr. Jayathissa De Costa - The history of legal education and the history of the legal profession of this country and an analysis of the historical development of the legal profession.

In his speech he emphasized the historical background of the legal profession of Sri Lanka. It was compared the gradual acceleration of the professional training opportunities given to the Attorneys at Law in Sri Lanka now and then. It was noted how the profession has become enlarged and how the misconduct of the legal professionals are encountered. Supreme Court's role towards the discipline of the legal professionals was discussed. The Supreme Court allowed the Bar Association disciplinary committees, professional purpose committee and the like to deal with some of the offences and more serious cases the Supreme Court itself issued notices and then after inquiry some of the members were dis-enrolled and the others were suspended. Professional ethics are the standards of conducts, the desirable practices and to avoid the undesirable practices he noted.

Presentation by Professor Camena Gunerathne - Role of the law schools in terms of professional ethics.

Professor Camena Gunerathne focused on the role of law schools, the role of law teachers and how law teachers fulfill their responsibilities. Maintaining academic standards can be the first step of the ladder where the role of the law schools begins. Since Sri Lanka is currently at a very critical stage, ending a 30 year war and now its been six years since and Sri Lankan have had a very difficult time and there have been problems which are very relevant to lawyers; constitutional amendments, threats to the judiciary, breakdown of the rule of law , violations of human rights, and she stated that the lawyers as a whole and the bar association now taken an active role in that. But she is questioning whether lawyers as a whole across the country still had that moral consciousness and felt that they had an ethical duty to fulfill their responsibilities to national development and whether we as teachers train our graduates to give them that sense of responsibility. So the question is that, as the law teachers in law schools how they address this issue. She is of the view that it is required to take a current review of our curriculum.

Presentation by Professor Veerle Heyvaert - How environmental legal scholarship does contribute to the legal profession and society at large.

She spoke about the environmental legal scholarship's contribution towards the legal profession based on five key points. First point was environmental principles and ideas, challenge, knowledge on general legal principles and conventions. New developments have identified areas where conventional domestic or international understanding may be no longer fit for purpose. For example in the context of there being environmental challenges assuming trans-boundary or global nature when my question there is traditional understanding of sovereignty and of territoriality and extra-territoriality are really still deal with this massive trans-boundary hazards that we are facing. First contribution is that it invites us to reconsider these notions.

Secondly she emphasized about re-thinking of the public and private divide. For instance she noted investment treaties where there are provisions that investors can sue governments for adopting regulations if these regulations change the prime of investment. Is that a contractual arrangement or public law arrangement? Boundaries between public law and private law in that field seem to be blurring. In the light of environmental law when it comes to a holding party's accountable to environmental damage the bifurcation between either having to sue the State and having to go through all the set of legal remedies in one direction and having to sue another private party through another set of channels that vision can be very be disruptive in the attach to get due compensation for environmental damage. As environmental lawyers it requires to downsize of this traditional private and public divide.

Third contribution is that environmental legal academics particularly deal with legal plurality. It is governed by several legal regimes and several levels of governance. It is hard to say these days that environmental problems do not involve at some degree international law as well as regional law as well as domestic law.

As the fourth point she noted environmental legal scholars' role on including soft law. Formally soft law was not binding. But very often in practice has increased the status of soft law. Environmental law has had to deal with soft law and has had to ask serious questions about if you have more officially a voluntary or non binding law that is received by the community as if it were binding, it is very difficult for the community to avoid then how do you

deal with it what kind of interpretive value does such a law have in regulatory decision making.

Finally environmental law has also fueled the debate of regulatory choice. Environmental law has been the most fantastic laboratory for regulatory experimentations with different types of strategies. United States Supreme Court justice Steven Brian and legal scholar Julliet Black has spent considerable efforts in examining environmental regulations with regulatory alternative strategies. Equally environmental regulation is valuable training tool in risk regulation, self regulation, responsive regulation, smart regulation, de-regulation, re-regulation and everything in between. So environmental regulation is the field where regulation has been most heavily scrutinized. It the most creative thinking has come out. It is becoming a powerful engine for reinvention and game-changer.

Speech by Mr. Thusantha Wijemanna. Some of the issues regarding the investors and the traders face due to lack of professionalism with regard to the way we practice law.

The speaker emphasized the importance of implementing alternate dispute resolution in the field of trade and investments. He said when it comes to the dispute resolution neither party trusts each other's jurisdiction and therefore Arbitraion is a useful mechanism that can be used in this regard, but as per his speech, one of the major issues arises is lawyers are reluctant to engage in arbitration on full time basis. Therefore the speaker stressed the mindset of the lawyers needs to be changed not to consider alternate dispute resolution as part time practice of lawyers and the country to go forward in development, it is essential to encourage foreign direct investments. (FDI) He further said to attract FDI having an arbitration mechanism for dispute resolution is a great advantage to the country.

Speech by Ms. Kamalini De Silva. Professional Ethics for lawyers.

Ms. Kamalini De Silva explored the important role played by lawyers as guardians of justice upholding rights of individuals and thereby ensuring a free and democratic society. She emphasized for the fulfillment of this role, acceptance by lawyers of their duties and obligations within our legal system is required. She stressed that the conduct whether within or outside the professional sphere is such that the knowledge of it would be likely to impair the trust of the client in the lawyer as professionals. She elaborated this referring to decided cases. Further Ms. Kamalini De Silva explained the important roles played by the Supreme Court, Ministry of Justice and Bar Association in respect of professional ethical conduct of Attorneys-at-law. Finally he argued that it is not the sanctions for incompetence and negligence constitute the motivation for diligence, rather a lawyer should be motivated by the desire for excellence not only demonstrating astuteness with respect to professional work but also in regard to every aspect of his conduct.

The History of Legal Education and the History of the Legal Profession of this Country and an Analysis of the Historical Development of the Legal Profession

transcribed plenary speech of
Dr Jayatissa De Costa
Principal, Sri Lanka Law College
locwal@slt.lk

When the Dutch conceded the maritime provinces of the country in 1796, the British occupied those areas and they installed their administration. As a principle they didn't do away with the existing legal systems as well as the administration of the legal system. So the legal profession as stood in 1796 latter part of the 18th century was administered by Dutch judges. They didn't want to corporate with the British conquerors. So gradually the British rulers, after Federick North's rule they started administering English law and the English legal principles to this country especially after the entire country became a British colony in 1815 they introduced the English legal system. But, they did not do away with the Roman Dutch Law system. So as a result, even now you get a mixture of Roman Dutch Law as well as the English legal system in this country. About the professional ethics, if you go to the earliest part of the entry to the legal profession in this country that was a kind of apprentenship system. British judges what they did was to select few candidates as prospective law students and then those students functioned as apprentices in the chambers of senior lawyers and trained by the British judges. Because in the earlier part of the 19th century almost all the judges were British people. So that was there for about in 56 years and in 1874 they started the present way of training lawyers mainly with the enactment of the Council of legal education. Supreme Court judges as well as the senior lawyers both were mainly from advocate profession. They appointed a committee of the Council of Legal Education to oversee the training of lawyers. When these lawyers were admitted to the Bar, according to the earlier Acts they had to undergo training in liberal arts. That means not only legal subjects, it's a spectrum of subjects called liberal arts including of the present humanities and social sciences. Whatever it is in the 19th century they started methodical training of lawyers and as a result Sri Lanka Law College (at that time Ceylon Law College) started functioning as the only training college for the lawyers. But there was a difference at that time, the English solicitors and English Barristers were allowed to practice without further examination or further registration. Gradually, the government with the attainment of independence did away with some of those concessions and the English Barristers were not automatically admitted. They too had to sit for number of papers and the solicitors also. There is a landmark case in 1990s where it was held that English solicitor cannot be admitted as an Attorney-at-Law, because in 1974 in this country the two professions were fused ; proctors and advocates was abolished and one class of lawyers called Attorneys-at-Law were admitted. And now in this country the legal profession consists only of Attorneys-at-Law. Of course instead of Queen's Counsels, the Presidents Counsels are there. They are selected from and among the senior lawyers who have attained eminence in their profession. Now, about the professional ethics in the earlier period especially during the British era there were very few complaints against the lawyers and very few numbers and far between also. No one took any serious note of those complaints. But with the growth of the numbers of the profession, now today there are about 16,000 lawyers in this country. So like that gradually complaints against the lawyers' misconduct or whatever started and the authorities especially the Supreme Court had to deal with them. And of course the Supreme Court allowed the Bar Association disciplinary committees, professional purpose committee and the like to deal with some of the offences and more serious cases the Supreme Court itself issued notices and then after inquiry some of the members were dis-enrolled and the others were suspended. So like that punishment will have to be metered out to some of misbehaviors of this profession. The importance of professional ethics in the legal profession, it's very obvious now because, professional ethics are the standards of conducts, the desirable practices and to avoid the undesirable practices. Law relating to ethics regarding the legal profession generally contained in some of the provisions of the constitution, about the admission and suspension or the or the enrolled of lawyers, Judicature Act. And mainly the Supreme Court rules which were promulgated in 1988 under the provisions of the constitution which allowed the Supreme Court to make rules. So according to the rules touting is an offence. Advertisement in certain categories is an offence. So like that there are duties laid down for the courts, fellow members of the

profession as well as for the general public. So like in any other profession, legal profession also a noble profession, one of the noblest professions. But unfortunately recent times we have seen the deterioration of standards, both moral standards as well as the general standards. That is due to various other factors. Because we cannot single out legal profession. Because, deterioration of standards is common to all the other professions, medical, engineering or whatever you call it. So that way legal profession is not an exception to the general deterioration. Now at present time legal ethics, professional ethics is a subject in most of the university curriculum. As far as the law college is concerned where I'm the principal, I'm the lecturer in professional ethics, that's a subject for the final year. Various other universities they are still introducing this as a subject. Because, that was never a subject and that was not one of the six core subjects in the United Kingdom universities, professional ethics. That is a matter for the Bar training institutions like the wings court or the college of law regarding the admissions of the Barristers profession as well as the Solicitors profession in England. But in Sri Lanka during the early part of the legal education, it means the university education, the law faculty of Ceylon University that was started in 1947, professional ethics was not taught as a subject. But I think now the law faculty, even now I'm told that it's not being taught, but only at the Sri Lanka law college. But every lawyer will have to undergo training in legal profession. For an example few months ago, the Supreme Court of this country has dealt with a lawyer who has accepted a fee, but never appeared in court. So what was the punishment metered out to him, to come back to law college and under my supervision to undergo another training course in professional ethics. One term he had to follow lectures in professional ethics which of course carried out and now he's again back in the practice. That's a right punishment for a lawyer who has neglected his professional duties. By having accepted a fee and failed to appear in courts. So three months he had to follow the professional ethics course at the law college. That was about six months ago. But there have been cases where the lawyers have been dis enrolled and suspended for years and years. And there are other cases where the suspended lawyers or the dis enrolled lawyers reapplied for admission and there again in the absence of any reparation or any improvement of his moral turpitude, the Supreme Court has refused. So any student studies in a profession, like law student or medical student or whatever profession, minimum standards must be maintained regarding the profession. As far as the law profession is concerned one has to strictly follow the Supreme Court rules and try to live up to the required standards of this profession.

Role of the Law Schools in Terms of Professional Ethics

transcribed plenary speech of
Prof Camena Gunaratne
Dean, Faculty of Humanities and Social Sciences, Open University of Sri Lanka
cgune@ou.ac.lk

What do you mean by the practice of law, the legal dictionary says that the" practice of law is the professional task performed by the lawyers in their offices or in court or in day to day basis". It also says the practice of law depend on lawyers having clubs that is actually very narrow definition of the practice of law. It just relates to the way lawyers function with clients and it can be questioned whether that definition is a very narrow definition and whether lawyers should have a wider function towards society, towards the community. The theme of this conference is professionalism for national development. So it is pertinent to pose the question if we see the practice of law in such a narrow way whether our lawyers really fulfilling their responsibility at a national level.

At the Howard law school there is specialized sector on the legal profession so they think the study of the legal profession itself is something very important and this is the report it's called "lawyers as professionals and citizens key roles and responsibilities of the 20th century". This has generated a lot of debate in US where they also looking at the question on what is the role of lawyers is, what do you mean by professionalism among lawyers The earlier definition on practice of law said the lawyer must have client and it is what the lawyer does in court or his office so on, Now the aforementioned report has a very interesting definition of the role of lawyers and it says the lawyer should be an expert technician, a wise councilor and an effective leader and then it goes on to say that in fulfilling these roles the lawyers have four ethical responsibilities and these are responsibilities to their client and stakeholders (obviously) , also responsibilities to the legal system, responsibilities to institutions and responsibilities to society at large. We are taking a much wider definition on what the practice of law is and what the roles and responsibilities of the lawyers are, The report says that, if you read the report it discusses this argument in the context of companies and law firms and law school unlike the way the lawyers practice here independently.
It will be focused on the role of law schools, the role of law teachers and how we fulfill our responsibilities. Many of us tend to forget that law teachers are also a part of the legal profession and the reason they are often not counted as a part of the legal profession is that most of them don't go to court and not allowed to. They don't even do counseling and there are many law teachers who haven't even joined the bar although they have PHD s in law. But generally it has been acknowledged that they are the branch of the legal profession and our function or practice of law is to teach the law and train future lawyer. Weeramanthri J. says in his book called ' an Invitation to Law' it is stated that

> " the legal profession is seen not as a two way but as a three way partnership in which the academic branch of the profession is by no means the least important " .

He had stated that the academic branch of the profession is the law teachers and the law schools and we are not the least important branch of the legal profession. If they are also a branch of the legal profession as law practitioners they practice by teaching that they also have to be expert technicians, wise councilors and effective leaders and also have responsibilities to clients which are the students, to the legal system, to the institutions and to the society at large. The question I would like to put forward is how law teachers and law schools , how are we carrying out to this function and are we producing graduates who in turn has fulfilled this roles and responsibilities. When doing that obviously first of all we must have the capacity to fulfill our own role. We ourselves need to be expert technicians which means we need to be able to teach, we need to maintain our own academic standards, we have responsibilities to our institution which is to a university or a law school, we have to be innovative and creative in teaching students. Teaching you not just the basics of law but teaching skills and these skills include the skills commonly required of a lawyer such as analytical reasoning, problem solving abilities, reading and writing skills, research presentation skills in fact I think if we look hard at our curriculum most law schools we tend to concentrate on teaching the substance of law rather than teaching skills. There are many reasons for this since we work under certain concentrates but that is something that we have to think about. But the whole mark of a lawyer is not just being an expert technician and I think the more difficult question is, are we teaching lawyers are we producing lawyers who can be wise councilors and effective leaders and I think this is where the national question comes in

to play here. Are we inculcating that kind of professionalism in lawyers as that we produce that they will contribute to national development? Now to be an expert technician you need certain skills which I mention few of them earlier but to become a wise councilor and an effective leader lawyers need more than that, they need to develop consciousness of their ethical responsibilities as the previous speaker said not only to their clients but to a wider community. I am looking at the practice of law beyond clients, to something as the role that the lawyers play in the wider community and in society at large. So they need to be prepared to fulfill their responsibilities even when they are not actually interrupting in clients. Here I would like to quote from the speech given by Sandra Conner a current judge of the supreme quote she said this many years ago it is relevant to us too. She said it is my belief that the dialogue appropriate to teaching ethics, morality and the law would transcend the discussion limited to the code of professional responsibility. To a large extent the court merely focuses on what a lawyer should not do as a practitioner such guidelines are no longer necessary but they do not address the broader aspect what a good lawyer should do to live up to the ideal of legal profession. So she says the code of ethics of lawyers which is very important as Dr. Costa was telling you about but nevertheless that code I think focuses mainly on the lawyer client relationship and what a lawyer does in court but it does not focus on what a lawyer should not do. It does not address the wider aspect of what lawyers ought to do to contribute to society at large. Now to illustrate my point I would like to share an anecdote. In a law school Some students were asked to interview a practicing lawyers and find out 18th amendment to the constitution. They came back and told their teachers most of them lawyers, many of them senior lawyers said we are not interested to the 18th amendment to the constitution we practice family law, land law or labor law, we are not constitutional lawyers so we do not know what the 18th amendment to the constitution is because they are not interested. Now the student came back very discouraged and very disheartened at the response and there we need to ask ourselves a question what kind of lawyers are we turning out who can say that they are not interested on what a constitutional amendment all about and it was that anecdote actually made me think about what kind of lawyers are we turning out. And I think personally as a law teacher we have failed somewhere down the line if we are producing lawyers who are saying that. We have probably taught them to be good technicians, good lawyers, we have probably taught them fundamentals of family law or whatever they are practicing and they probably having a good practice but does it stop there? Should we go beyond that? In inculcating certain ethical responsibilities in our students. Now again I would like to quote justice Sandra conner, she said law schools must instill in their students a conciseness of the moral and social responsibilities that they owe not only to their clients but to society at large and may be this is the crucial aspect of legal education that we are missing here. And as we all know we are currently at a very critical stage, we have ended a 30 year war and now its being six years since we ended and we have had a very difficult time and there have been problems which are very relevant to lawyers; constitutional amendments, threats to the judiciary , breakdown of the rule of law , violations of human rights, and I would like to say that the lawyers as a whole and the bar association we have now taken an active role in that. But I am questioning whether lawyers as a whole across the country still had that moral consciousness and felt that they had an ethical duty to fulfil their responsibilities to national development and whether we train our graduates to give them that sense of responsibility. So the question I would like to ask, though I don't have immediate answers as the law teachers in law schools how do we address this issue. I think we need to take a current review of our curriculum. Now currently we teach state law. Should we go for a more inter disciplinary basis? for example we teach criminal law but we don't teach sentencing policy and what do we have we have judges who give a spitted sentence for rape, for child abuse for child rape and they sentence people to prison for may be stealing few rupees. We are teaching constitutional law but we are not teaching political theory. We are not putting that law in context. And I think it is one aspect that we really have to look at. We also have to look at teaching more skills. I think kothalawela defense academy has revised and Peradeniya law department also is bringing adequate disciplinary focus into the law curriculum some of us are not constrained but maybe we should take a holistic issue approach to it and I would like to suggest that the council of legal education which currently alidades with Sri Lanka law college should take a more holistic issue to legal education in the country so that we can pool our recourses and have commonly look at the curriculum , the way we teach law to inculcate more professionalism in the legal profession which will contribute to national development.

How Environmental Legal Scholarship Contributes to the Legal Profession and Society at Large

transcribed plenary speech of
Prof Veerle Heyvaert
London School of Economics and Political Science, UK
V.Heyvaert@lse.ac.uk

When the Dutch conceded the maritime provinces of the country in 1796, the British occupied those areas and they installed their administration. As a principle they didn't do away with the existing legal systems as well as the administration of the legal system. So the legal profession as stood in 1796 latter part of the 18th century was administered by Dutch judges. They didn't want to corporate with the British conquerors. So gradually the British rulers, after Federick North's rule they started administering English law and the English legal principles to this country especially after the entire country became a British colony in 1815 they introduced the English legal system. But, they did not do away with the Roman Dutch Law system. So as a result, even now you get a mixture of Roman Dutch Law as well as the English legal system in this country. About the professional ethics, if you go to the earliest part of the entry to the legal profession in this country that was a kind of apprentenship system. British judges what they did was to select few candidates as prospective law students and then those students functioned as apprentices in the chambers of senior lawyers and trained by the British judges. Because in the earlier part of the 19th century almost all the judges were British people. So that was there for about in 56 years and in 1874 they started the present way of training lawyers mainly with the enactment of the Council of legal education. Supreme Court judges as well as the senior lawyers both were mainly from advocate profession. They appointed a committee of the Council of Legal Education to oversee the training of lawyers. When these lawyers were admitted to the Bar, according to the earlier Acts they had to undergo training in liberal arts. That means not only legal subjects, it's a spectrum of subjects called liberal arts including of the present humanities and social sciences. Whatever it is in the 19th century they started methodical training of lawyers and as a result Sri Lanka Law College (at that time Ceylon Law College) started functioning as the only training college for the lawyers. But there was a difference at that time, the English solicitors and English Barristers were allowed to practice without further examination or further registration. Gradually, the government with the attainment of independence did away with some of those concessions and the English Barristers were not automatically admitted. They too had to sit for number of papers and the solicitors also. There is a landmark case in 1990s where it was held that English solicitor cannot be admitted as an Attorney-at-Law, because in 1974 in this country the two professions were fused ; proctors and advocates was abolished and one class of lawyers called Attorneys-at-Law were admitted. And now in this country the legal profession consists only of Attorneys-at-Law. Of course instead of Queen's Counsels, the Presidents Counsels are there. They are selected from and among the senior lawyers who have attained eminence in their profession. Now, about the professional ethics in the earlier period especially during the British era there were very few complaints against the lawyers and very few numbers and far between also. No one took any serious note of those complaints. But with the growth of the numbers of the profession, now today there are about 16,000 lawyers in this country. So like that gradually complaints against the lawyers' misconduct or whatever started and the authorities especially the Supreme Court had to deal with them. And of course the Supreme Court allowed the Bar Association disciplinary committees, professional purpose committee and the like to deal with some of the offences and more serious cases the Supreme Court itself issued notices and then after inquiry some of the members were dis-enrolled and the others were suspended. So like that punishment will have to be metered out to some of misbehaviors of this profession. The importance of professional ethics in the legal profession, it's very obvious now because, professional ethics are the standards of conducts, the desirable practices and to avoid the undesirable practices. Law relating to ethics regarding the legal profession generally contained in some of the provisions of the constitution, about the admission and suspension or the or the enrolled of lawyers, Judicature Act. And mainly the Supreme Court rules which were promulgated in 1988 under the provisions of the constitution which allowed the Supreme Court to make rules. So according to the rules touting is an offence. Advertisement in certain categories is an offence. So like that there are duties laid down for the courts, fellow members of the profession as well as for the general public. So like in any other profession, legal profession also a noble profession,

one of the noblest professions. But unfortunately recent times we have seen the deterioration of standards, both moral standards as well as the general standards. That is due to various other factors. Because we cannot single out legal profession. Because, deterioration of standards is common to all the other professions, medical, engineering or whatever you call it. So that way legal profession is not an exception to the general deterioration. Now at present time legal ethics, professional ethics is a subject in most of the university curriculum. As far as the law college is concerned where I'm the principal, I'm the lecturer in professional ethics, that's a subject for the final year. Various other universities they are still introducing this as a subject. Because, that was never a subject and that was not one of the six core subjects in the United Kingdom universities, professional ethics. That is a matter for the Bar training institutions like the wings court or the college of law regarding the admissions of the Barristers profession as well as the Solicitors profession in England. But in Sri Lanka during the early part of the legal education, it means the university education, the law faculty of Ceylon University that was started in 1947, professional ethics was not taught as a subject. But I think now the law faculty, even now I'm told that it's not being taught, but only at the Sri Lanka law college. But every lawyer will have to undergo training in legal profession. For an example few months ago, the Supreme Court of this country has dealt with a lawyer who has accepted a fee, but never appeared in court. So what was the punishment metered out to him, to come back to law college and under my supervision to undergo another training course in professional ethics. One term he had to follow lectures in professional ethics which of course carried out and now he's again back in the practice. That's a right punishment for a lawyer who has neglected his professional duties. By having accepted a fee and failed to appear in courts. So three months he had to follow the professional ethics course at the law college. That was about six months ago. But there have been cases where the lawyers have been dis enrolled and suspended for years and years. And there are other cases where the suspended lawyers or the dis enrolled lawyers reapplied for admission and there again in the absence of any reparation or any improvement of his moral turpitude, the Supreme Court has refused. So any student studies in a profession, like law student or medical student or whatever profession, minimum standards must be maintained regarding the profession. As far as the law profession is concerned one has to strictly follow the Supreme Court rules and try to live up to the required standards of this profession.

Professional Ethics for Lawyers

transcribed plenary speech of
Ms Kamalini De Silva
Secretary, Ministry of Justice, Sri Lanka
kamalini.desilva@gmail.com

Before getting into the legal framework that is applicable to lawyers in Sri Lanka it is pertinent to quote from a famous fairytale Alice in wonderland chapter 6 by Luis carol 1865. “Would you tell me please which way I ought to go from here? That depends a good deal on where you want to get to.” I want all the lawyers and especially the law students here to think about where you want to get to. The subject of professional ethics is important especially for the Ministry of Justice since its role in the administration of justice is to ensure that the citizens and non-citizens of Sri Lanka have access to quality justice. Lawyers as guardians of justice play a pivotal role in upholding the rights of individuals and ensuring a free and democratic society. Fulfillment of the role requires acceptance by lawyers of their duties and obligations within our legal syst. And unequivocal obligation of a lawyer is to maintain the highest standards of ethical conduct. In fulfilling professional Responsibilities a lawyer necessarily assumes diverse roles which require performance of many arduous tasks. Every situation a lawyer can encounter cannot be envisaged. However fundamental ethical principles are always present for guidance. The necessity to ensure high ethical standards in Sri Lanka is the need of the hour. Since the opinion of the general public is that the ethical standards of the legal fraternity has deteriorated over the years. In this respect it will advert to a speech made by G.P.S. de Silva who was the Chief Justice and also to Mr. H.L.S. Silva president of the bar association at the convocation of the bar association of Sri Lanka on the 27th of March 1993. Chief Justice G.P.S. de Silva said as follows; “The bar of Sri Lanka with its sturdy sense of independence and important contribution has made in many areas of public life as an honoured place in this country. As has often been said and rightly so, the bar is heir to great and glorious tradition. However as of late there has been disturbing indications that all is not well with the profession. It is with regret that I’m constrained to refer to the decline in proper conduct, complains in regard to misconduct on the part of attorneys at law are not infrequent now. My colleges on the bench spend a fair amount of time looking into these complaints. They are faced with a situation of increasing numbers in the profession. This in turn enhances the need to maintain proper ethical standards. In this connection I trust that it would not be irrelevant to bear in mind, timely goal eloquently expressed by the former president of the bar association. The Chief Justice quoted the following words of Mr. Silva. "Out of all the qualities expected of us, the supremely important values are those of moral integrity and fairness. A conscious attention to a client’s cause and never ending quest for perfection in the exercise of our professional skills and the indomitable courage in the face of improper pressures that conflict with our duties. All these qualities might be unattainable but are very properly expected of us when we are entrusted by our clients often with matters of great consequence in their personal lives for which let us remember we are often handsomely paid. These values must be underscored in the present times. Let us remember that the law has no life independent of lawyers who functions within it. If we lawyers thru our own weakness and lack of serious concern, permit a decline in the professional standard which will cause a blight upon the administration of that justice and eventually lead to the rejection by the people for whose benefit it has been established. That would indeed be a tragedy for everyone for we would have then lost a great deal that is of immense value. Lawyers’ ethics is more than a set of principles for one to follow, it is also about how to conduct oneself whilst practicing. As such, a lawyer may owe duty to a third party and the wider community. As Dr. ARB Amarasinghe in his book of professional ethics and responsibilities of lawyers pointed out, a lawyer has many obligations. He has a duty to the client, to the court and to other tribunals and bodies. As an officer of the court he must act with honesty, integrity and candor. Any duties or directions made by the court must be fulfilled including any matter regarding which he has given an undertaking to court. His foremost duties to his clients require him to act with due skill and diligence and reasonable swiftness and courtesy while maintaining his clients confidence and avoiding conflict of interests. A lawyer has an obligation to demonstrate ethical practice to the public including his peers. In 1988 the supreme court of Sri Lanka in the exercise of its rule making power under article 136 (1) g of the constitution made the Supreme Court conduct of etiquette for attorneys at law rules. They were published in the gazette of 7th December 1988. These rules have the force of written law. Integrity is the fundamental quality of any person who seeks to practice as a member of the legal profession. The relationship between the lawyer and the

client is a fiduciary one. The client is unable to repose full confidence in the lawyers trust worthiness. Dishonorable or dubious conduct on the part of the lawyer either in private life or professional practice will reflect adversely on the lawyer, the integrity of the legal profession and the administration of justice as a whole. The conduct whether within or outside the professional sphere is such that the knowledge of it would be likely to impair the trust of the client in the lawyer as professionals. A regulating body will justify it taking disciplinary action. There are several interesting cases where the Supreme Court in the past has issued rules against errant lawyers. some of which are in re de soya a proctor who in his professional capacity signed a false certificate which enabled persons to obtain identity cards was suspended for three years. In re proctor who had without dishonest or criminal intention had negligently misappropriated his client's money was suspended for six months and ordered to pay cost. In re Dharmalingam who misappropriated the survey fees deposited with him which resulted in his client's case being dismissed was suspended for four months. A proctor who appeared in court in a state of intoxication was suspended for three months. in re Dharmarathnam who had prepared a petition of appeal in false and scandalous terms insulting the judge against whose decision the appeal was made was suspend for a month. The subject of ethics cannot be dealt with within a few minutes. When taken into consideration the innumerable complaints received by the ministry of justice regarding clients' dissatisfaction with their lawyers' professional service, it will be confined to the disciplinary control of attorneys at law in Sri Lanka. Since 1802 the Supreme Court has had the power to admit and enroll lawyers or refuse to do so and to exercise disciplinary control over them. Presently, the chief justice with three judges of the Supreme Court are empowered to make rules with respect to the above as well as rules on etiquette, conduct and attire. When an attorney at law is guilty of malpractice or gross negligence in the discharge of his professional duties, such a person is likely to be subject to disciplinary control by the Supreme Court. A lawyer who is careless and irresponsible will not only do a disservice to his client but also disgrace the profession and cause detriment to his own reputation and practice. Thus such conduct rightly warrants sanctions by the Supreme Court in order to preserve the reputation of the bar and also to ensure that the clients get the service that they expect. Section 42 (2) of the judicature act states that every person admitted as an attorney at law who shall be guilty of any malpractice or offence will be suspended from practice or revoked from office by any three judges of the supreme court sitting together. The Supreme Court in such instances is exercising disciplinary jurisdiction and not penal jurisdiction. An attorney at law whose misconduct is criminal in character whether it was done in pursuit of his profession or not may be struck off the roll, suspended from practice, reprimanded, admonished or advised even though he had not been brought by the appropriate legal process before a court of competent jurisdiction and even if there is nothing to show that a persecution is pending or contemplating. He further stated that "our task in the exercise of disciplinary jurisdiction is vested in us in terms of section 42 of the judicature act. In determination based on an appropriate degree of proof having regard to the nature of the charge will the person be formally to be struck off the roll or otherwise. The bar association too has a role to play in regulating the professional ethical conduct of attorneys law. In terms of section 43 of the judicature act, the chief justice or any judge of the supreme court may by order direct that a preliminary inquiry into any alleged misconduct of such attorney at law shall be held by the disciplinary committee of the bar association of Sri Lanka. Section 42 states that the chief justice shall appoint a panel of not less than 15 members of the bar association for the purpose of constituting a disciplinary committee for such inquiries. Each lawyers own conscience help determine the extent to which a lawyer's action should rise above minimum standards. But in the last analysis, it is the desire for respect and confidence of the members of the profession and of the society which lawyers serve which should provide to a lawyer the incentive for the highest possible degree of ethical conduct. A possible loss of that respect and confidence is the ultimate sanction. So long as practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength which permits of no compromise. Ethical conundrums can arise when lawyers' duties to law, colleagues and clients diverge. It is sometimes difficult to uphold these competing obligations. Not every situation which you as lawyers will encounter can be foreseen but fundamental ethical principles are always present for guidance. Within the framework of these principles a lawyer must with courage and foresight be able and ready to apply the body of the law to the ever-changing relationship of society. The extent to which a lawyer's conduct should rise above the minimum standards set up by the Supreme Court rules is a matter of personal decision. The lawyer who would enjoy the respect and confidence of the community as well as other members of the legal profession must strive to maintain the highest possible degree of ethical conduct. It is pertinent to stress the fact that sanctions for incompetence and negligence should not constitute the motivation for diligence. A lawyer should rather be motivated by the desire for excellence not only demonstrating astuteness with respect to

professional work but also in regard to every aspect of his conduct.

Issues The Investors And Traders in SAARC Countries Face Due to Lack of Professionalism with Regard to the Way We Practice Law

transcribed plenary speech of
Mr.Thusantha Wijemanna
Director General SARCO Arbitration, Islamabad, Pakistan
thusanthaw@gmail.com

There are a certain issues regarding the investors and the traders in the SAARC countries faced with because of certain lack of professionalism with regard to the way we practice law. Theme is about inculcating professionalism into legal profession, professional ethics for legal practice, before looking at the legal prospective, it can be seen that out of the world population of 7.3 billion in the SAARC region we have about 1.3 billion which is about 23% of the world population, you take the youth population of SARRC it's 494 million which is 27% of the world youth population. In the South Asia the Foreign Direct Investment in 2014 is 41 billion which 1.7% of the world total FDI. We have 27% of the population but only 1.4% of the FDI, out of the world 1.4 billion of people in South Asia earn only 1.25$ per day, before looking at the total infra trade in the south Asian region it's only 2% in GDP in South Asian countries, where as it is 40% of GDP in ASEAN countries.

We have a market of 25% of the world but we're unable to sell our goods, why is that? Why is there a hindrance of trade? No inter regional trade? You will ask me what law has got to do with this.My argument isone of the reasons for non-expansion of trade and investment is in the part of the investor or the trader to be subjected in to the jurisdiction of the investee when it comes to dispute resolution or vice versa, as long as this intervention exist people will be dealing with trade precautions, what happens there is having spoken to many traders in both sides of the borders in Pakistan and India I could see that neither party trust each other when it comes to dispute resolution, so how do we get out of this, they refuse to go to court because they do not trust the jurisdiction of each other, alternate dispute resolution can succeed in these areas but the question is do we as lawyers practice ADR in a professional manner ? Because of this issue the trade has been hindered for the development of trade in the region. One possible way is to have a mechanism to build the mental trust among the parties in which as a result SAARC arbitration council can function. We have brought all the requirements for arbitration, the question is why people don't want to come for arbitration, and they do not want to go through it, arbitration council is a very independent institution which is not controlled by any of the SAARC countries, attributed by all SAARC countries, appointments are rotational, professionals are recruited from all the countries, the only thing is that the sectaries is at Islamabad for the reason that it should be somewhere in the region, the real question is why people are not coming there? In all these countries when you go to meet the business community they want to go Singapore Malaysia, but does not look at the other countries, why is that, I asked them and the response was they said if we go to Singapore we can get our work done very fast and flexible, they handle it in a very "professional manner" in other words the arbitration centers in the SAARC region, we are not handling it in a professional manner or if in the past we used to go to London or to the Hague but all this has a cost to the trader or the investor so that is why the setting up of the arbitration council in Islamabad was to provide a legal frame work within the region for fair and efficient settlement of commercial industry regarding dispute or any sort in a method of dispute resolution or arbitration and to promote the grown dispute resolution and to promote the growth of arbitration by providing fair and inexpensive arbitrary service. I have a context that I'm prepared to deliver it but I'm unable to get people to make use of it, I have the best set of rules, they are based on an arbitration model but I'm unable to get this expectedly going, I'm trying to do it now by setting up limits. If you come before the SAARC you have to go through that process and the results will be awarded within 6 months or one year, we are trying to fix up the times because otherwise what has happened today is even in the legal profession to whom this arbitration is been entrusted by the business community has become, I hope that I'm not offending anybody, but it has become the evening practice of the practicing lawyers, they come in the evening at 3 or 4.30 and hold it for one or two hours and go off, but that is not arbitration, so the purpose of an ADR expectedly is not awarded. Sometimes it takes three years to get an arbitration award, but still it is fast because your import will take five years, the question is we as professionals we're taking it to arbitration to decide or accept for arbitration making the traders or the investors sit in the arbitration centers from morning till evening to finish the arbitration. I'm

sorry to say but some of the reasons per say when you're selecting an arbitrator you will always think that the older they are they've wisdom but you have younger people who has wisdom, I'm saying matured middle aged people, who are prepare to sit for long hours, I'm telling with experience I have gone before arbitrations where lawyers are not prepared to sit for more than two hours because they physically cannot sit for more than 2 hours, this is not exaggeration, I'm telling you with experience and therefore arbitrations are postponed so if we a s a country go forward, to develop, if we are to encourage foreign direct investment to this country we must have an arbitration mechanism where the disputes can be recovered quickly.

The business community is not happy to come and sit here for two or three years for investments, they want it in six months or so and if there are disputes they want solutions and the solutions can be done, we have that infrastructure, we have the rules and regulations but we have to change our mindset of the people who are making use of this arbitration center. So this is how professionalism can win your team to help the development of the country as lawyers because we think another reason that you think why do you want to go for arbitration, the procedure is simple, you'll never hear about losing an arbitration on a technical error, but what has happened is the easy procedure to be used has become so complicated because you have selected the wrong people, as your arbitrators I was told in India most of the retired supreme court judges are now arbitrators and sometimes in fact one lawyer was saying the procedure that he has adopted is much more stringent than the procedure in the court because he has the freedom of deciding his court procedure. So therefore we have to, my appeal to the younger generation is if we're go into the encouragement of investment to our region and once you become lawyers we have to change the mindset saying that lawyers who are practicing ADR should practice it fulltime basis. Arbitration reconciliation cannot be considered as part time practice we should consider this as full time practice. They should come and work the same time lawyers appear in courts. Appear continuously for 3,4 days and come up with solutions, if that is possible then we will be able to attract more foreign investment to this part of the region otherwise this region will always be stagnating. We have the markets, we distrust each other and we will allow the outsiders to come and dump their goods in these markets, when 40% of the trade is happening with the ASEAN countries we are doing only 2% so this is something we have to seriously look upon.

My appeal to the younger generation is please look at the future of the country in your hands and when you're practicing think that the country is at first, and therefore we must do things suitable for the country. I'm not saying that you'll should not go to court and do only at ADR practice you can continue the judicial practice, but if anybody is going to ADR take it as full time and do it full time and this is the only way this country can go forward. The international ADR center in the World Trade Center and I hope in time to come we can do this fulltime and bringing people for this.

Technical Sessions

(Oral and Poster Presentations)

Session Summary

There were 8 technical sessions under the themes of Emerging Trends in ICT and Intellectual Property Law Regimes, Business and Trade Practices in Sri Lanka: An Ethics Based Perspective, Modern Dimensions of Human Rights Law in Sri Lanka, Application of Private Law in a Pluralist Legal Society, New Paradigms in Environmental Protection and Human Development, Redefining the Role of the Judiciary and Recent Constitutional Developments, Prospects and Contemporary Challenges in Public International Law, Law and Society: Yesterday, Today and Tomorrow.

Technical Session I (Parallel A) on Law was held on the sub theme of Emerging Trends in ICT and Intellectual Property Law Regimes and the session was chaired by Dr DM Karunarathne, Former Director General National Intellectual Property Office, Sri Lanka.

The first presentation, Strengthening ICT Law Regime to Facilitate E-Commerce and M-Commerce Transactions: A Sri Lankan Perspective was presented by DMRA Dissanayake. The second presentation was a Re-Examination of Existing Laws Relating to Posting Offensive Content on Facebook or Twitter presented by Dr P Mahanamahewa.

Ms M.P.C.Wijesooriya presented her research paper based on the plant variety protection under intellectual property law. She discussed about the international and domestic legal framework of the plant variety protection. The Presentation no 4 was on the topic Professionalism, Innovative Culture in Universities and their Contribution to the National Development- An Intellectual Property Law Perspective by Mr HAM Harankaha and Presentation 5 was on Geographical Indications- Need of a Registration System for Sri Lanka by Ms Lihini M. De Silva. She emphasized that Sri Lankan Geographical Indications are being abused in the international market due to inadequacy of the protection available in Sri Lanka for Geographical Indications. She examined the current law of Sri Lanka and Articles of the TRIPS Agreement and highlighted the importance of having a registration system for Geographical Indications.

Technical Session II (Parallel A) on Law was held on the sub theme of Business and Trade Practices in Sri Lanka: An Ethics Based Perspective and the session was chaired by Mr Thushantha Wijemanna, Director General, SAARC Arbitration Council, Islamabad, Pakistan.

The first presentation was on the topic New Dimension Towards the Usage of Cheques in Sri Lankan Payments System by Mr VSN De Lanerolle who is a third year undergraduate of, Faculty of Law, Kotalawala Defence University. The research, which he has presented to the 8th International Research Conference, related to the usage of cheques under the category of payment system in Sri Lanka.

The key argument put forward by Ms CS Gunasekera's paper on Inverting the Paradox: Empowering Natural Resource Management in the Foreign Investment Regime in Sri Lanka is if properly harnessed, the exploitation of natural resources by foreign investors would lead to sustainable development. Accordingly, this paper first examines the role played by foreign investments in the economic development of a developing state, followed by how the unsustainable exploitation of natural resources by foreign investors impede sustainable development.

Ms Asanka Edirisinghe's qualitative research carried out an evaluation on the system of corporate governance applicable to the banking sector in Sri Lanka in the light of recent banking scandals. It established that the Sri Lankan law on corporate governance of banks is satisfactory but the implementation of such provisions is challenging as the Anglo American Structure of Corporate Governance fails to co-exist with the traditional setting in Sri Lanka. Therefore the presenter recommended that the corporate governance structure shall change its face to meet with the social, political and economic realities of the country.

The fourth Presentation topic was The Absolute Protection Available for the Disabled Children Under the Prevention of Domestic Violence Law; Sri Lankan Perspective which was presented by Ms IK Munasinghe and the fifth presentation was on, A Comparative Analysis of Directors' Duty of Care, Skill and Diligence in Sri Lanka, Australia and UK by Ms GAC Sajeevi and Dr SWP Mahanamahewa.

Technical Session III (Parallel A) on Law was held on the sub theme of Modern Dimensions of Human Rights Law in Sri Lanka and the session was chaired by Dr Prathibha Mahanamahewa, Dean, Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka .

Ms Hasini Rathnamalala's research paper was on the topic of Need of a Human Rights Law Framework for

Scientific Research in Sri Lanka and the second presentation was conducted by KERL Fernando, R Fernando, UNP Liyanage and L Fernando on the topic of Torture Occurrence in Police Custody: Critical Legal Study on Sri Lankan Context. This research has mainly focused on tentative substance of striking legal balance between Police powers and custodian Rights.

The third presentation, Protection of the Rights of Sri Lankan Women from Street Harassment was presented by KHM Navoda. The research was focused on the existing legal framework, in order to address the issue of street harassment faced by women in Sri Lanka and to explore the adequacy of the prevailing laws.

Ms. Navodanie Ratnatilake's research was focused on the youth policies currently in existence and the necessary amendments to be introduced within the educational sector to enhance the current mechanism. She has proposed a replacement of the policies with a Youth charter which would substantiate youth rights lawfully. Presentation no 5 of the session, Sexual Orientation and Human Rights; Applicable Laws of Sri Lanka and UK was done by Mr MAN Chandratilaka and Dr P Mahanamahewa.

Technical Session IV (Parallel A) on Law was held on the sub theme of Application of Private Law in a Pluralist Legal Society and the session was chaired by Mr Chandana Liyana Patabandi, PC .

The first presentation of the session, 1: Medical Negligence Law; For a Better Approach in Sri Lanka was done by Ms.Thilini Dayarathna, and she emphasized the adequacy and the suitability of the existing medical malpractice litigation system in Sri Lanka. The presenter has recognized the hidden gaps, inadequacies and the drawbacks of the existing legal framework of settling medical negligence disputes. The second presentation, Corresponding Trade Union Laws in Sri Lanka with that of International Standards to Enable Professional Recognition was presented Ms NKK Mudalige.

The presentation no 4, Entering a Contract at Will: A Critical Analysis of the Principles Governing Duress was presented by Ms Y Wijeratna. The author first discusses the significance of free will when forming a valid contract and how it can be vitiated by presence of duress. She analyzes how the common law concept of duress to person was expanded in its ambit to include duress to goods and economic duress.

Technical Session I (Parallel B) on Law was held on the sub theme of New Paradigms in Environmental Protection and Human Development and the session was chaired by Professor Veerle Heyvaert London School of Economics and Political Sciences.

The first presentation, The Application of Public Trust Doctrine as a Mechanism to Ensure Environmental Protection by Means of Law: A Comparative Analysis of Sri Lankan and Indian Legal Context was presented by Ms GJHK Siriwardana. The presentation no 2, Contemporary Validity of Customary International Law: An Analysis with Reference to International Law Making Process was presented by Ms Wasantha Seneviratne/Head Head, Department of Public and International Law, Faculty of Law, University of Colombo.

With compare to other presentations, the most amuse presentation was on the topic of 'Cassandra Complex: Analysis on Law Relating to Climatic Change in Sri Lanka' which was done by Mr GIM Liyanage. His research was based on the Climate Change Laws under the International Environmental Law and Under Sri Lankan Legal context. In his presentation he analysed the laws, regulations and policies relating to the climatic change in Sri Lanka and suggested possible recommendations in order to mitigate the impacts of climatic change in Sri Lanka.

Ms. Upeksha Sapukotana, in her research addresses the problem whether the Sri Lankan legal system has adequately responded to the challenge of e-waste management in order to uphold the concept of sustainable development in the country. Despite Sri Lankas' effort to partly address this issue through introduction of a regulation on disposal of hazardous waste, in keeping with the obligations under the Basel convention, she finds that the Sri Lankan legal framework on the subject needs much improvement in comparison to the developments that have taken place in other jurisdictions.

Ms. MLSM Perera presented her paper under the tile of 'The Link Between Right for Development, Right for Clean and Healthy Environment; and Essentiality of Including These Rights in National Constitution'. She discusses the importance of amending the Sri Lankan Constitution to include right to clean & healthy environment and right to sustainable development. Further, based on the research she presented certain recommendations.

Technical Session II (Parallel B) on Law was held on the sub theme of Redefining the Role of the Judiciary and Recent Constitutional Developments and the session was chaired by Mr Saman Wickramarachchi, Former Senior High Court Judge.

Dr. Thusitha B Abeysekara's research was on the topic of 'the Role of a Judge - What it is and What it Ought to Be: The Independence of Judiciary and Judicial Activism Clothed in Judicial Review in Sri Lanka'. As stated in his topic, it does not unavoidably mean that there is no comparative analysis. Wherever and whenever possible his research focuses to the examples in other jurisdictions. Some of those other jurisdictions are enjoying the concept of the apex judiciary which provides more flexibility over judicial reasoning process. This is what we do not have in Sri Lanka.

Research paper on Protection of the Rights of the People with Disabilities in Sri Lanka Need for New Legislation was presented by Mr DSR Jayawardena The fourth presentation of the session, Right to Information and Sustainable Development: A Development Agenda for Sri Lanka was done by B Wickramsinghe

Ms. UAT Udayanganie presented her research paper under the title of 'Ensuring Good Administration through the Development of Judicial Review in Sri Lanka'. The main objective of the research was to seek to define concept within Sri Lankan Administrative Law. Further it looked at concept as an aspect of lawfulness and from its functional perspectives. Moreover, she attempted to draw relationship between good administration and development of judicial review.

Technical Session III (Parallel B) on Law was held on the sub theme of Prospects and Contemporary Challenges in Public International Law and the session was chaired by Ms Wasantha Senevirathne Head, Department of Public and International Law, Faculty of Law, University of Colombo, Sri Lanka.

The first presentation of the session, Voluntary Repatriation as a Durable Solution to Sri Lankan Refugees in India: A Critical Analysis from a Legal Perspective was done by Ms Y Kathirgamathamby. Presentation no 2, The Contradiction Between Sustainable Development and Economic Development: Special Reference to the Colombo Port City Project of Sri Lanka was done by a team of KDU students, Ms SU De Silva, DMTM Sachindrani, Ms HACD Hatharasinghe and Ms I Bogahaatte.

The third Presentation, Modern Imperialism: A Legal Insight to North-South Dimension in Global Governance was presented by Dr Kokila Konasinghe. Ms. Kalyani M. Jayasekera presented a paper in International Research Conference, KDU. Her research title was "Identification of Non-State Armed Groups in Non-International Armed Conflicts: A Legal Analysis". In her paper presentation she discussed the subject of Non-State Armed Groups in the context of armed conflicts, which is one of the less explored areas of study, while the importance of such studies are much pressing today, given the multitude of armed conflicts throughout the world. In her study, attention was given to find out a proper definition for non-state armed groups within non international armed conflicts while removing isolated terrorist attacks that may take place without an armed conflict situation and other non-state actors, within the purview of International Humanitarian law.

Technical Session IV (Parallel B) on Law was held on the sub theme of Law and Society: Yesterday, Today and Tomorrow and the session was chaired by Mr Upali Gunaratne, PC.

The first Presentation under the topic, Should we Punish Drug Abusers? Reconsideration of Laws and National Policies of Sri Lanka was done by Maj. Dilantha Aluthge/Head-Military Law. This paper urges to seek possible provisions which can be adopted to eliminate illegal drug usage in Sri Lanka. The second Presentation, A Legal Obligation to Report Child Sexual Abuse? - A Review of National and International Standards was carried out by Ms N Mendis.

The fifth Presentation of the session, One Up for Statutory Interpretation and Two Down for Separation of Powers by Ms S Bulathwela and Ms S Bulathwela. The twins' aim was to assess the impact of applying the rules of statutory interpretation on the doctrine of separation of powers. The concepts such as constitutionalism and parliamentary sovereignty have been concerned in order to accomplish their aim. The research is based on a comparative analysis of Sri Lankan, common law jurisdictions with regard to different approaches adopted by judges when construing statutes. The presenters have arrived at a conclusion that the value of statutory interpretation is not protected only by ensuring the said political, constitutional doctrine, nevertheless providing justice to those whose ultimate resort is the court.

The author, Ms Ruvini Ahangangoda, on conducting the research has paid attention on the rate of children being directed for unlawful activities by adults via identifying the protection plans taken by government towards the safety of these children. The primary objective has been laid down as finding the reasons behind introducing a new legal reform. The research has been conducted in selected areas of Colombo city, has also interviewed the victim and a cross sectional study to find out facts from Child Protection Authority and commissioner of

Provincial Commissioners of probation and Child Care Services for the steps of prevention. The author finally has concluded the research by recommending that the enforcement mechanism should be more effective over capturing and identifying organized groups, who use children, and on the other hand against parents that uses the children for begging should also not be justified under any circumstance and severe punishment must be afforded.

Mr Shenal Eran Jayasekera is a third year undergraduate of Kotelawala Defence Universityand his theme of law category in 8th International Research Conference is kind of unique society related theme based on the Sri Lankan film industry. The theme and the inclusion considerably meet the current issues and challenges of Sri Lankan film industry in a law perspective. The presentation revealed that the whole scenario is a calamity while his approach highlighted the law and the calamity are two sides of a coin. This paper may be an outcome of fruitful communication between veterans in the particular subjects.

Apart from the oral presentations seven selected papers were presented as poster presentations. The details of those are as follows.

1. A Leelarathna-Sri Lankan Children in Immigration Detention in Australia: Human Rights and State Responsibility

2. BM Weerasinghe, HH Basnayake and JNM Fernando and GA Rajapaksha-Horizon Line of National Development in Light of Issues and Challenges in Sri Lanka: With Special References to Uma Oya Multi Purpose Project

3. P Rupasingh-Medical Negligence and Doctor's Liability; A Critical Review in Present Legal Regime in Sri Lanka

4. D Yapa-A Space Policy for Sri Lanka: A Need of the Hour

5. CS Kodikara -Right to Access to Information, is an Avenue for Strengthening the Sovereignty of People in Sri Lanka?

6. DT Samayawardena-Abduction of Infants and Illegal Adoption of Abducted Infants and Its Legal Situation on Adoption Laws in Sri Lanka

7. R Kuruwitabandara-Pungency in the Amusement

Strengthening ICT Law Regime to facilitate E-Commerce and M-Commerce Transactions: A Sri Lankan Perspective

DMRA Dissanayake
Legal Studies Unit, Faculty of Management Studies and Commerce, University of Sri Jayewardenepura, Nugegoda, Sri Lanka
rakitha.dissanayaka@gmail.com

Abstract-*Information and Communication Technology (ICT) plays a vital role in our everyday lives. Particularly, it makes regular business transactions easy and fast in globalized information society. Accordingly, traditional commerce conducted on paper-based medium has been transferred into Electronic Commerce and Mobile Commerce which takes place over electronic medium (i.e. Internet). Therefore, information technology and business are becoming inextricably interwoven with development information and mobile phone technology. More alarmingly, Internet can be used to commit cyber crimes and offences relating to e-commerce or m-commerce. Under Sri Lanka's current legal regime, there are several pieces of legislation recently passed by Parliament to mitigate risks and issues regarding ICT. Yet, serious doubts as to effectiveness of ICT legal regime remain. Especially, there are several practical difficulties in implementation of law relating to e-Commerce and m-Commerce. This research's primary objective is to explore practical difficulties in implementation of ICT legal framework with special focus on e-Commerce and m-Commerce. It also aims to examine ways and means of further strengthening existing legal regime while incorporating international standards to harmonize ICT legal framework in line with more advance jurisdictions. Study is based on primary and secondary sources i.e. statues, case law, text books, journals and electronic data bases. Analysis of selected jurisdictions has been carried out to have glimpse of comparative jurisprudence. To address above challenges, ICT-related legislation in Sri Lanka should be interpreted incorporating international standards and best practices followed in other advanced jurisdictions. Undoubtedly, prevailing ICT law has to go a long way to inculcate well-developed ICT legal framework in Sri Lanka. Unsurprisingly, our legal system and judiciary are helpless in terms of novel cyber issues.*

Keywords— *Information Technology Law, e-Commerce and m-Commerce, Strengthening*

I. INTRODUCTION

The journey of human race and modern day commerce is interwoven. At first man has entered into commercial transactions using straightforward batter of goods system because of illiteracy. However with the advent of coins and other forms of money, the transactions became possible for literate man to provide various forms of services such as selling, hiring, leasing, and mortgaging in exchange for money. In recent time man has become e-literate with electronic and information technology revolution. Specifically the technology revolution has transformed the way man does business and it made law into great transformation. Also it has introduced the computer and now smart mobile phone and it has invaded almost all aspect of our lives during past few decades. As a result of this combination of the Internet with computers, mobile phones and other modern devices, 'e-commerce' which includes 'm-commerce' which is an off-shoot of 'e-commerce' has borne and interact with people to do business in way that could not have been imagined a centuries ago.

It is pointless as well as unrealistic to reach an exact definition of e-commerce with the rapid changes in the internet and continuously evolving technologies. However the notion of 'e-commerce', according to commentators has been generally defined as "the buying and selling of goods and services on the Internet, especially the World Wide Web",[1] which makes enable "the paperless exchange of business information using electronic data interchange (EDI), e-mail, electronic bulletin boards, fax transmission, electronic fund transfer and now mobile phones".[2] In fact e-commerce is intermediate supporter of man to enter into cyberspace as the big shopping center on earth and also the center which provides a world of opportunities. Therefore e-

[1] http://searchcio.techtarget.com/definition/e-commerce (accessed 06.06.2015)

[2] http://www.businesstown.com/internet/ecomm-definition.asp (accessed 06.06.2015)

commercial transactions play major role of our day to day life.

According to global statistics published by e-Marketeer e-commerce sales exceeded USD 1 trillion for the first time in 2012.Also in 2013 e-commerce sales have grown 18.3% to USD 1.29 trillion worldwide.[3] In domestic scenario too, It is visible that similar phenomenon occurs with the exponential intensification of the internet facilitated by the increasing usage of high speed mobile broadband greater than the traditional fixed broadband technologies, with mobile operators offering high speed 4G LTE technology. Due to a revision in the classification of active subscribers in January 2013 declined by Department of Posts Telecommunications Regulatory Commission of Sri Lanka and Department of Census and Statistics, it is estimated that the mobile phone usage penetration has exceeded 20 Million in Sri Lanka.[4] Therefore it is evident that e-commerce and m-commerce have been boosted rapidly with the advancement of technologies in Sri Lanka. Further, there is a trend that Apple or Android devices and associated applications are increasingly being used by growing young population of the country and this technological advancement coupled with the introduction of internet and mobile payment systems have made better opportunities for growth of e-commerce and m-commerce.

ICT based commercial activities has opened a gateway to numerous opportunities for emerging economies to participate in international trade which means faster growth, higher living standers and new opportunities through commerce. Also it is reliable avenue to join other forms of commercial activity and to be a part of global economic community. Internationally, there are several model laws governing the recognition and enforceability of modern, fair, and harmonized rules on electronic commercial transactions have been formulated by the United Nations Commission on International Trade Law ("UNICITRAL) Working group IV on Electronic Commerce. UNICITRAL successfully adopted its Model Law on Electronic Commerce with Guide to Enactment 1996, Model Law on Electronic Signatures in 2001 and assisted to formulate UN Convention on Electronic Communications, adopted by the UN General Assembly in November 2005.[5]

Sri Lanka as a country, who became the first country in South Asia to sign the UN Electronic Communications Convention on 6th of July 2006, has enacted pieces of legislation to facilitate e-commerce and m commerce and to meet challenges regarding electronic transactions.[6] For instance, the Evidence (Special Provisions) Act No.14 of 1995, Information and Communication Technology Act No.27 of 2003, the Payment and Settlement Systems Act No.28 of 2005, the Electronic Transactions Act No.19 of 2006, the Payment Devices Frauds Act No.30 of 2006 and the Computer Crimes Act No.24 of 2007 were enacted as a step to meet challenge posed by technological evolution. Apart from becoming familiar with the provisions of the relevant laws, business man, lawyers, judges and policy makers should also be mindful of international conventions and model laws which could be of value in grappling with some of the problems posed by these developments and fill the gaps of domestic laws.

Prioritizing the practical difficulties in law as well as in implementation of law regarding e-commerce and m-commerce there are serious issues that we should especially focus to strength the effectiveness of ICT legal regime and mitigate the risk of trade and business.

II. RESEARCH METHODOLOGY

This research was carried out primarily as a library-based research. In so doing primary and secondary sources such as statues, case law, text books, journals, electronic data bases etc were used. Furthermore, analysis of selected jurisdictions such as India, European Union, Singapore, and South Africa has been carried out because of the salient features of them.

III. RESULT/DISCUSSION

It is essential to understand the legal issues and probable risks arising from e-commerce to ensure a safe, secure environment for trading with customers and other business. In this context it is necessary to note that the Electronic Transaction Act No.19 of 2006 may also give rise to certain practical difficulties in its implementation. It is only possible in this paper to provide an overview of some of major issues that are relevant to e-commerce and m-commerce.

[3] http://www.emarketer.com/newsroom/index.php/emarketer-ecommerce-sales-topped-1-trillion-time-2012/ (accessed 06/06/01)

[4] Sri Lanka Socio Economic Data 2014,Cental Bank of Sri Lanka 2014 ,Volume XXXVII

[5] http://www.uncitral.org/uncitral/en/uncitral_texts/electro nic_commerce.html (accessed on 26/05/2015)

[6] effect from 1st of October 2007,vide Gazette Extraordinary No.1516/25 of 27th September 2007

Under the Electronic Transaction Act of 2006 there are several difficulties regarding Certification Authority (CA) and Certification Service Providers (CSPs).[7]Considering the interpretations expressed by the sections of the Act[8], it does not insist on licence and even accreditation materializes to be optional while in other countries such as India[9] and Singapore[10] require to be licensed to fit into place in business of providing certification services. There is also a question arises as to whether the regulatory and supervisory provisions of the Act are adequate to maintain and actively participate to build up public confidence in authenticity, integrity and reliability of data massages, electronic documents, electronic records and other electronic communications because absence of any penal provision in this act to deal with badly behaved service providers who may occur serious loss or damage to general public due to fraudulent, inattentive or negligent conduct. In consequence of that the credibility of e-commerce and m-commerce transaction has become ambiguous. Though it is glaring that the Act reflects the establishment of a licensing regime through regulations to be made by the relevant Minister,[11] it has not provided any penal mechanism or sanctions to deal with CSPs who violate terms of any licence that may be issued. Therefore it important to note that the Act follows a technology neutral and minimalist approach regarding licensing and accreditations of CSPs while India is following more technology specific approach.[12]

In present, it is common that people enter into contracts through automated systems which contained in Electronic Transaction Act 2006.[13]According to the provisions, a contract formed by the interaction of an automated message system and a natural person or by the interaction of two or more automated message system shall not be denied validity or enforceability solely on the ground that there was no review by a natural person of the final contract or of each of the actions carried out by the automated massage system.[14] Due to the Act the automated system is defined as in an agent or tool of the person, who installed it, but the terminology of "electronic agent" used in certain other jurisdictions has been avoided in the Sri Lankan Act and it does not provide an answer when something goes wrong with the automated system. For instance, if an ATM machine which interacts with an individual such as a customer of a Bank becomes malfunction, is the transaction valid and enforceable? It is enlightening to note that in certain jurisdiction express provisions have been made to deal with problems of this nature. In South Africa, it is particularly provided that "a party interacting with an electronic agent to form an agreement is not bound by the term of agreement unless those terms were capable of being reviewed by a natural person representing that party prior to agreement formation."[15] In this respect the same solution was provided by the British Columbia legislation, Canada.[16] Therefore it is useful to consider these salutary provisions cautiously with a view of making the necessary amendments to the Sri Lankan Act because said provisions consist with the fundamental purpose of our Act which is to remove barriers to electronic transactions. Also there is a case where there is no human review of or intervention in the final contract for the sale of goods in question. In view of the Act, the contract is valid despite the absence of human intervention in the making of final contract and question can be aroused as to whether this is a statutory repudiation of common law requirement of ***Consensus ad idem.*** Therefore provisions of Electronic Transaction Act only seek to negate any claim that the lack of human intent, at the time of contract formation and prevents contract formation. When there is contract which machines are involved, the required intention comes

[7] Section 26 of the Electronic Transaction Act No 19 of 2006

[8] Section 18 of the Electronic Transaction Act No 19 of 2006

[9] 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.

[10] Section 27-35 Singapore Electronic Transaction Act of 1998

[11] Section 18(2) the Electronic Transaction Act No 19 of 2006

[12] Section 21-26 of Indian Information Technology Act 2000

[13] Section 17 of the Electronic Transaction Act No 19 of 2006

[14] Ibid 17(d)

[15] Section 20(d) of the South African Electronic Communication and Transaction Act 2002

[16] Section 17 of the British Columbia (Canada)Electronic Transaction Act 2001

from the programming and use of the machines. But there is a question behind intention of machines, acceptability of the contract and remedy where there is an error that occurred due to the technical reason.

Due to the chapter V of Electronic Transaction Act the rules of evidence would not apply to wills or other testamentary dispositions, power of Attorney, sale or conveyance of immovable property, trusts, bills of exchange, telecommunication licences, and other acts transactions or documents that may be specified through regulations made under the Act by the Minister .[17] In this regard it becomes indispensable to lead electronic or computer evidence relating to any fact coming within these excluded areas. Therefore if there is an issue set in these excluded area it will be the provisions of Evidence (Special Provisions) Act No 14 of 1995 that will be applicable.[18] There would appear to existing two legal regimes in regard to electronic and computer evidence in Sri Lanka. One is governed by the Electronic Transactions Act, and the other governed by the Evidence (Special Provisions) Act No 14 of 1995, which could become complicated proof of electronic transactions. Consequently, while a transaction which involve a bill of lading would attach to the rules in the Electronic Transactions Act, a transaction involve a bill of exchange would be governed by the Evidence (Special Provisions) Act on the other hand, and the question would arise with reference to which of these regimes would apply if there is a complex transaction involves both kinds of bills.

"Although a very early draft of the Electronic Transactions Bill which was later enacted by the Parliament of Sri Lanka did contain some provisions relating to data protection and privacy, somehow they were dropped from the Bill that was ultimately enacted as law"[19].According to the wordings of justice Saleem Marsoof who is the former Supreme Court judge, there are no provisions regarding issues of data protection and privacy in the Act. Though a Code of Conduct has now been prepared to deal with issues of privacy by the Information and Communication Technology Agency (ICTA), it is uncertain whether such a Code will be adequate to deal with the anxieties of privacy. There is no hesitation that with technological development, and in particular the advent of cookies, attack of web bugs and net spies, incursion of privacy on a systematic basis has become a common occurrence.

The Common Law action of *Actio Injuriarum* as a remedy which may be maintained against invasions of privacy and degradations to dignity may not rather be adequate to deal with the invasions and degradations that take place in cyberspace. In view of the privacy and data protection relating to cyber space there is a serious gap and lack of concern in the Electronic Transactions Act .Therefore it is necessary to amend or enact supplementary legislation with the objective of protecting individuals against invasions of their privacy through electronic means. Also there must be proper implementation in law relating to e-transactions equivalent to said modifications otherwise it will not be useful to have effective laws which cannot be implemented practically. It is very necessary to establish statutory built Data Protection Authority which will ensure the recognition, promotion and protection of the privacy of individuals. Accordingly, there should be an assurance and conferment to all individuals on a right to access of information relating to them and to correct errors or inaccuracies therein. Privacy as a wealth of general public contains right to information privacy indeed. As a treasures right, information privacy adds great importance as well as a value to building confidence amongst traders, consumers and the public in regard to electronic transactions. Therefore it is also essential to provide remedies through necessary actions for unethical and unreasonable interferences with the information privacy of an individual.

When there is a dispute over a contract, the parties must have an opportunity to seek assistance through dispute resolution mechanism to get matter resolved whether medium of contact is electronic based or using paper based medium, online or otherwise. Online transactions bring numerous uncertainties especially about the place where a defendant resides. Sometimes the person who advertised on web cannot be easily found out. Especially, it is silent on jurisdiction for transactions over internet or electronic contracts. Further there is also another matter to identify the jurisdiction of courts or forums regarding e-commerce contract to bring alternate dispute resolution. Sri Lanka has a capacity to follow section 9 of the Code of Civil Procedure to decide the jurisdiction of court. International principles governing the jurisdiction of cyber may be incorporated where there is no uniform law regarding that. Countries such as United State of

[17] Section 24 of the Electronic Transaction Act No 19 of 2006

[18] Section 5 of the Evidence (Special Provisions) Act No 14 of 1995

[19] S.Marsoof, Legal Issues Relating to E-Commerce, The Chartered Accountant (50th Commemorative Issue of the Journal of Chartered Accountants) Volume 44 page 38

America[20], European Union[21] are following different and own principles to decide jurisdiction relating to e-commerce transactions. These transactions always flow through the cross border of countries and a serious question arises if different counties treat a similar issue at different level? It makes parties confuse and they will have to do another shopping to find out the jurisdiction. It means that uncertainty of law regarding jurisdiction would lose the confidence of general public on e-commerce and m-commerce transactions.

Under the advancement of ICT literacy many citizen used to buy and sell goods through the internet and mobile applications using several e-markets such as eBay etc. However there are several questions behind these goods and transactions. In traditional commerce, people have a choice in accepting goods and services, way to make payment or select mode of payment and refuse to make payments after accepting goods or services where there is no due quality and standards in the goods. When it comes to the e-commerce and m-commerce there are some practical difficulties involved in because customer or consumer does not have ability to check the due quality of good. Even the selection of mode of payment and specifically remedies for bad behaviour of traders are limited. In modern era, countries like UK[22], European Union[23] have introduced number of directions to face these kinds of practical difficulties under e-commerce and m-commerce. Unfortunately, a country like Sri Lanka does not have such direction or uniform law than common methods like complaining before Consumer Fair Authority, Fair Trade Commissioner and institutional actions against unlawful enrichment to get rid of said difficulties.

IV. CONCLUSION

As has been observed there are lack of uniformity and uncertainty in the law relating to e-commerce and m-commerce. In point of my view, this is due to the advancement of technology per se and not a matter regarding law. The information era in which we live is updating day by day and posing challengers continuously. Therefore litigations relating to manipulation and violation of ICT law including law relating to e-commerce and m-commerce to own advantages and commercial purposes have increased. Sri Lanka as a country who is having same experience because of these practical difficulties has to be committed in ICT knowledge as well as the laws especially to face challengers regarding e-commerce and m-commerce. Nevertheless Electronic Transaction Act No 19 of 2006 as the ground breaking law in Sri Lanka relating to e-commerce and m-commerce is being implementing with other related laws, there are several difficulties that would not address properly. In view of mine, ICT law does not have any common boundaries which other laws face such as cultural boundaries. Therefore Sri Lanka or any other country does not need to think twice to incorporate salient features of ICT laws of other jurisdictions or international conventions into domestic law to mitigate the practical difficulties and risk relating to e-commerce and m-commerce. Further, law makers, judges focus to maintain functional equivalence for electronic communication in their decisions making. It means that it is essential to have functional equivalence between the papers based transaction and electronic transaction through the law and judicial decisions relating to e-commerce and m-.commerce.

ACKNOWLEDGMENT

Author thanks extensively to his parents, teachers, and academics who works with him at Legal Studies Unit, University of Sri Jayewardenepura, Nugegoda.

REFERENCES

Abeyratne SDB (2008) Introduction to Information and Communication Technology Law, pp. 40-73.

Abeyratne SDB, Dispute and Dispute Resolution in Cyber Space (2008) the Bar Association Law Journal Vol. XVI-Part 1; 153-164.

Fernando J, e-Transactions to m-Transactions-Serving the Next Generation Customers: Recent Legal and Information Security Trends (2015) The Bar Association Law Journal Vol.XXI; 98-112.

Marsoof S, Legal Issues Relating to E-Commerce, The Chartered Accountant (50th Commemorative Issue of the Journal of Chartered Accountants) Vol. 44; 38.

Marsoof S, Electronic Transactions in the Modern World: An Analysis of recent Sri Lankan Legislation (2006) LCL Rev: 108-126.

[20] Cybersell,Inc vs Cybersell 1997 U.S.App.LEXIS 33871 (9th Cir.December 2,1997)

[21] Brussels and Lugarno Conventions, Brussels Regulations (44/2001),Rome Convention 1980

[22] Distant Selling Regulations of United Kingdom 2000

[23] E-Commerce Distant Selling Directive 31/2000 of EU

Weerasooriya W (2012) A Textbook of Commercial Law (Business Law),The Postgraduate Institute of Management,pp. 451-476.

BIOGRAPHY OF AUTHOR

Author is a academia, Legal Studies Unit, Faulty of Management Studies and Commerce, University of Sri Jayawardenepura, Sri Lanka. His research interests include Information Communication Technology Law, Commercial Law, Intellectual Property Law, Environmental Law and Corporate Law. He has written several articles and presented papers in the area of ICT Law and Environmental Law. The author has completed his Bachelor's Degree in Laws (LL.B) from the Faculty of Law, University of Colombo, Sri Lanka in 2013.

.

Plant Variety Protection: Yesterday, Today and Tomorrow; With Special Reference to UPOV Convention, 1991 and TRIPS Agreement

P Wijesooriya
General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
padmaja.wijesooriya@kdu.ac.lk

Abstract— Plant variety protection has been identified by the industrialized countries for a long time. As a result of this identification plant variety protection became as an internationally identified protection system since 1991 by introducing the International Convention for the Protection of New Varieties of Plants (UPOV Convention). Further, this protection has been identified by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) as a sui generis form of intellectual property protection. Sri Lanka has limited number of legislations such as Fauna and Flora Protection Ordinance, Forest Ordinance, Plant Protection Act, etc. on plant protection but, these legislations have identified only the physical protection of the plant resources not the protection of the genetic resources and as a result, this can be identified as a great weakness of our existing legal framework. As a solution for this loophole, Sri Lanka has taken steps to introducing a Bill on Plant Variety Protection (Breeder's Rights) which was drafted in 2001 and 2011, but still it remains as a failure endeavour. However, Sri Lanka, as a nation rich in bio-diversity, it is very much important to implement a law on plant variety protection to protect agriculture, food and bio safety indoors the country. Because Sri Lanka has lost number of worthwhile opportunities to use hers own plants for agriculture and medicine purposes due to the loss of patentability. Hence, protection of new plant varieties is a key topic to focus on. Therefore this research paper focussed the importance of introducing a new plant variety protection law based on UPOV Convention and TRIPS Agreement.

Keywords— Plant variety protection, intellectual property law, patent

I. INTRODUCTION

"Humankind has not woven the web of life. We are but one thread within it. Whatever we do to the web, we do to ourselves. All things are bound together. All things connected."

Chief Seattle

Plant varieties are protected under the International Convention for the Protection of New Varieties of Plants 1991 (UPOV Convention). Ultimate goal of commence of this convention was to establish a *sui generis* legal framework for the protection of plant varieties under the framework of intellectual property protection in the world. Based on this purpose the state parties to the convention have formed an international union for the protection of new verities of plants (Jo¨rdens.R, 2005). Therefore the state parties of this convention has right to introduced their own legal mechanism to protect new plant varieties indoors their country.

In this article the researcher wish to discuss the international legal frame work which encourage the breeders' to invent new plant varieties and the legal protection given by these mechanisms to the breeders'.

II. INTERNATIONAL LEGAL FRAMEWORK

The international legal framework for the protection of plant verities largely identified under two documents such as UPOV Convention, 1991 and the Agreement on Trade Related Aspects, 1994. (TRIPS Agreement)

Under UPOV Convention, 1991 a plant verity has been identified as a It is a plant group within a single botanical taxon of the lowest rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met (Article 1 UPOV Convention, 1991). Furthermore it can be It can be defined by the expression of the characteristics resulting from a given genotype or combination of genotype or distinguished from any other plant grouping by the expression of at least one of the said characteristics or considered as a unit with regard to its suitability for being propagated unchanged (Article 1 UPOV Convention, 1991).

Further according to UPOV Convention a breeder is, the person who bred , or discovered and developed a variety or the person who is the employer of the aforementioned person or who has commissioned the latter's work, where the laws of the relevant contracting party so provide or the successor in title of the first or second aforementioned person. (Article 1; UPOV, 1991)

Moreover A new plant variety must meet following criteria including novelty, distinctness, uniformity and stability in order to enjoy the plant variety protection.

The novelty is a variety which has not been sold or disposed of, by or with the consent of the breeder (Article 6, UPOV 1991).The distinctness is the variety which is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of filing of the application. A variety that is of common knowledge does not have to be a protected variety (Article 7, UPOV 1991). The uniformity is The variety is sufficiently uniform in its relevant characteristics, subject to the variation that may be expected from the particular features of its propagation (Article 8, UPOV 1991). And finally the stability is the relevant characteristics of the variety remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle (Article 9, UPOV 1991).

Moreover according to the TRIPS Agreement Members shall provide for the protection of plant varieties either by patents or by an *effective sui generis* system or by any combination thereof. (Article 27 (3))

III. SRI LANKAN LEGAL FRAMEWORK

Sri Lankan legal framework for the protection of plant varieties can be discussed under two steps. One major step was the first working document made by the National Intellectual Property Office in 2001 and other step was an extension of the working document in 2001 came into discuss in 2011. The working document introduced in 2001 is known as Draft Bill for Protection of New Plant Varieties, 2001.

In order to obtain the IP rights under the Draft Bill for Protection of New Plant Varieties, 2001, the breeder should present the features of novelty, distinctness, uniformity and stability of the new plant variety. (Draft Bill for Protection of New Plant Varieties; Section 2)

Moreover, according to the Section 8 of Draft Bill for Protection of New Plant Varieties, 2001, it is provides provisions for entitlement to protection. As per the Section 8 it is provided that the breeder of the variety or his successor in title is entitled to apply for the protection under this Act.

In the second attempt made by the National Intellectual Property Office has introduced another aspect to the previous working document known as Breeder's Rights. The long title of the draft bill was "An Act to provide for the establishment of an effective system for protection of new plant varieties and of the rights of farmers, plant breeders and researchers, to encourage the development of new verities of plants; and to provide for matters connected therewith or incidental thereto." (Draft Bill for Protection of New Plant Varieties, Breeder's Rights; Long Title)

Part 1 of the working document provided provisions for the responsibility of administering the Act is shared jointly between the Directors-General of Agriculture and Intellectual Property. The reason for appointing the administrative power to these ministries because under this working document the breeder has the right to obtain a patent license from the National Intellectual Property Office and also the protected attempt encouraged by the Ministry of Agriculture. Therefore according to this document the working committee has identified the intellectual property and agriculture as a major branch under the document.

Part 2 of the draft bill interprets a "breeder" as "a person *or government department, university, statutory body or public funded agricultural institute that* has bred or discovered and developed a variety" (Draft Bill for Protection of New Plant Varieties, Breeder's Rights; Part 2).

Moreover, the draft also defines the word farmer in a comprehensive manner. A "farmer" means any individual who cultivates crops by cultivating the land himself; or gets crops cultivated in a land by any other person; or is a tenant cultivator in terms of the law relating to tenant cultivators or conserves and preserves, severally or jointly, with any person any wild species or traditional varieties or adds value to such wild species or traditional varieties through selection and identification of their useful properties (Kamardeen.N, 2013).

Further under this draft, it has identified a variety of farmers which define as the farmers who has been traditionally cultivated and evolved by the farmers in their fields; or is a wild relative or land race of a variety about which the farmers possess the common knowledge. (Kamardeen.N, 2013)

Part 3 of the draft provided provisions for that the 'Director General of Intellectual Property should establish and maintain a register known as the Register of New Plant Varieties in which all the qualified new plant varieties should be recorded. Such records should include, inter alia the name of each registered new plant variety, the name and address of the holder of rights, the name and address of the agent of the holder of rights, if any, and dates of application and registration, as well as the date of priority, if applicable' (Kamardeen.N, 2013; Draft Bill for Protection of New Plant Varieties, Breeder's Rights; Part 3). Therefore according to this draft it has

mandate to maintain a document known as the National Registry of New Plant Varieties. This should be located at the Plant Genetic Resources Center (Kamardeen.N, 2013). This registry will be under the administration and supervision of the Director General of Agriculture, and will exist for the collection and maintenance of information on extant varieties and the reception and maintenance of technical data and samples of new plant varieties. The head of the Plant Genetic Resource Centre shall act as the Registrar of the Registry of New Plant Varieties as directed and supervised by the Director General of Agriculture (Kamardeen.N, 2013).

According to Section 34 (1) the draft permits a farmer who has bred or discovered and developed a new variety to be entitled to the registration and other protection in like manner as a breeder (Draft Bill for Protection of New Plant Varieties, Breeder's Rights;Section 34 (i)). Furthermore, the farmers are also entitled to save, use, sow, re-sow, exchange, share or sell their farm produce including seed of a variety protected under the legislation in the same manner as they were entitled to, prior to the legislation coming into force (Draft Bill for Protection of New Plant Varieties, Breeder's Rights;Section 34 (ii)).

Moreover according to the draft provides that “any right established under this Act shall not be deemed to be infringed by a farmer who at the time of such infringement was not aware of the existence of such right” (Draft Bill for Protection of New Plant Varieties, Breeder's Rights; Section 35 (i)), and provides that “a relief which a court may grant in any suit for infringement referred to in section 41 shall not be granted by such court, not any cognizance of any offence under this Act shall be taken, for such infringement by any court against a farmer who proves, before such court, that at the time of the infringement he was not aware of the existence of the right so infringed.”(Kamardeen.N, 2013;Draft Bill for Protection of New Plant Varieties, Breeder's Rights; Section 35 (ii))

Furthermore the draft also includes a section on researchers’ rights under Section 36. According to Section 36 all researchers are given the exception to use registered varieties for experimentation and research, or as an initial source of variety for the purpose of creating other varieties: provided that the authorization of the holder of the rights to the registered variety is required where the repeated use of such variety as a parental line is necessary for commercial production of such other newly bred variety (Kamardeen.N, 2013).

V. CONCLUSIONS AND RECOMMENDATIONS

In accordance with UPOV Convention the National Intellectual Property Office has taken some several attempts to introduce an implement a legal framework to protect new plant varieties with the intention of encourage the invention of new plant varieties by the breeders of Sri Lanka. With regarding to the history of these attempts and which is discussed in the Sri Lankan legal framework it can be identified two attempts taken by the National Intellectual Property Office in 2001 & 2011 which remains as failed attempts in the history. In the first attempt the National Intellectual Property Office appointed a working committee to draft a bill in relation to protection of new plant varieties and its second attempt was to implement a new plant variety protection act with special reference to breeders’ rights and researchers’ rights. Even though the National Intellectual Property Office together with Agriculture Ministry has identified the need of a proper mechanism to protect new plant varieties indoors the country, the national legislature still refuse to promote these working document as a law. Therefore it is the high time to introduce a national legal mechanism to protect the national breeder’s indoors and encourage them for the further innovations which helps to bring a solution for the food safety as well.

ACKNOWLEDGMENT

Firstly, I would like to extend my sincere gratitude to Dr.Prathibha Mahanamahewa, Dean Faculty of Law, General Sir John Kotelawala Defence University, whose generous and continuous encouragement to write this research paper. Secondly, i would like to extend my heartful gratitude to Ms.Nazeema Kamardeen, Senior Lecturer, Department of Commercial Law, Faculty of Law, University of Colombo who has written a number of research articles based on plant variety protection in Sri Lanka. Without her comprehensive articles it would be failed attempt by me to writing this full paper since the working document, 2011 is a unavailable and unpublished document. Thirdly, I would like to thank my colleagues of the staff who supported me to complete this research. Lastly, I would like to thank my family to help me to finalize this study.

LIST OF REFERENCES

Agenda21; Earth’s Action Plan. By- Robinson Nicholas A.; 1993; under the auspice of the Commission on Environmental Law of IUCN-The world conservation union; Oceana Publication;

A Worldwide Fight against Bio-piracy and Patents on Life; 1995; Khor Martin; Third World Resugence No.63,

Appropriations of Traditional Knowledge – the Patenting of sweetness inhibitors; Gunawardana Jagath (Attorney-at- Law) (Unpublished)

Bio- Piracy: an early case where a microbe from Jaffna became a property of a U.S. drug firm; Gunawardana Jagath (Attorney-at- Law)(Unpublished)

Bio-Piracy: The Plunder of Nature and Knowledge; 1999; Shiva.V; South End Press

Biodiversity, Bio-piracy and Benefits: What allegations of Bio-piracy Tell Us About Intellectual Property: Developing World Bioethics; Hamilton.C; (2006)

Bio-piracy : The Bio- Diversity of Sri Lanka Under Monopolies of others; Gunawardana Jagath (Attorney-at-Law) (Unpublished)

Biological Diversity Conservation and the Law – Legal Mechanism for Conserving Species and Ecosystems; 1993; Klemm Cyrille de in collaboration with Clare Shine; IUCN Environmental Policy and Law; paper no.29; IUCN

Biopiracy, the CBD and TRIPS- The prevention of Bio-piracy; 2004; Ragnar Johan; Master Thesis; Faculty of Law, University of Lund

Elements of The Intellectual Property Law of Sri Lanka; 2010; Karunaratna D.M..(LL.B(Hons),M.Phil,Ph.D.) Attorney-at-Law; 1st Edition Sarasavi Publishers.

"India may contest U.S Patent on Diabetic Remedy"; Sharma Devendes; New Delhi, India; August 27, 1999

Intellectual Property Law; 2005; Edenborough Micheal; MA (Cantab), D.phil (Oxan); Barrister; 1st Edition Cavendish Publishing Limited.

Intellectual Property Law; 1995 Holyoak Jon and Torremans Paul; Buttersworth; London, Dublin and Edinburgh; 1st Edition

Intellectual Property: Patent, Copyright, Trade Mark and Allied Rights; 1999; Cornish W.R.; Sweet and Maxwell; 4th Edition

Legal Protection of Traditional Knowledge; Gunawardana Jagath; (Attorney-at- Law) (Unpublished)

The Significance Of Plant Variety Legislation In Promoting Economic
Growth: An Analysis Of The Proposed Law In Sri Lanka; Camardeen.N; 2015

Agreement on Trade Related Aspects of Intellectual Property Rights, 1994

TRIPS: The impact on Plant variety protection and Bioiracy in Devoloping Countries; Special Reference to Sri Lanka; Galhena Chathra A.N. (Attorney-at-Law)

Traditional Knowledge of biodiversity in Asia-Pacific: Problems of Piracy and Protection'; GRDIN and Kalpavriksh; November 2002

International Convention for the Protection of New Varieties of Plants, 1991

Your Environmental Rights and Responsibilities; A Hand Book for Sri Lanka; Environmental Foundation Limited; 2009

BIOGRAPHY OF AUTHORS

Author is a lecturer in Law (Probationary), Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka. Her research interests include Environmental Law and Intellectual Property Law. She obtained her LL.B and LL.M from Faculty of Law, University of Colombo. Currently she is reading for her MPhil/PhD Programme at Faculty of Graduate Studies, University of Colombo.

Professionalism, Innovative Culture in Universities and their Contribution to the National Development- An Intellectual Property Law Perspective

HAM Harankaha
Faculty of Law, University of Colombo, Colombo 3, Sri Lanka
harankaha@gmail.com

***Abstract*—** *It is evident that national development of a country and its economic development have a close relationship. Undoubtedly, economic development is an essential aspect of broader notion of national development. Innovations and inventions of a country play significant role in enhancing economic development. These innovations and inventions, in a broader sense, include organized knowledge in creating new technological products, manufactures and services, industries, businesses, software and digital industries such as cinemas. Simply said, these are areas covered by legal regime of intellectual property and information communication technology. Further, a joint venture of both state and private sector for enhancement of knowledge culture would ensure viable and more stable development of a country. It is therefore evident that professionalism is an integral role in national development and intellectual property law plays a vital role in incentivizing and protecting professionalism in a country. This research attempts to analyze issue as to why contribution of university researchers/intellectuals to enhancement of inventions and innovations of country has not been effectively inculcated to country's economic development. Research analyzes existing legal hindrances affecting professionals to contribute services effectively in intellectual property law perspective by evaluating some IP law concepts i.e. employer -employee relationship, ownership concept and joint ownership of inventors. It discusses adequacy of existing laws and their pitfalls by recognizing importance of introducing new laws. Study is mainly desk-based research which analyzes relevant Conventions, Acts and regulations while having deep look at experiences of other selected jurisdictions. In addition, researcher used some data of local higher educational institutions with respect to their experiences on commercializing their inventions. Research concludes that contribution of university sector through commercializing their innovations is an important aspect in inculcating professionalism in national development and recommends that some intellectual property aspects such as joint ownership and co-ownership should be given more recognition and clarification while emphasizing on proper implementation and enforcement of relevant laws.*
Keywords- innovations, intellectual property, professionalism

Keywords *- Innovations, Intellectual Property, Professionalism*

I. INTRODUCTION

Today, from the perspective of universities, there is a growing interest to join forces with the private sector as universities are highly expected to make a tangible contribution to society. It is believed that universities are no longer a *blessed* investment free from the critical evaluation of cost effectiveness (Nezu, 2010). Universities are, hence, heavily expected to contribute to economic development by investments in R&D enhancing the technological development of the domestic industry. However, commercializing university researches and laboratory products and processes which may be technologically accurate and sound in theory, butmaybe lack of marketability is now in the minds of many policy makers in developing countries.Hence, any useful research results which remained unused in laboratory shelves without having a pro-active policy to transfer such results to industry can be minimized if factors such as idea of professionalism and the commercialization of research within an effective intellectual property protection mechanism can be properly adapted to the legal regime of a country.This research paper critically evaluates to what extent some intellectual property concepts can be utilized to enhanceuniversity - industry relationships and commercialization of research works in the market.

II. COMMERCILIZATION

It is hence important to identify an exact meaning given to the idea of commercialization in this present context. The process of commercializing intellectual property involves moving the fruits of creative thinking, research and development from the laboratory bench, author's study or designer's computer to the market place. This process of defusing innovations into the community has become known as technology transfer, or alternatively innovations. It is provided that for creation of intellectual property rights(IPR) planning is very important. Simple creation of an IPR without determining its importance and use by the public will not do any good. Such an IPR will not have any value also and only will remain in paper. As IPR has dual objectives, namely (i) the creator getting some benefit-financial or otherwise- for the intellectual

inputs given in such creation and (ii) the society getting the benefit of the IPR created, the planning the creation of IPR plays a very important role. This planning of innovations essentially includes commercialization of inventions.(Subbaram, 2010). No doubt, this involvement is something beyond the control and the capacity of the researcher/inventor attached to the university or the research institution and, it is a process which needs many assistance from the industries and the technology transfer offices.

III. INNOVATIONS

Innovation has been defined as; being the transformation of knowledge into new products, process and services and this involves discerning and meeting the needs of customers. Further, Improvements in marketing, distribution and service are innovations that can be as important as those generated in laboratories involving new products and processes. Therefore, an essential aspect of innovations seems to bemeeting the needs of customers while it being a transformation of knowledge to a new product or process. The concept of innovation hence involves with the process of *transforming* the very rudimentary type of invention produced in the laboratory to a customer demanding device which has a profitable market for the inventor/patent owner and a utility value for the customer as well.

IV. ECONOMICSOF PATENT SYSTEM

Classical economic theories of the patent system build on (old) notions that in the absence of patents underinvestment in R&D and innovation would occur and/or that too much secrecy would occur. Thus an extra incentive to invent, disclose and innovate would be needed and a patent right would help fill this need. This theory is basically founded on Bentham's famous thesis; […] which one man has invented, all the world can imitate. Without the assistance of laws, the inventor would almost always be driven out of the market by his rival, who finding himself, without any expense, in possession of a discovery which has cost the inventor much time and expense, would be able to deprive him of allhis deserved advantages, by selling at a lower price.(Bentham, 1962). Although there are many counter arguments against this basic theory the researcher takes the above nation as the basis on which his propositions are developed.

V. UNIVERSITIES AND ENTREPRENEURSHIP

In analyzing commercialization of research works, the following two concepts in relation to economics in patent are important.

i. Entrepreneurship
ii. Underinvestment in R&D and innovations

Entrepreneurship: Patent and IP system is an institution for stimulating entrepreneurship toward economic growth and welfare. Ordinarily, entrepreneurship comes in many forms;e.g., autonomous, corporate, state**,** university, military, etc., however, it is noted that this research limits its scope only to universitiesand the university as an entrepreneur. The research deeply analysespossible repercussions of universities being recognized as an 'entrepreneur'from the perspective to what rextent it can deviate from its traditional role as a non profitable institution engaging in research activities solely for public good.

Underinvestment: Here, under-investment means lack of investment in R&D and innovations. There are arguments that today's issue is underinvestment in R&D and innovations, both technical and non-technical, in a market economy. Underinvestment in R&D means the difficulty of selling the particular product and thereby appropriating profits to cover investment expenses. Therefore, funding agencies. Government and companies are reluctant to provide sufficient investments. According to this opinion, it can be further argued that the universities would be adequately funded by the Government or funding agencies to the extent that universities produce, as their inventions and innovations, products and processes that could be largely marketable or commercialized. This argument can also be furthered that, as far as university-industry collaboration is concerned, the industries would please to tighten their assistance with universities if universities could satisfy the industries that they engage in researching on more marketable product rather than any embryonic type of products which would only remain in a paper.

V. PATENT RIGHTS AND PUBLIC-FUNDED UNIVERSITIES

It is well established that universities are expected to work on education, research and further to fulfil its social responsibilities such as advising various faculties of the government, assisting the policy makers on policy matters and disseminating the new knowledge among the local and foreign institutions and agencies. Among these '*duties'* of universities, research works play a prominent place as it has a direct bearing on the socio - economic development of any country.

However, up to many recent years, it was the reality of many developing countries that University academics have attached far greater importance to writing academic papers and having them published in leading scientific journals/ publications rather thanseeking patent protection for their innovative ideas or inventionsortransferring this new technology to private

sectors/private industries for the purpose ofcommercialization or marketing the invention. In other words, it is obvious that many useful research resultsmay remain unused on laboratory shelves of universities if a pro-active policy to transfer such results to industry is not undertaken. Hence, the importance of having this university-industry relationship can be justified in many respects.

In fact, working with industry is a multi-beneficiary option for universities, as business laboratories tend to be better funded and better equipped. Sometimes the level and quality of their research is as high as those of universities. In addition, students tend to prefer universities that have close working relations with industry, since such universities offers opportunities for finding good jobs after graduation.(Nezu, 2009)

Hence this research aims to see Possibilities of enhancing effectiveness of researches and inventions of universitiesthrough-an effective university-industry relationship(U-I Relationship) which can be built up by applyingan effective intellectual property policy.This collaborative effort between universities and industries will also assist academic scientists who are typically lacked the market knowledge and the resources to successfully commercialize their own inventions by way of allowing them to own the intellectual property rights over the inventions created by them.

One of the main issues raised by many experts was whether public-funded universities be allowed to commercialize their inventions (that are created out of the funds granted by the government or a government agency) and allowedthem to be profit-earning institutions. The argument was that this new phenomena wouldbe a contradictory approach from its traditional or conventional role.

When the professionalism of universities are expected to enhance and when the universities are expected to produce quality products which can be commercialized through their research, there are several issues to be addressed.One issue is about the government policy as to the intellectual property status of research produced via government funds. Importantly, next one is regarding the ownership of the intellectual property created by inventors attached to universities. And nodoubt, this ownership should be granted to a one who is selected from the main three responsible faculties, namely, the Government, the University and the Scientist/inventor. Because, as far as the research done by the public funded universities are concerned, it is obvious that there are several *intermediaries* involved with this process. Among them; the government as the funding agency, the university as the Recipient and the inventor/scientist as the university employee attached to the institution play prominent roles.Hence, it is important to find out what should be the government policy as to the intellectual property status of research produced via government funds.

A. USA

In the USA, earlier situation was that invention derived from federally funded research ought to be made available to the public royalty-free and with non-exclusive licenses. In other words; The government shall retain title of the invention, a non exclusive patent right is granted to the university and the university was expected to use commercial development of the invention for the social welfare.

Present Position ofUSA with respect to commercialization of university research and collaborative research activities between universities /government funded research institutions and industries are wellmanaged by the Bayh-Dole Act of 1981.

Referring to Bayh- Dole, some argues “possibly the most inspired piece of legislation to be enacted in America over the past half-century”.(S Ray & Saha, 2010). Many opinions over the impact of Bayh-Dole vindicate that Bayh- Dole clearly answered the question whether academic researchers can own and commercialize government-sponsored research. According to the Act, they not only can but are also obligated to do so.Bayh-Dole gave universities and businesses the ability to maintain title to their federally sponsored innovations.

The impact of Bayh-Dole has been highlighted by many critics. The earlier institutional framework in the USA, had typically encouraged or mandated federal agencies sponsoring research to make the results widely available to the public through publications made available in the public domain or through government ownership of patent titles for non exclusively licensing to multiple industry players....Firms(industries)in many cases, did not even get to know about the inventions taking place at universities and, even if they did, they were not willing to pick up these inventionsin their nascent stage without exclusive patent licence.(Eisenberg (1996; Gallini, 2002)

Hence, as a result, Bayh-Dole granted intellectual property rights to universities, not to the inventing researchers and it established technology transfer offices in universities having powers to;

i. patent prosecution
ii. maintaining patent portfolios
iii. licensing and

other coordinating works between universities and industries.

The proponents of Bayh-Dole type legislations further point out that,in USA, since 1984 university patenting and licensing have increased dramatically, as has licensing income from university reseach. Hendersan et al (1998)observed that university patents grew more rapidly than overall US patents and much more rapidly than US domestic patents. It is also observed that the share of university patents in total US patents with domestic assignees, increased from less than 0.5 per cent in 1970 to nearly 4 per cent by 1999, and the rate of growth of this share began to accelerate just before 1980.(Mowery, 2005)

However, it should also be noted that there are different views on the success of Bayh –Dole among the scholars in the recent past. One argument is that Bayh-Dole is a legislation of country-specific. They argue that Bayh-Dole was passed in a climate of economic crisis in the USA, when there was a fear of loss of economic and technological leadership to Japan. This atmosphere contributed to the passage of Bayh-Dole despite little evidence it was needed, and minimal discussion of its potential cost.(Sampat, 2009; Mowery, 2004). Hence the mere application of a Bayh-Dole type legislation in developing countries, without judging the ground realities of the particular country, would not be a successful attempt as it was expected at the begining. The strongest argument put forward against the success of Bayh-Dole Act in the USA and potential success of Bayh- Dole type law in developing countries is mainly based on its anti- public interest impact.

It is obvious that now there is some rethinking of this legislation even in the U. S. For example, some U.S. scholars opine that the Act inadvertently created a misalignment between the private interests of university technology transfer offices and public interests that benefit the innovation system at large.(Boettiger and Bennett, 2006). It is also reviewed that privatization of academic research can sometime hider research and commercialization and hence, in response to this, the government and funders of research are increasingly exploring alternative to the Bayh-Dole model.(Lee, 2009; N. Sampat, 2009)

INDIA

Even in India, there has been a vast opposition against the adaptation of Bayh-Dole type legislation, titled the Protection and Utilization of Publicly Funded Intellectual Property Bill, 2008 (The Indian Bayh-Dole Act) in India. Some critics, While re-visiting to the traditional duty of universities to dessiminate their knowledge in the public interest by way of putting their research outcomes in public domain, argue against the fully privatization of innovation of public-funded universities(It should be noted that under Bayh-Dole type Acts, allowing particular university to patent its research work and granting the right of licensing them to others means universities are allowed to acquire private right to sell their products.) It is the common belief of many moderate scholars that one of the main ways in which publicly funded universities and laboratories contribute to domestic innovation and productivity is by getting knowledge and technology into the public domain. One of the objectives of the Indian legislation is "to ensure access to university technologies by all stakeholders for public good." However, they argue that, Indian Bayh- Dole Act makes no distinction between the characteristic of inventions that should be patented, and those that would be more effectively produce social benefits via placement in the public domain.(Sampat, 2009)

Therefore, it should be noted that a Bayh-Dole type Act can not be considered as the only remedy available for smooth commercialization of university research and enhancing in-built relationship between university and industries. This type of law should inevitably take into consideration the fact that to what extent a university can deviate from its trational duty of putting its research outcome into public doman. For universities, there must be a clear direction on what type of research works should be put into commercialization(by way of obtaining patent for them) and what should not.

VI. PATENT OWNERSHIP IN THE EMPLOYMENT POSITION OF SRI LANKA

Sri Lanka does not have a Bayh-Dole like law, instead we have the Intellectual Property Act of 2003.It is important to analyse whether there are provisions in the Act which deal with U-I relationship. In this respect, section 69 of the Act is noteworthy.It provides;

> "In the absence of any provision to the contrary in any contract of employment or for the execution of work, the right to a patent for an invention made in the performance of such contract of employment or in the execution of such work shall be deemed to accrue to the employer.

Provided that,

Where the invention acquires an economic value much greater than the parties could reasonably have foreseen at the time of entering the contract of employment, the inventor shall be entitled to equitable remuneration which may be fixed by the court an application made to it in that behalf. In the absence of an agreement between the parties.

Cornish points out, in free-market economics it is an assumption, by now largely unremarked, that a products of labour belonge to the owner of the business. It has even been an accepted fact in England, he further argues, when Lord Simonds declares in *Patcehtt v Sterling* (1955) as; it is an implied term in the contract of service of any workman that what he produces by the strength of his arm or the skill of his hand or the exercise of his inventive faculty shall become the property of his employer.(Cornish, 2010)

However, it should be noted that it is not a mandatory theory that an employee is obliged to hold his invention for his employer under whatever circumstances. This is a matter which shall depend on factors such as the nature of the service provided by the employee, time of producing the invention, the nature of the invention and its relationship with the nature of the business of the employer.

The issue to be analyzed here is whether this concept that, the ownership of an invention made by an employee attached to an establishment during his employment primarily belongs to the employer, is something applicable to the inventions that are the product of academic research in higher educational institutions. For this, primarily two factors are expected to be established; namely, the particular researcher who has invented the new invention should be an *employee*of the university and the university must have the right to claim the ownership of the patent.The Issue here is whether a public funded university can claim the ownership of the patent. Especially without having a Bayh-Dole type Act by which thepatent rights of inventions of universities are actually granted to the university. As has been analzsed, there is a strong view that inventions of public-funded universities, other than using them for public benefits by way of allowing them to be inthe public domain, should not be used for commercial purposes.Analzsingthe before 1980s in England, Cornish opines; most British universities did not seek to assert rights over inventions made by their staff. It was by and large assumed that commercialization of results was not part of their role as bodies sustained by government grants and student fees. At the same time Cornish accept the fact that when financial pressures built up upon them, however, they began to set up technology transfer offices in universities and to claim ownership of patents.(Cornish, 2010). The present position of UK law is provided by the section 39 of the UK Patent Act, which in effect departs only marginally from the common law principles which determines whether employer or employee is initially entitled to an invention.

However, in the context of promoting the university-industry relationshiips, factors such as researchers attached to universities and industries, their legal status, ownership of inventions invented by them should be clearly determined and established. In Sri Lanka, according to the above mentioned proviso(of section 69), the inventor shall be entitled to an equitable remuneration which may be fixed by the court if the invention acquires an economic value much greater than the parties could reasonably have foreseen at the time of entering the contract of employment in the absence of an agreement between the parties.

In an analysis, it is obvious that this section does not avoid the opportunity given to the parties to enter into a contract by including conditions even against the basic principle that the ownership of an invention made during the employment goes to the employer. In the UK, this depends on the policies of different universities. Cornish points out; each university sought its own resolution of the controversial issue by specific terms in employment contracts and these vary in content. Typically the university claims patent and associated rights from their grant onwards, but then offers inventors a considerable share in earnings.(Cornish, 2010)

However, it is submitted that, academic and university relationship cannot be equated with the ordinary employer-employee relationship. Hence, the general rules of ordinary employer-employee relationship cannot be applied in academic research in general as academics are entitled to their academic freedom as well. This academic freedom flows from an appreciation that the academics are both employees of their university and members of it!

Therefore it is recommended that in SriLanka, the government must have a clear IP policy on the ownership of inventions produced by universities. While determining the applicable law in general by the government, universities must be adequaltely given the freedom of deciding what percentage of income (or profit) the university should give the research-inventor as his part of contribution and the rationale of determining that. Further,universities must have a clear policy on the fact that what type of inventions should be used for commercial purposes and what should not. In short, if not determined by law, universities must be vigilant enough to distinguish, from their inventions, which one should be choosen for patenting (for commercialization) and which should not. In determining that, the *social welfare factor* of the particular invention need to be clearly identified. No doubt any invention made providing reliefs or healing against health issues and on medicare, inventions beneficial for desables, inventions based on

traditional knowledge etc., can be *per se*detrmined as pro-public interest inentions which should not be patented solely for commercial purposes.

VII. JOINT AUTHORSHIP- Section 67(2)

The concept of joint ownership is explained as follows;

> "Where two or more persons have jointly made an invention, the right to a patent shall belong to them jointly".

It is then important to see whether this concept can effectively be applied to university-industry collaborative works in Sri Lanka. It is evident that there is no clear definition provided for "joint-authorship" under Sri Lankan law. In the absence of having a definition, it is important to see how other jurisdictions define this.

According to UK position, *a person who has merely assisted in the creation of an invention but has made* ***no*** contribution of a creative nature *shall not be deemed to be the creator or a co-creator of such invention.*(Bently and Sherman, 2001)The question here is by whom and how it decides this *creative nature* of an invention?Because any assistance given by any industry or institution in the private sector to university research can be in different forms such asfinancial, laboratoryand other technical type of assistance.It is questionable as to whether these assistances be identified as *contribution of a creative nature?*

It has been examined by the researcher that the very nature of joint ownership of patent could be identified by analysing the following factors.

i. by way of defining 'inventor'i.e. UK Patent law defines inventor to mean the 'actual deviser ' of the invention. Joint inventors are construed accordingly.

ii. identifying 'inventive elements' of the invention-this is a matter to be decided by the court by analysingthe descriptions/claims of the patent application. There, the court is expected to see whether the claimant was responsible to develop some or all of these elements.

iii. Joint ownership can also be decided by looking at the inventive contribution of each and every party.

It is submitted that in the absence of having a proper caselaw guiding principles like in UK i.e. *Moor* v. *Regents of the University of California*, to ascertain the nature of creative contribution by one joint owner, in Sri Lanka, it is hardly possible to determine this factorif any statutory guidline in law is not available.

A. Right to a Patent

In general, the right to be granted a patent is *primarily* given to the inventor or joint inventors. This is evident by section 67(1), (2) of IP Act 2003. It provides that; subject to the provisions of section 68 the right to a patent shall belong to the inventor.

It further provides that where two or more persons have jointly made an invention, the right to a patent shall belong to them jointly.

It is important to identify the underpinning rationale of this concept.Bently observes thar; this focus upon the inventor follows the common practice whereby the creator is accorded the privileged status of first owner of intellectual property rights. (Bently, 2001)

However, an invention made in a contract of employment is an exemption to this phenomenon. As it has been earlier observed, *In the absence of any provision to the contrary in any contract of employment or for the execution of work, the* right to a patent for an invention made in the performanc*e of such contract of employment or in the execution of such work shall be deemed to accrue to the employer.(emphasis added)*

The underpinning rationale of this law is obvious. This section serves for the recognition of entrepreneurship, investments, giving recognition to the initiation of the work and the organizational skills of investors. However there are several issues to be recognized and examined under this section.In fact, this section should be analyzed in the backdropof whether the real inventor, that is the employee, is entitled to include his name in the patent application or granted patent as the 'inventor'.

It is an accepted law that the right of the employee, who is the actual inventor or developer of the invention, to be recognized (named) as the inventor (not as the patent owner) under the patent granted.
This has well been recognized in other laws i.e. UK Patent Act, s. 13, EPC Arts. 62, 81. According to this section, inventors are entitled to be named on the patent, even if they are not entitled to the patent.

It is submitted that this recognition is important in the phase of encouraging employees or university researchers in universities to engage in more effective and fruitful researches.

It is obvious that Sri Lankan patent law recognises the right of the inventor, even though he is an employee worked under a contract of employment to be named in the patent as the inventor of the device. Section 70 of the

IP Act of Sri Lanka provides that, 'the inventor shall be named as such in the patent...'

However, it is also submitted that the section 69 of the IP Act which recognizes the right of the employer as the patent owner does not cover the position of an employee who was a joint inventor with someone who was not also an employee of the institution. i.e. a university lecturer completes an inventive work after engaging in a collaborative research work with a researcher of a private company. It is yet questionable in this case whether the employer- the university in this case-is entitled to claim ownership to the whole of the property.

REFERENCES

Bainbridge D. *Intellectual Property*, 3rd ed., Pitman Publishing

Bently L and Sherman B (2001). *Intellectual Property Law*, 3rd ed., Oxford University Press

Bhandari M K (2012). *Law Relating to Intellectual Property Rights*, 3rd ed., Central Law Publications

Chandra R (2010). *Knowledge as Property*, Oxford University Press

Chawla A (2013). *Law of Copyright; Comparative Perspective,* Lexis Nexis

Cornish W and Llewelyn D (2010). *Intellectual Property Law: Patents, Copyright, Trademarks and Allied Rights,* 7th ed., Sweet & Maxwell

Davis J (2012). *Intellectual Property Law*, 4th ed., Oxford University Press

Flanagan A and Montagnani M L (eds.) (2010). *Intellectual Property Law Economic and Social Justice Perspectives*, Edward Elgar

Ghidini G (2006). *Intellectual Property and Competition Law*, Edward Elgar

Gupta V K (2004). Multi-disciplinary Studies on IPR in R and D: a Review, Vol 9, Journal of Intellectual Property Rights

Nezu R (2009). Overview of Technology Transfer, IPR and Effective Univrsity-Industry Relationship

Sampat B(2009) The Bayh-Dole Model in Developing Countries: Reflections on the Indian Bill Policy Brief October 2009

Taraporevala V J (2013). *Law of Intellectual Property*, 2nd ed., Thomson Reuters

Wadehra B L (2013). *Law relating to Intellectual Property*, 5th ed., Universal Law Publishing, New Delhi, India

Geographical Indications- Need of a Registration System for Srilanka

LM De Silva
General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
lihini.desilva@kdu.ac.lk

Abstract *- Sri Lanka is a developing country that possesses varieties of natural resources with great economic value. Many of them have grabbed the international market and they are main sources of foreign exchange for Sri Lanka. Geographical Indications (GI) like Ceylon Tea, Ceylon Cinnamon, Ratnapura Blue Gems and other spices play an important role among them. GIs receive less attention when compared with other Intellectual Property Rights such as Copy Rights, Patents, and Trademarks. Lack of professionalism among academics, practitioners, towards this area has become a major issue in the development of law relating to Geographical Indications & thus legislative innovations with regard to a registration system for GI attracted less public discussion. Ceylon Tea, which is known as 'Black Gold' of Sri Lanka is a good example that has faced the pathetic result of not having adequate legislative provisions, particularly with regard to a registration system of Geographical Indications. Therefore this paper will discuss whether laws available in Sri Lanka to protect Geographical Indications in the domestic level and in the international level are at a satisfactory level. Finally this paper will suggest a registration system of GI should be implemented while emphasizing how successfully such system has been used in other jurisdictions. Author uses secondary resources such as Library Research and Internet inclusive of books, Journal Articles, Cases and other related statues as main sources of this Research. In addition author has interviewed stakeholders in the field in terms of its practical application in Sri Lanka. Furthermore a comparative study was done inclusive of USA and India by the author for the purpose of providing recommendations to Sri Lanka.*

Keywords *- Geographical Indication, Registration System, Certification Mark*

I. INTRODUCTION

"While natural resources are shared quite unevenly among nations, every country has at least one undeniable resource: its geography. A nation, among other things, a defined geographical area. Thus the protection of geographical indications is potentially of interest to all nations." (Daniel Gervais, 2009)

Sri Lanka being a country that is well equipped with natural resources and traditional knowledge has an immense potential of gaining socio - economic development through Geographical Indications. GIs like Ceylon Tea, Ceylon Cinnamon, Ratnapura Blue Gems and other spices play an important role in the field of development in Sri Lanka. As defined in the Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPS Agreement) GIs are indications which identify a good as originating in the territory of a Member, or a region or locality in the territory where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin (TRIPS Article 22.1). Link between the product and the particular Geographical Indication adds a distinct characteristic to Geographical Indications. Natural factors like climate change, soil condition, are determining factors of the characteristics of GIs. For an instance monsoon rain, cold weather & laterite soil are determining factors of the flavour of Ceylon tea. On the other hand historical context, intergenerational skills, are key human factors of determining the characteristics of GIs. More emphatically, local and foreign customers tend to purchase these products due to specific qualities, characteristics and reputation that derive from the place of origin. According to a Consumer Survey performed in European Union, 40% of the consumers are ready to pay 10% of the premium for origin guaranteed products (European Commission, 2003).

Unlike other Intellectual Property Rights, there is rarely a specific law protecting GIs (Watal, 1999). Though it is included as an intellectual property right in the TRIPS Agreement, (TRIPS Article 1.2) GIs being more linked with traditional knowledge that mostly belong to 'old world', it has received less sustained attention from the professionals in the legal arena when compared with other intellectual property rights. Focusing on the geographical aspect of GIs, some argue that GI protection does not cover 'human innovation' in the making of relevant products to justify the recognition of GIs as a form of Intellectual Property (Dagne, 2014).

GIs should be protected in order to prevent consumers from being misled as to the true origin of the product and to protect the rights of the producers. Many Sri Lankan products that carry GIs, have attracted the global

community because of the quality, reputation and characteristics that remain in these products. But in the recent past noticeable abusive acts were reported against Sri Lankan products; more emphatically with regard to Ceylon Tea. One such example would be use of Lion Logo on retail packs that contain 100% Chinese Tea that destined to Libya. In another instance, use of Lion Logo was detected in Dorra Al-Otuor brand tea packs in which the packaging has been done in Jordan and Northern Iran (Worldwide symposium on Geographical Indications, 2014). Sri Lankan Cashew and Cinnamon are other products that are being abused when Vietnam and Indonesia export the same products. This suggests the current domestic and international legal regime is not at a satisfactory level to protect GIs and thus have led to a misappropriation of GIs. Supposedly, a strong legal mechanism is imperative in order to gain the maximum use out of GIs both in the domestic level and at the international level.

In this paper, Section II explains why GIs need to be protected and in Section III, the protection for GIs in Sri Lanka is examined. Section IV discusses about the international protection for GIs and Section V focuses on the expansion of the subject matter of GIs at the international level. Section VI discusses about the experience in India with special reference to the GI Act in India, and Section VII presents the recommendations and Section VIII provides the conclusion.

II. WHY GIS NEED TO BE PROTECTED

> *"They make it possible to add value to the natural riches of a country and to the skills of its population, and they give local products a distinguishable identity"* (Addor & Grazioli, 2002).

GIs in its nature are attached with a particular geographical area and thus help to take the maximum use out of resources in the particular area. Because of the qualities, reputation and characteristics attributable to that particular geographical area people tend to buy these products and this reference to the geographical area is inherent in GIs. Although GIs function like a Trade Mark it distinguishes products originating from a certain source. Advantages identified by a United Nations Conference on Trade and Development could be unfolded as follows:

> *" ...geographical indications and trademarks reward producers that invest in building the reputation of a product. They are designed to reward goodwill and reputation created or built up by a producer or a group of producers over many years or even centuries. They reward producers that maintain a traditional high standard of quality, while at the same time allowing flexibility for innovation and improvement in the context of that tradition … Geographical Indications and Trade Marks represent legal mechanisms that producers can use to differentiate their products, according to criteria such as the sustainability or traditional nature of production, and thus appeal to consumers. As such they have great relevance to developing countries dependent on primary commodity exports…"* (Downes, & Laird, 1999).

This clearly illustrates that there are obvious advantages of protecting GIs. Hence, it is no longer necessary to treat GIs differently to other IP rights such as Patents, Trade Marks and Industrial Designs. Felix Addor and Alexander Grazioli identify two main criteria that need to be satisfied in order to make the maximum use of the economic potential that lies on GIs.

- Countries provide at the national level adequate protection for their GIs; and
- The protection granted at the international level is effective for GIs identifying all products (Addor & Grazioli, 2002)

More significantly obvious benefits for the development could be identified with regard to Ceylon Tea. "Ceylon Tea is continuing to do a yeomen service to the economy of Sri Lanka while contributing 15% share to the country's foreign exchange earnings. Only the expatriate remittances from the 02 million Sri Lankans employed overseas and the garment trade earn more hard currency for the island. Exports of Ceylon Tea generate an annual income of US$ 1.5 billion and this revenue covers the hard currency requirement necessary for the entire food import bill of the country. With 2% contribution to the Nation's GDP and dependence of 10% of the population on the industry, Ceylon Tea plays a pivotal role in the economy of Sri Lanka" (De Alwis, 2013). With these notable advantages of GIs it is highly questionable why Sri Lanka still lacks adequate protection to protect GIs at the international level.

III. PROTECTION FOR GEOGRAPHICAL INDICATIONS IN SRI LANKA

Under the current legal status of Sri Lanka, the Intellectual Property Act No 36 of 2003 (IP Act) provides varieties of protection for GIs. Section 161 (1) (i) of the Act provides *sui generis* protection for GIs and it denotes that an interested party is entitled to prevent use of a GI, if the product does not originate in the original geographical area in a manner that mislead the public as to the geographical origin of goods. Here any interested party means not only producers and consumers, but also

it will embrace general public as well. According to Section 161 (1) (ii), parties can rely on unfair competition where there is an act which constitutes unfair competition within the meaning of Section 160 of the IP Act. As per Section 160 (1) (a) of the Act, any act or practice carried out or engaged in, in the course of industrial or commercial activities, that is contrary to honest practices shall constitute an act of Unfair Competition. Though Unfair Competition could be expounded broadly, it is restricted to the situations where competition is perceptible in the market and also one has to establish his/her right before remedy is granted. Further, pursuant to Section 161 (1) (iii) of the IP Act use of a GI in translation or accompanied by expression such as kind, type, style or imitation or the like is prohibited. The Court can grant an injunction and any other relief deemed appropriate in above circumstances as per Section 161 (4) of the Act.

In addition to Section 161 of the IP Act, Act offers protection by way of a Certification Mark or a Collective Mark according to Sections 142 (3) and 138 (3) respectively. Certification marks are marks which indicate that the goods on which they are used are certified by the proprietor of the respective mark with regard to the origin, material, and mode of manufacture, of goods or performance of services, quality, accuracy or other characteristics. Presently, Ceylon Tea has been registered as a certification mark by Sri Lanka Tea Board.

Under the Act, the owner of the certification mark is not authorized to use the mark (Intellectual Property Act No. 38 of 2003. Section 142 (5)). The owner controls the use of mark by making sure that the goods contain certain characteristics, qualifications and standards. Having a certification mark system for the protection of GI provides a number of benefits to a country. It will create a legal regime that is well known to both local and foreign enterprises. The additional cost needed for the implementation of a new registration system of GIs is saved and the resources already in use for applications, registrations, oppositions, cancellations, adjudications, enforcement will be committed for GI protection too.

In USA, GIs are protected through Certification Marks and Collective Marks. 'Florida Citrus' and 'Napa Valley' are famous GIs in USA that are registered as domestic Certification Marks. This protection is available to foreign GIs also. Therefore 'Darjeeling Tea', and 'Prosciutto di Parma' are two foreign GIs registered as Certification Marks in USA. This clearly demonstrates that in order to protect Sri Lankan GIs in USA, GIs need to be registered either as a Certification Mark or a Collective Mark. But still, Sri Lanka has been unable to register at least 'Ceylon Tea' in USA. USA being the major export destination for Sri Lankan products in 2014 which absorbed 24% of our exports (Export Development Board- Sri Lanka, 2014), there still seems the need of Certification Marks and Collective Marks protection for GIs.

However, Sri Lanka doesn't have a registration system for GIs. This has caused to the abuse of Sri Lankan GIs at the international level. If Sri Lanka possesses a registration system of GI, it could have marketed products with great protection more specifically in Europe where there are people who prefer Sri Lankan products. In 2014, 31% of the total export earnings were derived from European Union member countries (Export Development Board - Sri Lanka, 2014).

IV. INTERNATIONAL PROTECTION FOR GEOGRAPHICAL INDICATIONS

It is worth examining the international protection for GIs in order to perceive the available protection for GIs since whether it is Sri Lanka or not when goods travel beyond borders, any country has to tackle with the existent protection. There are a number of International Agreements that address the protection of GI, but it is only the TRIPS Agreement that addresses GIs universally. Felix Addor and Alexander Grazioli identify two main reasons for not addressing this issue in a global perspective. That is, other agreements provide protection only where unfair competition arises or the number of countries that are being covered is limited to address the issue universally (Addor & Grazioli, 2002).

A.Paris Convention

Paris Convention provides protection for Trade Marks, indications of provenance and other Indications of source against misleading acts. Article 10 of the Paris convention stipulates that , where 'direct or indirect use of a false indication of the source of goods or the identity of the producer, manufacture or merchant occurs Article 9 should be applied, and Article 9 guarantees seizure, upon importation of goods bearing a false indication of source. Article 10*bis* denotes the basic international standard against unfair competition and it could be argued that use of false indications of source is prohibited under 10*bis* (3).

B. Madrid Agreement

Although Article 1 of the Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods defines an Indication of Source it does not provide a higher international protection. However this includes both 'false' and 'deceptive' indications of source. Article 1.1 denotes all goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of

origin shall be seized on importation into any of the said countries.

C. Lisbon Agreement

Lisbon Agreement grants a higher standard of protection for appellations of origin, but the number of countries signed are limited. Article 2.1 of the Lisbon Agreement provides the definition for appellation of origin and affords protection against usurpation, imitation including where the origin is indicated and where there is a translation of an appellation or accompanied by 'kind', 'type', 'make', 'imitation' or the like. Due to the less number of signatory countries Lisbon Agreement does not provide an adequate international protection. (As at 6 June 2015, Lisbon Agreement had only 33 member states)

D. TRIPS Agreement

Among international agreements relating to GIs, TRIPS Agreement provides an immense potential for the protection of GI universally. This is mainly with regard to the signatory states and the level of protection it offers. Although TRIPS Agreement provides one definition for GIs it affords two tiers of protection.

Under Article 22.2 of the TRIPS Agreement, acts that mislead the public or which constitute an act of unfair competition under Article 10*bis* of the Paris Convention are prohibited. Also Article 22.3 of the TRIPS Agreement affords *ex officio* refusal or invalidation of Trade Marks which contain or consist of a GI, if the use of GI in the Trade Mark misleads the public as to the true origin of the product. According to Article 22.4, states have the obligation to provide protection against GIs that are literally true, but which falsely represent to the public that the product identified by the GI originates from another territory.

Article 23 of the TRIPS Agreement provides additional protection for wines and spirits. Article 23.1 prohibits the use of a GI, even where the use of a GI is not misleading or it does not constitute an act of unfair competition. Also it allows member states to prevent the use of a translation of a GI or GI, accompanied by expressions such as kind, type, style, imitation, or the like.

Many of the Sri Lankan products do not fall under wines and spirits. Therefore general protection under Article 22 applies to these products. In comparison to the protection for wines and spirits, protection for other products are limited. It is seen as a historical anomaly favouring producers of certain agricultural products who had the good fortune of being at the right place at the right time when international agreements were forged. (Sanders, 2005) Under the general protection one has to prove that public is being misled or the act constitutes unfair competition. But wrongful exploitation of the reputation of another product may harm manufacturers and customers. 'Since lawsuits based on passing off or unfair competition are only effective between the parties of the proceedings, the distinctiveness of a given Geographical Indication must be shown every time that GI is enforced' (WIPO Doc. SCT/5/3 of 8 June 2000).

However, the obligation to fulfil this requirement is satisfied in many countries by allowing GIs to be registered as certification marks, collective marks and allowing passing off actions to be instituted in civil courts. It is evident that when reading Article 22 of the TRIPS Agreement together with Article 1.1, member states are not obliged to implement more extensive protection than is required by the Agreement and also member states have the power to determine the appropriate method to implement the provisions of the Agreement. This demonstrates that the standard of protection that could be expected is low for products other than wines and spirits where many of the Sri Lankan products such as Ceylon tea, Ceylon cinnamon and other agricultural products fall. Also, Article 24(9) of the TRIPS Agreement stipulates, 'There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin or which have fallen into disuse in that country.' By virtue of Article 24(9) of the TRIPS Agreement, a GI needs to be protected in the particular country in order to protect internationally. In these circumstances, at least to grab the available protection in the countries where there is a good market for Sri Lankan GIs, a registration system would provide a suitable mechanism to the country.

V. EXPANSION OF THE PROTECTION OF GEOGRAPHICAL INDICATIONS

However, there is an ongoing debate whether Article 23 should be extended to cover products other than wines and spirits. In support for the extension of Article 23, WTO members such as Sri Lanka, Bangladesh, Cuba, Egypt, Iceland, India, Kenya and Switzerland joined hands together. On the other hand Australia, Canada, Chile, and Uruguay led by United States oppose the extension. They argue that it will create an obligation on WTO member states to protect GIs of other countries at a very high level and thus 'this could involve a considerable burden, particularly in view of the fact that some members such as the ECs, have over 700 domestic GIs'(Evans & Blackney, 2006). It is with foremost significance to mention that if additional protection under Article 23 is extended to cover products other than wines and spirits, along with a registration system for GI in Sri Lanka, Sri Lankan products would be granted a fruitful protection for GI at the international level.

In June 2005, European Communities (hereinafter referred to as EC) submitted a proposal suggesting a multilateral register for GIs which involves three steps in the process (European Communities Proposal, 2005). According to this proposal, once WTO members notified their GIs to WTO Secretariat, they must publish them, and that will provide an 18 month period for the members to examine and object the registration of such a GI. Finally the notified GIs will be registered in the multilateral register with reference to any objection made by the member countries (European Communities Proposal). Therefore it is clearly visible that the countries which lack a registration system will have to face more difficulties to satisfy a mandatory registration system. Sri Lanka being a country which falls in the same category will find it difficult to comply with and accordingly needs to take positive steps to confer the potential protection for GIs.

VI. LESSONS FROM INDIA

An effective protection for GIs was of considerable importance for a country like India which was richly endowed with natural agricultural products and which already had in its possession renowned geographical names such as 'Darjeeling' (Tea), 'Alphonso' (mango), 'Basmati' (Rice) etc (Hiriwade & Hiriwade, 2006). In the same way Sri Lankan 'Ceylon Tea' is abused in the international market, Basmati Rice and Darjeeling Tea of India triggered a lot of controversies in the international market. In this scenario Geographical Indication of Goods (Registration and Protection) Act of 1999 was enacted and came into force in 2003. (Hereinafter referred to as the GI Act) Under the GI Act, a Geographical Indications Registry was established with all India jurisdiction in Chennai and it is administered by the Controller General of Patents, Designs and Trade Marks. Although registration of GIs is not mandatory in India, according to section 20(1), no person "shall" be entitled to institute any proceeding to prevent, or to recover damages for the infringement of an unregistered GI. Therefore as per section 21(a) only a registered owner and its authorized users can take necessary actions against infringement. Section 6(1) specifies a GI Register, which is divided into two parts: Part A and Part B. In terms of Section 7 of the GI Act, the distinguishing characteristics of the goods and the registered proprietor (ex. Tea Board, Coffee Board, Spices Board) are incorporated in Part B. As per section 8 of the GI Act Part B contains the details of the authorized users of GIs.

Registration of GIs in India indicates a number of benefits to the country. First it prevents unauthorized use of GI by others and thus grants legal protection. Thereafter registered owners and authorized users can register their products in WTO member countries and can confer a higher level of protection for GI at the international level also. Further, only the registered owners have the advantage of instituting an action in the courts against infringement of registered GIs and it is the registered owners who possess the exclusive rights of GI (Pandey & Dharni, 2014). According to a post-registration survey, with reference to other changes discovered in post registration, product demand has increased by 33% while another 33% has resulted in revenue increment. 17% of respondent demonstrates that registration has resulted a decrement in duplication whilst increasing the brand value (Bagade & Metha, 2014). Thus India has been able to benefit from the current registration system available in India.

VII. RECOMMENDATIONS

It is clear that the protection granted by the current law in Sri Lanka for GIs is not adequate when the products travel beyond its boundaries. But the commercial value that could be gained through GIs is imperative with regard to the development of the country. Therefore it is recommended to have a system that will protect GIs at the international level also. This could be achieved by implementing a registration system for GIs. Apart from this a multilateral registry at the international level is recommended and also author suggests that Article 23 should be extended to cover products other than wines and spirits

VIII. CONCLUSION

Despite the fact that adequate protection has not been coffered for GIs in Sri Lankan legal framework, GIs have become a great economic tool with the potential of bringing foreign exchange to the country. The current situation of GI in Sri Lanka suggests that the available legal mechanisms to protect GI is adequate as far as the domestic protection is concerned, nonetheless, it is not sufficient when GIs travel beyond borders to the international market. Therefore GIs have been often misused in the world market. More specifically 'Pure Ceylon Tea' known as 'Black Gold' in Sri Lanka had to face so much controversies in the world market. Albeit the four corners of the domestic protection is wider than the protection granted by the TRIPS Agreement, failure to introduce the registration system for GI has caused to place GIs back in the queue among other intellectual property rights.

Protection granted for agricultural products and other foodstuffs is also lower than the protection granted for wines and spirits according to Article 22 of the TRIPS Agreement, and due to the fact that WTO countries being not obliged to confer a higher level of protection Sri

Lanka at least needs to have a registration system to grab the available protection in the international level.

Experience from India reveals that post registration period has resulted in an increase in the revenue and has brought so many benefits to the producers, consumers and to the country as a whole. Some scholars argue that introducing a separate registration system will cause additional cost for a country and thereby suggest the existing certification mark and collective mark registration system for the protection of GIs. But this study recommends a registration system for Sri Lanka along with other available protection mechanisms in the light of the above mentioned basis.

Moreover, harmonization of the countries with regard to the extension of the subject matter of the Article 23 of the TRIPS Agreement is imperative, which will thereby allow products other than wines and spirits to be entitled for a higher standard of protection. Similarly, an international registry of Geographical Indications will best fit for a more efficacious worldwide GI regime.

One cannot disagree when Felix Addor and Alexander Grazioli say that,

> *"All countries have products with a given quality, reputation or other characteristics which are essentially attributable to their geographical origin. Their domestic and international marketing could greatly benefit from the use of GIs. However in order to fully benefit from this intellectual right protection, authorities and producers in WTO members, especially in developing and least-developing countries, need to be pro-active"* (Addor & Grazioli, 2002).

REFERENCES

Addor, F. Grazioli, A. (2002) *Geographical indications beyond wines and spirits* [Online] 5 (6 November). Available from: https://www.ige.ch/fileadmin/user_upload/Juristische_Infos/e/PDF-doku3.pdf [Accessed: 30th May 2015]

Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) 1994

Bagade, S. B. Metha, D. B. (2014) *Geographical Indications in India: Hitherto and Challenges* [Online] 5(2). Available from: http://www.rjpbcs.com/pdf/2014_5(2)/[146].pdf [Accessed 11th May 2015]

Dagne, T.W. (2014) *Intellectual Property and Traditional Knowledge in the Global Economy: Translating Geographical Indications for Development.* Routledge Research in Intellectual Property. Routledge Available from: https://books.google.lk/books?id=EnlsBAAAQBAJ&pg=PA13&lpg=PA13&dq=david+r.+downes+innovative+mechanisms+for+sharing+benefits+of+biodiversity&source=bl&ots=-E5q-ixTd6&sig=HTovRE6kT15HJM8kkjAucouf-V4&hl=en&sa=X&ei=sxFrVarCDYbluQTO0IPYBg&ved=0CC8Q6AEwAw#v=onepage&q=david%20r.%20downes%20innovative%20mechanisms%20for%20sharing%20benefits%20of%20biodiversity&f=false [Accessed 10th June 2015]

Gervais, D. (2009) *Traditional Knowledge: Are we closer to the answer(s)? The potential role of Geographical Indications*. [Online] Availbale from: https://www.academia.edu/8885244/Traditional_Knowledge_Are_We_Closer_to_the_Answers_The_Potential_Role_of_Geographical_Indications. [Accessed 12th May 2015]

De Alwis, H. (2013) "Ceylon Tea"- Sri Lanka's Best Known Geographical Indication in *Worldwide Symposium on Geographical Indications.* Bangkok March 27 to 29, 2013. WIPO.

Downes, D.R. Laird, S.A. (1999) *Innovative Mechanisms for Sharing Benefits of Biodiversity and Related Knowledge: Case Studies on Geographical Indications and Trade Marks, Paper prepared for UNCTAD Bio trade Initiative*. [Online] Available from: http://www.ciel.org/Publications/InnovativeMechanisms.pdf. [Accessed: 31st May 2015]

EUROPA.EU (2003) *Why do Geographical Indications Matter to us.* [Online] Available from: http://europa.eu/rapid/press-release_MEMO-03-160_en.htm. [Accessed: 28th May 2015]

Evans, G. Blackney, M. (2007) The International Protection of Geographical Indications yesterday, today, and tomorrow. WestKamp, G. *Emerging Issues in Intellectual Property: Trade, Technology and Market Freedom: Essays in Honour of Herchel Smith.* Edward Elgar Publishing.

Evans, G.E. Blackney, M. (2006) The Protection of Geographical Indications after Doha: Quo Vadis? [Online] 1 (40) Available from: http://gaileevans.com/EvansGIsAfterDohaJIEL06.pdf. [Accessed: 1st June 2015]

Export Development Board (EDB) Sri Lanka. (2014) *Performance of the export sector in Sri Lanka - 2014* [Online] Available from: http://www.srilankabusiness.com/pdf/performance_of_exports_2014.pdf (accessed: 31st May 2015]

Exportur/LOR and Confiserie du Tech Case (ECJ C-3/91 of 10 November, 1992)

Government of Sri Lanka, Intellectual Property Act No. 38 of 2003.

Hiriwade, M. Hiriwade, A. W. (2006) *Geographical Indications: Indian Scenario* [Online] Available from: http://eprints.rclis.org/7878/1/EF6C0C53.pdf [Accessed: 11th May 2015]

Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of October 31,1958 as revised at Stockholm on July 14, 1967, and as amended on September 28,1979

Madrid Agreement Concerning the Registration of Marks as amended on September 28,1979

Pandey, N. Dharni, K. (2014) *Intellectual Property Rights*. PHI Learning Pvt Ltd.

Paris Convention for the Protection of Industrial Oroperty as amended on September 28,1979

Sanders, A.K. (2005) Future Solutions for Protecting Geographical Indications Worldwide. In Health, C. & Sanders, A.K. (eds) *New Frontiers of Intellectual Property. Studies in Industrial Property and Copy Right Law.* Hart, Oregan .

Watal, J. (1999) Intellectual Property Rights and Agriculture: Interests of Developing Countries. In *The conference on the Agriculture and the New Trade Agenda in the WTO 2000 Negotiations*. Geneva. October 1-2,1999

BIOGRAPHY OF AUTHOR

Lihini M. De Silva is a lecturer in law at General Sir John Kotelawala Defence University, Sri Lanka. Her research interests include Environmental Law and Intellectual Property Law. She obtained her LL.B (Hons) from Faculty of Law, University of Colombo.

New Dimension towards the Usage of Cheques in Sri Lankan Payments System

VSN De Lanerolle
Faculty of law. General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
delanerollevindya@gmail.com

Abstract- *The usage of cheques other than cash (Coins and Note) and e- payments are integral part of Sri Lankan payment system. Bank cheques continue to remain as the main non cash payment in the country. In recent time with the introduction of new technology for the paper base payment system, the usages of cheques have been appreciated. Simultaneously the new legal and regulatory environment for the growth of electronic payment system have been presented by the legislation nevertheless legal environment relates to paper base payment system remain stagnant. Though the Central bank designated the national cheque clearance functions under the Monetary Law Act no 58 of 1949 and is regulated by the payment settlement Act no 28 of 2005, did not incline to safe usage of cheques like introducing cheque clearance via Post office in the area to avoid the possibility of happening impediments and calamity of cheques. According to the above facts, it is revealed that the legal protection given to the customers of the usage of cheques, by upgrading the existing law or imposing new legislations, are poor in this stage. The main goal of this project is therefore to fill this gap. Moreover it is further given a comparison with the jurisdiction of India. Information in relation to this will subject to both primary and secondary sources, referencing journals, statutes, licensed commercial bank reports. Eventually the existing legislation, in relation to customers of the usage of cheques, to be upgrade and new introductions like Inter- city cheque speed clearance and clearing house membership to the post office should be given by enacting new provisions for the existing law.*

Keywords -Cheques, Payment System, Post office

INTRODUCTION

In modern world, payment systems have been enhanced unprecedentedly. Most of the countries have shifted towards electronic financial transactions instead of traditional financial transactions (paper base medium). In Sri Lanka, cash (Coins and Note) remains the most popular retail payment structure. Nevertheless Cheques are the immensely popular non cash retail payment instrument. In recent time with the introduction of new technology, the paper base payment system has been facilitated by the development of emerging electronic payment mechanisms specially for improving efficiency of cheque payments in Sri Lanka. Simultaneously the guidelines and the regulatory framework for the growth of electronic payment system have been recognized and adopted. From the outset this paper focuses on the legal protection given to the customers of the usage of cheques by formulating a proper mechanism in relation to the paper base payment system.it is to be discussed whether the legal protection given to the customers of the usage of cheques poor in this stage along with that it is assumed that the legal framework, in relation to customers of the usage of cheques, to be upgraded and business activities through the usage of cheques will be increased by introducing new cheque clearance system. A new cheque clearance system has been initiated to launch for the purpose of upgrading the existing cheque clearance process by the Central Bank of Sri Lanka (CBSL). Accordingly, as the evolution of the payment system in Sri Lanka Cheque Imaging and Truncation (CIT) system, was handled by LankaClear (pvt) Ltd (LankaClear), the national clearing house under the guidance of CBSL, was launched in 2006. LCPL performs the national cheque clearing function as designated by the Central Bank of Sri Lanka (CBSL) under the Monetary Law Act and is regulated by the Payment and Settlement Systems Act. To strengthen the regulatory and operational framework for Cheque Imaging and Truncation System, the Payment and Settlement Systems Act No. 28 of 2005 was adopted for the proper and efficient implementation, administration and enforcement of the provisions of the aforesaid Act. This Direction may be cited as the general direction in respect of Cheque Imaging and Truncation System.

This research was conducted by combination of qualitative methods. Generally it was employed journal exercises, in context observation in books on negotiable instruments, reference with regard to the payment and settlement Act no 28 of 2005, Electronic transaction Act no 19 of 2006, payment Devise Act no 30 of 2006 post office ordinance and Bill of exchange ordinance no25 of 1927. Moreover Mobile payments guidelines no 1 of 2011 for the bank led mobile payment service and Mobile payments guidelines no 2 of 2011 for custodian account based mobile payment services were referred. Additional information was obtained from online article through

internet resources for the purpose of this research. These resources included legal institutions in other countries which had the track record of successfully implementing new recognition system and new approach for the cheque clearing system. Data from the interview of authorities in payment and settlement department in Central Bank of Sri Lanka were analyzed for the purpose of concerning the steps which had been executed in relation to cheque clearing process in paper base payment system.

I. CHEQUE.

A cheque.as a negotiable instrument is a written order made from one person instructing his bank to pay specified amount of money to another person. According to the bill of exchange ordinance no 25 of 1927, cheque has defined as a bill of exchange drawn on a banker payable on demand. All the cheques are bill of exchange, but not all bill of exchange are cheques. Trace back to the history, the first printed cheque, application came into existence in 1717, which was introduced by the bank of England. During the second half of the 19th century, as cheques became more widely used, provincial clearings were set up, based in towns around England and Wales. Subsequently the process has spread over the world. It had been a tremendous growth until the electronic payment mechanism embraced the payment system. In Sri Lanka, before emergence of technology in relation to cheques and its clearing process, the commercial banks handed over physical cheques to LankaClear for clearing. It had a long process to be executed and also reflected certain issues and limitations since paying bank is responsible for the payments that they release to the beneficiary of the cheque holders. In order to avoid the frauds, banks had to physically examine the cheques itself as a reliable way. Apart from delay of the clearing process, people were using cheques as counterfeit to delay payments. They issue cheques with the intention of committing frauds knowing that they did not have enough balance in their account to support it. In the last resort the payee is negatively affected and embarrassed. On the whole it reflects certain loophole in the manual clearing process.

II. CHEQUE IMAGINE AND TRUNCATION SYSTEM

This was the modern version of clearing process which was flown from automate to electronic clearing process. Cheque Imaging & Truncation System (CITS) is an image-based cheque clearing system, which replaced the physical cheque with electronic information, flowing throughout the clearing cycle. This process eliminated the actual cheque movement in cheque clearing and reduced the delays associated with the physical movement of cheques.

When considering the protection given to the customers of the usage of cheques, a person who may cross a cheque can pass on a perfect title, he hold the bill free from defects in the title of prior parties and he can enforce payment against all prior parties. On the side of Lanka clear, they shall be responsible for the rules, procedures, roles, responsibilities, duties and function of the CITS participant.

Most of the cheques are dishonored since the cases of cheque bounce which are common in these days. Moreover it can be identified types of cheque frauds namely as,

- Counterfeit - copy cheques printed by various methods on non-bank paper to look exactly like genuine cheques and drawn by a fraudster on genuine accounts.
- Forgery – a genuine cheque that has been stolen from an innocent customer and used by a fraudster with a forged signature.
- Fraudulently altered- genuine cheque that has been made out by the genuine customer, but a fraudster has altered the cheque in some way before it is paid in, e.g.by altering the beneficiary's name or the amount.

There are many incidence had occurred on the offence of fraudulently altered. A suspect who had altered the value of a cheque to 985,000 from Rs. 2650 and also attempted to cash Rs. 972,000 on a stolen cheque as reported on Lanka Newspaper.com (2005). It is reflected that issues in relation to the cheque clearing process have been increased nevertheless the IT security infrastructure for the financial institutions and customers becomes vital in order to prevent risk and threats. Under the electronic transaction, the risk can be mitigated through the use of digital signatures. Along with that LANKASIGN (authentication for the use of digital signature) has been gathered with CITS.

Preventive measures have been taken by implementing domestic rules and regulation on forgery, fraudulently altered and cheque bounce. Some of them can be identified under s.401 in penal code that issuing cheques without fund is a criminal offence and s. 25 of the Debt recovery Act in relation to the offence commit by the drawer. Counterfeit is another mode of fraud which commits with the assistance of advance technology.

The advance technology needed to be recognized in order to prevent such impediments. The ultraviolet (UV) printing is being advanced as emerging technology in relation to the cheque security features. The functional

UV cheque authentication process has been launched by India, Malaysia and Nigeria in current contest. The obvious benefit of such features is that they help to detect and discourage fraud: Many would-be cheque forgers fail because they are simply unaware that such items are present; others are deterred by the difficulty of printing a convincing fake.

The cheque imaging devices (cheque scanners or reading devices) are increased with the development of cost effective UV cameras. UV stands to benefit the banking system as shorten the time to clear the cheques and also identify fraudulent cheques, and places tremendous pressure on the accepting bank to detect forgeries on Day One. However UV is difficult to prevent hard figures on fraud since it is in working process. In contrast to above that there exists a clear correlation between the use of advanced electronic clearing techniques and a reduction in successful fraud attempts. Computer assisted verification can be accomplished by visually inspecting normal and UV scanned images on a display, and flagging suspect cheques. Moreover, machine-readable UV allows greater precision. Protection is covered from both alteration and forgeries at the same time since different techniques under the UV printing linked with machine reading.

It is observed that the major limitation on UV security feature was the lack of proper application to read it by machine until recently, which was adjusted by fitting UV cameras into the cheque scanners.

The more common methods of UV cheque verification are recognized as UV scatter spray, UV fiber paper, printed UV background, printed UV logo, UV serial number and 2D bar code.

- UV scatter spray- Spots of UV ink are spattered randomly on the cheque. The cheque is valid only with the presence of UV.
- UV fiber paper – ultraviolet fibers are included in the paper itself which is similar to the technique use in notes. It is given the higher protection since it cannot be reprinted on fake papers.
- Printed UV background- patterns on the background which made of difference designs, strips of waves with UV ink in cheque except in the key areas such as amount and space of the signature.
- Printed UV logo- A logo is printed across sensitive areas of the cheque or in specified locations. It completely makes difficulties on forgeries.
- UV serial number- a set of numbers in a particular order, printed with the VU ink which reflect a specified code similar to MICR in order to prevent forgery.
- 2D bar code- information is stored in the ways of both horizontally and vertically in a graphic image in order to hidden from human eye.

The recognition of aforesaid factors will guide to the sophisticated paper base payment system with the assistance of advance technology in order to protect the customers of the usage of cheques from the cheque scam. Successful implementation to be executed by amending the provisions in the Payment and settlement Act in order to promote, payment system safety, control risk and expand the transaction with the medium of cheques to the international contest since the part of the electronic payment system namely mobile payment service shall be used only for domestic transactions.

When considering the further protection and the accessibility on the side of the customer of the usage of cheques, it seems that service on the bank in relation to the cheque needed to be further reaches to the customers of the usage of cheques specially in the rural areas (developing areas) in Sri Lanka.

An alternative for the above issue would be the post office. Nevertheless according to the post office ordinance, Banking Act no30 of 1988, payment settlement Act no 28 of 2005 or monetary law Act no 58 of 1948, it has not been granted the post office to carry out banking services to the customers of banks. In contrast to the domestic law in Sri Lanka, it would be a great advantage if the customers of the bank can reach to their nearest post office instead of reaching to the bank to encash their cheqeus in order to prevent forgery, fraudulently altered cheques and prevent from stolen them. Similarly it would be better to withdraw or deposit money in their bank account. Sri Lanka post has been serving their quality postal services and familiar to customer. It has been covered by establishing post offices throughout the island. According to the statistics, Sri Lanka post has a total of 4737 post offices in the whole country. It reflects a post office for every 14 kilometer radius. This would be benefits for specially those in rural areas who may live miles from the nearest bank branches. As the result of that possibility to select the alternative would be the nearest post office.

According to the objectives of the Sri Lanka post, it has been declared that to improve the relationship and cooperation among customers, postal employees and other stake holders involved in Sri Lanka Post and Maintain financial stability within the postal network which will give linkage in relation to the objective of the Central Bank of Sri Lanka. Financial system stability requires a stable macro-economic environment, effective regulatory framework, well organized financial markets, sound financial institutions and safe and robust payments infrastructure. The maintenance of financial stability entails the prevention, detection and reduction of threats to the financial system as a whole.

In Sri Lankan contest most people willing to encash money through cashiers rather than using machines with the help of passbooks issued by banks although the electronic payment system is existence. Many elderly people have not the clear knowledge on the electronic payment system there by still rely on the physical cash withdrawal, deposits cheques.

The recent advancement for the growth cheque clearing is that the cheque clearing at post office branches. This system, has been execute by the Hongkong and Shaghai Bank Corporation (HSBC), has commenced by United Kingdom (UK). Along with that some institutions including NetWest Lloyds TSB and Halifax bank Company had commenced service on cheques paid through post office braches. HSBC current account holders will soon be able to make cash deposits and check balances at the Post Office. It has been built a grip with the post officer in order to bank's customers to access their account at the post office branches. According to the branch banking of the HSBC, it provides services available at post office branches. Services are introduced namely as check customer's balance on their current account, withdraw cash from their current account and deposit cash into their current account. Moreover the customers have been allowed to deposit cheque using a pre -printed HSBC credit slips. It shortens the time than clearing them at the HSBC branches. "Certain circumstances, subject to status, we may offer a cheque encashment service at Post Office branches to customers who are unable to use a Chip and PIN card." as reported on HSBC.

That would be better alternation in payment system in Sri Lanka to enhance the transaction via the usage of cheques parallel to the electronic transaction. Moreover the Sri Lanka post transacts with HSBC as the agency services.

Commencing such activity will appreciate the usage of cheques annually. According to the operational highlight of the annual report 2013/14 in LankaClear has shown that Rs. 7228 billion total value of cheques had been cleared. As chief executive officer of lankaClear has mentioned that the volume of cheque cleared during the financial year of 2013/14 was 48.5 million, which was increase of 2.4% compared with previous financial year. According to the statistic the cheques are still in the vital position and preferred for non-cash payment system.

Considering the legal environment it is needed to be strengthening domestic law with regard to the frauds on usage of cheques. The holder of the cheques is received the protection given it from the cheque itself when it is crossed, not negotiable or drawing it as account payee only. In such situation it is more difficult for fraudster to steal and encash from the bank. Provided that some situation where altering a genuine cheque to add an extra name to a payee line without any of the original detail being removed. Similarly there is a high amount of risk in relation to the cash cheques since those are paid for the bearer instead of depositing on an account. It will generate a loss and the threat for the actual owner of the cheque holder. On the other hand it is waived the responsibility of the paying bank. Nevertheless protection is available for paying bank, if the bank has made the payment in good faith without negligence during the course of the ordinary business of the bank. In the last resort protection is lost on the side of the usage of the actual cheque holders.

III. ENACTMENT OF DOMESTIC LAW

In Sri Lanka there many legislative enactment have been imposed to formulate, adopt and monitor the implementation of a payment system policy. The CBSL is the sole authority to maintaining financial system stability. The payment and settlement Act no28 of 2005 which is the Act provide regulation on the CITS and legal provisions are placed under the Act. The general direction of the Act is not in derogation of any other written law, rules and regulation of the clearinghouse (LankaClear). Moreover it is recognized that electronic presentment of cheques and all related matters, including the requirements for valid presentment, collection, retention of cheques, the dishonour of cheque so presented and responsibilities of bankers. Thought the protections of customers are covered in the Act, it has not been declared what type of protection to be given for the aggrieved customers of the usage of cheques. The Debt Recovery Act no 02 of 1999 is linked with offence commits by the account holders by which they are charged under this Act. Any person who draws, a cheque knowing that there are no funds or not sufficient funds in the bank to honour such cheque, shall re guilty of an offence under this Act and shall on conviction by a

Magistrate alter summary trial be liable to punishment. Moreover the Penal Code of Sri Lanka is also stated that issuing cheques without fund is a criminal offence.

The function on the cheque clearing system will be able to streamline and extended protection for the cheque holder can be grant by taking the contribution of the post office branches which would minimize threats by ensuring the easy access to the clearing branches. Until now the Sri Lanka Post has not the clearing house membership to execute clearing functions. According to the post office ordinance ordinance, there is no definite provision on cheque clearing and its functions as well.

According to a function as to promote the standards of products and maintain a service of international standard that would reflects opportunity to enhance the quality and extend their service by which it shows a path to make combination with banks. There is a possibility to expand the dimension of Sri Lanka post and introduce banking affairs with regard to the cheque deposits and encash them. It is needed to be executed an amendment to the postal ordinance. Section 10 (1) of the ordinance on interchange of money orders and postal orders, the manner in which and condition subject to which such order issued and paid, comes under arrangements with other countries for the transmission of postal article.

IV. ENACTMENT OF INTERNATIONAL LAW

Ghana- with regard to forgery and dud cheques, Bank of Ghana enforce regulations on the application fines and strict application of the sanctions. It is an offence under the law of Ghana to issue cheques knowing that it would contain an insufficient balance in the account to support to the amount on the drawn cheque, defraud and countermand cheques issued subsequently by the holder without the good faith. Any person found guilty shall be fine or imprisonment under the section 313A of the criminal offence Act no 29 of 1960.

India- section 138 of the Negotiable Instrument Act 1881 directs toward the cases of dishonor cheque which are the criminal offence and is punishable by imprisonment not exceeding two years or with the monetary penalty or with both. The offence of bounce chaques is given the same legal capacity by the section 138 of the Act along with cheating under the section 420 of the penal code. It has been given the opportunity for the payee to file a civil case to initiate money recovery procedure in the civil court from the drawer under order 37 of the code of civil procedure (1908).

United Kingdom - with regard to the non-cash payment The Bill Of Exchange Act 1882 and Cheque Act 1957 and 1992 cover the definition and the scope of the cheque.

Singapore- the law relating to dishonor cheque is being considered under the section 415 of the Penal Code. Moreover any person found guilty for an offence of forged cheques for the purpose of cheating is punishable not exceeding 02 years under the section 420 of the penal code. It is wholly inoperative where a signature on the cheque is forged or places a signature without the authority of the actual cheque holder under section 24(1) of the Bill Of Exchange Act.

V. KEY FINDINGS.

Usage of cheque in current contest acts as an integral part in Sri Lanka's payment system. With the introduction of advance technology (CITS has replaced the automated cheque clearing system), the growth of the cheque usage has been appreciated. Nevertheless electronic payment modes are existence. While the electronic payment mechanisms provides number of benefits for the customers, there is a definite percentage of usage of chques still engaging with traditional paper base payment system. According to the statistics in 2013/14 in LankaClear on cheque presented for clearing has been increased in 2.37% in contrast to 2012/13 Although the cheque holders have been given the protection, it is still needed to be upgrade. Ultra violate printing as a cheque security feature needed to be recognized in Sri Lankan contest. Except the rules and regulation on banking and certain legislative provisions in relation to the cheques under the negotiable instrument, there is no any specific and effective mechanism to act for the offence in relation to the usage of cheques. Moreover the lack of proper access to bank branches affects to the usage of cheques specially in rural areas and also it affects to many elderly people who transacting with banks. Alternative method has recognized. The withdrawal and deposit of cash through the cheques at post office braches are commenced in the banking industry in the world although Sri Lanka has not implemented it yet.

VI. PROPOSAL.

The existing legislative provisions governing the cheque payment system contains certain loopholes. It is needed to be amending the legislation in order to cover the efficient and effective legal protection in favor of the customers of usage of cheque. Outdated legal provision in the aforesaid legislations should be amended otherwise it may break streamline on the cheque payment system. It would be obvious amend the Post office ordinance in order to giving banking function such

as cheque deposits and encash the cheques by which it will be given effective advantage to customers. HSBC has given current account holders to access to their current account and withdraw cash using a cheque at post office braches. This would be a comfortable operation on the side of cheque holders in Sri Lanka. The advance cheque security feature of Ultraviolet printing should be introduced apply to the new cheque clearing mode called Cheque Imagine and Truncation System.

Moreover public awareness programs on proper usage of cheque in the paper base payment system and preventive measures from the forgery, counterfeit, stole and fraudulently altered cheque are not sufficient enough to educate the customers of the banks and are still in the primary level in current contest. Implementing effective advance awareness among customers, institutions, corporates and administrative bodies on threats towards the usage of cheques and prevent from those calamity is a contemporary requirement. The awareness programs needs to be concurrent to the general public in order to educate them without any effort. Another emerging trend on the cheques through the technology is recognized as a way sending a digital image of the physical cheque via mobile phone from the point of customer to the bank. In order to establish such type of facility, it is vital for government to take steps.

VII. CONCLUSION

It is clear that payment system in Sri Lanka is a combination of electronic payments and the paper base payment system. Even though the usage of cheques has the definite percentage, the recent orientation moves towards to the electronic payment. The existing legal framework on the usage of cheque should further strengthen in order to mitigate errors forgeries and corruption in the cheque payment system. Moving toward to Sri Lanka Post makes formidable task to expand the usage of cheques specially in rural area in Sri Lanka.

ACKNOWLEDGMENT

This research was supported by Payment and Settlement department of Central Bank. I thank to those who provided insight and expertise that tremendously assisted the research. I would also like to show my gratitude to those for sharing their knowledge during the course of the reseach.

BIOGRAPHY OF AUTHOR

The Author is a third year undergraduate of Kotalawala Defence University. The research, which he has presented to the 8th International Research Conference, related to the usage of cheques under the category of payment system in Sri Lanka. The inclusion of the research consists with the new legal and regulatory environment for the growth of paper base payment system. In addition to that the paper revealed the issues relate to usage of cheques in paper base payment system and it has been presented some suggestions to upgrade it.

REFERENCES

Barnes, J & Dwarkin, T. M. (2000) *Law for business:* Irwin Mcgraw Hill

Goode, R. (1995) *Commercial Law:* Penguin books

Goldman, A. J. & Sigismand, D. *Business law: Principles and Practices:* Houghton Mifflin company

LankaClear (2015)*SL Rupee cheque clearing/ overview*.[online] Available from*:* http://www.lankaclear.com/product_service/1-overview [Accessed 13/06/2015]

LankaClear (2015) *common card and payment switch.* [online] Available from: http://www.lankaclear.com/product_service/10-overview [Accessed 13/06/2015]

Sri Lanka. Payment and Settlement Act no 28 of 2005. Section 44(g) 2005

Post office ordinance no 11 of 1908. Section 10 (1)(g) 1908

Reeday. T. G (1976) *The law relating to banking.* Cheque. Chapter 13. London: Butterworth &co. ltd

Sri Lanka, Bill of exchange ordinance no25 of 1927. Section 73. (1927)

Sri Lanka, LankcClear (pvt). (2006) *Annual Report.* [online]. P 01. Available from: http://www.lankaclear.lk/anual_report/10/2012-2013.pdf [Accessed 13/06/201]

Sri Lanka, Payment and Settlement Department (2006) *General Direction – Cheque Imagine and Truncation system. Central Bank* http://www.cbsl.gov.lk/pics_n_docs/09_lr/_docs/directions/psd/6_GenDirection_2006e.pdf

the Cheque andCredit Clearing Company, (2012) *cheques and cheque clearing facts*.[online] p.05. Available from: http://www.chequeandcredit.co.uk/files/candc/press/cheques_the_facts_2012.pdf [Assessed13/06/2015]

Technologybanker (2013) *New improved cheques clearing system introduced by CBN.* [online] May 06. Available from: http://www.technologybanker.com/it-ops/new-improved-cheque-clearing-system-introduced-by-cbn [Accessed 14/06/ 2015]

Ultraviolet cheques security. *Understanding a new era of automated fraud prevention.* [online] Available from: https://www.google.lk/?gws_rd=ssl#q=ultraviolet+cheque+security [Accessed 13/06/2015]

UV cheque authentication process. *Prevention of fraud in inward clearing* [online] Available from: https://www.google.lk/?gws_rd=ssl#q=UV+cheque+authentication+process+in+sri+lanka [Accessed 13/06/20115]
Thegguardian(2012) *HSBC joins the banks using post officer's counter culture.* [online] September 2015. Available from:

https://www.google.lk/?gws_rd=ssl#q=UV+cheque+authentication+process+in+sri+lanka [Accessed 13/06/2015]

Inverting the Paradox: Empowering Natural Resource Management in the Foreign Investment Regime in Sri Lanka

CS Gunasekera
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
sisimali92@gmail.com

Abstract **-** *Foreign investments, often serve as major catalysts in economic development. For a developing country like Sri Lanka rich with natural resources, such resources can be used as key means of attracting huge inflows of foreign investments. However, unplanned and unsustainable natural resource exploitation at foreign investor hands would give rise to a range of environmental, economic and social issues thereby creating drastic impacts on sustainable national development. The objective of this research is to evaluate the comprehensiveness of the existing Sri Lankan foreign investment regime in facilitating optimal use of natural resources and put forward recommendations for further development of law in this field in the light of relevant international standards. Research will be qualitative based on books with critical analysis, journal articles, conventions, statutes, hanzard reports, case laws and data collected from legal experts, policy making authorities and civil society victims. Multi-lateral investment and trade instruments such as GATT and GATS encourage sustainable and optimal use of natural resources in the context of international investments. Given the geophysical characteristics of Sri Lanka this paper analyses how optimal use of natural resources would fuel national development. Although the Sri Lankan foreign investment regime provides substantive safeguards to mitigate environmental pollution caused by foreign investment projects, it has failed to address optimal use of natural resources by foreign investors. This research proposes a mechanism to integrate natural resource management into the legal regime governing foreign investments in Sri Lanka. Accordingly, the study examines how international environmental law principles i.e. inter-generational and intra-generational equity, public trust doctrine and precautionary principle can be incorporated into domestic legal framework in terms of policy decisions and judicial activism. Further, ensuring foreign investor compliance into these standards and monitoring such compliance is required. Hence, proposed mechanism proves that if effectively managed, optimal use of natural resources by foreign investors would boost Sri Lankan national development. In absence of much legal authority in this regard, this research can be used as a guideline for multi disciplinary professionals like policy makers, lawyers, judges, investment consultants and engineers to enhance professionalism in the respective professions.*

Keywords *- Natural Resource Management, Foreign Investments, Sustainable Development*

I. INTRODUCTION

Sri Lanka is a developing nation rich with natural resources. However, owing to the lack of adequate capital, technology and knowledge, most often, the use of natural resources in its development process has been minimal. In this context, foreign investments can be recognized as one of the most viable solutions available for the exploitation of natural resources in the country's strive for economic development.

Foreign investments can be classified as Foreign Direct Investments (FDI) and Portfolio Investments. (Sornarajah, 2010) For the purpose of this paper, the sole consideration will be placed on FDI. Portfolio investments being concerned with the investment in financial assets, it is difficult to identify a considerable impact of this type of investment on the natural resources of the host state.

However, it should be noted that not all investments pave the way for sustainable development especially where the domestic regulatory mechanisms are ineffective and inadequate. (IISD, 2014) Accordingly, the poorly calibrated exploitation of natural resource at the hands of foreign investors would give rise to a number of environmental, economic and social issues. Consequently, natural resources would become a curse to the country rather than being a blessing. Therefore, promoting the right type of investment plays a vital role in the sustainable development of a country.

In this backdrop, the main argument put forward by this paper isif properly harnessed, the exploitation of natural resources by foreign investors would lead to sustainable development. For this purpose, this paper proposes a mechanism to integrate the natural resource management into the legal regime governing foreign investments in Sri Lanka. Accordingly, this paper first examines the role played by foreign investments in the economic development of a developing state, secondly how the unsustainable exploitation of natural resources by foreign investors impede sustainable development,thirdly, the repercussions of unmanaged exploitation of natural resources in the Sri Lankan context, and fourthly the importance of integrating

natural resource management in foreign investment regime. Fifthly this paper analyses how the natural resource management has been integrated into the foreign investment regime in the international sphere followed by the existing domestic regime. Ultimately, a mechanism to integrate natural resource management into the domestic foreign investment regime will be proposed.

II. THE ROLE PLAYED BY FOREIGN INVESTMENTS IN THE ECONMY OF DEVELOPING COUNTRIES

Sornarajah (2010) defines foreign investments as the " transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets." The classical economic theory asserts foreign investments as being wholly beneficial to the host state. Since foreign investments facilitate the flow of foreign capital, the domestic capital available in the host state can be used for otherpurposes in the public interest. The technology which is not available in the host state is also introduced thereby triggering its diffusion in the host state.

Further, such foreign investments open a wide range of new employment opportunities for the host state employees. Once such individuals are employed by Multi-national Enterprises(MNEs) they will be able to upgrade their skills acquainted with advanced technology, management etc. Subsequently, when such labour moves to other companies including domestic firms or become entrepreneurs so learned skills can be transferred to the host economy. And also it can be observed that the infrastructure facilities in the host state improved to accommodate huge inflows of foreign investments would be of muchbeneficial to the host state economy as a whole.(Sornarajah, 2010) Hence foreign investments are often being perceived as beneficial to the sustainable development of developing states. For Singapore though devoid of natural resources reached the height of its development through foreign investments. In contrast

Broadly speaking, many regional and multi-lateral investment instruments are rooted on the tenet that foreign investments contribute to the development process of the host state. For example the Multilateral Investment Guarantee Agreement promotes insurance of foreign investment against political risks on the basis that it would set aside barriers to international investment and strengthen the development process. (Shihata, 1988). Further, the World Bank's Guidelines on the Treatment of Foreign Direct Investment issued in 1992 is also based on the classical theory.

Moreover, it is evident that arbitral tribunals have also given recognition to this proposition. For example in Amco v Indonesia (1984) 23 ILM 351 the arbitral tribunal was on the opinion that "to protect investments is to protect the general interests of development and developing countries."

III. DOES THE UNSUSTAINABLE EXPLOITATION OF NATURAL RESOURCES BY FOREIGN INVESTORS IMPEDE SUSTAINABLE DEVELOPMENT?

Natural resources could be either renewable or non-renewable. A wide range of resources including forestry, water, fauna and flora and marine resources fall within the scope of renewable resources whereas minerals can be classified as non-renewable resources.

However, most of the resource rich countries are developing countries.Given the lack of adequate capital, technology and knowledge, most often, they do not have any means to make use of their natural resources in the country's development process. Hence, resource rich developing countries often resort to foreign investments for the purpose of exploiting their natural resources. For example developed countries like Canada, and developing countries like Chile and Mexico have successfully made use of inward FDI in mining industry to reach economic development.

However, the realization that foreign investments promote economic development has led the so called developing countries to attract foreign investments as much as possible. Hence the host states often tend to liberalize their regulatory regimes so as to create an investor favourable climate.Accordingly, environmental standards are often lowered. (Viñuales,2011)This may either result in environmental pollution or excessive natural resource exploitation. It is this second repercussion that will be analysed right throughout this paper.

The excessive exploitation of natural resourcescan have adverse impacts on the host economy as a whole. The finite character of non-renewable resources has the perils of leaving the producers in a vulnerable state once when the stocks are completely depleted. Further, the 'boom and bust cycle' caused by the price fluctuations in the international market of main commodities exported by resource rich countries often drastically affects on their economies. In addition, when a country starts mass scale exporting of suddenly discovered natural resources

then such nations are more vulnerable to the 'Dutch disease' .(Ravago,Roumasset, Burnett, 2008).

Further, the over exploitation of resources by foreign investors would deprive the domestic entrepreneurs from using the same resources and they would be left unemployed. It would adversely affect the poverty rate of the host country. Such over exploitation resulting in the depletion of natural resources would also amount to adverse climatic changes and affect bio diversity, cultural heritage sites, extremely sensitive environments etc. Ironically, the natural resources would impede the development process of the host state.

Many of the African countries provide home for large endowments of natural resources such as natural gas, oil, gold and diamond etc. Natural resources thus act as the key factor for attracting huge inflows of foreign investments. But most of these countries are still struggling with no considerable economic development. According to the United Nation's Human Development Index (Human Development Report 2005) Which summarizes information on income, health, and education across countries worldwide, most of the oil producing African countries such as Equatorial Guinea, Gabon, The Republic of Congo, Yemen, Nigeria, Angola and Chad are among the lowest ranked countries. Hence it is understandable that investment in natural resources does not per se contribute for the development process of the host state. Paradoxically it would rather be an impediment on the development process .

IV. REPERCUSSIONS OF UNMANAGED EXPLOITATION OF NATURAL RESOURCES IN SRI LANKA

In the Sri Lankan context unplannedand poorly calibrated natural resource exploitation at the hands of foreign investors has given rise to a wide range of environmental, economic and social issues thereby creating drastic impacts on the sustainable national development. For the purpose of this essay two such instances will be analysed.

In Bulankulama v The Secretary, Ministry of Industrial Development (also known as the Eppawala case)[2000] 3 Sri L. R. 43the government entered into an joint venture agreement with a foreign company Freeport MacMoran Resources Partners of United States to mine the phosphate deposits in Eppawala area.According to scientific evidence the phosphate deposits in Eppawala region amounted to 25 million metric tons.As laid down in the agreement the mining was to be carried out at a proposed rate of 1.2 metric tons for the first 12 years and thereafter at 900,000 metric tons per year. Accordingly the whole phosphate deposit would be completely depleted within a period of thirty years and thereafter Sri Lanka will have to import phosphate for its needs.

In addition the petitioners contended that owing to the exploration and exploitation of the phosphate deposit around2,600 families or 12,000 persons, including themselves, are likely to be permanently displaced from their homes and lands.According to scientific evidence environmental pollution and severe health issues are likely to be caused due to the large scale mining activities and the construction of factory for the production of phosphoric acid and sulphuric acid in Trincomalee.

Eppawela phosphate deposit is located in an area of extreme historical importance and of archaeological value in the proximity of monuments close to the Cultural Triangle sites with the Sri Mahabodhi and Ruwanweli Saya. Under the proposed large scale mining activities Jaya Ganga or Yoda Ela irrigation systems would also be adversely affected. These cultural monuments and ancient irrigation works are non renewable culturalheritage which reflect the ancient civilizations and therefore should be preserved for the benefit of future generations.However, the court giving due consideration to all these issues ultimately rejected the proposed project.

The clearance of the Somawathiye National Park by the US based Dole Food Company for the purpose of cultivating bananas is another++r instance for the unplanned and unsustained exploitation of natural resources by foreign investors. Somawathiye National Park provides home for varying species of fauna and flora and also it is of vital importance as a national heritage site. Hence the so called clearing would endanger the lives and habitats of wild animals that live in this area. Further adverse environmental issues were likely to result from such clearances. In terms of S. 3 and S. 6 of the Fauna and Flora Protection Ordinance No 1 of 1970 clearing of such national parks is highly prohibited. However, the company has taken over more than 10, 000 acres and around 900 hectareswere cleared. The environmental lawyer Mr Jagath Gunawardena noted that such a national park cannot not be cleared even after conducting an Environmental Impact Assessment (EIA). However, owing to the strong objections raised by the environmentalists ultimately the project was abandoned.

.

V. THE IMPORTANCE OF INTEGRATING NATURAL RESOURCE MANAGEMENT IN THE FOREIGN INVESTMENT REGIME

The discussion so far put forward by this paper establishes what matters most is not the quantity but the quality of foreign investments. Foreign investments can have both positive and negative economic, social and environmental impacts. What is more important is promoting the right type of investment. This could be achieved by means of a stable regulatory regime.

Hence, it is obvious thatif properly managed the optimal use of natural resources by foreign investors would boost the national development in Sri Lanka.Instead, Natural resources are often regarded as a curse merely because most resource-rich countries do not have a proper strategy for the sustainable exploitation of natural resources. For example it can observed that some resource rich countries have become successful in achieving long- term economic development whereas some other counties still struggling with no considerable development achieved. For example when comparing oil rich countries which are favourable destinations for foreign investments one can notice that around thirty years ago both Indonesia and Nigeria had comparable per capita incomes. But today Indonesia's per capita income is four times that of Nigeria. (Ross, 2003)

In this backdrop, an undeniable obligation is vested with the host state to devise a code of conduct for MNEs to follow in exploiting the host state natural resources. (Mabey and Mcnalley, 1999) Integration of natural resource management into the foreign investment regime in Sri Lanka,therefore, is of vital importance to facilitate the sustainable exploitation of natural resources by foreign investors.

VI. INTERNATIONAL INSTRUMENTS

This paper in this sectionanalyses how the optimal use of natural resources by foreign investors has been given recognition in the international context. On one hand, this notion has found expression inseveral international instruments and on the other hand many states seem to have incorporated the standards laid down in the so called international instruments into their domestic regimes.

Talking about international instruments, the OECD Guidelines for Multinational Enterprises (2000) can be regarded as the one of the world's prominent corporate voluntary code of conduct. The Environment chapter of the Guidelines lays down some key guidelines to be followed by MNEs to manage the sustainable use of natural resources. Accordingly, the companies are required to establish a system of environmental management which includes collection and evaluation of timely information regarding environment, establishing and monitoring measurable objectives targeting improved environmental performance. The Guidelines also require the companiesto conduct Environmental Impact Assessment (EIA), adopt environment friendly technology which enhances the company's environmental performance and maintain contingency plans for preventing, mitigating and controlling environmental damage caused from their operations.

The UN Global Compact (2000) is another voluntary initiative,established to guide the private sectors for the accomplishment of Millennium Development Goals adopted by the United Nations General Assembly (UNGA)in 2000.It lays down ten cardinal principles in the areas which are possibly being affected by the business activities that is to say human rights, labour, environment and anti-corruption. In respect of environment this initiative requires the businesses to adopt a precautionary approach to meet environmental challenges, undertake to promote environmental responsibility, and develop and diffuse environmentally friendly technologies. Furthermore, the UN Principles of Responsible Investmentlays down principles for investors pertaining to the exploitation of natural resources.

It should also be noted that 'non lowering standards' clauses are incorporated into regional trade and investment instruments for the purpose of averting the host state from lowering their environmental standards as a means of attracting foreign investors.For example Article 1114(2) of North American Free Trade Agreement(NAFTA) which is a non-binding approach to a "non-lowering ofstandards" on environmental protectionrecognizes that it is"inappropriate to encourage investment by relaxing domestic health, safety or environmental measures."

In addition, it can be observed that many environmental law principles uphold notion of natural resource management. Accordingly, the concept of sustainable development as defined in the Brundtland report(World Commission on Environment and Development, 1992) provides that it is the "development which meets the needs of the present without compromising the ability of future generations to meet their own needs". The intergenerational and intra-generational equity as recognized in Principle 3 of the Rio Declaration on the Environment and Development 1992 provides that "The

right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations" Similarly Principle 2, 3 and 4 of the Stockholm Declaration(1972) emphasizes on the management and conservation of natural resources andnatural eco systems for the benefit of present and future generations. Principle 5 provides for the management of non–renewable resources to prevent its future depletion. Hence,these principlesthereby impose an obligation to effectively manage natural resources for the benefit of present and future generations.

The precautionary principle as embodied in the principle 15 of the Rio Declaration imposes an obligation to foresee and assess environmental risks, to warn the potential victims of such risks and take measures tomitigate such risks. Most often this precautionary principle is put into action in terms of the Environmental Impact Assessment. According to the principle 17 of the Rio Declaration "Environmental impact assessment, as a national instrument, shall beundertaken for proposed activities that are likely to have a significantadverse impact on the environment and are subject to a decision of a competentnational authority."

Further,in terms of the principle 11 of the Rio Declaration the state parties are required to enact legislations and environmental standards which promote the regulation of the optimal use of natural resources.Likewise, Principle 13 of the Stockholm Declaration requires the state parties to integrate resource management into development planning with a view to preserve and improve the environment. These environmental law principles are of vital importance because many host states seem to have incorporated them into their foreign investment regimes to enhance the natural resource management.

For example, in Russia the Constitution itself in Art 42 endorses the sustainable use of environment and its resources. Foreign investors seeking entrance to Russia are required to adhere into domestic environmental regulations. Accordingly, the Law 'On Environmental Protection' (2002), Russia's main environmental legislation, in a separate chapter lays down general requirements for various economic activities including the selection of location, construction and operation of various types of facilities, and general features of the legal regimes pertaining to specially protected areas. Furthermore, foreign investors are required to obtain environmental permits and also to adhere into the concept of the State Environmental Expertise (SEE) and EIA. Environmental fines are incurred for the non compliance with Russian environmental laws. In addition the Law on the Protection of Marine Biological Resources the new Law on Subsoil Resources are currently in the process of negotiation before the Russian Parliament.

Similarly, Canada has taken a number of steps to ensure thesustainable use of natural resources by foreign investors in the mining industry. The Mineral and MetalPolicy of the Government of Canada (NRCan, 1996) is in compliance with sustainable development goals. The Canadian Environmental Protection Act is the main legislation which regulates the sustainable use of natural resources at the federal level. The foreign investors are also required to act in compliance with the Environmental Code of Practice for Metal Mines(2009). Environmental Impact Assessment (EIA) is mandatory for most of the large scale projects in Canada. Moreover, in cases where the indigenous communities own mines and mineral rights investors must gain title or lease by paying royalties to the community or entering into a Impact Benefit Agreement(IBA) with the community.

VII. SRI LANKAN LEGAL REGIME

The foreign investment regime in Sri Lanka has provided for numerous substantive protections to mitigate environmental pollution caused by such operations.However, it can be observed that it has not become that successful in promoting the optimal use of natural resources by foreign investors.

The Natural Resource management and conservation is provided in terms of S.17 of Environmental Environment Act No 47 of 1980 (as amended). Accordingly, it is mandatory for the Central Environment Authority to recommend to the Minister 'the basic policy on the management and conservation of the country's natural resources in order to obtain the optimum benefits there from and to preserve the same for future generations and the general measures through which such policy may be carried out effectively'

The precautionary principle has been incorporated in to the domestic system in terms of the Environmental Impact Assessment(EIA) as laid down in the part 1VC of the Environmental Environment Act No 47 of 1980 (as amended).Accordingly, an obligation is imposed to conduct an EIA prior to the commencement of the project and identify the potential environmental impacts that can be caused due to such project. Hence the

mitigatory measures can be incorporatedin to the planning process prior the commencement of the project thereby reducing the possible environmental impacts. The EIA can thus be used to identify the most feasible area for the proposed project. The Board of Investments requires theses mechanisms to be adhered into by the foreign investors seeking entrance to Sri Lanka.

The Strategic Environmental Assessment (SEA), though not legislatively incorporated, is currently conducted in different districts of Sri Lanka.Accordingly, a whole district is subjected to the environmental impact assessment and ultimately the particular industries that should be located in different areas of the district is determinedgiving due consideration to its natural resource concentration. Consequently, the industries can be located in areas which are aptfor such industries and rich with natural resources which are useful for such industries. Such SEA has been carried out in Northern Province, Hambanthota and Trincomalee.

In addition it can be observed that the judiciary has also given expression to the environmental law principles dealing with natural resource management. The concept of sustainable development was upheld in the Eppawala case. Similarly,the precautionary principle has also found expression in the said case.

The principle on intergenerational and intra- generational equity upholds the rights of future generations whilerecognizing the rights of the present generation to exploit natural resources. Justice Amarasinghe in Eppawala case referring to the intergenerational and intra-generational equity in the context of the sustainable use of phosphate deposits in Sri Lanka was on the opinion that

"International standard setting instruments have clearly recognized the principle of inter-generational equity. It has been stated that humankind bears a solemn responsibility to protect and improve the environment for present and future generations. (Principle 1, Stockholm Declaration) . The natural resources of the earth including the air, water, land flora and fauna must be safeguarded for the benefit of present and future generations. (Principle 2, Stockholm Declaration). The non-renewable resources of the earth must be employed in such a way as to guard against their future exhaustion and to ensure that benefits from such employment are shared by all humankind (Principle 5, Stockholm Declaration) The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. (Principle 3, Rio De Janeiro Declaration). The inter-generational principle in my view, should be regarded as axiomatic in the decision making process in relation to matters concerning the natural resources and the environment of Sri Lanka in general, and particularly in the case before us. It is not something new to us, although memories may need to be jogged"

VIII. INTEGRATION OF NATURAL RESOURCEMANAGEMENT INTO THE FOREIGN INVESTMENT REGIME.

Given the inadequacy of measures to safeguard the optimal use of natural resources by foreign investors it is of vital importance to devise a mechanism to integrate the natural resource management into the foreign investment regime.

It is therefore recommended to carry out a survey and prepare a list classifying renewable and non-renewable resources. Accordingly the resources to be allocated for foreign investors should be determined after giving due consideration for environmental, economic,social concerns and also in the national interest.

Further it is also required to carry out a screening process and recognize the beneficial and detrimental foreign investments. In this respect the industrial know – how should be given a major consideration. In certain instances the outdated technology brought into the country by the foreign investors give rise to numerous environmental and health issues. Therefore, as the host state Sri Lankan government shouldtake measures to permit the entrance of foreign investors who bring new technology with them. Most of the resource rich countries encounter severe environmental impacts simply because they tend to imitate the economic policies of other highly developed countries. Instead, the prominence should be given for 'cutting edge industries' depending on the geophysical characteristics and availability of natural resources.

The Strategic Environmental Assessment (SEA) should be incorporated into the National Environment Act specifying the required guidelines to be followed in carrying out such assessment. Accordingly, the district should be subjected to an environmental impact assessment and ultimately the particular industries that should be located in different areas of the district should be determined giving due consideration to its natural resource concentration. Such details should be submitted to the Board ofInvestments who will then have to guide and instruct the foreign investors seeking entrance to Sri Lanka as to the exact zones or regions where they locate their projects.

In most instances the advanced and modern technology brought with the foreign investor is not transferred or diffused into the domestic economy. The local employees are not provided with the opportunity of acquiring the skills in management and those associated with the technology.Foreign investors are cautious enough to reserve such know-how and other skills with themselves. Hence joint venture agreements can be introduced in respect of certain significant industries so that domestic entrepreneurs also have a say on such projects. The joint venture system in the context of foreign investmentsis currently operating in India.

In addition it is essential to enact laws giving effect to the international principles on natural resource management. Further the Board of Investments should take measures to ensure the investor compliance with such rules and regulations.

IX. CONCLUSION

Natural resources are a blessing to a developing country like Sri Lanka. As argued throughout this paper, if properly harnessed the sustainable exploitation of natural resources by foreign investors could pave the way for the sustainable development. Hence, a stable legal regime is essential to achieve this objective. However, the foreign investment regime in Sri Lanka does not adequately provide safeguards for the proper management of natural resources. Hence, integrating the natural resource management into the foreign investment regime plays a crucial role in Sri Lanka's strive for sustainable development.

ACKNOWLEDGMENT

The author would like to thank the environmental lawyer Mr. Jagath Gunawardena and Dr Thusitha Abeysekara of Faculty of Law, General Sir John Kotelawala Defence University for the immense support and guidance given in compiling this research paper.

BIOGRAPHY OF THE AUTHOR

Chathurika Sisimali Gunasekera is a third year undergraduate at the Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana. She has previously presented several research papers in both national and international research conferences (India). Her research interests include Administrative Law, Human Rights Law, Environmental Law and Intellectual Property Law. She is also a member of the KDU Mooting Team.

REFERENCES

Amco v Indonesia (1984) 23 ILM 351

Bulankulama v The Secretary, Ministry of Industrial Development [2000] 3 Sri L. R. 43

Abeysekara, TB., *A Proposal for the Protection of Digital Databases in Sri Lanka* (PhD Thesis, University of Exeter-UK 2013) available at https://ore.exeter.ac.uk/ repository/handle/10871/14172 visited on 24/07/2015.

GH, Brundtland, and World Commission on Environment and Development. *Our Common Future: Report of the World Commission on Environment and Development*. Oxford University, 1987.

International Institute for Sustainable Development & United NationsEnvironment Programme. (2014). *Trade and Green Economy: A Handbook.* 3rd edn.Geneva: International Institute for Sustainable Development

National environment Act, Sri Lanka No 47 of 1980

North American Free Trade Agreement1993 9 32 ILM 289, 605)

Ravago M, Roumasset J,Burnett K (2008) Resource management for Sustainable Development of Island Economies. Working paper No 08-04

Rio Declaration on Environment and Development 1992(UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874)

Shihata, I. (1988) The MIGA and Foreign Investment

Sornarajah M (2010) *The International Law on Foreign Investments,* 3rd edn. Cambridge: Cambridge University Press

Corporate Governance of Banks: A Critical Analysis of Sri Lankan Law and Practice

A Edirisinghe
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
aaedirisinghe@gmail.com

Abstract— *Banks play one of the most significant and essential roles in any financial system; the health of the economy and the soundness of banking system go hand in hand. In Sri Lanka the Capital market reforms have taken place since 1990s adopting the Anglo American structure of Corporate Governance. Notwithstanding the reforms several banks faced scandals in recent years, most significant being the failure in Pramukha Savings and Development Bank and the imminent failure in Seylan Bank. Further measures were introduced following the scandals for effective regulation of banks. Currently this area of law is mainly governed by the Banking Act No 13 of 1988 including directives issued thereunder, Companies Act No. 7 of 2007, Codes of best practice and Regulations issued by the Securities and Exchange Commission. The key problem which is sought to be addressed in this research is the banking failures in Sri Lanka. More specifically the study examines whether such failures can directly be attributed to the inadequacies of the corporate governance laws. The objective of the research is to find out the issues prevalent in the law on corporate governance of banking and its implementation with regard to the fact whether such laws co-exist with the traditional socio-political setting in Sri Lanka and to propose necessary amendments and improvements to the same. This research will be carried out based on primary sources viz. relevant acts, codes and international instruments and secondary sources viz. text books, journals, electronic resources, documents of SEC, Central Bank, CSE, Financial Sector Reforms Committee (FSRC) and Annual reports of the banks. The Study concludes that Sri Lankan law on corporate governance of banks is satisfactory and mainly in line with international standards and the problem lies within implementation of such laws since Anglo American Structure of Corporate Governance fails to co-exist with the traditional socio-political setting in Sri Lanka.*

Keywords— *Banks, Corporate Governance, Sri Lanka*

I.INTRODUCTION

"Corporate governance deals with the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment"

- Shleifer and Vishny

Effective corporate governance is an integral part of the modern corporate world. It is important in both global and domestic environment to obtain the full benefits of global capital market, attract long term patient market, increase the confidence of the investors, reduce the cost of capital and ultimately to induce more stable resources of financing (OECD Principles of Corporate Governance).

According to OECD, "Corporate Governance is a set of relationships between a company's management, its board, its shareholders and other stakeholders. It also provides the structure through which the objectives of the company are set and the means of attaining those objectives and monitoring performance".

Corporate Governance of banks is of paramount importance to any economy and shall receive a significant and serious attention in any state, since aproper system of banks is directly co-related with the smooth functioning of the economy. Theeffects of failures of such banks are not limited to its investors and depositors but it can have adverse spillover effectson each and every stakeholder in the economy. The banking crisis in 2007-2008 that threaten to sink the entire global economy re-emphasized the special attention on corporate governance of banks both in developed and emerging economies.

Former studies suggest that thebank failures in emerging economies are largely due to poor risk diversification, inadequate loan evaluation, fraudulent activities and the overall poor corporate governance practices of banks (Winkler, 1998;Haque, Thankom and Kirkpatrick, 2011; Huizinga and Laeven,2009;Basu, 2003; Sundarajan and Balino, 1991).It appears from these studies that the main cause of bank scandals in developing economies is the absence of satisfactory mechanisms for the management, regulation, observation and supervision of banking activities.

Therefore the solution obviously rests within the implementation of a proper mechanism of corporate governance. The corporate governance model shall be consistent with the social, political, economic and historical realities of the country if it is to achieve its

intended purposes. Further the stakeholders of the banks play a vital role in the enforcement of the corporate governance procedures and can act as observers of banking activities(Decisions, Recommendations and other Instruments of the Organisation for Economic Co-Operation and Development,2004)

This research arises from an interest to find out the underlying causes to the banking scandals in Sri Lanka that frequently occurred in recent years causing grave repercussions to the stakeholders in such banks and weakening the public faith towards them.

In Sri Lanka, corporate governance laws have been reformed since 1990s. The salient feature of these reforms is its close alliance with the Anglo American or Anglo-Saxon Structure of Corporate Governance which is prevalent in U.S.A, U.K, Canada, Australia, and the most of other common wealth countries. Despite the reforms several significant banking scandals took place in recent years. The first one is the failure in Pramukha Savings and Development Bank and the second one is the imminent failure in Seylan Bank. This implies that there is a failure in the system of corporate governance relating tobanks in Sri Lanka may it be in the system itself or in its implementation.

Failures of banks are particularly costly to a developing country like Sri Lanka, if it is a systematically important bank; there is a risk of the whole economy being collapsed. Sri Lanka, which has debts piled up for generations to pay, is not in any shape to bear such cost. Hence it is in the best interest of the country's economy that we have a proper legal system to control and monitor the banks. Therefore this research will evaluate the system of corporate governance in Sri Lanka as applicable to banks in the light of recent banking scandals. The study will further examine new measures introduced to govern the banks following the scandals and will evaluate whether they provide an effective framework for the governance of banks. It will ultimately lay down suggestions to improve the value, effectiveness and reliability of the banking system.

A. Methodology

The research was carried out using the qualitative method of research. It is used because the opted research problemrequires understanding, experiencing, describing and comprehensively analyzing the corporate governance structure applicable to the banks. Further deciding whether the failures in corporate governance contributed for the recent banking scandals in Sri Lanka requires an in-depth observation of the corporate governance process.

Theories and the legal framework pertaining to corporate governance of banks were examined based on primary sources viz.relevant acts (Banking Act No 13 of 1988 including directives issued thereunder, Sri Lanka Accounting and Auditing Standards Act No. 15 of 1995,Monetary Law Act No 58 of 1949,Companies Act No.7 of 2007),Codes (Codes of best practice issued by the Institute of Charted Accountants of Sri Lanka and SEC) Regulations (Regulations issued by SEC) and international instruments and secondary sources viz. books, journal articles, research papers and online sources.

Semi structured interviewswere usedto have direct interactions with the key actors in the selected area of research i.e. Colombo Stock Exchange (CSE), the Central Bank of Sri Lanka (CBSL), Securities and Exchange Commission (SEC), Fitch rating companies,Sri Lanka Institute of Chartered Accountants (SLICA), Licensed Commercial Banks (LCBs) and Licensed Specialized Banks (LSBs) in Sri Lanka.A range of issues was looked at in the interviews, including corporate governance reforms, recent scandals in Sri Lanka, regulatory frameworks, actual implementation and the role of the regulatory institutions and stakeholders of banks with regard to the corporate governance of banks.One of the basic limitations to carry out this method was the reluctance on the part of the officials to reveal the true information due to lack of trust, fear or any other reason most particularly in the highly politicalized public institutional structure in Sri Lanka. The gap between rhetoric and reality was bridged using secondary data gathered through examination of the documents of the SEC, CBSL, CSE, Financial Sector Reforms Committee (FSRC) reports and Annual reports of the banks.

II.CORPORATE GOVERNANCE OF BANKS

According to the literature, the importance of corporate governance arises due to the separation of ownership and management of modern corporate entities.

Kraakman (R. Kraakman, 2009) identifies three generic agency problems that may arise in business firms, each and every one of which shall be correctly addressed for the proper functioning of the firm. The first involves conflicts between firm's owners and hired managers, the

second involves the conflicts between majority and minority shareholders and the third involves conflicts between the firm and the parties with whom the firm contracts. A strong corporate governance structure will mitigate the conflicts of interests between and among different stakeholders of the company and will safeguard their interests.

Good corporate governance in the banking sector is particularly important due to the unique role that they play in the economy. As held by Justice Micheal Kirby ''Banks have played an integral part in society for hundreds, perhaps thousands, of years. They are the cornerstone in the economies. They provide backbone to many people's lives' (Gough v Commonwealth1994).

Banks hold number of unique characteristics which mandates them to adopt proper mechanisms of Risk Management which can be identified as follows.

1. Firstly Banks equity is relatively small and its liabilities are greater. Therefore the banks must be keen to strike a balance between the conflicting interests of the depositors and borrowers.
2. Secondly the business of banks is highly dependent on the public faith and confidence of the public towards the banks.Loss of public confidence in banks could be contagious and could easily lead to systemic banking crisis situations.
3. The banks raise their funds not mainly through the shareholders but through the depositors. This places a special fiduciary duty on the banks towards its depositors.
4. The failure of one bank may result in the failure of other banks and other non-bank firms, thus can have systemic consequences on the entire economy.
5. Banks play the role of the Agents of the payment system domestically and internationally therefore proper functioning and governance of banks are important to the stability and soundness of the payment system which is a pre-requisite for an efficient macro-economy.
6. 'When a bank makes a loan by crediting the borrower's demand deposit account it augments the nations credit supply' (United States v Philadelphia National Bank 1963*)* Thus the banks can have an effect on Cost of Money, Liquidity, Inflation, Interest Rates, Exchange Rates, Gross Domestic Product and every constituency of the economy.
7. The cost of irresponsible lending by the banks is usually borne by the depositors, tax payers, government and the entire society at large.The Asian Financial crisis in 1997 and the sub-prime mortgage crisis in 2007 provided good examples for the adverse effects of irresponsible lending by the banks.

Undoubtedly the best method of risk management that can be adopted by the banking sector which addresses all these characteristics, issues and vulnerabilities is the implementation of a proper and effective mechanism of corporate governance.

III. SRI LANKAN LEGAL FRAMEWORK RELATING TO CORPORATE GOVERNANCE OF BANKS

In Sri Lanka there are 25 Licensed Commercial Banks (LCB), including locally incorporated banks and foreign incorporated banks with local branches and 9 Licensed Specialized Banks (LSB) including savings banks, development banks and long term lending/development banks.As at the end of the year 2014 the banking systemwhich accounted to 58% of the total assets of the financial system, dominated the financial system in Sri Lanka (CBSL).

Sri Lanka has 6 systematically important banks (2 State owned banks and 4 privately owned banks) upon which the stability of the financial system is highly dependent and which represented 75 per cent of the LCB sector assets, 63 per cent of the banking sector assets, and 36 per cent of the entire financial system's assets as at the end of 2014 (CBSL).

The CBSL acts as the government watch dog of the banking sector in Sri Lanka. The Banking Act and the Monetary Law Act empowers the CBSL to license, regulate and supervise the banks in the interest of the general public. Under these laws, the CBSL shall undertake the followings.

1. Licensing of new commercial and specialized banks

2. Issue prudential directions, determinations, orders and guidelines to banks, under the statutes
3. Conduct Continuous Supervision and Examination of banks
4. Enforce regulatory actions and the resolution of weak banks

(CBSL)

Discharging the first function, the CBSL license the Public Companies registered under the Companies Act as LCBs and LSBs if their Articles of Association set out 'the carrying on of banking business as a primary object' provided they meet the capital requirement specified in the Act. (LCB – Rs. 10 billion, LSB – Rs. 5.0 billion) As far as the branches of foreign banks are concerned such banks shall have an assigned capital of not less than Rs. 5.0 billion and in addition the Head Office of a foreign bank, which proposes to establish a branch in Sri Lanka, may be required to remit to Sri Lanka a sum of money as determined by the Monetary Board with the approval of the Minister in order to be licensed(CBSL). This requirement is important since it induces the banks not to take unnecessary risks, ensures that the bank has enough funds to cover up its debts if the bank is forced to close and it acts as a shield against the deficit in cash flows.

The CBSL has adopted the Basel capital adequacy standards for all licensed banks effective from January 2008.Accordingly, all banks are required to follow theStandardised Approach for credit risk, Standardised Measurement Approach for market risk and Basic Indicator Approach/ the Standardised Approach for operational riskin computing capital charge for capital adequacy purposes (CBSL). With the effect from 2015 CBSL upgraded its capital adequacy standards to be in line with the Basel III capital adequacy ratio thus corresponded with the timely international standards.These requirements on Capital Adequacy Ratioensure that the banks make provisions conformingto the expected value of thelosses and prevent a bank's financial problems from spreading andthreatening financial stability.It will ensure confidencein the banks without endangering the banks' role as providers ofcapital.

The Bank Supervisory Department of CBSL carries out the regulatory and supervisory functions relating to LCBs and LSBs based on the Basel Committee Standards for Bank Supervision. This assures a bank supervision which is in conformity with the globally accepted standards. Further CBSL issues necessary directives, determinations, orders and guidelines on the licensing, winding up and operations of the licensed banks, resolution of poorly functioned banks and implementation of regulatory actions. This ensures that CBSL will always have a keen eye on the activities of the banksand will take development and corrective measures as and when necessary.

The continuous supervision of banks by CBSL is based on the periodic information provided by the banks on weekly interest rates of deposits and advances, monthly returns on assets and liabilities, income and expenditure, classified advances and provisioning for bad and doubtful debts, statutory liquid assets, quarterly returns on capital adequacy, investments in shares, accommodation granted to related parties, interest spreads, foreign currency exposures, maturity gap analysis and annual returns on audited financial statements and abandoned properties (CBSL).

CBSL has introduced a rating system called CAMEL rating system which focuses on Capital adequacy, Asset Quality, Management, Earnings and Liquidity and also on the compliance by the banks with other statutory and legal requirements as an internal supervisory rating mechanism. This rating system helps to categorize banks according to their performances, to identify the relative strengths and capabilities of the banks and to take necessary actions with regard to the poorly functioned banks.

All LCBs and LSBs are subject to the statutory examinations under Banking Act and the Monetary Law Act which focuses on an assessment and an identification of banking risks, management of these risks and an assessment of adequacy of resources to mitigate these risks.CBSL focuses on the weaknesses, deficiencies of LCBs and LSBs and their non-compliance with regulations and seeks to ensure that the corrective action is taken by the bank.

Further, under the provisions of the Accounting and Auditing Standards Act, banks are required to make its accounts in accordance with the SLAS and SLAuS introduced by SLICAin full convergence with the pronouncements issued by the IASB and IFRS subject to some minor modifications and to have an independent

and professionally qualified auditor holding the certificate issued by SLICA to practice (*Sri Lanka Accounting and Auditing Standards Act 1995* S.6 &s.7). These provisions together with the codes of best practice and Companies Act no 7 of 2007 establish impartial, independent and transparent auditing and accounting practices which are significant to maintain the corporate governance of banks. Further Sri Lanka Accounting and Auditing Standards Monitoring Board (SLAASMB) monitor the compliance with the SLASand the SLAuS by the Banks licensed under the banking act (*Sri Lanka Accounting and Auditing Standards Act 1995s.25)* in practice.

Further the banks are required to publish their quarterly and annual Auditing Financial Reports in newspapers in all Sinhala, Tamil and Englishlanguages. This requirement ensures the transparency of the banking activities and the access to information of banks by all the stakeholders of such banks as well as by other interested parties and prevents frauds and mismanagement by the directors of the banks.

Apart from these regulations the Corporate Governance mechanisms contained in the Companies Act is also applicable to the banks. Under the Act the Board of Directors shall comply with their duties towards the company and its shareholders namely; the duty to act in goodfaith and in theinterests of company, duty tocomply with Actand company'sarticles, Directors standard of care and the Use ofinformation andadvice (*Companies Act No. 7 of 2007* s. 187, s. 188, s. 189,s. 190).Further it lays down that a company shall not enter into any majortransaction, unless such transaction isapproved by special resolution with the consent of all the shareholders ofthe company (*Companies Act No. 7 of 2007* s. 185)

The codes of best practice emphasize that the directors of the banks shall make immediate disclosure of the related party transactions. This requirement assures the transparency, reduces the private benefits by the management and enlists capital and labour markets as well as financial analysts and media in deterring suspect transactions with the threat of lower share prices and the risk of reputational harm(R. Kraakman, 2009)

The above analysis on the legal framework pertaining to corporate governance of banks in Sri Lanka reveals that Sri Lanka has a strong legal framework to govern the banking sector and to protect the interests of all the stakeholders concerned there with. Yet one cannot fully agree that the corporate governance of banks in Sri Lanka is 100% effective and the recent banking scandals reveal that there is a failure in the corporate governance mechanism that goes beyond the legislations.

IV. THE TWO BANKING SCANDALS AT A GLANCE

The two banking scandals which had taken place in recent years in Sri Lanka are the failure in Pramukha Savings and Development Bank (PSDB) and the imminent failure in Seylan Bank which can be summarized as follow.

A. Pramukha Savings and Development Bank

PSDB was started in 1997 as a License Specialized Bank. At the time PSDB was incorporated there was no proper legal framework or precedent on how a private sector LSB should carry out its functions.Under the law of Sri Lanka at that time only the LCBs were given parate execution rights and PSDB as a LSB had no parate rights. PSDB however lent to customers but when the borrowers defaulted payments on loans it had no means to recover such loans other than resorting to civil law litigation which was impractical to a banking institution.

Due to the high percentage of non-performing loans which amounted to 75% of the total loans of the bank, negative net worth of Rs. 230 million and the inability to maintain the minimum statutory liquid assets ratio of 20, CBSL decided to liquidate the bank and cancel the license given to the bank in October 2002. This left the deposits of nearly 15,000 depositors in oblivion.

B. Seylan Bank

Seylan bank which commenced operations in 1988 is a systematically important LCB in Sri Lanka. The Controlling shareholder of the bank was Ceylinco Consolidated Group of Companies. Seylan was one of the well performed companies owned by CCGC and the bank invested the funds of its depositors in other companies owned by the CCGC, most significantly in the Golden Key Credit Card Company (GKCC).

In 2005 CBSL imposed restrictions on the expansive lending by Seylan bank and at the same time media stories arised that the director board of Seylan Bank is using the deposits of its customers to cover up the liquidity problems in GKCC. This resulted in the fear and distress among the depositors of the bank and they rushed to the bank with a view of withdrawing their funds. The bank faced the risk of bank run and the

chairman attempted to ensure the depositors that their funds are safe, but to no use.

Seylan which was not in any shape to pay back a huge amount of money at once ran into an imminent failure.
At that time CBSL intervened and appointed Bank of Ceylon to bring the operations of Seylan bank under its control.

The above discussion provides a glimpse of the two banking scandals taken place in recent history in Sri Lanka. The next part of the research will carry out an in-depth analysis on the underlying causes for the aforesaid scandals and for the failures in corporate governance legal framework relating to banks in the country.

V. UNDERLYING COURSES FOR THE SCANDALS

A deep exploration in to the banking scandals discussed in part IV and the practical implementation of corporate governance laws reveals several Corporate Governance mechanisms which have been neutralized by the traditional social, political, economic and historical setting in Sri Lanka.

A. The dominating shareholders

"A company dances to the will of dominant shareholders shows nothing but the tragic fate of everyone concerned with the company including the majority shareholders themselves"

The shareholder regime that exists in Sri Lankaas in most of the other developing countries is known as controlling shareholder regime, where a large block-holder controls the corporation by owning a majority of shares. According to the majority rule which laid down in the case*Foss v Harbottle* the decision of the majority shareholders will prevail over minority shareholders and the minority shareholders are required to accept the decisions made by the majority shareholders.
Likewise most of the banks are dominated by an individual person, family members, relatives or separate corporate entities belonging to the same individual. Usually in Sri Lanka 80-20 rule of ownership applies with regard to the banks where the 80% of the shares are held by 20% of the shareholders and the remaining 20% of the shares are held by 80% of the shareholders. Further the majority shareholders may form different companies both regulated and unregulated under their direct or indirect ownership to make a control pyramid to confer power over the bank.

This regime is on hand beneficial. The concentrated ownership is beneficial for corporate valuation, because large shareholders are better at monitoring managers (Jensen and Meckling). Notwithstanding the benefits this model may adversely affect the interests of other stakeholders, the corporation and the economy as a whole as there is the tendency of dominant shareholder abusing his dominant position.

Usually in Sri Lanka where the Boards of Directors are also consistedof close alliances of the dominating shareholdersit acts not in the interest of the company, but in their own individual interests which will be detrimental to all other stakeholders of the bank.

In these two banks board meetings, annual reports, and other corporate governance mechanismsdid not serve its intended purposes rather they had been ceremonial and a marketing mechanism. Therefore eventhough Sri Lanka has necessary laws to control the conduct of the directors and make them accountable to the shareholders they are being crippled in the traditional ownership context in Sri Lanka.

B. The weak role of the minority shareholders

'Get up, stand up, stand up for your rights. Get up, stand up, Don't give up the fight'.

-Bob Marley

The second basic reason for the failures in the corporate governance in Sri Lanka is the poor role played by the minority shareholders. Even though they are provided with the mechanisms to protect their rights they are reluctant to resort to such mechanisms. One of the basic reasons behind this is the higher legal costs that a plaintiff will have to bear in the Sri Lankan legal context. The second reason is the lack of faith on the part of minority shareholders on the judicial system in Sri Lanka which was exceedingly under the influence of the executive in recent past.

Due to these reasons there is no proper implementation of the existing minority shareholder protection mechanisms and where there is no implementation the laws are of no value.

C. Bank Governance

"Politics is a cloak; once you've worn it,No one can affect you"

The third underlying course for the failures in corporate governance of banks is the disregard of apparent non-compliances and breaches of statutory provisions and regulations in the politicalized socio-legal context in Sri Lanka.

The governor of the CBSL is appointed on the basis of political affiliations. The recent banking history in Sri Lanka reveals that the CBSL is usually led to serve the interests of the government in power and not the interests of the banking sector or its stakeholders. (The best example is the bank consolidation plan suggested by the previous government). Therefore the role of CBSL as the government watchdog of the banks is highly doubtful.

On the other hand most of the dominating shareholders and directors of banks are usually the descendants of the elite families in Sri Lanka, whose ancestors played a great role in the hegemonic politics in the country. Therefore they naturally receive the political protection and safeguards.

Politics played a great role in both Seylan and PSDB scandals. The examination of Seylan scandal revealed that the chairman of the bank was known for the violation of banking laws and regulations for years but was noticed by CBSL only in 2006. As far as PSDB is considered it was refused to be licensed by the then governor of CBSL, but the CBSL was forced to grant the license to PSDB by the then president at a time when the character and integrity of the PSDB chairman was highly controversial and outrageous.

It appears that where the hands of politics are raised over the administration of justice, relevant officials are either directed by private benefits or they are more concerned about not being a political victim rather than prudently exercising the duties at their office.

D. Auditing

"Every penny in the company has an owner, who has the right to know thefate of that penny"

Impartial and transparent auditing and accounting practices are significant to maintain the corporate governance of banks. However, there is always a difference between the theory and reality.

In Sri Lankan social setting most of the directors, executives, auditors, accountants all belong to the elite social class who share drinks together in the leisure. Therefore no matter what the laws and regulations states about independent auditors, in a situation where the dominant shareholder has the control over the company he always chooses his colleagues to be the auditor.The auditing of private companies is usually given to the audit firms with personal contacts. In this context auditing is nothing but a nicely painted lie.

E. The Director Board

"When the director board consists of family members the company affairs become family affairs'

In the controlling shareholder regimes the majority shareholders may take various steps to retain the power within them. One of the basic methods of achieving this purpose is forming a board of directors consisted with family members and friends. The examination of the annual reports of the banks disclosed that approximately 80% of the banks are controlled by the family members. The chairman, CEO and the members of the board usually belong to the same family and the Chairman and CEO positions were generally held by the same individual regardless of the existing laws and regulations.

Further there is a huge gap between the annual and corporate governance reports of the bank and the reality. The inspection of these reports revealed that the corporate ownership structure is not properly revealed in the reports. There are many in-law relationships, friendships and other alliances between and among the majority shareholders and directors (including non-executive directors) which are unknown to the shareholders or public and which cannot be traced from the annual or corporate governance reports of the banks

In summary the political influences and family affairs continue to affect the corporate governance legal structure in Sri Lanka relating to banks which is particularly supported and strengthened by the ignorance or unwillingness on the part of other stakeholders to compel the banks to comply with the laws and regulations.

VI. RECOMMENDATIONS

1. Eliminating the political influence.

The political influences on the affairs of the banks shall be eliminated and the banks shall be allowed to operate

independently. The non-compliances with the laws, rules and regulations by the board of directors of the banks shall be taken seriously and they shall be punished accordingly.

2. Empowering Minority Shareholders.
The excessive powers held by the majority shareholders shall be controlled, checked and balanced in such a manner that they will not be able to abuse their dominant position. Minority shareholders shall be made aware and encouraged to resort to minority shareholder protection mechanisms conferred by the law.

3. Increasing board performance.
The bank supervisor, CBSL shall conduct workshops, seminars and training programmes to increase the awareness among the directors on their responsibilities and the adverse consequences of the violations of their duties.

4.Preserving the Independency of the Auditing process.
The directors and shareholders shall be thoroughly advised to appoint an independent auditor as the auditor of the bank and auditors who provide false information or who hides the true financial position of the banks shall be penalized under the provisions of Accounting and Auditing Standards Act.

5. Enhancing disclosure and transparency
The mentality of the executives of the banks who sees disclosure and transparency merely as a compliance requirement shall be changed and they shall be made aware to consider the transparency and disclosure as a means of managing the affairs of the stakeholders of the bank.

6. Making the court proceedings speedy and less time consuming.
The judicial proceedings shall be made more prompt and less time consuming. The judges shall be hasty to go deep into the matter in question and provide with a proper judgement on time.

The implementation of the above recommendations will fill the gap between the law and practice relating to the corporate governance of banks in Sri Lanka and will contribute towards a sound banking sector. It will ultimately preserve the stability of the financial system and will enhance the national development.

VII. CONCLUSION

The study reveals that Sri Lanka has a satisfactory legal system for the corporate governance of banks which is in line with international standards. However this legal structure does not co-exist with the traditional social, economicand political setting in Sri Lanka. Implementation of such laws in this context makes a certain group of people immune to the laws.The recent banking scandals in Sri Lanka can be attributed tothe failures in the implementation of corporate governance laws. Therefore the corporate governance structure relating to banks shall be reformed to go in line with social, political and cultural realities of the country.

REFERENCES

Arun, T. G. and Turne, J. D. (2004) Corporate Governance of Banks in Developing Economies: Concepts and Issues.*CGIR.* P. 371-377.

Basu, S. (2003) Why do Banks Fail?*Int. Rev. Appl. Econ*. P. 231.

Chua W.F. and Poullaos, C. (1998) The dynamics of 'closure' amidst the construction of market, profession, empire and nationhood: an historical analysis of an Australian Accounting Association 1886–1903.*Accounting, Organizations and Society.*P. 155-187.

Demirgüç-Kunt, A. and Detragiache, E. (1998)*Financial Liberalization and Financial Fragility*[Online] Available from -elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-1917[Accessed: 10/11/2014]

Dempsey, A. L. (2013)*Evolutions in Corporate Governance: Towards an Ethical Framework for Business Conduct*, Sheffield: Greenleaf Publishing.

Ekanayake, A., PereraH., and Perera S. (2010) Contextual relativity of the role of accounting in corporate governance: Evidence from the banking industry in Sri Lanka.*Sixth Asia Pacific Interdisciplinary Research in Accounting Conference*. Sydney, July 2010.

Foss v Harbottle [1843] 67 ER 189.

Gough v Commonwealth [1994] 56 ASC 270.

Greenspan,A.(1998) Testimony before the committee on banking and financial services.*US House of Representatives.*

Haque, F.A and Kirkpatrick, C. (2011)The political economy of corporate governance in developing economies: The case of Bangladesh.*RIBAF*P. 169.

Hopper, T., Tsamenyi, M., Uddin, S. Wickramasinghe, D., (2008) Management accounting in less developed countries: what is known and needs knowing' *AAAJ.* P 470-514.

Huizinga, H. and Laeven, L. (2009) Accounting discretion of banks during a financial crisis. *IMF Working Paper.*

Kraakman, R. (2009)*The Anatomy of Corporate Law*. Oxford university press.

Reaz, M. and Arun, T. (2006) Corporate governance in developing economies: Perspective from the banking sector in Bangladesh. *Journal of Banking Regulation*. P.94-105.

Rezaee, Z. (2008) *Corporate Governance and Ethics*. New Jersy: John Wiley & Sons.

Senaratne, S. and Gunaratne, P. S. M. (2009) Corporate governance development in Sri Lanka: Prospects and problems. *Sixth International Conference on Business Management*.University of Sri Jayewardenepura Sri Lanka, 2009.

Siddiqui, J.(2010) 'Development of Corporate Governance Regulations: The case of an emerging economy' *Journal Of Business Ethics.*P. 253.

Sri Lanka. *Banking Act*(1988).

Sri Lanka. *Companies Act*(2007).

Sri Lanka. *Monetary Law Act*(1949).

Sri Lanka. *Sri Lanka Accounting and Auditing Standards Act* (1995).

Sundarajan, V. and Balino, T. (1991)*Banking Crises: Cases and Issues.* Washington DC: International Monetary Fund. UK. *Companies Act*(2006).

United States v Philadelphia National Bank[1963] 374 US 321.

Winkler, A. (1998). Financial Development, Economic Growth and Corporate Governance.*Finance and Accounting Working Paper Series*(Paper No. 12).

BIOGRAPHY OF THE AUTHOR

The author is a Lecturer (Probationary) at the Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka. She has obtained LL.B (Hons) from Faculty of Law, University of Colombo and LL.M in International Business and Commercial Law from Ealing Law School, University of West London. Her research interests include Banking and Finance Law, Commercial Law and Environmental Law.

Entering a Contract at Will: a Critical Analysis of the Principles Governing Duress

YP Wijerathna

Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka

Abstract— *For the purpose of forming a valid contract, the parties to a contract must have entered in to it with their own free will. The element of free will is a fundamental component of a legally valid contract and a basic principle in law of contract. Elements which can make a contract void or voidable are known as vitiating elements. If the act of entering in to the contract is corrupted by duress to person or goods, economic duress or undue influence, a contract will become voidable. A voidable contract will bind the both parties to contract unless one party repudiates it. Historically the scope of the common law concept of duress was extremely limited and could be pleaded only in circumstances where the last result was obtained as a result of exerting unlawful force or threats of unlawful force against the person of the other contracting party. Later, over the years, the doctrine of duress was formulated and widened in its ambit to deal with duress to goods and economic duress as well. The objective of this research is to distinguish the applicable principles in the relevant area which demands a clearer exposition. This research will be conducted through a review of primary sources viz. case law, and secondary sources viz. books with critical analysis, law journals and conference papers. The study concludes that the parameters of the concept of economic duress have not been made as yet and the ambiguity exists with regard to duress of goods. It is recommended that a clear set of guidelines which allow considerations of connected factors should be developed when deciding cases of economic duress, although a demand for a value judgement to some extent is unavoidable and a proper authority should be developed with regard to duress of goods that can determine the instances in which a remedy would be permitted by law.*

Keywords— *to person and goods, Economic Duress, Law of Contract*

I. INTRODUCTION

A contract is an agreement which produces legally identifiable obligations between the contracting parties and such a contract is capable of being legally enforced (Honore, Newman and MCQuoid-Mason, 1978). Peel and Trietel, (2011), mark a distinction between contractual and legal obligations as "the factor which distinguishes contractual obligations from other legal obligations is that they are based on the agreement of the contracting parties" (Peel and Trietel, 2011, p2).

For the purpose of forming a valid contract, the parties to it must have entered in to it with their own free will. The element of free will is a fundamental component of a legally valid contract and a basic principle established in law of contract. Elements which can make a contract void or voidable are known as vitiating elements such as misrepresentation, mistake, duress and undue influence. If the voluntariness of entering into a contract is disturbed by duress to person, economic duress or undue influence, a contract will become voidable. A voidable contract will bind the both parties to a contract unless one party repudiates it.

The concept of duress, concerns situations in which contracts are entered in to by partiesfollowing a threat. Historically the scope of the common law doctrine of duress was extremely limited and could be pleaded only in circumstances where the last result was obtained as a result of exerting unlawful force or threats of unlawful force against the person of the other contracting party. As a consequence, equity developed the doctrine of undue influence which is wider in scope, to fill the gaps in law. However, over the years, the doctrine of duress was further widened in its ambit to deal with duress to goods and economic duress as well. As demonstrated by case law, a precise line marking a distinction between undue influence and duress is hard to be drawn (*Lawler v Speaker* [1969]). Some are of the view that these doctrines cannot be segregated and that the concept of undue influence constitutes a form of duress (*Trigg v Trigg* [1993]). In the case *Trigg v Trigg* [1993], the Supreme Court of Mexico, opined that it is impossible to mark an accurate line where one doctrine starts and the other ends.

II. RESEARCH PROBLEM

The area of the doctrine of duress is not completely free from doubt. Particularly the concept of economic duress remains unclear despite its application in thousands of cases and is in need of a clearer exposition. The doctrine needs to be critically analysed for the purpose of distinguishing the principles calling for further clarifications.

III. METHODOLOGY

The researcher followed the traditional black letter approach to conduct this research. Since these concepts have been developed by judges over the years, in the absence of a statutory framework to regulate the area, case law was subjected to extensive scrutiny with an emphasis placed upon the gradual evolution of the doctrine. Qualitative data was collected through a review

of primary sources viz. case law, and secondary sources viz. books with critical analysis, law journals and conference papers. The focus of this research is limited to the operation of the principles governing the relevant doctrines in English law which is considered a part of the Contract Law in Sri Lanka.

IV. EVOLUTION OF THE DOCTRINE OF DURESS

A.The traditional doctrine

Traditionally the concept of Duress developed as a creature nurtured by common law. The concept was later widened in its scope and could be arranged in to three categorized namely duress of the person, duress of the goods and economic duress. In early stages of English law, the doctrine was subjected to quite narrow interpretation where it merely indicates actual or threatened physical violence to the person of a party to a contract (*Barton v Armstrong* [1976]). When a contracting party makes a decision to enter into a contract following such violence, it is recognized as duress of person. The threats relevant in this case are those which give rise to fear of loss of life, harm to the body or fear of being imprisoned. This fear can be caused in respect of the contracting party or against a close relative of the party such as spouse and children.

The effect of a contract being tainted with duress is that it becomes voidable and the party that exercised duress will be obliged to pay damages for the purpose of restitution of the aggrieved party. In circumstances where the aggrieved party decides to continue with the contract, damages will be awarded in respect of any losses resulted from duress.

B.Duress of goods

The restricted scope of the traditional concept of duress had been subjected to strong criticism and was later disapproved since it proved to be unsuccessful in giving due consideration to the results following other forms of illegitimate conduct and threats. As demonstrated by early English cases in the area of duress, rationale for not identifying duress of goods in the early stages was that the expectation that a reasonable person may have the capacity to resist any pressure exercised in respect of goods in contrast to duress of person since the goods are not irreplaceable and any loss can be rectified through monetary compensation (Peel and Trietel, 2011, p2). Parke B. stated in *Atleee v. Blackhouse* [1838] "in order to avoid a contract by reason of duress, it must be duress of a man's person and not of his goods". As pronounced in *Skeate v Beale* [1841], any person is expected to exercise a normal degree of steadiness and therefore, the fear arises in respect of goods cannot be considered sufficient to deprive anyone of their free will.

Nevertheless, with the development of law and economy, this standpoint was identified as unreasonable and was rejected for the first time in the case *Occidental Worldwide Investment Corporation v Skibs* (*The Sibeon& The Sibotre*) [1976] in which Kerr J., analysed the effect of duress to goods with the example of having someone compelled as a result of threat to burn down his house. Following this approach number of cases including *Universe Tankshipsof Monrovia v International Workers Federation* [1983] continued to extensively analyse the concept.

C.Economic Duress

The scope the doctrine of duress was extended over the years and initially *Occidental Worldwide Investment Corp v Skibs* [1976] decision accepted illegitimate business compulsions which pose an adverse effect on the financial eudemonia of a person as one of the grounds based on which a contract can be vitiated. Further, in the 18th century case, *North Ocean Shipping Co Ltd v Hyundai Corporation Co* [1979], threats to breach a contract were recognized as constituting economic duress. This doctrine was further evolved following cases such as *Dimskal Shipping v International Works Federation* (*The Evia Luck*) [1992] and *Universe Tankshipsof Monrovia v International Workers Federation*[1983] where the courts recognized that economic pressure will constitute duress when such pressure is not legitimate and has been a basic factor that made the aggrieved party enters into the contract.

The doctrine has played a vital role in construction cases as well (Krol, 1993). For instance, in the case *Carillion Construction Ltd v Felix (UK) Ltd* [2001] decided in 2001, the court thoroughly instituted the doctrine of economic duress in the area. Further, the courts formulated the device for policing renegotiation of contracts through a broad analysis of the doctrine, in another construction case, *Williams v. Roffrey Brothers* [1991].

V. DISCUSSION AND ANALYSIS

Analysis of cases in this area demonstrates that compulsion, economic duress and commercial pressure

overlap and are clearly interconnected. As specified by Lord Diplock in *Universe Tankshipsof Monrovia v International Workers Federation*[1983] mentioned that "Commercial pressure in some degree, exists whenever one party to a commercial transaction is in a stronger bargaining position than the other party." Kerr J. in the *Siboen* [1976] and Mocatta J., in *North Ocean Shipping Co Ltd v Hyundai Corporation Co*[1979] recognized commercial pressure as a ground which can amount to duress that operates as a ground for vitiation of a contract.

Yet, in the case, *Pao On v Lau Yiu Long* [1980], the judges stated that commercial pressure cannot be considered as duress in the absence of vitiation of consent. Later, in *Universe Tankshipsof Monroviav International Transport Workers Federation* [1983], courts replaced the element of vitiation of consent with the compulsion of will which refers to the absence of a choice. However, in *Pao* [1980] Lord Scarsman recognized the possibility of considering unreasonable use of strong bargaining position, that is commercial pressure short of duress as a basis for repudiating a contract and identified this issue as a question of both degree and fact.

The Courts are hesitant to intervene in commercial matters and repudiate contracts, mainly to respect the idea of contractual freedom, except in most serious factual circumstances. The act of dismissing the 'strong bargaining position' in *Pao* [1980] resulted from the issue of avoiding the contract. Nevertheless in the modern day context, an aggrieved party generally does not seek to avoid contracts but merely seek to reverse unjust enrichment of the defendant (*CTN Cash and Carry Ltd v Gallagher Ltd* [1993]).
When considering the issue of proving economic duress, the cases decided so far do not provide a clear picture and the position of law with regard to this area remains unsettled. However, decided cases seem to suggest that the elements to be proved for the purpose of establishing economic duress are not much different from those which required to be proved in cases of duress to person.

As elaborated by Lord Scarman in *Universe Tankships*case[1983], two elements are to be fulfilled namely the illegitimacy of the pressure and the compulsion of the will that denotes absence of choice which make the coerced party run out of any other option than to comply with the demand. When deciding whether there has been an absence of choice, the court will take in to account the facts of the each case as there are no specific criteria to look at. A compulsion of will does not merely refer to complete absence of alternatives but to the absence of a reasonable alternative. Consequently, an aggrieved party will be granted relief by law based on duress only in the event such party did not fail to resort to the reasonable alternatives. As indicated by *Hennessy v Cragmyle*[1986], a less tempting alternative may be considered as a reasonable alternative. In *Hennessy*, a failure to pursue an available statutory remedy disqualified the aggrieved party from establishing duress.

As elaborated in the case, *Atlas Express Limited. V KafcoLimited*[1989] the matter to be decided most of the time is whether the threat can be characterized as serious. Whether the threat is illegitimate, majorly depends on the manner how the aggrieved party viewed the possible consequence of not abiding by the duress when exercised. Nevertheless, accepting the existence of duress when the victim has no choice than to comply with the compulsion, had been viewed by many, as an unfitting position which can result in commercial chaos (Stewart, 1984). Rather than depending on the victim's standpoint, concentrating on the coercer's outlook, and thereby assessing the justifiability of using the pressure in the context in which it has been used, is argued to bring more satisfactory results (Stewart, 1984). Further, Rafferty (1980) views that assessing the purpose of the coercer can decide the legitimacy of the threat.

A free market system accepts existence of legitimate commercial pressure (Stewart, 1984). Therefore, marking a clear distinction between legitimate commercial pressure and the illegitimate commercial pressure is crucial. In the New Zealand case, *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* [1983] the ultimate danger of making the remedy for economic duress readily available, in situations where the contracting parties have equal bargaining power has been recognized.

In *Adam Opel GmbH v Mitras Automotive* [2007], as stated by Donaldson J., the elements to be given consideration when determining whether the pressure exercised in a case is legitimate or not, are not well settled and not exhaustive. He further stated that making of a value judgement is unavoidable when deciding whether the exerted pressure has exceeded the limit of common and general commercial pressure.

Another noteworthy point is the absence of unequivocal judicial agreement as to the requirement of the presence of an illegal threat to establish duress. , although not common, a conduct which is not unlawful sometimes can amount to illegitimate pressure. As stated by Steyn L.J., in the case, *CTN Cash and Carry Ltd v Gallaher Ltd* [1993] p.719,
"Goff and Jones, "The Law of Restitution", third edition, at p. 240, observed that English courts have wisely not accepted any general principle that a threat not to contract with another, except on certain terms, may amount to duress. Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which "lawful-act duress" can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying "never*".*

As suggested by Lord Scarman in *Universe Tankship* [1983] nature of the act or the omission threatened by the coercer, will decided the legitimacy of the pressure. In this context, a thereat made by a person to do something, he/she has a legal right to do would never amount to duress. Nevertheless, in some cases, a threat to something clearly lawful, can make the threat illegal as a result of the circumstances of the demand. A case of blackmail can provide a sound example for this. Therefore, concentrating on the illegality and the legality of the threatened act or omission will form an artificial barrier which produces absurdity. Analysis of the decisions in *Smith v. Charlick* [1956] and the *White Rose Flour Milling Co Pvt Ltd v Australian Wheat Board* [1944] will further support this argument. Further, the court should have freedom to accept, in appropriate circumstances, the legitimacy of pressure regardless of its unlawful nature.

The standard of the test of causation applicable to economic duress cases, is low when compared to cases that deal with duress to person as a result of the public policy reasons. In economic duress cases the 'but for' test which indicates a low hurdle, has been recognized by the courts as the most appropriate since it is the same test applicable in cases of mistake and misrepresentation as well. Mance J. in *Huyton SA v Peter Cremer Gmbh* [1999], suggested that "but for test' should be the minimum standard when considering causation in economic duress cases and further stated that the pressure exerted must had been a decisive factor. He further stated that"[T]he illegitimate pressure must have been such as actually caused the making of the agreement, in the sense that it would not otherwise have been made either at all or, at least, in the terms in which it was made" (*Huyton SA v Peter Cremer Gmbh* [1999] P.681). It should be noted that, this involves an assessment of the mentality of the victim which can further lead to a subjective judgement which can produce more uncertainty in the area.

VI. FINDINGS AND RECOMMENDATIONS

Distinction between commercial pressure and economic duress is a question of degree. The concept of economic duress is well defined in general terms, yet the parameters of the doctrine remain unclear. Due to the relatively recent origin of the concept, several aspects of economic duress still continue to be ambiguous. The doctrine is indeterminate and it should be applied in the light of the varying circumstances of each individual case. This results in having countless contributing factors to be subjected to consideration when offering a remedy. Although case law, over the years has established imprecise set of principles, in the absence of a clearer standard or at least a precise set of guidelines, judicial decisions may continue to lack consistency and thereby fail to provide certainty in the area.

The aim of a test in this context is to decide whether there has been an absence of genuine consent when entering or when modifying a contract. Further when distinguishing legitimate and illegitimate pressure, developing a scientific criteria to measure internal consent is impractical. However, clear guidelines to be considered when examining the exterior criteria for the above purpose can be a practical option. The operation of solely intuitive justice, when deciding the relevancy of the factors is risky and rather a comprehensive articulated set of principles should be developed. Limits of the doctrine of economic duress are determined principally based on policy grounds. However, it is recommended that, for the benefit of cases that may arise in future, a clear set of guidelines which allow considerations of connected factors should be developed by the courts, although a demand for a value judgement to some extent is unavoidable.

Similar to the ambiguity that exists in some areas of economic duress, in cases of duress to goods, no precise guidelines exist. What can be merely stated is that, if a set remedy is to be established by law in relation to

duress of the goods, it should be narrower and must be based upon a much more limited basis than the cases which involve duress of the person. Therefore, it is recommended that a proper authority should be developed to decide, what kind of instances would provide the basis depending on which a law would allow a remedy.

Another major difficulty exists in this area is lack of awareness among laymen with regard to these fundamental concepts of Law of Contract. One may enter into a contract following duress and not be aware of the remedies the law can provide. Therefore it is recommended that these standards which promote contractual free will and principles governing these common law concepts should be enshrined in Codes of Business Conducts and Ethics as far as possible.

VII. CONCLUSION

The doctrine of duress operates as a vitiating factor that can render a contract invalid in law. The doctrine involves cases where a party to contract takes unjustifiable advantage of the other party. What permits interference of courts in the area of duress is the fact that this violates the fundamental principle of Contract Law. As established by case law, when the intention to enter in to a contract is stimulated by a mode which is unlawful, the law will forbid the contract to stand [*Royal Bank of Scotland plc v. Etridge* (No.2) [2001]. Existence of a threat, real or veiled is a mandatory requirement in cases of duress and in cases where duress is present, person or persons whose rights are infringed act in a manner that he or they would not have acted normal circumstances.

Compared to economic duress and duress to goods, the traditional concept of duress to person is more straightforward. The concept of economic duress as explained above lacks well defined and set parameters. The contemporary legal framework regarding economic duress is not free from ambiguity and is based on intuitive justice. Any approach based on value judgement to distinguish legitimacy and illegitimacy of pressure can produce confusion. In the same manner the doctrine of duress to goods has in its scope ambiguous areas as well. It can be concluded that although the economic duress and duress to goods within of the general concept of duress are defined well in general terms and are strongly established in the law of contract, they demand a clearer interpretation and refinement. Although setting up sharply exact criteria to decide what is commercially moral is impractical, guidelines, precise to at least some extent, are needed in areas that lack clarity.

ACKNOWLEDGMENT

Author thanks Mr.Thushyantha Wijemanne, Director General SARCO Arbitration, Islamabad, Pakistan for providing valuable remarks to this research at the IRC Conference 2015. Further, the author would like to extend gratitude to Dr Thusitha Abeysekara, Senior Lecturer in the Faculty of Law, General Sir John Kotelawala for encouragement.

REFERENCES

Adam Opel GmbH v Mitras Automotive [2007] EWHC 3481 (QB).

Atlas Express Limited. V Kafco Limited (1989) 3 W.L.R 389.

Atleee v. Blackhouse [1838] 3 M, & W. 633 p 650.

Barton v Armstrong [1976] AC 104.

Carillion Construction Ltd v Felix (UK) Ltd [2001] BLR 1.

CTN Cash and Carry Ltd v Gallaher Ltd [1993] EWCA Civ 19 p. 719.

Dimskal Shipping v International Works Federation (The Evia Luck) [1992] 2 AC 152.
Equiticorp Finance Ltd (in liq) v Bank of New Zealand (1993) 32 NSWLR 50.

Hennessy v Cragmyle[1986] ICR 461. Lawler v Speaker [1969] 446 S.W.2d 888.
North Ocean Shipping Co Ltd v Hyundai Corporation Co [1979] Q.B. 705.

Occidental Worldwide Investment Corporation v Skibs (The Sibeon&TheSibotre) [1976] 1 Lloyds Rep 293.

Pao On v Lau Yiu Long [1980] A.C. 614.

Royal Bank of Scotland plc v. Etridge (No.2) [2001] UKHL 44 p.7.

Skeate v Beale [1841]11 Ad and El 983 p.990.

Smith v. Charlick [1956] 56 S.R. (N.S.W.) 323.

Trigg v Trigg [1993]37 N.M. 296, 22 P.2d 119.

Universe Tankships of Monrovia v International Workers Federation [1983] 1 AC 366.

White Rose Flour Milling Co Pvt Ltd v Australian Wheat Board[1944] 18 A.L.l. 324.

Williams v. Roffrey Brothers [1991] 1 Q.B. 1, 21.

Peel, E. and Trietel, G. (2011). Trietel Law of Contract. 13th ed. Sweet and Maxwell,2.

Krol, J.P.J., (1993). Construction Contract Law . John, Willey and Sons

Honore, R., Newman, E. and MCQuoid-Mason, D. (1978). The South African Law of Obligations. Butterworth

Stewart A., 1984. A free market system accepts existence of commercial pressure. Melbourne University Law Review 14(3).

Rafferty. 1980. The Element of Wrongful Pressure in a Finding of Duress. Alberta Law Review 18, 432.

BIOGRAPHY OF THE AUTHOR

Author is a Lecturer in the Faculty of Law, General Sir John KotelawalaDefence University, Ratmalana.She holds an LLM in International Business and Commercial Law from University of West London and LLB (Hons) from University of Colombo.

A Comparative Analysis of Directors' Duty of Care, Skill and Diligence in Sri Lanka, Australia and UK

GAC Sajeevi[1#] and SWP Mahanamahewa[2]
[1]*Department of Commerce, Faculty of Management Studies and Commerce, University of Sri Jayewardenepura, Nugegoda, Sri Lanka*
[2]*Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka*
[#]chathusajeevi@gmail.com

Abstract— *The Companies Act No. 07 of 2007 made considerable changes to numerous areas of corporate law in Sri Lanka including the codification of the common law duties of directors which are set forth in the Sections 187 – 200. This was an attempt to make the duties of directors clear, accessible and better known and understood. Section 189 which codifies the common law duty of skill and care of company directors seems to impose a statutory burden on directors in exercising their powers and in decision making. The exact scope and dimensions of the duty are vague as the judiciary in Sri Lanka has not yet interpreted the provisions in the Companies Act relating to duties of directors. The aim of this study is to first summarize the directors' common law duty of skill and care. This will be followed by an examination of the statutory provisions on directors' statutory duty of standard of care, skill and diligence. Next, a comparison with the jurisdictions of UK and Australia is done with particular emphasis on the interpretation of the statutory provisions by the judiciaries in those jurisdictions. A light insight in to Business judgment rule is also provided. The study adopts qualitative approach, using comparative study design. The materials used in the study include statutes and a range of case laws as well as published works. The research will provide a useful and easy-to-read, important and impartial source of information for academics, lawyers, directors, shareholders and other interested parties to gain an understanding of directors' duty of skill and care.*

Keywords *- Directors' Duties, Duty of Care, Skill and Diligence, Business Judgment Rule*

I. INTRODUCTION

The Companies Act No. 07 of 2007 made considerable changes to numerous areas of corporate law in Sri Lanka including the codification of the common law duties of directors which are set forth in sections 187 – 200. This was an attempt 'to make legal provisions more consistent, certain, comprehensible and accessible to the general public at large and to the commercial community in particular, which will not only facilitate the practitioners but also directors themselves.'[i] Section 189 which imposes a statutory burden on directors in exercising their powers and in decision making to 'not act in a manner reckless or grossly negligent and to exercise the degree of skill and care that may reasonably be expected from a person of his knowledge and experience', is a codification of the common law duty of care and skill.

Over the years this common law duty has undergone profound changes due to the changes in the standard of care required of a director in the commercial world. This led many states to codify the common law duty to a statutory provision. Sri Lanka also followed suit. The exact scope and dimensions of the duty are vague as the judiciary in Sri Lanka has not yet interpreted the provision (section 189) in the Companies Act.

In this study, the authors aim to first summarize the directors' common law duty of care, skill and diligence. This will be followed by an examination of the statutory provisions on directors and the new statutory duty of standard of care. Next, a comparison with the jurisdictions of UK and Australia is done with particular emphasis on the interpretation of the statutory provisions by the judiciaries in those jurisdictions. A light insight in to Business judgment rule is also provided.

II. METHODOLOGY

The study adopts qualitative approach, using comparative study design. The material used in the study include legislations, judicial decisions, books, electronic/ internet sources, journal articles. The study is principally an analysis and comparison of the legal provisions (both statutory and common law) relating to directors' duty of care, skill and diligence. All conclusions are based on careful comparison between the corporate law in Sri Lanka, Australia and UK.

III. DISCUSSION

A. Directors and their duties under the Companies Act No. 07 of 2007

1) Directors

According to section 529 of the Companies Act the expression "director" includes any person occupying the position of director by whatever name called.[ii] Wikramanayake A.R. (2007) states the Companies Act brings a wide group of persons within the definition of director, focusing on the substantive functions performed by each within and in respect of company rather than mere designation.[iii] The definition of a *B.* director is considered to include executive directors, *C.* non-executive directors and de facto directors.[iv] Another type of director is 'shadow director' which is defined in the Act as "a person in accordance with whose directions or instructions a director or the board of the company may be required or is accustomed to act." [v] All companies in Sri Lanka must have at least one director except a public company which should have at least two directors.[vi] In addition, all companies must appoint directors who are not disqualified.[vii] Such appointed board of directors are vested with "all the powers necessary for managing and for directing and supervising the management of, the business and affairs of a company.[viii] The board is thus vested with extensive power except in certain instances such as major transactions.[ix]

2) *Directors' Duties*

An important feature of the Companies Act No. 07 of 2007 is for the first time, duties of directors have been catalogued in statutory form. Sections 187-200 provide for the duties of directors. Accordingly, directors are required to act in good faith, and in the interests of the company.[x] A director must not contravene the provisions in the Act or the Articles.[xi] A director must not be reckless or grossly negligent and they must exercise the degree of skill and care that is expected of a person of his knowledge and experience.[xii] A director can rely on reports, statements, financial data and other information prepared or supplied, or on professional or expert advice given by employees, professional adviser or expert within their professional or expert competence, or by other directors or committee of directors within their designated authority.[xiii] When a director of a company becomes aware that he is interested[xiv] in a transaction or proposed transaction with the company he has to cause it to be entered in the interests register. If the company has more than one director it has to be disclosed to the board of directors the nature and extent of that interest.[xv] When director of a company obtains information as a director or an employee of the company, which would not otherwise be available to him, he must not disclose it or use it except for the purposes of the company or as required by law.[xvi] A director who has a relevant interest[xvii] in the company's shares must disclose the number, class and nature of the interest in shares to the Board of directors.[xviii] Such details must also be entered in the interest register.[xix]

The Duty of Care, Skill and Diligence

The general principle is that directors are liable for damages which emanate from negligence in the performance of their duties.[xx] As a result they need to exercise their duties and functions with care and skill. The duty of care owed by a director of the company arises from "the fact that he has assumed responsibility for the property or affairs of others" as was stated by House of Lords in *Henderson v. Merrett Syndicates ltd* [xxi].

Historically, in contrast to the rigorous enforcement of fiduciary duties,[xxii] the courts formulated the duty in largely subjective terms. In explaining the duties of directors, *Romer J* in *Re City Equitable Fire Insurance Company Ltd.* stated that "in discharging the duties, a director must act honestly; and must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take, in the circumstances, on his own behalf." The judgment allowed the directors the benefit of any doubt about their competence. It was only expected from them what they could give given their individual level of skill and experience.[xxiii] This approach reflected the view that directors were chosen by shareholders and thus their choices were the shareholders' business.

However, this subjective approach to duty of care and skill has been changed due to the more demanding nature of modern business. The mainly subjective test in Re *City Equitable Fire Insurance Co Ltd* case has been replaced by a more objective standard approximating to 'a reasonable director'. In *Norman v Theodore Goddard*[xxiv] the court held "the degree of care which a director of a company owes when carrying out functions in relation to the company is the care that would be taken by a reasonably diligent person having both: (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in

relation to the company (the objective test), and (b) the general knowledge, skill and experience that the director has (the subjective test). The standard mentioned by Hoffman J can be considered as a dual, hybrid subjective/objective one for expert directors. The law now is stringent when concerning an expert director."

A company director is not, per se, treated as an expert, either in the task of general management or specific area of finance, personnel or legal services.[xxv] However, a director specifically appointed because he professes and is required to display some special skill will be liable in negligence for failing to meet the objective standard of care set by the notional reasonably competent member of such profession. Yet, such professional may not necessarily be liable to exhibit other higher skills of management or diligence than his non-qualified fellow director, although this remains controversial.[xxvi]

The board of directors acts as a whole and although some of its members may be given additional powers by the articles or by resolution, the general duties and responsibilities are the same for all. As was held in Re *Lands Allotment Co*[xxvii] there is no distinction between the position of executive and non-executive directors. If a breach of duty is to be attributed to a board on the basis that all of its members were present at a meeting which had approved a wrongful act, then the liability of each director is joint and several and no allowance is made for the fact that some are part-timers and may have acquiesced in a situation which they did not fully understand.

In summary, in common law duty of care, skill and diligence, a distinction exists between skill and care. For the standard of care, an objective test is set, namely, that to be expected of 'a reasonable man' by virtue of the position of trust that they occupy over company property which they are empowered to manage. However, in assessing the duty skill in common law a director is only required to exercise that degree of skill which may be reasonably expected of a person of his knowledge and experience, i.e. 'ordinary prudence'. [xxviii] On this basis, the standard of skill is a subjective one.[xxix] The duty of care and skill thus is a dual/ hybrid one.

The directors are also under a duty to exercise due diligence in the performance of their duties. "Diligence" as was stated in *Dorchester Finance Company v. Stebbing*[xxx] means "care as an ordinary man might be expected to take on his own behalf." In comparison to the duty of care and skill the duty of diligence is definitely an objective one.

D. Other Jurisdictions

1) Australia

Section 180 of the Corporations Act of 2001 of Australia provides for the duty of care, skill and diligence; "A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) Were a director or officer of a corporation in the corporation's circumstances: and

(b) Occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

In Australia, the original subjective test for the duty of care has been replaced with an objective standard both at common law and statute law. In *AWA case (Daniels v. Anderson)*[xxxi] the court considered the four major aspects of duty of care: the nature of the duty, the ability for directors to delegate, the need for directors to keep informed about the company's business, and the standard of care for both executive and non-executive directors. Clarke and Sheller JJA recognised that directors can and should have 'varied commercial backgrounds'; but irrespective of the background they have a 'duty greater than that of simply representing a particular field of experience.' Further, the contention that non-executive directors ought to be able to rely on a low standard and one of more subjective nature was also rejected by the NSW Appeal Court. It was emphasised that objective duty of care apply to both executive and non-executive directors.

Sri Lanka can use a similar approach in assessing the duty of care, skill and diligence provided in section 189 of the Companies Act. It must first be ensured that the duty is objectively applied and assessed. Second that it must be applied in equal force to all directors whether state or private, executive or non-executive in nature.

A multi-coloured array of breach of duties[xxxii] was revealed in *ASIC v. Adler*.[xxxiii] Most importantly, the court found that there was a conflict between the director's interests and the director's duties and the duty of care requires a standard that demonstrates some diligence. *Santow J* outlined a number of considerations that form the cornerstone of the duty of care of directors and it

shows the depth of the Australian law regarding directors duty of care. The case offers the key requirements for the duty of care from which Sri Lanka can take guidance:

(1) A duty of care, diligence and skill;
(2) A standard of care that is commensurate with the skill and diligence of a director in that company at that time;
(3) The standard of care that is at worst that of the ordinary prudent person;
(4) The standard of care that requires the director to appropriately inform him/herself of all aspects of the company's affairs that one would reasonably expect of a director in that company at that time;
(5) Any delegation of duties should reflect all the qualities of care, skill and diligence of a director in that company at that time;
(6) The director's care, skill and diligence reflects a rational belief of a reasonable person in that company at that time that their decisions were in the best short and long term interests of the company.

In the case of *ASIC v. Healey*[xxxiv] the Australian Federal Court of Appeal held that directors of a company were liable for a breach of their duty of care and diligence by not noticing that the company's financial records incorrectly classified a large number of current liabilities as non-current liabilities. Middleton J held that "the directors failed to take all reasonable steps required of them, and acted in the performance of their duties as directors without exercising the degree of care and diligence the law requires from them." The case highlights the importance of directors making 'informed decisions' and the need to apply themselves diligently and with an inquiring mind so that they can form their own opinions.

According to the views expressed by Australian judiciary the principle regarding the duty of care and skill can be summarized as follows: the minimum standard of care of directors is the care of an ordinary prudent person. A higher standard applies where the case merits it. Where a higher standard is applied it is up to the directors to prove why such a standard does not apply to him.

The provision in the Companies Act in Sri Lanka is worded "a director … shall exercise the degree of skill and care that may reasonably be expected of a person of his knowledge and experience' and therefore is susceptible to subjective interpretation as Australian provision has been in the past. It is unclear how it would be interpreted by courts. Does the education level of a director influence the standard of care? Would the courts tolerate the breaches by a younger, less experienced director? Is the care, skill and diligence expected of a director in a small company same as a of a multinational company? In comparison the Australian provision outlines an objective test that is determined by considering the corporation's circumstances, the office held and the responsibilities the office carried within the company. Sri Lanka can benefit from taking guidance from both Australian statute law and case law in determining a standard of care, skill and diligence of directors.

The view of the Australian judiciary is that what is in the best interest of the company should be decided by the directors of the company.[xxxv] Therefore, they are reluctant to review or second guess the business decisions of directors, particularly when they are made in good faith and for a proper purpose.[xxxvi] A decision of directors will be subjected to scrutiny by the courts only if no reasonable board would have made it.[xxxvii] The common law principles which are termed as the "**Business Judgment Rule**" apply to decisions of directors in Australia. As was decided in the case of *ASIC v. Rich*[xxxviii] the onus of proof of to show that directors have complied with the elements of the business judgement rule is with the directors.[xxxix]

Section 180(2)[xl] of the Corporations Act provides a statutory version of the business judgment rule that applies to the duty of care, skill and diligence. Section 180(2) of the Corporations Act of 2001 of Australia provides "A director or other officer of a corporation who makes a business judgment is taken to meet the requirements statutory duty of care, skill and diligence and their equivalent duties at common law and in equity, in respect of the judgment if they: (a) make the judgment in good faith for a proper purpose; and (b) do not have a material personal interest in the subject matter of the judgment; and (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and (d) rationally believe that the judgment is in the best interests of the corporation." Therefore, in Australia breach of directors' duty of care and skill is decided in the backdrop of the business judgment rule.

The business judgment rule is a corporate law doctrine originated in the United States as a common law rule

relating to directors' duty of care, skill and diligence.[xli] The rule applies to the process of directors' decision-making, and consists of a rebuttable presumption that in making business decisions, the directors of a company have acted on an informed basis, in good faith, and in the honest belief that the business decision taken was in the best interests of the company.[xlii] The aim of the rule is to protect innocent and honest company directors from attracting personal liability for breach of their duties of care, skill and diligence or from claims of negligence against.

Sri Lankan law must appreciate the complexities involved and the developments witnessed by Australia in directors' duty of care, skill and diligence. The business judgement rule assist the entrepreneurial essence of the company to thrive without overly intrusive laws, while at the same time providing essential corporate governance to protect the company from negligent or incompetent directors.[xliii]

This balance is essential to encourage reasonable and calculated 'risk taking', while ensuring the proper observance of directors' duties. Sri Lanka Companies Act is light on protection of the interests of the honest and diligent directors and does not provide for a business judgment rule. The statutory burden imposed by section 189 therefore, can adversely affect the performance of a company as the directors will be unwilling to take any risks or do anything innovative. Hence, In application of the duty of care, skill and diligence in Sri Lanka, special attention must be paid to the business judgment rule.

1) *United Kingdom*

The UK was one of the first nations to establish rules governing the operation of companies. Over several centuries UK has had a host of legislations relating to companies.[xliv] However, these statues did not contain a detailed provision describing the fiduciary duty of directors until the Companies Act of 2006 was enacted. The common law concept of fiduciary duty of directors on the other hand was developed by the UK courts through numerous cases.[xlv]

Section 174 of the Companies Act of 2006 provides "A director of a company must exercise reasonable care, skill and diligence. This means the care, skill and diligence that would be exercised by a reasonably diligent person with—the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and he general knowledge, skill and experience that the director has."

Unlike Australia, and like Sri Lanka, business judgement rule is not provided in the UK Companies Act. However, it is taken up by courts. Like the Australian Courts , the courts in UK now appreciate there is a distinction between oversight and management which means the nature and extent of the duty of skill, care and diligence will depend on factors such as the size, location and complexity of a company's business and urgency of any decision. The formulations in section 174 take account of the special background, qualifications and management responsibilities of a particular director."[xlvi]

IV. CONCLUSION

The directors' duties are not merely 'lawyers' law' but as Lady Arden argues, they clearly bring the law more within the reach of individual directors, guiding them toward higher standards, playing a meaningful role in 'making positive improvements in corporate governance.'[xlvii] The codification of scattered common law on duty of care, skill and diligence has led to awareness of directors which must definitely increase their impact. They can prepare and take precaution for the challenge head of them. Obviously, reading twelve pages[xlviii] of the Companies Act is something a director could do, and those unwilling to do so should not be directors in the first place.

The law is moving towards expecting an objective test of care, skill and diligence from both executive and non-executive directors. The standard expected in decision making of a director is what is reasonably required of a person having the knowledge and skill and experience required in that position. Sri Lanka needs to develop its approach to duty of care to reflect an appropriate balance between protections on interests of shareholders on the one hand and promotion of entrepreneurial endeavours on the other. Such a balance will boost the corporate financial success in Sri Lanka.

V. REFERENCES

Australian Securities and Investments Commission (ASIC) v. Adler (2002) NSWSC 483

Australian Securities and Investments Commission (ASIC) v. Healey (2011) FCA 717

Australian Securities and Investments Commission (ASIC) v. Rich (2009) NSWSC 1229

AWA case (Daniels v. Anderson) (1995) 37 NSWLR 438

Cabral Harsha, (2007), Companies Act No. 7 of 2007 and The Corporate Law of Sri Lanka
Companies Act No. 07 of 2007
Companies Act of 2006, UK
Corporations Act of 2001, Australia
Dorchester Finance Company v. Stebbing(1989) BCLC 498
Kanag-Isvaran Kanagayagam and Wijayawardana Dilshani(2014), Company Law,Unie Arts (private)Ltd, Colombo 13
Lady Justice Arden DBE, (2007) Companies Act 2006 (UK) : New Approach to directors' duties" (2007) 81 ALJ 164

Pearce Jeremy, (2010), "Directors' duties of Care, Skill and Diligence in Vietnam", http://epubications.bond.edu.au/cgej/17

Wickramanayake Arittha R. (2007), Company Law in Sri Lanka, Deal Place, Colombo 3

[1] Position Paper No 8 of the Advisory Commission on Company Law

[1] Section 529 of the Companies Act No. 07 of 2007

Section 529 further provides the definition of director includes-

- for the purposes of sections 187, 188, 189, 190, 197,[1] 374 and 377 a person in accordance with whose directions or instructions a director or the board of the company may be required or is accustomed to act.

- a person who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the articles of the company, would be required to be exercised by the board.

- For the purposes of sections 187 to195 (both inclusive), 197, 374 and 377 a person to whom a power or duty of the board has been directly delegated by the board with that person's consent or acquisence, or who exercises the power or duty with the consent or acquiescence of the board.

The section exempts a person who acts only in a professional capacity from being identified as a director.

[1] Wikramanayake A.R. (2007), Company law in Sri Lanka at page 170

[1] A de facto director is a person who has not properly been appointed even though he assumes the status and functions of a director.

[1] Section 529 of the Companies Act No. 07 of 2007

[1] Section 201 of the Companies Act No. 07 of 2007

[1] Section 202(2) of the Companies Act, No. 07 of 2007 provides, "the following persons shall be disqualified from being appointed or holding office as director of a company—(a) a person who is under eighteen years of age; (b) a person who is an undischarged insolvent; (c) a person who is or would be prohibited from being a director of or being concerned or taking part in the promotion, formation or management of a company, under the Companies Act, No. 17 of 1982, but for the repeal of that Act; (d) a person who is prohibited from being a director or promoter of or being concerned or taking part in the management of a company under section 213 or section 214 of this Act; (e) a person who has been adjudged to be of unsound mind; (f) a person that is not a natural person; (g) in relation to any particular company, a person who does not comply with any qualifications for directors contained in the articles of that company."

[1] Section 184 of the Companies Act No. 07 of 2007

[1]The meaning of a Major Transaction is provided in Section 185 of the Companies Act. Accordingly, a major transaction means -the acquisition or disposal of assets or agreement to acquire or dispose of assets (whether contingent or otherwise) that are greater than half the value of the assets of the company before the acquisition or the disposal; or a transaction which cause or is likely to cause the company to acquire rights or interests or incurre obligations or liabilities exceeding half the value of the assets before the acquisition; or a transaction or series of related transactions which have the purpose or effect of substantially altering the nature of the business carried on by the company.

[1] Section 187 of the Companies Act

[1] Section 188 of the Companies Act

[1] Section 189 of the Companies Act

[1] Section 190 of the Companies Act

[1] The circumstances in which a director can be treated as interested is defined in the Companies Act. Section 191 of the Act provides a director is interested in a transaction if he is a party to it, or will or may derive a material financial benefit from it, or he has a material financial interest in another party to it. A director will also be considered interested if he is a director, officer or trustee of another party to the transaction, or a person who will or may derive a material financial benefit from the transaction provided that such party is not the company's wholly owning holding company, a wholly-owned subsidiary, or another wholly-owned subsidiary of the holding company. If the director is a parent, child, or spouse of another party to the transaction, or person who will or may derive a material financial benefit from the transaction, he too will be within scope of the definition. A director who otherwise has a direct or indirect material interest in the transaction would also be deemed to have an interest in a transaction in which the company has an interest in the transaction. According to Section 191(2) a director is not deemed to have an interest in a transaction to which the company is a party, if it merely consist of the company giving security to a third party which has no connection to the director, at that third party's request, on a debt or

obligation for which the director or another person has personally assumed responsibility, whether in whole or in part, under a guarantee, indemnity or by the deposit of a security.

[1] Section 192

[1] Section 197 od the Act

[1] Meaning of relevant interest is defined in the Companies Act. According to Sction 198 relevant interest mens, if the director is a beneficial owner of the share, has the power to exercise or control the exercise of any right to vote attached to the share, or acquire or dispose of the share, or the power to control the acquisition or disposition of the share by another person. Interest is also deemed to exist if the director has right to exercise such powers under any trust, agreement, arrangement or understanding relating to the share, whether or not that person is a party to it. This applies regardless of whether the power is expressed or implied, direct or indirect, legally enforceable or not, related to a particular share or not, subject to or capable of being subject to a restraint or restriction exercisable presently or in the future, subject to conditions precedent, or exercisable along or jointly. (section 200(3)). The reference to power which form the criteria for a relevant interest, includes powers that arise from or are capable of being exercised as a result of a breach of any trust, agreement, arrangement or understanding, whether or not it is legally enforceable. (Section 200(5).

[1] Section 200 of the Companies Act

[1] Ibid

[1] Dorchester Finance Co Ltd v. Stebbing (1989) BCLC 498 (Ch)

[1] (1994) 3 AllE.R. 506

[1] of good faith, honesty and avoidance of conflicting interests

[1] Romer J held that "directors were expected to provide reasonable attention to the affairs of the company although they could delegate their duties to appropriate officers of the company; that is, to management." Also he held that "it was not necessary for directors to attend every meeting". This particular view has now been clearly seen as too lax because of the more recent developments.

[1] [1991] BCLC 1028

[1] Re *Brazilian Rubber Plantations and Estates Ltd* [1911] 1 Ch 425 at 437; Re *Macro (Ipswich) Ltd* [1994] 2 BCLC 354,[1994] BCC 781

[1] *Dorchester Finance Co Ltd v Stebbing* (1977)[1989] BCLC 498

[1] [1894] 1 Ch 616

[1] *Overend, Gurney & Co v Gibb* (1872) LR 5 HL 480 [2]

[1] If a director of a small private company were expected to exhibit the skill normally exercised by the chief executive of a multinational corporation the two persons would in theory be able to change places without difficulty. It is clear that such a juxtaposition is far-fetched.

[1] (1989) BCLC 498

[1] (1995) 37 NSWLR 438

[1] Santow J stated: "So far as Adler is concerned, the findings indicate not only that he contravened the *Corporations Law* in many respects but also that he did so with knowledge of the impropriety of his conduct and for the purpose of advancing his own personal interests at the expense of the companies of which he was a director or officer. His conduct thus amounted to a most serious dishonesty, occurring not as an isolated act but as a pattern of conduct over a number of months. This conduct was coupled with persistent lies and deceits designed to conceal his conduct and/or its impropriety.

[1] Australian Securities and Investments Commission (ASIC) v. Adler (2002) NSWSC 483

[1] Australian Securities and Investments Commission (ASIC) v. Healey (2011) FCA 717

[1] Smith v. Fwcett (1942) Ch 304, Howard Smith Ltd v. Ampol Petroleum (1974) AC 821

[1] Howard Smith Ltd v. Ampol Petroleum (1974) AC 821, Harlowe's Nominees Pty Ltd v. Woodside (Lake Entrance) Oil Co NL (1968)121 CLR 483

[1] Hutton v. West Cork Railway Co (1883)23 Ch D 654, Shuttleworth v. Cox Bros (Maidenheaf Ltd) (1927) 2 KB 9

[1] Australian Securities and Investments Commission (ASIC) v. Rich (2009) NSWSC 1229

[1] The judiciary also stated that factors such as 'the importance of the decision, the time available to obtain information, the costs relating to obtain information, the state of the company's business at the time and the nature of competing demands on the boards' attention' must be considered in deciding whether a director has taken an 'informed decision'.

[1] Section 180(2) of the Corporations Act of 2001 of Australia provides "A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they: (a) make the judgment in good faith for a proper purpose; and (b) do not have a material personal interest in the subject matter of the judgment; and (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and (d) rationally believe that the judgment is in the best interests of the corporation.

[1] Jones E (2007) Directors' Duties: Negligence and the Business Judgment Rule. In 2007 SA Merc LJ 326 at p, 326.

[1] Ibid

[1] Pearce Jeremy, (2010), "Directors' duties of Care, Skill and Diligence in Vietnam", http://epubications.bond.edu.au/cgej/17

[1] The first legislation for incorporation of companies was the Joint Stick Companies Act 1844. There have been several other statutes such as Joint Stick Companies Act of 1856, Companies Act of 1862, Companies (Consolidation) Act of 1908, Companies Act of 1948, Companies Act of 1967, Companies Act of 1980

[1] Regal (Hastings) v. Gulliver (1942) 1 All E.R. 378, Phipps v. Boardman (1967) 2 A.C. 46, Industrail Development Consultants ltd. V. Cooley (1972) 1 W.L.R. 443

[1] The Right Honourable Lady Justice M Arden DBE, "The Companies Act 2006 (UK): A new approach to Directors' Duties" (2007) 8 The Judicial Review 145

[1] Lady Justice Arden DBE, "Companies Act 2006 (UK) : New Approach to directors' duties" (2007) 81 ALJ 164

[1] Pages 151-162 of the Companies Act No. 07 of 2007

"A Double Edged-Sword?" Need of a Human Rights Law Framework for Scientific Research in Sri Lanka

H Rathnamalala
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
rathn016@umn.edu

***Abstract*—*scientific experiments and research are not novel concepts to developed nations. Major regional legal systems such as European Human Rights System have recognized such phenomenon and developed a strong human rights protection system. However, currently, although there is a trend in Sri Lanka towards scientific experiments the non availability of human rights based protection mechanism has posed a potential threat. Though there is an evolving Intellectual Property Law protection framework in the bio-medical research in Sri Lanka. Jurisprudentially, there is a gap between carrying out a scientific research and human rights protection; especially for research objects. Rights such as right to life, right to privacy and freedom of expression should be recognized in such a human rights law protection mechanism in scientific research in Sri Lanka.The main objective of the research is to focus on the human rights framework that is to be considered in scientific research in Sri Lanka. The secondary objective is to identify the main human rights concepts that are applicable in the above framework to introduce a bill on the above area. The research methodology is mainly the legal research method, which is based on the exploratory research design. A library based, secondary data review will be adopted by the researcher. However, the researcher will adopt qualitative research design, if the need arises in the confirmatory purposes. Therefore; the research methodology could be a mixed method.The research outcome is a research publication that will provide clear insights to legal institutions such as Sri Lanka Law Commission and the Department of Legal Draftsman to consider introducing a legal framework in scientific research in Sri Lanka. Therefore; in light of the research outcome, it could be introduced as a policy research.*

***Key Words-** Human Rights Framework, Scientific Research, Policy Integration*

I. INTRODUCTION

The main objective of the research is to focus on the human rights framework that is to be considered in scientific research in Sri Lanka. The secondary objective is to recognize the main human rights concepts in the United Nations System (Herein after the U.N. System) that is applicable in introducing a domestic legislative enactment in the above area. The author specifically focuses on the General Assembly Resolutions on protecting human rights in scientific research. Further, it is to be focused on the positive aspects of the regional human rights mechanisms, where proposed Sri Lankan bill could adopt as possible implementation mechanisms.

The research problem seeks answers on the prominent areas to be included in a domestic legal framework which protect human rights in scientific research.

It should be noted that the research will not be covering the areas such as Intellectual Property Law or medical Law aspects.

II. SCIENTIFIC RESEARCH AND HUMAN RIGHTS IN THE U.N. SYSTEM

The U.N. System had been recognized the importance of protecting human rights since its inception. Due to the atrocities occurred during the Nazi-Germany era and having those painful and gloomy memories in mind, the U.N. focused on the strengthening the strong relationship between scientific research and protection of human rights.

The early attempts embedded in the Universal Declaration on Human Rights as early as 1948. However; until 1968, there was no direct dialogue on the protection of human rights in the field of human rights. However, Teheran Proclamation was adopted in Teheran Conference in 13th May 1968. It indicates that:
"While recent scientific discoveries and technological advances have opened vast prospects for economic, social and cultural progress, such developments may nevertheless endanger the rights and freedoms of individuals and will require continuing attention."

It is evident that in a time period such as in 1960s, there were certain doubts on misusing of scientific research adversely on human rights. Terrors of the aftermath of World War II could be the main reason for the above indication.

International Covenant on Economic, Social and Cultural Rights (G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976) enshrined below mention rights such as article 12 (1) the right to enjoy highest attainable standard of physical and mental health, right to education article 13 (1), right to take part in cultural life and to enjoy the benefit of scientific progress and its application and to benefits from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Right to be free from torture or cruel, inhumane and degrading treatment article (7) is in International Covenant on Civil and Political Rights (G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976). The aforementioned developments occurred after adoption of Bill of Human Rights. By the time, human rights advocates realized the close relationship between scientific research and human rights.

Further, the following quote evident the same understanding on the "double-edge sword standard" on the relationship between scientific research and human rights in that era of the human civilization.

> "Technological advancements have always been potential means in man's hand, and they have always served human requirements. And it is man who has to decide the ends to which science and technology shall be used. And as man is a social being, his steps taken in this regard reflect necessarily the advantages or inadequacies in the political, social and intellectual organization of society" (Premont et al.,1987)

The above quotation provides clear indications on scientist's prime responsibility in protecting human rights in scientific research.

United Nation's Commission on Human Rights adopted the Resolution 1986/9 of "Use of scientific and technological developments for the promotion and protection of human rights and fundamental freedoms." The draft resolution of the above discussed in-depth on both positive and negative impacts of scientific research and developments on human rights. By this time, most of the nations in the world recognized the relationship between scientific developments and human rights law as a "double-edged sword."(Kubota, 1987)

As discussed above, the resolutions of 1983/41 and also 1984/27 showed how effective science and technology could be in promoting human rights and fundamental freedoms. (Kubota, 1987) However, it must be accepted that it is not so used in the history and therefore, it is to be emphasized on the advantages and disadvantages of the relationship between human rights and scientific research. "Scientific and technological progress have laid highly important foundations for the realization of human rights. Nevertheless, the fact cannot be ignored that technological developments have and will no doubt continue to have consequences which affect respect for human rights (E/CN.4/1984/28). Having the above mentioned framework in mind, it is to be focussed on the key areas for the legal framework to protect human rights in scientific research in Sri Lanka.

III. NEED OF A LEGAL FRAMEWORK FOR SRI LANKA

Sri Lankan legal framework has not yet given a proper recognition for the relationship between scientific research and human rights. Right not to be tortured has been recognized as a fundamental right in the 1978 Constitution; nevertheless, it is not sufficient to address issues which could be come across. At the same time, Sri Lankan Constitution has not guaranteed the Economic, Social and Cultural Rights. Therefore, it should be noted that there is a potential threat in the future for the protection of human rights in scientific research in Sri Lanka. Hence; it is timely to adopt a bill with relation to human rights and scientific research.

Though Sri Lankan scientists are not yet engaged in genealogy or cloning, chances are very high which in the recent future, such technological advancements to be taking place. Therefore; the need of a human rights law framework in scientific research is a timely solution to resolve the above matter.

IV. COMPONENTS OF THE HUMAN RIGHTS FRAMEWORK FOR SCIENTIFIC RESEARCH IN SRI LANKA

This part of the research paper will recognize the area to be incorporated in the proposed Sri Lankan legal framework on protecting human rights in scientific research.

Firstly, the U.N. General Assembly Resolution 2450 (XXIII) of 19 December 1968, provides far-reaching insights for any individual jurisdiction a clear path for incorporating the protective tools to oversee the relationship between scientific research and human rights law in a legal framework. It is as follows:

> (a) Respect for the privacy of individuals and the integrity and sovereignty of

> nations in the light of advances in recording or other techniques;
> (b) Protection of the human personality and its physical and intellectual integrity, in the light of advances in biology, medicine and bio-chemistry;
> c) Uses of electronics which may affect the rights of the person and the limits which should be placed on such uses in a democratic society; and
> (d) More generally, the balance which should be established between scientific and technological progress and the intellectual, spiritual, cultural and moral advancement of humanity. (UNGA Resolution 2450 (XXIII) of 19 December 1968)

Components of the above U.N. Resolution could be incorporated in the Sri Lankan bill on protecting human Rights in Scientific Research. For example, obtaining "informed consent" by when human beings are research objects, to ensure protecting right to privacy in all the instances and adhere into the limits set forth in the Fundamental Rights Chapter of 1978 Constitution on Freedom of Expression.

On the other hand, in a context where right to life has not yet been guaranteed by the 1978 Constitution of Sri Lanka, when human beings are becoming research objects, there should be a very special mechanism to protect their rights. Further, as indicated in the introductory part, Sri Lankan Constitution has not recognized economic, social or cultural rights as fundamental rights.

Secondly, certain components of the outcome of Tehran Conference are also applicable in Sri Lankan context. "...such developments may nevertheless endanger the rights and freedoms of individuals and will require continuing attention." (Teheran Proclamation, 1968). It is compulsory to pay continuous scrutiny over scientific research to ensure that human rights have been protected and is essential to overcome a potential threats to life, liberty and freedom of citizens as well as the to ensure democracy of the country. Therefore, it should be incorporated provisions to guaranty above requirements in order to anticipate possible violations. In light of the aforesaid facts, it is indeed necessary to focus on introducing such rights in the fundamental rights chapter of the 1978 Constitution.

Thirdly, the implementation mechanisms should be recognized. Especially, the features of human rights relating to the scientific research area practices by strong regional human rights mechanisms such as European Human Rights System could be identified.
Mainly, there are three legal instruments in the European System in protecting human rights the bio-medical research. Namely, the European Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, (ETS No. 164, entered into force Dec. 1, 1999), Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine on the Prohibition of Cloning Human Beings, (ETS No. 168, opened for signature on Jan. 12, 1998, not in force) and the Additional Protocol to the Convention on Human Rights and Biomedicine, on Transplantation of Organs and Tissues of Human Origin, (ETS No. 186, opened for signature on January 24, 2002, not in force).

Three of the aforesaid legal instruments include important features of the subject matter and the continuous process of carrying out of scientific research in the jurisdiction of the European System of Human Rights could be the reason for the above development where as once Roscoe Pound indicated as "law should reflect the society." The pertinent areas to be considered for the domestic legal regime are listed below.

Mainly, the European Convention For the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, (ETS No. 164), *(*entered into force Dec. 1, 1999.) has been covering many areas which could be adapted in to a local system. Especially, it focuses on the areas such as consent (Chapter 2), Scientific research and Protection of Persons undergoing research (Chapter 5), organs and tissue removal of living donors for transplant Purposes (Chapter 6), Protection of Persons who have mental disorder (Chapter 7) Embryos in-vitro (Art. 18), Non-selection of future child's sex in medically assisted procreation (Article 14) and finally, Steering Committee on bio-ethics as the implementation/supervisory mechanism for the treaty. The above features have been elaborated in extensive manner in order to protect human rights in scientific research in the region.

Subsequently, the Additional Protocols, respectively on the Transplantation of Organs and Tissues of Human Origin, 2002 and Prohibition of Cloning Human Beings, 1998 also incorporates advanced protection on human rights in matters of cloning human beings and tissue transplantation, areas; those of which could be possible

threats to Sri Lanka in coming generations. Therefore, it should also be incorporated in a Sri Lankan bill.

V. CONCLUSION

Relationship between Scientific research and human rights law is like a double-edged sword. Therefore, individually countries have to take measures to incorporate relevant mesures in the domestic legal system to protect human rights. Sri Lanka is a developing country and could expected to be advancements in the field of scientific research in near future. If there is no propoer human rights standard recognized by the Sri Lankan domestic legal, there will be repurcussions in near future as discussed above.

Introducing a legislative enactment on scientific research and human rights will be a turning point in Sri Lankan law related to scientific research and technological advancements. The aforesaid framework could be in a form of legislative enactment or of a part in a fundamental rights chapter of the Constitution. Further, it will enhance and encourage the scintific research in Sri Lanka for the betterment of human beings while leading the country for rapid development through scientific research.

ACKNOWLEDGMENTS

Author is grateful to Professor David Weissbroadt and Professor Barbara Frey (University of Minnesota, USA) for their endless support in her human rights law research since 2009. Also, author grateful to Professor Camena Guneratne (OUSL-Sri Lanka) for her kind guidance in advanced legal research and Dr. R.Wijesiriwardene (KDU,Sri Lanka), for encouraging inter-disciplinary research.

BIBLIOGRAPHY

Kubota,Y.(1987)*Consideration of the Relationship between Scientific and Technological Developments and Human Rights in the United Nations Human Rights Fora*, 56 Nordic Journal of International Law,334.

*David,*K.(2005)*Maintaining the Integrity of Scientific Research*,13 Journal of Law and Policy 7.

Weissbroadt, D. (2009). *Law, Policy and Process: International Human Rights Law.* Lexis Nexis.

Torben, S. (2007) *Moral Relativism and Human Rights*, 13 *Buffalo* Human Right Law Review 73.

(2010-2011) *Welfare versus Autonomy in Human Subjects Research*, 38 Florida State University Law Review 303.

Berjis, Malosack (2010) Human Embryonic Stem Cell Research and Surplus Embryos: Moral Argument, 29 Mississippi College Law Review, Vol. 427.

Ram, Natalie (2009/2010)*Assigning Rights and Protecting Interests: Constructing Ethical and Efficient Legal Rights in Human Tissue Research*, 23 Harvard Journal of Law & Technology, 119.

Case Law:

United States v. Brandt (The Medical Case),
2 Trials of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10, at 181-82 (1949) (Nuremburg Code).

Web Search

University of Minnesota Human Rights Library http://www1.umn.edu/humanrts

BIOGRAPHY OF AUTHOR

Author is a lecturer in the Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana. She is currently reading for her M.Phil/Ph.D. in Law. She holds LLM in Human Rights Law (University of Minnesota Law School-USA), LLM and LLB (Hon) from University of Colombo. Her research areas are Human Rights Law, Women's Rights Law and International Humanitarian Law.

Torture Occurrence in Police Custody: Critical Legal Study on Sri Lankan Context

KERL Fernando[1#], R Fernando[2], UNP Liyanage[2] and L Fernando[3]
[1]*Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka*
[2]*Police Department, Sri Lanka*
[3]*Faculty of Management, Social Sciences and Humanities, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka*
[#]elisharadini.fernando@yahoo.com

Abstract— *A Police force is established in a country with the prime objective of enhancing the internal security of a state. Thus, the safety and security of the individuals is expected to be upheld by the Police and from the initial commencement of complaining procedure, the whole legal investigation procedure is performed by the Police. However, in some incidents when individuals seek assistance from the Police it was evident that the Police have violated their fundamental rights mainly under Article 11 of the Sri Lankan Constitution and the Act against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment No 22 of 1994. On the other hand, this strong legal coverage has considerably prevented Police officers from torturing individuals in Police custody. It is also evident that this has affected the amount of cases solved by the Police. Therefore, this study aims to critically reveal the bitter story of torture occurrence in Police custody and to find other possible solutions in order to enhance the amount of case solving. The research problem of this study thus aims to evaluate the efficiency of other possible methods in case solving without violating the fundamental rights of the Police custodians through torture. Thus, the research objective is to enhance the protection of both Police officers and Police custodians during solving cases and to ensure further civil trust towards the Police. This study will be based on both quantitative and qualitative research methods which critically analyze applicable legal standards, statistical data, and practical experiences of the police officials and views of the experts in order to understand the problem and to find possible answers. These reforms are to be introduced to international arena, in order to inculcate professionalism of Police officers for national development and to overcome many challenges in the future.*

Keywords - *Torture, Police custody, Case Solving*

I. INTRODUCTION

Police force performs a tremendous responsibility in upholding peace and security, especially in a country like Sri Lanka being a developing state in which many latest incidents arise day by day in the civil society which cannot be predicted. Thus, Police Department being the sole government authority responsible to sustain internal peace of the state face the major obstacle of case solving while striving to balance both interests of executing Police powers and fundamental rights of the custodians.

Therefore, this paper aim to address one of such burning issues namely torture occurrence in Police custody which directly affect the professionalism of the Police officials.

II. CONCEPTUAL FRAMEWORK

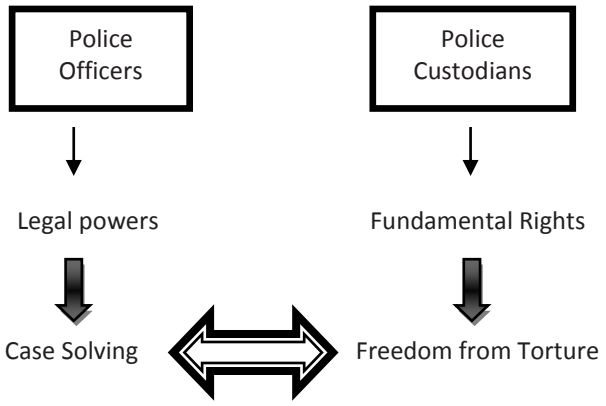


Figure 1. Conceptual Framework
Source: Author's Original construction

This emphasizes the conceptual framework and the scope of the study. Accordingly, the two main paradigms of this research are the Police department and the Police custodians.

A. Police Department

During the era of British rulers, Police Department of Sri Lanka was established by the Police Ordinance in 1865. Basically, the Department was initiated to foster and maintain peace and order in the country. In order to achieve this initial purpose Police officers have been empowered through several legal enactments. Since the

main focus of Police Department envisages in this study is the execution of Police powers in case solving, this research will be limited only to the aforesaid particular scope.

Sri Lankan Police Department is the sole state institution who is legally empowered to solve criminal cases. The Code of Criminal Procedure No 15 of 1979, Chapter XI under 'information to Police officers and Inquirers and their powers to investigate', Section 108 mentions that "the Minister may appoint any person by name or office to be an inquirer for any area....." Accordingly, unlike in Europe and USA, in Sri Lanka since there exist no such private appointments for case solving, the sole responsibility to solve criminal cases is granted to the Police Department.

A. *Police Custodians*

According to the Collins English Dictionary a 'Police Custodian' means "any person who is in Police custody, kept in secure under the supervision of Police officers". In the theoretical aspects this definition implies the most suitable description. Thus, in the practical scenario of Sri Lanka this situation is more developed through New Law Reports (NLR). Accordingly, Police summon individuals to question or individuals come to Police to lodge complaints. In both these circumstances Police keep them in the Police station for a certain time until the turn comes. During this period if such person's freedom is being limited then under fundamental rights (FR) it is considered as a FR violation. As for an example, an individuals' freedom could be limited in Police station when he is not allowed to meet his relatives or a lawyer. Therefore, the moment which a person's freedom is felt limited in the Police Station then at that point he is considered as a 'Police Custodian.' However, it is the researchers' point of view that this is a very sensitive issue.

III. CONFLICT INTEREST BETWEEN POLICE OFFICERS AND POLICE CUSTODIANS

From the beginning of 1980's the conflict interest between Police officers and Police custodians embarked due to various reasons.

Major reason was the development of the communication media in which such torture occurrence incidents in Police custody become famous. Another one of the most tempting reasons was the globalization backed by the World Wide Web (WWW). This enhances the dissemination process of the legal regimes compared with other nations worldwide and Sri Lankans become aware about the remedies in order to counter during a torture occurrence.

Moreover, early Police Department of Sri Lanka was widespread as a monopoly, in which when individuals have been tortured or violated FR, there was no other place to seek a remedy. But with the establishment of Human Rights Commission of Sri Lanka by Act No 21of 1996 civil society become more vigilant about the Human Rights as well as the remedial procedures.

IV. TORTURE

As per Merriam- Webster Dictionary torture means an act of causing severe physical pain as a form of punishment or as a way to force someone to do or say something or something that causes mental or physical suffering which is a very painful or unpleasant experience. Also torture is two folded namely, physical torture and mental torture.

In the practical arena, it has been victimized that Police custodians have been tortured by Police Officials during the period of custody in order to case solving. This is highly criticized and severely affecting the professionalism of the police force of the state.

A. *Legal Obligations*

The main legal obligation is emphasized in Article 11 of the 1978 Constitution of Sri Lanka that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This is the general application applicable to all incidents of torture. The most important facet of Article 11 is that under Chapter III, 'freedom from torture' has been recognized as a Fundamental Right.

Moreover, in the Act against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment No 22 of 1994 has specifically addressed the subject of torture.

B. Case Laws

In the early precedents, interpretation of torture has been only limited to physical torture.

In the cases of Amal Sudath Silva Vs Kodithuwakku (1987) 2 SLR 119 and Rathnapala Vs Hector Dharmasiri, HQI Rathnapura (1993) 1 SLR 224 it was proved that severe physical torture has been occurred in Police custody and it was decided that even though the suspect is a ruthless criminal, Police has no power torture suspects.

On the other hand, the case of Sudarsha Kumarasena Vs SI Shriyantha, OIC, Dikwella SCA 257/93 it was reported a verbal torture occurred to a Police custodian. Here, CJ Mark Fernando held that even only a verbal torture is a violation of Article 11 of the Constitution of 1978.

Also, in Subasinghe Vs PC Sandun (1999) 2 SLR 23 a suspect has been hand capped and demonstrated in public as a criminal by Police. Court held that this is a Degrading treatments and Police Constable has been prosecuted in violation of Article 11.

Furthermore, in the case of Mohomad Nilam Vs Udugampola SCA 68/2002, suspects have been kept as police custody in an inhuman manner. In this case court adopted the famous Greek Judicial precedent which illustrated that suspects should not kept in custody at a less ventilation or lack of toilet facility or lack of sleeping facility or a place in which many custodians kept; if do so it is considered as an degrading treatment.

One of the most important decision to Police department was held in Vijayasiriwardana Vs IP Kandy (1989) 2 SLR 312 that execution of Police powers in order to arrest a suspect does not amount to violate Article 11 of the Constitution. This has been further emphasized in the case of Jeral perera Vs Sena Suraweera, OIC, Wattala (2003) 1 SLR 317.

Considering all the aforesaid case laws it is evident that Police officers have been influenced to torture custodians in various ways.

IV. PUNISHMENT

This has been broadly discussed by the Section 2 (4) of the Act against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment No 22 of 1994 that a person guilty of an offence under this Act shall on conviction alter trial by the High Court be punishable with imprisonment of either description for a term not less than seven years and not exceeding ten years and a fine not less than ten thousand rupees and not exceeding fifty thousand rupees. Moreover, Section 2 (5) of the Act made this an offence as a cognizable offence and a non-bailable offence.

V. DISCUSSION

During the research it was identified that many reasons has caused to result torture occurrence in Police custody.

One of the main reasons is that the spontaneous mentality of the Police officers that as soon as a crime occurred, a suspect has to identified and produce to courts. This has simply manipulated Police officers to cause torture to suspects in custody. This mainly occur due to the superior command of the Police Department's hierarchy that when senior officers pressure junior officers to solve the cases as soon as possible. This mentality and the culture should be evaded from the department because there is no any particular limited time frame to solve a case. Being hurry to solve cases will amount to suspect the wrong criminal.

Another reason is that the lack of technological assistance to solve cases. Unlike in Sri Lanka, in many developed countries Police personnel or inquirers or police stations are occupied with 'Liar Detector Machines', which enhance the scientific acknowledgement of the evidences. In addition, they use video clips of suspects' verbal evidences to compare with their body language while providing evidences. These technological supports highly enhance the capacity and amount of case solving in developed countries. Lack of such technological support has also caused the negative impact of torture occurrence in Police custody.

Also as per the medical and psychological researches the behind story to commit torture is also supported with the mental capacity, family background as well as the life experiences of the Police officials.

On the other hand, one may argue that lack of awareness Police officers may tempt to torture the custodians. Thus it cannot be accepted because Police officers who have been recruited to all ranks have been thoroughly educated during the training period regarding the legal notions of the State. Therefore, none of the Police officer can be opt out in the sake of lack of awareness.

During the study it was highly revealed that Police officers cannot violate FRs of the individuals, in the sake of executing Police powers in order to solve cases. If torture is committed by any police officer to the custodians it can be considered as a usage of excessive discretionary legal powers which is also infringement to Ultra Vires concept in Administrative law principles. Moreover, it is then also a violation of rule of law as well as Equity principles.

VI. RECOMMENDATIONS

The prime objective of this study is to discover new means and methods to solve cases by Police Department rather than torturing the suspects during custody.

The words of admittance by suspect after being tortured in the Police custody has no legal affect. Because as per Section 27 of the Evidence Ordinance, confession done by a custodian to Police officers has no legal validity. Only the facts or evidences will be supportive to solve cases.

Therefore, torturing to custodians has no positive effect in the present context because that would only result the interdiction of the Police officer with the present day strong legal enactments.

Accordingly, this study propose that Sri Lankan Police Department must develop the technological arena in order to enhance the amount of case solving as per discussed above.

Also, Police officers should not be sensitive and act in subjective manner when solving cases. If a Police officer sees the victim as his own family member then he is no longer playing an objective role. Then there after he will try to solve the case in a more sensitive manner which will definitely amount to cause torture to the suspects.

Most importantly, Amendment to Criminal Procedure Code 2013 Schedule emphasize that a suspect can be kept in Police custody for 48 hours. This will highly effective to reduce torture occurrence in Police custody because when more time is legally allowed for inquiries then Police officers will try to solve cases in a very legal manner. But one may also criticize this that when 48 hours have been allowed to keep suspects in Police custody then a reliable risk of being tortured could also be predicted. However, this 48 hours principle is seem to be more beneficial to Police officers than to custodians.

Moreover, Police Department must enriched and nourished with the dissemination of legal enactments, repercussions of torturing custodians in order to reduce the torture occurrence in Police custody and to enhance the professionalism of the Police officers.

VII. CONCLUSION

This study envisaged that no person is subjected to torture in Police custody, and if any Police officer performed such then he is amount to violation of Fundamental Rights of such individual and severe punishments will be inherited to the prosecutor. Thus, the usage of technological assistance in order to solve cases would amount to reduce the torture occurrence in Police custody and inculcate professionalism of the Police officers

REERENCES

Act against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment No 22 of 1994

Amal Sudath Silva Vs Kodithuwakku (1987) 2 SLR 119

COLLINS ENGLISH DICTIONARY, 2015. *Definition for Police Custodians* [online] [viewed 16 June 2015]. Available From:http://www.collinsdictionary.com/dictionary/english/police-custody

HRCSL, 2014. *Human Rights Commission History* [online] [viewed 17 June 2015]. Available from: http://hrcsl.lk/english/faq/

Human Rights Commission Act No 21 of 1996

Jeral perera Vs Sena Suraweera, OIC, Wattala (2003) 1 SLR 317.

MERRIAM- WEBSTER DICTIONARY,2015. *Torture Definition* [online] [viewed 17 June 2015]. Available from: http://www.merriam-webster.com/dictionary/torture

Mohomad Nilam Vs Udugampola SCA 68/2002

Sudarsha Kumarasena Vs SI Shriyantha, OIC, Dikwella SCA 257/93

Rathnapala Vs Hector Dharmasiri, HQI Rathnapura (1993) 1 SLR 224

Subasinghe Vs PC Sandun (1999) 2 SLR 23

The Code of Criminal procedure Code No 22 of 1979

The Constitution of the Democratic Socialist Republic of Sri Lanka 1978

Vijayasiriwardana Vs IP Kandy (1989) 2 SLR 312

BIOGRAPHY OF AUTHORS

KERL Fernando is an undergraduate at Faculty of Law, General Sir John Kotelawela Defence University, Sri Lanka. Her research interests include military law, security studies and human rights law. She has followed a Diploma in Human Rights at The Centre for Studies of Human Rights in the University of Colombo, Sri Lanka. She has presented several papers at many International Conferences and Symposiums.

DIG Roshan Fernando is presently serving as DIG Uva (Badulla/ Monaragala Districts)

ASP Ujith NP Liyanage presently serving as OIC District III Badulla. He has followed a Diploma in Explosive Incident Counter Measures course at Louisiana state University USA, Diploma in Community Policing at police Academy and many courses related police Department.

Lakshan Fernando is an Undergraduate at Faculty of Management, Social Sciences and Humanities, General Sir John Kotelawala Defence University, Sri Lanka. His research interests include Management studies and Social Sciences. He has presented several papers at many international Conferences and Symposiums.

Protection of the Rights of Sri Lankan Women from Street Harassment

KHM Navoda
Faulty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
glitznavo@gmail.com

Abstract— *Street harassment is a form of discrimination against women which directly affects women's rights and dignity. When women experience verbal or physical harassment done by unknown men in public streets it results in limiting their freedom of movement. It further amounts in physical, emotional, sexual violations of their rights. The prevailing patriarchal society has produced men's attitude of supremacy and ultimately women have become the victims of such gender stereotypes. Therefore, it is questionable whether there are adequate laws in Sri Lanka to overcome the issue of street harassment in order to safeguard women's rights. The main objective of this paper is to critically evaluate the existing legal framework to address the issue of street harassment and to explore whether such laws are adequate and practically implemented in Sri Lanka. The secondary objective is to examine whether the laws alone can remedy the issue of street harassment. The author seeks to assess both quantitative and secondary data. A questionnaire will be administered to gather quantitative data and an age category of 15 – 55 years of females will be taken as the sample for this research. Desk research entails the legal standards with special reference to the penal code of Sri Lanka and United Nations convention on elimination all forms of discrimination against women (CEDAW). Today, in the contemporary society women have identified the importance of their rights to be treated without discrimination and they fight to win their rights. Therefore, a strict legal framework with practical implementation of laws will change the mind set of street harassers and eventually the safety of Sri Lankan women can be guaranteed and this will change the existing situation.*

Keywords— *Gender Discrimination, Legal Framework, Street Harassment*

I. INTRODUCTION

This research paper provides an overview of the existing legal frame work to address the issue of street harassment. Street harassment may vary from minor to major offences, starting from catcalling to rape. The researcher has addressed the street harassment which takes place in public streets of Sri Lanka and the scope is on verbal and physical harassment. Verbal harassment such as Catcalling, Whistling and actions like Stalking, leering, blocking the way and physical harassment such as groping and indecent touching cause by men towards women are considered in this paper. There is a law for major offences such as rape and sexual assault. But the menace of street harassment issue has not been addressed specifically in our law which may later pave way for serious offences, therefore, the root cause should be remedied. There is a difference between sexual harassment and street harassment in which street harassment is a form of sexual harassment. Sri Lanka has 345 on sexual harassment but there is no specific regard on street harassment.

It should be noted that street harassment limits the freedom of movement of women and also causes gender inequality which are fundamental rights guaranteed under Article 14 (h) and Article 12(2) respectively under the 1978 constitution of Sri Lanka. Moreover, when street harassment occurs it is a deprivation of women's rights which in fact means, that Sri Lanka is in the face of clear violations of international obligations granted under Convention on the Elimination of all forms of Discrimination against women.

A. Research Problem

- Whether the existing legal framework is adequate to address the issue of street harassment.

B. Objectives

- To identify the existing legal framework regarding street harassment.
- To explore the adequacy of the legal framework to address the issue of street harassment.
- Assessing whether laws alone can remedy the issue of street harassment.

II. METHODOLOGY

This research paper is based on the feminism approach, therefore, only women were considered for the sample. 100 women of age 15- 55 years were requested to complete the questionnaire. The questionnaire includes

questions with likert rating scale, open ended and multiple choice questions to find the responses of women regarding their experienced street harassment.

Apart from the questionnaire the penal code (Amendment) Act No.22 of 1995 of Sri Lanka, Vagrants Ordinance of Sri Lanka, and Articles 12(2), 14(1) h of the 1978 Constitution of the Socialist Democratic Republic of Sri Lanka and international standards such as the United Nations convention on elimination all forms of discrimination against women (CEDAW) are analyzed in order to explore the legal standards to address the issue of street harassment.

Bothe quantitative and qualitative data are gathered through the questionnaire and other domestic and international legal standards.

A. Limitations

- Since this is a sensitive topic some women refuse to give the true picture on the street harassments they have experienced.

III. LITERATURE REVIEW

A. An overview of the Section 345 of the penal code (Amendment) Act No.22 of 1995 of Sri Lanka

Section 345 of the penal code (Amendment) Act No.22 of 1995 introduced the offence of sexual harassment by replacing the offence of outraging the modesty of a woman. This amendment is a great step forward for the reason that it has identified sexual harassment as a criminal offence.

Whoever, by assault or use of criminal force, sexually harasses another person, or by the use of words or actions causes sexual annoyance or harassment to touch other person commits the offence of sexual harassment and shall on conviction be punished with imprisonment of either description for a term which may extend to five years or with fine or with both and may also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused by such person.

Explanation 1 Unwelcome sexual advances by words or action used by a person in authority, in a working place or any other place shall constitute the offence of sexual harassment. Explanation 2 for the purposes of this section an assault may include any action that does not amount to rape under section 363[24]

Since this is a criminal offence the burden of proof is high that the harassers' actions should be proved beyond reasonable doubt. Moreover, attention should be drawn to the term 'authority', in which it gives the idea that Police, armed service personnel, school officials, medical officials fall under the mentioned term. But in this paper street harassment is identified as verbal and physical harassment done by 'strangers' in public streets and not any particular authority. Therefore, such interpretation cannot be established through this provision and the strangers actions are hard to prove beyond reasonable doubt. In fact, the term 'any other place' is vague and ambiguous. Therefore, if *Ejusdem* generis (of the same kind) Presumption of language is applied, a general word following a particular word of the same class. In the case of Powell v Kempton Racecourse (1899)[25], the words 'other place' were held to mean 'other indoor place' for the fact that the list referred to a 'house, office, room or other place'. Therefore, in the penal provision explanation. It gives the idea that public streets are not included. The most crucial aspect to be focused is that this has to be proved beyond reasonable doubt and the standard of proof is high. In this paper the researcher seeks to explore the adequacy of the legal framework to address street harassment cause by Catcalling, Whistling, Stalking, leering, blocking the way, groping and indecent touching. The above elements are hard to prove beyond reasonable doubt mainly because the harassers are strangers. The researcher's objective is to remedy the root cause in which it will create a deterrent effect for severe offences as well. Therefore, a formation of a civil law remedy will support to address the prevailing inadequacy of laws.

B. The Vagrants Ordinance

The Vagrants Ordinance can also be examined in assessing the legal framework regarding street harassment. According to Section 3 (1) e of the ordinance, Every person who upon any wharf, jetty, street, road, walk, passage, verandah or other place situated within any proclaimed area and used by or accessible to the public, persistently and without lawful

excuse follows, accosts, or addresses by words or signs any person against his will and to his annoyance,
Shall be deemed an idle and disorderly person within the true intent and meaning of this ordinance, and shall be liable upon the first conviction to be imprisoned, with or without hard labor, for any term not exceeding fourteen days, or to a fine not exceeding ten rupees.[26]

In this section it is clear that 'streets' are explicitly addressed. But the offences are vague in nature in which What amounts to 'words' or 'signs' fail to give a picture whether acts like Shouting, making noises, whistling, leering, catcalling, blocking the path, groping fall within this section. Also the maximum fine is only 10 rupees, which would not suit the modern situation. Therefore, vagrants Ordinance itself is clearly outdated and inadequate to remedy the issue of street harassment.

C. Article 12 (2) and 14(1) h of the Constitution of the Democratic Socialist Republic of Sri Lanka

According to Article 12 (2) of the 1978 constitution of Sri Lanka entails 'No citizen shall be discriminated against on the grounds of race religion, language, caste, sex political opinion place of birth..'[27] Apart from that, in comply with Article 14 (1) h the freedom of movement and of choosing his residence within Sri Lanka[28] is a guaranteed fundamental right. 'Freedom of movement' means that everybody enjoys this right including women. Therefore, when women undergo and experience street harassment it clearly evokes the fundamental violations of their rights that is the right to equality and freedom of movement. The common scenario is that men harass women in streets and they engage in such harassment to show their masculinity towards women, in fact women discrimination occurs for being women. Mainly because of the female gender women are discriminated and eventually street harassment causes fear and it limits access to public places by women. (This is further explained through the results obtained through the questionnaire)

D. The convention on the Elimination of All Forms of Discrimination against Women

The convention on the Elimination of All Forms of Discrimination against Women is the primary international mechanism in respect of protection of women's rights. Since Sri Lanka is a signatory party to the convention, there is an obligation to ensure that rights of women are protected and promoted within the country.

Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires States to "pursue by all means and without delay a policy of eliminating discrimination against women" which expects the duty to "refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation" and "take all appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. CEDAW created an impact on the National Policy of Sri Lanka. The women's charter was adopted and accepted as the government's policy document on women and it guarantees the rights such as political and civil rights, rights within the family, right to education and training, right to economic activity, right to health care and nutrition, right to protection from social discrimination and right to protection from gender based violence.[29]The attention should be aimed on the fact that street harassment limits women's access to public streets and it creates a fear among women, which means if the menace of street harassment prevails and as long as the issue is not remedied the above mentioned other rights such as political, civil, and economic rights will also be hindered. Therefore, street harassment should not be considered as a minor issue because the questionnaire revealed severe impact of such street harassment on women and this has already become a habit among men to engage in harassment.

E. Recently reported incidents

The recent case on Wariyapola incident made an environment to address this issue. A girl was catcalled by a young man in a public street and she slapped him in retaliation. The video on girl's reaction became famous in social media and it created a fear among men and in return was a motivation for women to stand against their rights and the police was also inattentive on the case and the girl was not given an opportunity to respond which is a clear violation of the Convention on the Elimination of

All forms of Discrimination (CEDAW). Even if the law is adequate the law enforcement authorities themselves are not attentive in protecting the rights of women in fact, the rights of women cannot be guaranteed. In this regard an important point should be made, that law enforcement training should be given specially to police authorities so they can better identify the situation and act against street harassment.

Professor Savitri Goonesekere had made an important point on this issue.
"There is a serious breakdown of the hierarchy of institutions. When talking about this incident, the police made a rather illogical response. They should have first taken the complaint and listened to both parties and then taken some action. The girl was not given an opportunity to respond. I'm not trying to justify her actions but then again the procedures that were followed were rather illogical. Also this video was found on social media and you never know whether there are any technological manipulations. It's is in the hands of the police to make a detailed inquiry, but they failed to do their job."

F. The proposed civil law remedy

With the analysis of the existing legal system the researcher identified the prevailing inadequacies, and that the prevailing law on such harassment is fragmented and scattered. Therefore, author seeks to propose a civil remedy for street harassment to overcome the issue with the aim of creating a deterrent effect. In order to establish a civil law remedy the harassments that occur in streets such as catcalling, leering, shouting, whistling, Blocking the path, groping, stalking, public exposure assault, rape should be categorized into sectors. For that the basic rights such as freedom of movement, equality should be combined to come up with a wide interpretation to address street harassment.

Verbal harassment such as catcalling and whistling are hard to prove and it is hard to convict the perpetrators. But such harassments done by men directly results in discriminating women and embarrassing women in public streets and it undermines the dignity of women. The offences are hard to prove yet the gravity of the negative impact on women are high, but due to the difficulty in gathering proof author seeks to categorize the mentioned offences as minor offences. Moreover, the harassments such as stalking, groping, indecent touching, public exposure that occur in public streets can be proved when compared with minor verbal harassment. In fact, the mentioned acts or physical conduct can be categorized as medium scale offences and evidence of eye witnesses and by standers can be gathered to punish the harassers when such actions are done. However, the offences such as rape and assault are identified as criminal offences under the penal code of Sri Lanka.

Therefore, the author intends to propose the civil remedy to the category of minor and medium scale harassment. The words of such laws should be drafted in a manner in which it includes both verbal, physical as well as minor and major harassment. Since the verbal harassment is hard to prove the focus should mainly be on medium scale harassment. If the law is drafted as such, it would create a deterrent effect to the forms of minor harassments as well. The demarcations as minor and medium scale harassments are distinguished only for the purpose of gathering evidence and there should be no distinction on the imposed punishments, in instances where verbal harassments can be proved. Moreover, spot fines, fines and compensation and a maximum imprisonment of six months can be imposed. The fines and compensation should be decided in a manner in which it suits the contemporary society. It is evident that criminal charges are hard to impose in these instances even though the gravity of the harassment is high due to the difficulties in gathering evidence regarding strangers.

Since this is an area where there is less attention but needs more attention the responsible authorities should consider about establishing a new law which would address street harassment. Once a law is introduced responsible authorities should be given law enforcement training, unless otherwise the protection of rights of women cannot be achieved.

G. Law in the United Kingdom on street harassment

In the United Kingdome there are a number of specific laws which make street harassment illegal.
'Using threatening, abusive or insulting words or behavior in a public place which is likely to cause harassment, alarm or distress is against the law. Specifically section 5 of the public order Act1986 states,
A person is guilty of an offence if he
(a) Uses threatening, abusive or insulting words or behavior, or disorderly behavior, or
(b) Displays any writing, sign or other visible representation which is threatening, abusive or insulting.

For example this would include behavior like swearing at someone in the street, or making unwanted or inappropriate sexual comments.

In terms of gauging the level of seriousness of this offence, it is a summary only offence meaning it can only be dealt with in the Magistrates' Court and not the Crown Court and the maximum penalty is a fine. Therefore this is one of the less serious criminal offences that come before the Courts.'[30]

From the street harassment law in the United Kingdom it depicts that it has identified street harassment as a civil offence and it includes verbal as well as physical harassment. Therefore, Sri Lanka should also seek to develop such a civil law redress to control the issue of street harassment in guaranteeing the basic rights of Sri Lankan women.

In order identify the violations of women's rights which occur as a result of street harassment, a questionnaire was adopted to further prove the inadequacy of the existing legal framework and also to explore the practical implementation of prevailing laws. Therefore, the above mentioned analysis is further elaborated through the questionnaire.

IV. RESULTS OF THE QUESTIONNAIRE

Following findings were revealed through the questionnaire.

The answers to the statement 'What type of street harassment have you experienced frequently?" 52%, 12%, 2%, 12% 8%, 14% have experienced catcalling, whistling, leering, stalking and groping, public exposure respectively.

The answers to the statement 'What were your reactions?' 77%, 10%, 12%, 1% have ignored, verbally responded, sought help from by standers, physically responded.

The answers to the statement 'Did you receive assistance from the others (by-standers)?
65% responded 'Yes' and 35% responded 'No'

88% of women from age 15 – 35, 12% from 36 – 55 experience street harassment.

The answers to the statement "The reaction of the police once the incident is complained?"

45% stated that police were inattentive, 12% stated that they adviced the harrasers when they are brought to the police, 10% stated that police humilated them for complaining such incidents, 33% agree that police rendered assistance to overcome their bad experience.

The answers to the statement 'What were your inner reactions?'
73%, 10%. 0.1%, 16.9% have felt annoyed, angry, happy and disgust respectively.

Response to the statement "Does your way of dressing induce harassers?"
96% agreed that the dress has no impact on the harassers while 4% stated that the dress induces harassers.

Responses to the statemet, "What are the personal barriers you have imposed on yourself to avoid street harassment?"
8%Try not to go alone, 32%Avoid wearing my favourite types of clothes,48% try to avoid going in public streets at certain times and 12% change their route.

90% of women experience harassment on daily basis and also it was revealed that majority of males of age 16 - 35 engage in street harassment.

V. DATA ANALYSIS

Through the questionnaire it was revealed that most men of age 16 - 35 enagaged in street harassment and the most common type of street harassment is cat calling (52%) and whistling (12%). Most women of age 15- 35 become the victims of such harssment. Moreover, it was revealed that most of their response was to ignore such men. Even if they ignore such harassment women commented that they feel anger, disgust towards such harassers. 90% of women experience harassment on daily basis and the intersting fact is that they mentioned harassment as a 'normal' experience for them, Furthermore, it was stated stated that they try their best to act 'neutral' on such occasions because there is no remdy to avoid such harassment.

The important fact to be noted is that majority of women agreed that they are being insulted by men for the fact that they are women. Moreover, they insisted that they feel unsafe uncomfortable and insecure when

they experiene street harassment. Also few women of 0.1% have felt happy on the comments passed to them by men. According to this analysis the fact, that should be taken into consideration is that most types of harasmments fall into the category of verbal and certain action based harassment. Also 98% women see street harassment as a social menace. A number of women have gone through psygological trauma and as a result they tend to change their routes and routines frequently, in fact they feel fear about men in public streets. Furthermore, women said that men engage in such harassment beause they don't feel any fear to harras women mainly because of their mentality on 'masculanity' and they do not feel fear because of the fact that no legal actions are being taken to remedy the issue. This was revealed from the statements given by women and most of the women agreed that police were totally inattentive when they complained about their siuation and that some police officers humilated them for complaining on such experience of harrasment. Apart from that they also argued that some police officers have mentioned that there is no law to adrress street harassment.

Therefore, it is evident through the given responses that street harassment is a serious issue that should immediately be adressed. Men treat women as 'objects' to release their inner frustrations and more importantly, since there is no remedy men do not feel fear or rather there is no detterent effect that has been created within the society. When the laws are lenient men try to gain unneccessary advantages from such lenient laws therefore, the proposed civil remedy will be helpful in adressing this social menace of street harassment.

The following are some of the comments given by women of age 25 – 35

"I have been told worst things that can ever imgine and that no one should ever be heard"
(Respondent age – 26)

"A guy last week catcalled at me, and I verbally responded him loudly when I walked by, I yelled at the top of my lungs and nearly 10 people turned around as he slinked away embarrassed. It made me react in this way because once complained about a harasser to the police they didn't even care about me I felt sorry for being a girl"
(Respondent age 20)

From the above respones it is clear that women undergo serious violations of their right to movement and right to equality. What is more suprising is that the law enforcement authorities themselves show their attitudes of 'masculinity' towards women and it undermines the dignity of women. She reacted in such an aggressive manner because her previous situation was not remedied. It is quite obvious that the comments itself has anger and annoyance and they believe that males do not respect females in the society.

"When I walk alone people have whistled. This has happens to me every day and at many times. However, I do not react on such occasions, I rather avoid such people. Whistling and catcalling would not stop. The best remedy is just to ignore them, nobody care about the embarrassment we go through" she said. (A/L student)

"I go to Pettah to buy essential household items. Obstructing my way and whistling are common. The best thing is to avoid such harassers and avoid eye contact. What we wear has nothing to provoke men to whistle at women. Even if you are fully covered, catcalls would not stop. We have to deal with these things in day-to-day life. Actually we are helpless in this respect," she said (respondent age 35)

"The worst thing I have experienced is, that a stranger followed me for several days, even after I shouted at him he fearlessly stalked me. He stopped that on the day I sought help from others." (Respondent age 28)

"Once I was indecently touched by a man and I immediately went to the police officer who was there close by and he thoroughly advised the harasser, but this unaccepted behavior has become a habit of men." (Respondent 32)

Since the prevailing law is not adequate to adress this issue and there is no legal redress for them they have stood up to win their rights. Women act in aggression to release their inner pain and this might have certain adverse results. with the wide usage of social media certain campaigns are carried out to remedy the issue of street harassment and there are instances in which harasees upload photos of the harassers and those are being shared through social media. This create more complicated issues and such acts violate certain ethics and it amounts in violations of the rights of the harrasser in return. It was revealed that such acts are done by

young women because law does not provide any remedy for stereet harassment and that women are being discriminated everywhere.

The above quoted responds give a strong message to the society and to the law making and law enforcement authorities to adress and remedy the inadequacies in the prevailing legal system on the issue of street harassment and the proposed civil law remedy will pave way to control the unaccepted behaviour among harassers in public streets.

VI. CONCLUSION AND RECCOMENDATIONS

Therefore, from the above revealed facts it clearly evoked that women's right to access public streets and their fundamental rights are deprived and are discriminated based on their gender, because of the patriachal society and men's attitude. Therefore, laws should be in place to create a detterent effect to such harassers and the researcher propses a civil redress such as a harrasment statute to be implemented by giving referece to Artcle 12(2) and Artcle 14(g) of the 1978 constitution of Sri Lanka which in fact would be compatible with international mechanisms such as CEDAW.

Moreover, once the law is been kept in the correct place law enforcement training should be given to police authorities and the police code of conduct should be practically enforced and they should be trained to respect the dignity of women.

Furthermore, it should be noted that laws alone cannot completely remedy the social issues that prevail in the society. Therefore, awareness programs should be conducted to make people aware about street harassment. Also the stereotypical attitudes of patriaachal society should be changed eventually. 'Blue' for boys and 'pink' for girls concept should be changed and the first step should be taken from the smallest family unit itself.

The girls should not be taught to be scared of boys on the other hand boys should not be given excessive freedom if not for girls. If a mistake is done a mistake is always a mistake and it has nothing to with the gender. When different treatments are given to boys and girls within the family they carry the same attitudes to the society at large. As a result men show their supremacy over women and women have to tolerate their attutudes of supremacy. In fact, males do not feel fear to disrespect women and to undermine their dignity because, that is the way males and females have been treated within the family unit. Therefore, certain attitudanal changes should also be changed for the fact that law cannot remedy the offences all alone.

However, law is the major fact that should be considered. Therefore, implementing the propesed civil law remedy for verbal and physical harassment will remedey the situation to a greater extent and it will also create a detterent effect to other severe offences as well and ultimately it would result in the protection of rights of Sri Lankan women from Street harassment while creating a safe and a friendly environment for women in Sri Lanka.

REFERRENCE

The constitution of the Democratic Socialist republic of Sri Lanka 1978.

Convention on the Elimination of all forms Of Discrimination against women.

Penal code (Amendment) Act No.22 of 1995

Law on statutory interpretation
http://home.loxfordlaw.co.uk/unit1/notes-on-statutory-interpretations

Vagrancy Ordinance of Sri Lanka [1]http://www1.
umn.edu/humanrts/research/srilanka/statutes/Vagrants_Ordinance.pdf

Mohammed H, (2013) Hollaback in Istanbul
http://www.asianpressinstitute.org

http://www.ihollaback.org/wp-content/uploads/2014/10/Street-Harassment-Know-Your-Rights.pdf (Accessed on 15th August 2015)

Inculcating Professionalism among Sri Lankan Youth through Educational Reforms Empowering Youth Rights: Legacy in Retrospect

N Ratnatilake
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
navowagz92@gmail.com

Abstract— Youth predominantly represents most innovative and energetic community of a country. Hence it bestows a responsibility upon country to groom and enhance their professional standards guiding them on contribution for national development agenda. This research seeks to address educational reforms that could be introduced to inculcate professional discipline among Sri Lankan Youth uplifting their self- confidence and ethical standards. United Nations considering individuals between ages of 15-24 as 'youth' of a country, enormously efforts to encourage them on impact they could make on society with ground-breaking suggestions and standards they could maintain in professionalism. It is a right that needs to be vested upon youth for initiating and determining paradigm shifts creating the world that they would want to make a survival in future. In that regard main objective of research is to identify amendments to be introduced in Sri Lankan education curriculum and effect it could make in inculcating professional discipline identifying it to be a youth's right to have a prestigious education. Quantitative and Qualitative sources would be of assistance to make this research a success and thus it would be based on a comparative analysis made on UDHR, ICCPR, ICESCR, African Youth Charter, Ibero American Convention on Rights of Youth and National Youth Policy of Sri Lanka with National Human Development Report: Youth and Development 2014. Interviews conducted with Secretary to Sri Lanka Ministry of Education, Chairman- National youth Services Council, Junior Chambers International – Sri Lanka and Youth Link Movement along with questionnaires presented among youth (age 15- 25), school teachers and parents would layout authoritative and public opinion for educational reforms paving way to establish ways and means of implementing professionalism as a youth right in Sri Lanka. This research while suggesting educational amendments with a rights-based approach would create platform for responsible authorities to make their attention upon an effective mechanism to empower youth and utilize their innovations in a fruitful manner for sustainability. The research would finally accomplish the Legacy of youth to become stakeholders of panoramic development exercising their inherent youth Rights.

Keywords— *Professionalism, Educational Reforms, Youth Rights*

I. INTRODUCTION

The legacy of 'youth' being stakeholders of a country's future is a universal truth that the humankind has been witnessing throughout ages. An Individual who was once a youth becomes a forerunner of the nation according to the way he or she has been moulded during his or her turning point in life as a youth and the experience that he or she would have had during the early stages of life. The ambitious and the innovative milestone of life cherished by any human being as a youth, praise them with an inherent potential in leadership skills and with unique burgeoning ideas at all levels.

The United Nations organization recognizes this enthusiastic community to be 1.8 billion of the world's population under the age category of 15-24, whereas Sri Lanka identifies 23% of the local youth population within the age group of 15 -29. Therefore the spirit of this community should be an essential concern of a country, whereby it is expected to empower them with knowledge, skills, ability, career guidance and professionalism focused on leadership skills conceded with self-confidence and a code of ethics.

The researcher through this comprehensive and analytical study on youth rights, strive to pursue the objectives of:

- Respect towards the professional standards followed by a code of ethics that needs to be inculcated for the progression of youth community in the prevailing educational system of Sri Lanka.
- Expand the scope and application of the policy alternatives that have already been established nationally by proposing them to be replaced with a youth charter for feasible and effective mode of implementation creating a binding effect.
- Render justice and promote equity in retrospect of youth Rights on behalf of the Sri Lankan

Youth community whilst formulating a background for further research and discourse on this developing branch of human rights in the domestic sphere and the international arena among youth delegates.

In that regard, the research would emphasize on the current policies recognized within the domestic legal framework to address professional education as a Youth Right and its implementation with a comparative analysis on the regional and international initiatives that have established and implemented professionalism through education as a youth right benefiting the youth community with their commitment towards the sustainable development agenda of the country.

II.METHODOLOGY

This research has based its study on qualitative and quantitative resources. As qualitative sources the researcher has focused on the National legislations. Consequently the constitution of Sri Lanka has established the foundation and had paved way to ensure the youth rights which forms an integral part of human rights. The research also has focused and has initiated proposals following the principles laid down by the Sri Lankan Youth Policy which were recently incorporated by the Ministry of Youth Affairs and Skills Development of Sri Lanka.

Since the research focus to promote professionalism through educational reforms, it has also supported and had constructed major arguments upon the policies introduced by the 'National Educational goals and basic skills' the student - teacher progress report of year 2015, (the latest version).

In addition to the local standards the research adopted international instruments recognized and ratified by nation states, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and cultural rights. The Youth Charters from foreign countries on regional basis had provided guidelines and necessary amendments that could be brought forward if the local authorities are to adopt a youth charter domestically.

The interviews conducted with a member of Sri Lanka Youth and among National and international youth delegates has enriched the research with substantial feedbacks which could be implemented within the domestic sphere.

The quantitative figures which enhanced the scope of the research has been extracted by the National Human Development report of 2014 and by a survey conducted among youth voluntary groups, teachers and students.

The research area associated with a developing branch of law has been exclusively confined with limited resources up to date and thus, to avoid such circumstances the research endeavours to initiate a comprehensive and an intellectual discourse upon the new area and stimulate logical ideas in order to accomplish the research objectives successfully and rationally.

III.DISCUSSION

A. Sri Lankan Policy Alternatives to Empower Youth Rights in Professionalism

1) Existing Youth Policies Compromising Youth Rights:

'Professionalism' followed by leadership skills, self-confidence, discipline and Inter-cultural interaction would be the pillars of an Individual to build up its personality into a potential and a well-established citizen in the society. Apart from the subject knowledge, skills and talents, a preliminary code of ethics would escort towards a dignified character that would have the capability of making a substantial contribution to the Sustainable development of the country. Youth representing a very radical state of mind necessarily should be adapted to such a code of ethics in order to guide them how to furnish their innovative opinions in a descent manner integrated with soft skills. Robert Kennedy emphasizing on the inherent nature of youth states that:

"This world demands the qualities of youth: not a time of life but state of mind, a temper of will, a quality of imagination, a predominance of courage over timidity, of the appetite of adventure over the life of ease"

The spirit of youth therefore needs to be ignited and professed with adequate ethical standards moulding their personalities. The assistance given through Professional Education starting from school would be an idealistic approach to achieve this common goal on behalf of the entire youth population in Sri Lanka and would compromise the Youth's Right for Professional Education.

The National Policies until the establishment of the National Youth policy (NYP) have not taken any interest of emphasizing upon this essential factor throughout the history in a broad manner. The National Youth Policy which came into force on the 14th of February 2014 was one of the major initiatives of the Ministry of Youth Affairs and Skills Development of Sri Lanka to address the

youth problems and challenges they face in the society at large.

During a specific era the youth were considered to be a 'violent' or a 'frustrated' community of the local population due to the youth led insurrections in the 1970's and 1980's. Despite being an aggravating group, the youth had to undergo a discontent period due to the three decades of war in the country and their desires and opinions have been ignored and abandoned at all times.

Hence addressing the youth issues in a holistic manner the National Youth Policy was inaugurated considering the "Youth as a constituency with certain Rights and Obligations". Furthermore the Policy intends to recognize the potential of youth to contribute meaningfully to the development of the country and identifies the key actors and institutions must have a duty to ensure an enabling environment where youth could flourish.
The Principles and Values underlying the NYP sets out certain important principles empowering Youth Rights in Professionalism and recognizing Human Rights as a fundamental basis for youth development.

"3. Empowering youth:
To strengthen youth to participate and take responsibility On behalf of themselves, their community and humanity

iii. Respect for equity and social justice in conceptualizing development

v. Commitment for democratic principles and human rights as enshrined in the Sri Lankan constitution and international covenants to which Sri Lanka is signatory

vi. Promoting high standards of professionalism and integrity by all involved in youth work

ix. Ensure participation of young people at all levels of decision making process

x. Respect human rights as a fundamental basis for youth development"

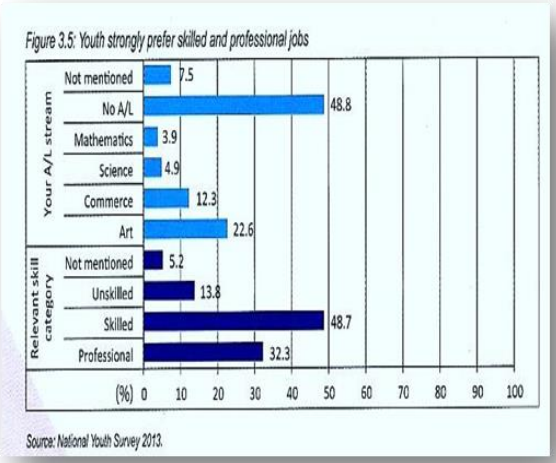
(NYP- Sri Lanka)

The National Youth Policy likewise has adapted a Rights based approach to ensure the youth's Rights in an organized manner paving the way to integrate professionalism and to empower participation and respect young people's aspirations at all levels of decision making. Hence it has also strived to identify special youth groups in the society who needs an extraordinary attention such as: Unemployed Youth, Youth from war affected communities, excluded, discriminated and exploited youth groups, youth at different educational levels, young women, rural youth, urban low income youth, youth in conflict with the law, estate sector youth and differently abled youth. These marginalized groups comprise a majority of the youth population in Sri Lanka thus it highlights the importance of empowering the rights of this groups through professional standards since the energy and the innovative ideas utilized would influence all advancements in the sustainable development agenda of a country.

Although these policy alternatives have been circulated within the country, the authorities associated with youth persist on the belief that 'Inculcating professionalism' needs to be implemented commencing from the school education itself, since the age group of 'youth' lies between an individual's childhood and adulthood where he or she probably spends one quarter of their youth in the school and insists that it is necessary to allocate government expenditure on professional education for effective implementation.

2) *National Educational Policy propounding Professionalism:*
The Educational Policy of Sri Lanka in its national educational goals has adopted a basic structure to encourage inculcating professionalism among school children. But in the practical scenario it gives effect to the doubt whether such goals are in fact implemented for the developments in Professional Education. Precisely in the progression of the ethical standards of the students to interact in diversity, Integrity, self-confidence, responsibility and the potential to face different issues at any given situation. The responses to questionnaires distributed among youth prominently highlights the necessity of professional educations where they need to be guided regarding their career from school itself and should be given opportunity to engage in campaigns organized at school levels and during their vacation period after pending results of ordinary level examination.

A similar attitude has also been illustrated in a National Youth Survey conducted in year 2013 where youth has strongly preferred skilled and professional jobs.



Source: Sri Lanka National Human Development Report 2014

The Asian Youth Delegates at the World Conference on Youth 2014 proposed the adaption of a model of 'Summer Camps' concept conducted constantly in European countries which is not very much constant and effectively conducted in Asian countries to uplift the leadership skills, interactive skills in cross cultural backgrounds and discipline among youth, as suggestions to initiate professional education among school children.

However, the research identifies a Code of Ethics specifically adapted in the national level would be of assistance in this contemporary urge of effective implementation to establish the basic disciplinary grounds of professionalism. Therefore In making Preference to an Australian- Victorian model, code of ethics would bring out suggestions in the national level since Sri Lanka has also been a Colony of the British and still co-exist with the Victorian influence in laws and regulations and in many more structures of the country.

The Victorian model of ethical practise encourages internships, apprenticeships, other vocational training and skills development for youth at school level with special reference to 'Universal Declaration of Human Rights(UDHR)' and the 'Child Rights Convention(CRC)' since the age of youth formulates an integral part of childhood whilst simultaneously making reference to youth school leavers as well. The code precisely recognizes and inspires the professional education to be monitored with a code of ethical practise and defines a code of ethics as follows:

"A Code of Ethical Practice is a document developed by a body of practitioners to provide an agreed framework and set of values for professional practice. It provides a frame of reference in which to develop ethical and safe practice"

The Youth Affairs Council of Victoria (YACVic) that drafted the Code, states that it is a 'living' document developed for the youth sector and proclaims that it reflects the history and evolution of the youth work profession in Victoria and adapts the Youth Affairs Council of Western Australia's Code of Ethics and the United Kingdom National Youth Agency's Ethical Conduct in Youth Work. Moreover providing a definition for 'young people' the code insists that the code would apply to youth between ages 12-25 and taking into consideration the necessity of other organizations it up held that the code would also apply to young people in a broader age bracket.

However it is significant that the code has given prominence to Indigenous youth Sectors of the Australian society taking into account the 'Declaration on the Rights of Indigenous Peoples'. Throughout the codification, it depicts that it has adopted a Human Rights based approach to convince Rights of youth in inculcating professionals among the Youth.

The compilation of the national educational goals of Sri Lanka with a code of ethics would enhance the scope of professionalism from a skills based education to professionalized education which would benefit the youth sector in their pursue to contribute in the development process being counterparts of the future Sri Lanka. Hence the responsible authorities would have to expand the scope of application and implementation in an effective manner extracting models from other countries in a way justifiable to the domestic context to inculcate professionalism among Sri Lankan Youth for National Development exercising their Youth Right to participate in decision making and shoulder the responsibility of building the nation.

B. International Jurisprudence Steering Professionalism to Empower Youth Rights through Educational Reforms

The 1978 constitution in Article 14(1) (g) declares that:
"The freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise"

The supreme law of Sri Lanka entitles each an every citizen with the fundamental freedom to engage in any profession and under such freedom the youth would also be an exclusive community who would enjoy the

freedom of profession or any other business or trade. The professional education thereby needs to be amended and reformed for every youth citizen to enjoy this freedom in a fruitful manner.

Proposing the educational policies to be adopted in member countries the 'Universal Declaration of Human Rights (UDHR)' and the 'International Covenant on Economic, Social and Cultural Rights (ICESCR) set out provisions to empower human rights in professional education.

"Article 26(1) -.....Technical and professional education shall be made generally available……"

"Article 26(2) - Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace"

The ICESCR adopting the similar wording of *Article 26* of UDHR in *Article 13* of the covenant realizes the need for strengthening the professional standards.

Youth rights which needs to be ensured could be identified as a sub category of Human Rights, therefore coupling *Article 14(1) (g),* the domestic law of Sri Lanka with International Jurisprudence reflected in UDHR and ICESCR would establish the basic right for every citizen to enjoy the fundamental freedom of professional education where by it would be possible to comply such basic rule with the National youth Policy alternatives to formulate a Youth Right which would even provide an ideal proposal for a domestic Youth Charter.

A mechanism which could be adopted and implemented in such a way would create the platform to introduce a local charter on Youth Rights. The step by step proceeding of introducing youth charters in a majority of nation states would convey a message to the international community and would urge the need of having an internationally recognized and a binding charter exclusively on youth rights.

1) Regional Action Plans Establishing Grounds to Inculcate Professionalism as a Youth's Right: African Youth charter / Ibero American youth charter

The African Youth Charter and the Ibero American Youth Charter are very significant charters which make the parties binding to ensure and empower Youth Rights within the respective regions and provide models even for drafting a charter in the Sri Lankan context for effective implementation of Youth Rights beyond the thresholds of a policy.

The African Youth Charter is one of the prominently recognized charters around the world and would be an ideal adaption to the domestic law of Sri Lanka to draft a legal framework on youth rights since both countries regulate under a similar jurisdiction following the Roman Dutch Law.

The African Youth emphasizing on the Right to Professional standards in education through

Article 10 (3) (d) declares:
"Provide access to information and education and training for young people to learn their rights and responsibilities, to be schooled in democratic processes, citizenship, decision-making, governance and leadership such that they develop the technical skills and confidence to participate in these processes;"

Article 11 (2) (f) declares:
"Institute measures to professionalize youth work and introduce relevant training programmes in higher education and other such training institutions;"

Apart from the African Youth Charter, The Ibero-American Youth Charter also lay down educational rights for youth based on professional standards under *Chapter 3- Economic, Social and Cultural Rights* of the Convention in the following manner:

Article 22(4):
"The education shall promote the exercise of values, arts, science and technologies in the transmission of teaching inter- culturalism, respect of ethnic cultures and open access to new technologies and promote among the educated people the vocation for democracy, human rights, peace, solidarity, acceptance of diversity, tolerance and equal rights of men and women."

Article 22(5):
"The State Parties recognise that education is a life-long learning process which includes elements from formal and non-formal education which contribute to the continuous and comprehensive development of youth."

The provisions embedded by the Ibero American convention ensures the fundamental Rights of Youth in the European and American countries, thereby declares the need to ensure professional education to empower the youth rights in the regional level which could at least

pave way to adopt a charter within the Asian region and subsequently or predominantly in Sri Lanka as well.

2) Discourse Within Youth Conferences Proposing Professionalism through Education as a Youth Right: Colombo declaration on youth

The Colombo Declaration on youth is the outcome document of the World Conference on Youth (WCY) 2014 which clearly insisted on establishing professional standards in education and make educational reforms to the existing policies and laws. The Youth delegates from around the world at a general forum negotiated and agreed upon empowering youth rights in this regard and would commit to declare a youth rights charter in their respective countries.

"Realizing Equal Access to Quality Education

Article 11

Increase recognition of non-formal education and vocational education, including volunteer schemes and Information and Communication Technology models and apprenticeships, as an effective means of empowerment and skills transfer.

Article 4

Redouble efforts to integrate education for democratic structures, sustainable development, along with civil liberties, social leadership, human rights, gender equality, inter-culturalism, and peace education into national curricula.

Article 15

Achieve effective learning outcomes at all levels that impart knowledge and skills that match the demands of active citizenship."

Identifying the loopholes in implementation of the professional standards among nations, the delegates have made special concerns on redoubling the efforts to integrate education for the advancement of post 2015 sustainable development agenda which could only be gain by inculcating professionalism through educational reforms which would ultimately empower youth rights igniting the key concern at the conference. Moreover the delegates focused on the importance of maintaining the 'reciprocity' among nations through *Article 12*.

Sri Lankan being the host country of WCY 2014 has formed the background to advance youth Rights in Sri Lanka in a substantial manner, therefore the research suggests and encourages ta take quick and effective measures to implement a curriculum to reform education to initiate professional education in a successful manner.

III.CONCLUSION

Sri Lanka being a developing country essentially needs to empower the youth through professional education to sustain the national development of the country by extracting the youth energy and innovation. According to the research study in the course of respecting the ideas and opinions of the youth groups, respecting the views of the responsible authorities and integrating the international jurisprudences suggesting stability in the empowering process, adopting of a Youth Charter would be effective to intensify the implementation process where the state would be made binding to follow the regulations in a rigid manner. The country currently expects the legacy of youth to be in action to sustain the forthcoming national development agenda therefore it is important that the government invest the national expenditure more accurately with necessary resources in education whilst adopting new reforms to inculcate professionalism among Sri Lankan Youth to empower Youth's Rights to take part in decision making and committing themselves to drive the future of their country in a strategic manner.

REFERENCES

Colombo Declaration on Youth- 'Mainstreaming Youth in the Post-2015 Development Agenda' (2014)

Code of Ethical Practice – A First Step for the Victorian Youth Sector (2008). Youth Affairs Council Council of Victoria Inc.

Legislation (Africa. African Youth Charter 2006)

Legislation (Ibero - American Convention on Youth Rights, 2005) Ibero-American Young Organization

Sri Lanka. Printed on the Order of Government (1978) *'The Constitution of the Democratic Socialist Republic of Sri Lanka'*. Department of Government Printing, Sri Lanka.

Sri Lanka. Ministry of youth Affairs and Skills Development (2014) '*National Youth Policy Sri Lanka'*. Bright Publishers.

Sri Lanka. Student – Teacher Progress Report (2015) *'National Educational goals and basic skills'. Department of Government Printing, Sri Lanka.*

United Nations Development Program Sri Lanka (2014) *'Sri Lanka National Human Development Report 2014: Youth and Development'*.Softwave Printing and Packaging (pvt) Ltd.

United Nations Department of Public Information (1948) *'Universal Declaration of Human Rights'*. United Nations Organization.

United Nations Department of Public Informational (1976) '*International Covenant on Economic, Social and Cultural Rights'* . United Nations Organization.

BIOGRAPHY OF AUTHOR

Research interests: human rights, international criminal law, international humanitarian law, sexual and gender based violence.national security law. Research paper presented in 2015 sexual and gender based violence, 'Evacuating overwhelming tragedy': Lacuna in the sri lankan legal framework to protect undergraduates being victims of SGBV within local universities at the Eastern University, Sri Lanka co-organized with Association of Commonwealth Universities.

Sexual Orientation and Human Rights; Applicable Laws of Sri Lanka and UK

MAN Chandratilaka[1#] and P Mahanamahewa[2]
[1]Legal Studies Unit, Faculty of Management Studies and Commerce, University of Sri Jayewardenepura, Nugegoda, Sri Lanka
[2]Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
#nihal177@yahoo.com

Abstract— *All human beings are born free with equal rights and dignity despite sexual preferences. The Penal Code of Sri Lanka, made sex between men an offence. The Sri Lankan Penal Code was formulated by British as they then were. The existence of lesbianism was not even acknowledged by the Penal Code. With the amendments made to the Penal Code in 1995, women too now face anti-homosexual regulations. Though this law is rarely enforced in this country, its mere existence is enough for the police and anti-gay groups to brand gays and lesbians as perverts and law-breakers. The Buggery Act of 1533 made buggery a capital offence in England until 1861. The Wolfendent report led to the passage of the 1967 Sexual Offences Act, which legalized homosexual acts. Civil Partnership Act recognizes same-sex relationships from 2005. The Marriage (Same Sex Couples) Act 2013, allows same-sex marriage, was passed in 2013. Regionally India and Nepal also have taken steps to change their laws. Why does Sri Lanka still discriminate sexual minorities despite English and international development? In this article, we examine the applicable laws of Sri Lanka and UK of sexual minorities; whether we can be benefited from their developments. It also reviews how UK law gradually developed from death penalty to recognition of same sex marriages in 2013. For this purpose I would use the comparative research method to achieve the objectives. The main Objective is to explore the laws of UK and to measure the relevant human rights instruments. With the development of cyber laws and globalization international law influences individual countries. This area of law is quite capable of developing in Sri Lanka but unfortunately international laws around the world are ambiguous. This study opens up the opportunity for activists who are involved in working in the field of human rights/sexual orientation.*

Keywords— *Orientation, Human Rights, Discrimination*

I. INTRODUCTION

Sexual orientation is an enduring emotional, romantic, sexual or affectional attraction to another person.It is different from *sexual behaviour* because it refers to feelings and self-concept. Persons may or may not express their sexual orientation in their behaviours. Sexual orientation exists along a continuum that ranges from exclusive homosexuality to exclusive heterosexuality and includes various forms of bisexuality.

Sexual orientation is a relatively recent notion in human rights law and practice and one of the controversial ones in politics. Prejudices, negative stereotypes and discrimination are deeply imbedded in our value system and patterns of behaviour. For many public officials and policy-makers the expression of homophobic prejudice remains both legitimate and respectable. Many countries around the world have laws regulating sexual activity between adults of the same sex. These laws are used by the police to harass, intimidate, and arrest gay men, lesbians, bisexuals, and transgender persons.

Countries that maintain these so-called 'sodomy' laws violate the international standard. Many of these throughout the world are legacies of the British colonial period, when colonizers introduced penal codes mimicking those in England. Today, countries around the world must face the lingering impact of these laws. The original laws, which speak of 'unnatural sexual acts against the order of nature', unquestionably, find their moorings in Christian strands of morality.

Sri Lanka has had an unpleasant human rights situation. Since independence, the political situation in Sri Lanka has been characterised by the conflict between the Sinhalese majority and the Tamil minority. The conflict has claimed over 65,000 lives when it ended recently in 2009. Like most other Asian countries, Sri Lanka is still entertaining a sodomy law. Sections 365 and 365A of the Sri Lankan Penal Code prohibit homosexuality. Section 365 prohibits 'carnal intercourse against the order of the nature', while section 365A uses the phrase 'an act of gross indecency'

Throughout the world the lesbian and gay movement have accelerated in recent years. By integrating questions of gender and sexual orientation into international human rights law, these movements have laid the groundwork for addressing human rights violations against homosexuals. Sodomy laws have been repealed in

many jurisdictions. All the European countries, including the United Kingdom have decriminalised the homosexuality.

II. METHODOLOGY

"What knows he of England who only England knows?"

The sentiment of Rudyard Kipling's famous question can be applied to justify the science of comparative law.

The comparative research method will be used in this research as cross-judicial study, analysis, identification and explanations of similarities and differences in order to achieve the objective of the research. Examination of the law in these selected jurisdictions is needed to explore whether there is a pattern for the development of the law and also to ascertain whether this pattern will be suitable for adoption in Sri Lanka. The application of a comparative method of analysis, allows us to observe how other societies at a similar stage of civilization face up to the same and corresponding problems. Therefore it is important to compare other legal systems to determine how these systems solve the problems encountered in the law of human rights and to consider how Sri Lanka can be benefited by the adoption of principles and solutions obtained in those systems.

There are numerous reasons that comparative research has been adopted in this research. Comparative research has become popular recently specially in social sciences research. Globalization has been a major factor, increasing the desire and possibility for educational exchanges and intellectual curiosity about other cultures. Information technology has enabled greater production of quantitative data for comparison, and international communications technology has facilitated this information to be easily spread.

This is also a library based research as it can be done in library situation in most of the time. Varies constitutions, statutes, case laws, international treatises, research articles, books, paper articles and internet articles will be used.

III. DISCUSSION

A. United Kingdom

The first civil injunction against sodomy in British history was the Buggery Act of 1533, which made the 'detestable and abominable vice of buggery committed with mankind or beast' a felony. The Act allowed the monarch to issue death sentences against those convicted and to appropriate their property. Thus sodomy shifted from being a sin against God to also being a crime against the state. Buggery remained a capital offence in England until 1861, when the Offences Against the Persons Act repealed the death penalty as the mandatory punishment for homosexuality. The Labouchere Amendment of 1885 outlawed 'gross indecency' between men, a category wide enough to encompass any type of sexual activity. This is the legal provision under which Oscar Wilde was famously convicted.

In the autumn of 1953 there was little public support for homosexuality to be decriminalised. After several scandalous court cases in which homosexuality had featured, on 24th. August, 1954, British Parliament appointed a Home Office departmental committee 'to consider . . . the law and practice relating to homosexual offences and the treatment of persons convicted of such offences by the courts.' This Committee was chaired by John Wolfenden. Result of their research was the *Report of the Departmental Committee on Homosexual Offences and Prostitution,* published in 1957 and popularly known as the Wolfenden Report. The final recommendation of this Committee was that "homosexual behaviour between consenting adults in private should no longer be a criminal offence." The report led to the passage of the 1967 Sexual Offences Act .Its publication was a turning point in the legalization of homosexuality in European countries, all of which have now legalized homosexuality and homosexual acts.

As a result of the European Court of Human Right's ruling in *Sutherland v UK* in 1997, UK made a reduction of the age of consent for homosexual acts from 18 to 16, making it equal to that for heterosexual acts, through Sexual Offences (Amendment) Act 2000 with effect from January 2001.

Through the enactment of Human Rights Act (HRA) 1998 , the UK has incorporated and enforced the rights guaranteed in the European Convention on Human Rights. This means that there is a domestic remedy in the UK now if discrimination occurs on grounds of sexual orientation, since Article 8 of the Convention gives a right to respect for private and family life, and Article 14 has been interpreted by the European Court of Human Rights to include 'sexual orientation' among the prohibited grounds of discrimination . In *Antonio Mendoza v Ahmad Raja Ghaidan* the Court of Appeal held that a gay couple should be treated in the same way as a heterosexual couple for the purposes of succession rights under the Rent Act 1977.Apart from the UK Human Rights Act, the European Union has been active recently in this area.This has been made possible by amending Article 13 of the EC Treaty, where 'sexual orientation' has been inserted among the prohibited grounds of discrimination

Turning to the UK Ministry of Defence policy excluding homosexuals from the armed forces, in the cases of *Lustig-Prean and Beckett v United Kingdom, Smith and Grady v United Kingdom* (1999) the European Court of Human Rights ruled that such a policy is a violation of the Convention rights. In order to comply with it, policy in the UK in relation to homosexuals in the armed forces has been relaxed significantly. *The Armed Forces Code of Social Conduct: Policy Statement* explains the new approach. Sexual orientation is acknowledged to be 'essentially a private matter for the individual.' The coming into force of the Human Rights Act 1998 extends protection against dismissal or detriment on the ground of sexual orientation to all individuals employed by public authorities.

Regarding transsexuals, following *P v S*, the Sex Discrimination Act 1975 in the United Kingdom was amended with effect from 1 May 1999 by the Sex Discrimination (Gender Reassignment) Regulations 1999. Under the new section 2A, the definition of discrimination was extended to include direct discrimination in relation to gender reassignment. In a further recognition of legal acceptance of homosexual couples in the UK, a Civil Partnership Act was passed in 2004.

Same sex marriages was legalised in England, Wales and Scotland in 2014, Today, LGBT citizens have most of the same legal rights as non-LGBT citizens and the UK provides one of the highest degrees of liberty in the world for its LGBT communities. the UK currently holds the record for having the most LGBTI people in parliament in the world with 27 LGBTI MPs elected at the 2015 election.

B. Sri Lanka

The Penal Code of Sri Lanka, which was enacted in 1883, made sex between men an offence. The Sri Lankan Penal Code is a carbon copy of the Indian Penal Code which was formulated by the British Parliament in the 19th century. Both Sri Lanka and India were colonies of Britain, so it is clear that Sri Lankan Code is also based on British criminal laws as they then were. The existence of lesbianism was not even acknowledged by the 1883 Penal Code. The Victorian laws introduced under British colonial rulers did not acknowledge that women could have sex with each other and therefore lesbians could not be prosecuted. However, with the amendments made to the Penal Code in 1995, substituting the word 'males' with the gender-neutral 'persons', women too now face anti-homosexual regulations. Though this law is rarely enforced in this country, its mere existence is enough for the police and anti-gay groups to brand gays and lesbians as perverts and law-breakers.

Sections 365 and 365A of the Sri Lankan Penal Code of 1883, as amended by Act No.22 of 1995, are the provisions that criminalize homosexuality. The term of imprisonment under section 365A being two years or less allows this offence to be prosecuted by the police in the Magistrates Court, unlike an offence which entails a prison term of three or more years which makes it an indictable offence that has to be prosecuted by the Attorney General. Moreover, it is a sad fact that those who are charged under this penal provision are made to undergo a great deal of harassment and humiliation at the hands of unsympathetic police officers. Not only are these individuals submitted to various forms of blackmail, there are many instances where demands of bribes were made from these helpless victims. Extreme humiliation, sexual harassment and sexual abuse at the hands of police officers too are known to take place on these instances. It is clear that in Sri Lanka people are discriminated because of their sexual orientation despite the fact that the Sri Lanka constitution of 1978 recognise non-discrimination or Sri Lanka is a party to the several United Nations Conventions which decriminalises homosexuality. Though Sri Lankan penal provisions based and imported from England yet Sri Lanka has failed even to reach some of their development like non-discrimination which England adopted as far as in 1967.

The equalisation process can be divided into three stages:
First, decriminalisation;
Secondly, non-discrimination; and
Finally, provision of same-sex marriages having equal status to heterosexual ones.

These are the steps that can be taken as far as the law can do. While some countries like UK has even reached the peak, the third stage, Sri Lanka is still grappling with the threshold question of decriminalisation. Decriminalisation is, however, the only demand that the gay and lesbian activists are making. That is all the human rights the homosexual people need in Sri Lanka at present. They are not crying for social recognition, they only want legal indifference. Delete sections 365 and 365A from the Penal Code and they are happy. They do not want any more legal protection, like non-discrimination in employment or the likes, let alone provision for same-sex marriage.

When comparing the two countries fundamental rights chapter in 1978 constitution is not wider than the Human Rights Act in UK. Sri Lankan Constitution does not recognise right to life (however the court has accepted) right to privacy and right to health as fundamental rights. Asia or South Asia has no strong mechanism or recognised institution like European Union. Public

morality and attitudes are different. Country like Sri Lanka still strongly believes and promotes 'family' unlike the UK which promote 'individualism'. We cannot expect our parliament to appoint committees or amend the laws. Therefore Sri Lankan cannot expect to change their laws recently. But human rights are universal in nature. People with different sexual orientation are lived all over the world. Those sexual minorities live in Sri Lanka are also entitled to equal treatment and to live with respect and dignity. If they are denied human rights, treat as a second class people, commit suicide or seek asylum in UK where these laws were introduced, is a shame for a civilised country. Indian Delhi High Court decided in 2009 that penalising homosexuals violate the Indian Constitution. Nepalese Supreme Court decided in 2007 that penal code provision of criminalising sexual minorities are against the international standards that Nepal is a party and decriminalise homosexuality. Sri Lanka is also a party to all those international conventions.

IV.CONCLUSION

Sri Lanka is in the backwater of the global gay rights village requires no further explaining. Reflecting upon world opinion shows that a tolerant attitude towards deviant sexual orientation to be an inseparable part of all human rights.The opponents of a change in this particular law is mainly the religious fundamental groups.Beside, Sri Lanka being a pluralistic society must be tolerant of each others preferences and their views. Religious beliefs of a group of society cannot be used to justify the criminal penalty on homosexuality.

The Penal Code is the major statute which embodies the substantive criminal law of Sri Lanka. In Sri Lanka any change in the penal provisions is necessarily through legislative enactment. Therefore, it is of paramount importance for Parliament to be mindful of the sombre responsibility thrust on it to update the law in keeping with the contemporary global requirements.

The question mooted here is that is it reasonable for law to seek to penalize persons for their sexual preferences? Even if sexual orientation towards a person of the same sex is considered immoral, should law enforce morality? The Wolfendon Report made a very important distinction between the criminal law and private morality, "… unless a deliberate attempt is made by society, acting through the agency of the law to equate the sphere of crime with that of sin there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business". The reality is that there are many forms of morally unacceptable offences, like adultery and suicide which is not made to suffer the sanctions of criminal law. The law should not and cannot seek to penalize persons for their sexual preferences. Reformation of the criminal law of this country is needed in order for the homosexuals to take their rightful place in the society. The penal law as it stands now endorses old-fashioned bigotry, justifies second class status of the homosexuals, and legitimises prejudice against all lesbians and gays. Allowing a law of this nature to remain in the statute books puts Sri Lanka totally out of line with most other countries it strives to emulate. It leaves the country in par with a category of countries whose human rights record is questionable and held in contempt by all international forums worthy of recognition.

Very few cases on this law have actually reached the upper courts level in all this time, but the law continues to be a potent tool of oppression. It provides the impunity to a venal police to extort money, blackmail, indulge in violence, and extract other favours, including sexual favours, by dangling this law on homosexual males and hijras, a traditional social group of transvestites and transsexual persons. It impedes sexual health promotion activities like HIV/AIDS interventions amongst same sex attracted males. It discourages reporting of male rape, and therefore encourages such rape, often by police. In sum, it disrupts the social existence of all same sex attracted persons, erodes their dignity and self respect, and reduces them to a sub-human level of existence.The greatest barrier to more effective safer sex education for homosexuals is the criminal law as it now stands.

Sherman de Rose, leader of Companions on a journey said that often Sri Lankan homosexuals committed suicide because they had no support from their families, from their community and from the state. The suicide is a shame for a society which claims to be civilised. Homosexuality was made criminal when it was not understood at all and was seen in the same way one might see smoking.Since the 1890s there has been a lot of change in science's approach towards homosexuality .Science is in agreement that being gay is irreversible. It cannot be cured. So what is the purpose of this law? You might as well pass a law outlawing tall people or fat people or people with curly hair. The law serves some purposes in Sri Lanka like blackmail. It allows unscrupulous elements in our society to prey off gay men. And from 1995 government made the situation worse. Lesbianism, which was not a criminal offence, has now been made one.

South Asian people often say that homosexuality is not a native thing, it is really an import from the West. But this is only preposterous. Same gender attraction is present in all cultures. 'Homosexuality is as native to the Indian Subcontinent as heterosexuality, and cannot be dismissed

as a western import.'. In fact the only thing that was imported was section 365 of the Penal Code, which was brought in and gifted to Sri Lankan people by the British. The British must have found homosexuality prevalent enough and with enough freedom and social sanction to have their Victorian morals shaken, and would therefore have wanted to put a stop to such 'vile native' practices by legislating appropriate laws. It is not homosexuality that is a western import, it is criminalisation.

The universality of Human rights demands that prevailing and dominant cultural and social norms cannot be invoked in a manner as to circumvent or restrain fundamental and constitutional rights. Many of the progressive legislations in Sri Lanka would never have been enacted if we were to give way to the arguments by cultural relativists.

Governments of the countries which still criminalizes homosexuality do so on the pretext of prevailing social attitude towards homosexuals. should law enforce morality? Law should have better things to do than peeping through the bedroom windows and punish sex between consenting adults. "I don't care what other people are thinking because I'm gay. But I do have to care what the law says. And it's what the law says that counts for everybody. Social perceptions etc are all bogus. If the law says it's a crime, everybody will say it's a crime and raise their finger accusing that you're a criminal. If ever it's deleted from the crime books, no one would dare point to you. This was what a middle-aged gay person in Sri Lanka had to say.

The truth is, at the end of the day, that the possibility of changing the law in the near future is meagre. The main reason, it is submitted, is the fear of losing power. The only worry of the government is that if they legalise homosexuality it might anger the traditionalist citizen-voters who might in turn dethrone the government of the day in the next election. In conclusion it is urged that thought be given to the fact whether people should be allowed to live their lives in their own society with respect, dignity and freedom: these are fundamentals of human rights. This should be the same for everyone everywhere, irrespective of race, religion or culture. Let the government and all the right thinking people in Sri Lankan society unite in this effort.

ACKNOWLEDGMENT

This work is the result of M.phil/Ph.D research. During this time we have been assisted by many people. First of all I am deeply indebted to Fr.Dr.Noel Dias for his advice from time to time. Dr Abeysinghe'S advice, counsel and patience must be appreciated .These comments greatly helped me shape this essay. I am grateful to my friends Arjun and Isuru for their support. Special thanks go to the authorities of Public library; Colombo university library and Sri Jayewadenepura university library for letting me use their resources. I gratefully acknowledge the support given by Asela who sent me books and other materials. My Friend's Gayan's patience and good humour have been invaluable in sustaining me through the ups and downs of this project. I also want to thank Chaturi and Vilani for their admonitions and suggestions, though they will no doubt continue to disagree with me about many matters. Last but not the least; I appreciate the generosity of Lawyers, Magistrates and other persons in taking the trouble of giving me tips on the topic.

REFERENCES

Dudgeon v United Kingdom 4 Eur.H.R.Rep.149 [1981]
Norris v Ireland 13 Eur.H.R.Rep.186 [1991]

Wolfendon Report, United Kingdom, 1957
Naz Foundation v Government of NCT of Delhi and Others WP(C) No.7455/2001 decided on 2nd july 2009

http://iglhrc.org/sites/iglhrc.org/files/SriLankaCC.pdf accessed 04.03.2015

Sutherland v UK LTL 28/3/2001, Lawtel web services

Medical Negligence Law; for a Better Approach in Sri Lanka

KNT Dayarathna
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
tnd_1982@yahoo.com

Abstract— *Doctors are expected to use their special expertise knowledge and skills to save patient's lives without being negligent and if a patient suffers an injury due to negligence of doctor, there's a remedy available under civil law. In a medical negligence law suit, the plaintiff has to prove four elements, and whether the defendant doctor has attained the required standard of care is a complex factor which is difficult to determine in a lawsuit. In English law several tests have been developed to measure this requirement in a medical negligent lawsuit. In today's society the patients want best of care and the doctors wanted to treat their errors as human errors. While granting a satisfactory solution to the victimized patient, the courts also have a duty to allow doctors to behave without fear of litigation. So with the emerging concepts of patient autonomy and the patient safety, medical negligence has become a debatable issue today. This paper analyzes some case studies, articles and books of medical negligence law with the main objective of examining the required standard of care by doctor. Medical malpractice lawsuits have continued to rise in western countries over the past years. It directly affects clinical freedom and therefore doctors tend to take defensive actions when treating patients. In countries like Sri Lanka on the other hand, people are not much aware about medical negligence even terrible incidents take place, causing injustice to patients. Based on the analyzed issues and identified best practices (such as no fault compensation schemes, Alternative dispute resolution), this paper discusses about how Sri Lanka can best respond to the patient safety approaches by law reforms with the aim of reducing medical negligence to ensure patient safety and also to reduce risk of litigation.*

Keywords— *Medical Negligence, Litigation, Reforms*

I.INTRODUCTION

Medical profession is regarded as a noble profession. The doctors are expected to use their special expertise knowledge and skills to save patient's lives without being negligent. If a patient suffers an injury due to the negligence of the doctor, there's a remedy available under the civil law. A person who claims a negligent medical malpractice, have to prove four elements. Adequacy of the standard of care exercised by the doctor is the main problem associated with medical negligence claims. In a malpractice law suit the court has to determine whether the defendant doctor has attained the required standard of care. In today's society the patients want best of care and the doctors wanted to treat their errors as human errors. Moreover it is essential to protect patient's rights, who approach doctors with lot of expectations. While granting a satisfactory resolution to the victimized patient, the courts also have a duty to allow doctors to behave without fear of litigation. So with the emerging concepts of patient autonomy and the patient safety, medical negligence has become a debatable issue today. Medical negligence is "the breach of duty of care towards a patient by an act of commission or omission, resulting in damage or harm or injury to a patient" (Fernando.R, 2013). Medical liability lawsuits are civil actions designed to determine whether a doctor was professionally negligent and whether the negligence caused the harm.

Due to the inherent weaknesses associated with the fault based civil liability system and the adversarial litigation procedure in Sri Lanka, it is doubtful whether ill persons are ever be able to claim compensation for their injuries. The main research problem of study revolves around some issues in medical negligence legal framework and lack of public awareness about remedies associated with medical negligence. Therefore, the study reviews the necessity of a paradigm shift in medical negligence cases with reference to duty of care. The paper also attempts to investigate the necessity of moving to alternative modes to redress victimised patients in Sri Lanka.

II. METHODOLOGY

This paper review some past literature, analysis of past case studies and books in the area of medical negligence law with the main objective of examining the required standard of care by a doctor, which is one of a main factor of a medical negligence claim. Several reforms to Sri Lankan law is proposed in the light of analyzed case studies, academic expressions and identified best practices around the world to protect the interests of both the patient and the doctor.

III.DISCUSSION

In a medical negligence claim, the plaintiff has to prove that the doctor owed a duty of care, doctor violated the required standard of care, person suffered a compensable injury and the injury was proximately

caused by the act. In most cases, breach of standard of care is determined according to the standard of the 'reasonable man' and where there's a breach in the professional duty, that is determined according to the standard of comparable professional practice (Bryden.D, & Storey. I, 2011). The court has to determine whether the defendant doctor has attained the required standard of care, taking into consideration of all the relevant important factors in order to balance both parties' interests, the doctors and the patients. Traditionally it is considered that the doctor has not breach the standard of care, if the practice is supported by a responsible body of similar professionals. This test for medical negligence was established in a case, *Bolam* v *Friern Hospital Management Committee* (1957 1 WLR 582). This standard was again accepted in cases such as, *Sidaway* v. *Board of Governors of Bethlehem Royal Hospital and the Maudsley Hospital* (1985 AC 871), *Maynard* v. *West Midland Regional Health Authority* (1984 1WLR 634) and in *Whitehouse* v. *Jordan* (1981 1WLR 246). According to the Bolam test, the doctor is not negligent, if he has acted in accordance with a responsible body of medical opinion. This approach has been severely criticized as it fails to address patient's interests rather than giving more interests to the role of the doctor.

The idea derived from the judgment in *Bolitho* v. *City and Hackney Health Authority* (1997 4 All ER 771) allowed courts to behave more actively with regard to the question of standard of care, evaluating rights of all the concerned parties. With the Bolitho judgment a two stage test was recognized in English law. This two stage risk analysis test was used later in *Marriott* v. *West Midlands Health Authority* (1999 Lloyds Rep Med 23) and in *Penny, Palmer and Canon* v. *East Kent Health Authority*(2000 Lloyds Rep Med 41).

Today the world highly speaks about human rights. Patient's rights are an important part of that and have become a strong debate in today's world. Rather than highly relying on medical evidence, the decision of Bolitho case allowed the courts to reach a conclusion on the reasonableness and the duty of care of clinical conduct by considering all the competing interests and values. It is the duty of the experts in the medical field who possess necessary knowledge, skills and experience, to assist the court impartially to determine standard of care by providing a valid and a reliable scientific medical testimony. The House of Lords decision in Bolitho case invited the courts to have a closer scrutiny of the expert evidence and the reasonableness of the doctor's conduct rather than accepting the standard of care determined by a group of professionals. This opened the way to critically analyse whether the opinion given is reasonable and logical. Accordingly, under English Law, the standard of care must be in accordance with the practice accepted by a respectable body of professionals and is expected to be up to date and current practice also must be reasonable and logical and the conclusion reached, must be defensible by reason.

Negligent liability of a doctor also can occur if the doctor failed to disclose necessary information to the patients. Informed consent is the process by which the treating health care provider discloses appropriate information to a competent patient, so that the patient may make a voluntary choice to accept or refuse treatment (Appelbaum P.S, 2007). The consent of the patient should be given with full knowledge of the risks involved, probable consequences and the alternatives. The doctor or the healthcare provider must disclose sufficient information to the patient or to the guardian to give the consent. In modern medical practice, doctrine of consent is paramount important and the doctor has to disclose the material risks inherent in the treatment and also the patient has to give the consent with full understanding (Mayberry M.K,& Mayberry J.F, 2002). In some situations, the failure to obtain the consent may lead to a medical malpractice law suit. The health care provider has a duty to provide all the potential benefits, risks, alternatives in the medical procedure which he/she is going to undergo and has to obtain the consent of the patient. In a country like Sri Lanka, because of the knowledge gap between the doctor and the patient, there is no adequate discussion between the doctor and the person who gives consent to the treatment before signing the consent form. In, *Chester* v *Afshar* (2004 UKHL 41), a question arose regarding the failure to disclose information. The court considered whether the consultant's omission provided a sufficient basis for establish a causal link between the harm and the breach.

Sri Lanka has a society which accepts the hierarchical orders and the medical profession is regarded as a noble profession which is in the top level of the hierarchy. Sri Lankan Constitution (1978) contains a Fundamental Rights Chapter. But right to life and patient's rights have not been recognized as fundamental rights under the present constitution. Even though there are number of patients in Sri Lanka who suffers from medical negligence behaviours, most of them do not go before the courts due to lack of proper knowledge and understanding. Even there are many incidents that take place due to medical negligence in Sri Lanka, most of the people are unaware about medical negligence and ill treatments.

In 2005, a 48 year old mother had her healthy leg accidently amputated, whilst another died after

transfusion of a wrong blood type at the Negombo Base Hospital. (Ceylon Today, 14th August 2013). A 24 year old girl's left arm was amputated and a 5 year old girl died in a Colombo private hospital when she was taken for a MRI Scan are some reported cases comes under medical negligence. Another incident was about a 45 year old man who lodges a complaint with the police and alleged that his wife died due to medical negligence of the gynaecologist and obstetrician who performed the surgery (Daily News, 1st March 2013). Even many incidents happened in Sri Lanka, they rarely come before courts.

The law of medical negligence and the duty of care owes by a doctor to the patient was reviewed by the Sri Lankan judiciary in the case of *Priyani Soyza* v. *Arsekularathna* (2001)(2)Sri.LR 293*)*. The Supreme Court, in a unanimous judgment, delivered by Dheeraratne J. held that the plaintiff's claim had failed and that the defendant's guilty of negligence on treating the deceased child did not cause her death and was no liable for damages. However, by delivering the judgment, the Supreme Court held that, despite the fact that negligence was established, the failure to establish a causal nexus between the negligence and the death of the patient, led to fail the plaintiff's claim.

Causation is also a debatable issue in medical malpractice litigation. In determining causation, the court often uses the "but for" test and when there are several causes, the court see whether the defendant's conduct materially and significantly contributed to the injury of the plaintiff. Firstly it has to be proved that the defendant's breach has caused the claimant's damage and secondly the damage must be such that the law regards it proper to hold the defendant responsible for it (Goldberg.R, 2012). Most of the medical injury cases fail, when the defendant can establish that the injury can occur regardless of the breach of duty and when there are combined causing factors for the injury suffered, it is hard to identify the exact factor which finally led to the harm. In *Barnett* v. *Chelsea and Kensington Hospital Management Committee* (1969 1 QB 428), it was considered, whether the defendant's negligence is the cause of the death or would it have inevitably happened anyway. According to the Priyani Soyza judgement, it is doubtful whether an ill person ever be liable in a claim of negligence. Moreover the public will lose respect for the law and the society will dismiss the judiciary as a stronghold which protects their rights.

PRACTICAL AND A FAIR REDRESSAL FOR MEDICAL NEGLIGENCE

This complication can be reduced to some extent by introducing out of court compensation systems. Many experts throughout the world recommend advanced alternative methods to compensate injured parties by medical negligence behaviours. Rather than focusing on the negligence, some countries have introduced no fault compensation systems. It removes the requirement of proving fault or negligence and compensate based on the loss. With regard to medical malpractice, patient is compensated for a proven injury incurred unnecessarily through treatment. Such a no fault compensation system has been implemented in New Zealand (Hitzhusen.M, 2005). Sweden, Denmark, Norway, Finland, France also have eliminated fault criteria, for some kinds of medical injury (Douglas.T, 2009). This is very common in New Zealand and if a claim for compensation is successful, that compensation is paid from an account maintained through general taxation. This can be argued as a fundamental improvement over negligence and can be considered as a more rational system which can compensate patients. The other advantage is, claims can be proceeded faster than litigation and also physicians can more focus on better health care of patients rather than practicing defensive medicine. In Germany medical malpractice claims are referred to mediation boards. In France medical negligence cases are handled under an administrative law scheme. The Canadian medical malpractice claims declined steadily since 1997 due to improved patient safety initiatives and physician participation in continuing professional development programs and informal judicial forums are also being used to address patient concerns in Canada (Sonny Bal .B,2009). Alternative Dispute Resolution (ADR) is a better platform which can be used as a technique to resolve conflicts without going to court rooms. Alternative Dispute Resolution has the potential to help reform the current tort system, reducing costs and increasing both parties satisfaction (Sohn. D.H, Sonny Bal. B, 2012). Mediation is one form of Alternative Dispute Resolution. It is a negotiation that is facilitated by a neutral third party mediator. Arbitration is a more formal and a binding method, which have a skilled and knowledgeable arbitrator as the decider of facts. Pre-trial screenings can also be used as a tool to reduce fraudulent claims. Pre-trial screenings are informal screenings before litigation by a neutral party to assess the relative strengths of each party's case and determine whether the trial merits going to trial. In United States pre-trial screening panels have been existence since 1957. These medical-legal screening panels are created by statutes, by court rules and also by voluntary cooperation of local bar and medical associations (Johnson.L.L,1976-1977). ADR has become

increasingly prominent in the medical malpractice reform discussion. Mediation, Arbitration and pre-trial screening have been successfully implemented in the medical arena throughout the world (Sohn.D.H , Sonny Bal.B,2012).

Article 25 of the Universal Declaration of Human Rights (1948) recognized right to health as a human right. International Covenant on Civil and political Rights (1966), states that every human being has the inherent right to life and this right shall be protected by law (Article 6). International Covenant on Economic Social and Cultural Rights (1966) recognized right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Article 12). According to South African Constitution (1996), everyone has the right to life (Article 11) and also everyone has the right to freedom and security (Article 12). Everyone has the right to access to health care services within available resources (Article 27(1)). However Sri Lankan Constitution (1978) does not recognized right to life as a fundamental right. Right to health care services has not directly protected as a fundamental right under the Sri Lankan Constitution.

Sri Lankan adversarial legal system is both costly and time consuming. So Sri Lankans rarely go to courts for injuries caused by medical negligence. Also it is difficult to establish the negligence, because doctors are reluctant to provide evidence against their own professional colleagues. The burden of proving the four main elements in a medical negligence case lies with the plaintiff. Out of these elements, most difficult elements to prove are that the defendant doctor violated the standard of care and the breach of standard of care has led to the harm. This is a difficult task from the injured patient's point of view and also the fear of litigation may lead doctors to practice defensive medicine which finally affects the effectiveness of the medical practice. Doctors will conduct tests and procedures not for the purpose of furthering the diagnosis of the patient, but to avoid litigation and to show that the required standard of care has been met. Even these unnecessary tests are a defence for doctors there may be situations that these unnecessary tests can create a potential risk to the patient. From the patients point of view defensive medicine increase expenses in patient care and can delay the required treatment. Additional tests which lead the patient to unnecessary risks can lead to another malpractice litigation, which ultimately damage the doctor-patient relationship. If the patients tend to bring more and more lawsuits against doctors, it will affect the doctor patient relationship adversely. Practically doctors hesitate to accept another doctor's patient because it can lead to another malpractice claim. Because of the litigation fear, doctors cannot improve the standard of care which they provide for patients because they lack their clinical freedom.

IV.FINDINGS AND RECOMMENDATIONS

Sri Lankans are not aware of their rights. Even the damage has occurred due to the negligence of the doctor, sometimes they are reluctant to go before the law, due to lack of understanding and the fear of litigation. So steps should be taken to educate the general public through media and other several campaigns regarding ill treatments. In a medical negligence claim, the responsibility of the court is to strike a balance between both the parties. It is important to compensate the injured patients if the injury has caused as a result of the doctors negligent.

Steps should be taken to strengthen the doctor patient relationship. In order to build up a better doctor patient relationship, it is essential to have a good discussion regarding the benefits, risks and different alternatives available for a patient. Even after an injury occurred to a patient through the negligence by the doctor, they are reluctant to discuss their mistakes. Doctors should be given the assurance that the admission of errors will not lead as evidence against them in courts (Liang.B.A, 2004). And also it is the responsibility of the country to provide a confidential platform for such a discussion.

If the courts decide large financial awards as damages in a medical malpractice claim, it will de-motivate doctors to pay required standard of care towards patients in the future. Introduction of damage caps may reduce unnecessary law suits. Statute of limitations is another effective way which can reduce doctor's fear of litigation and by a statute of limitation, can limit the time period for the plaintiff which can bring a claim. This will reduce the fraudulent malpractice claims which come to courts and also will motivate doctors to accept medical errors and to build up a good doctor patient relationship. Moreover pre-trial screening methods have to be adopted prior to the hearing of the malpractice claim. The case can be screened by an impartial panel which constitutes from the experts in the medico legal field. Even in this stage the impartial panel can lead the parties to settle the case without going to litigation. The main purpose of creating a screening panel is to reduce malpractice litigation while redressing patients and also balancing doctor's interests. These informal procedures help litigants to exchange their ideas politely, and come to a settlement without adhering to strict legal procedures in the court room.

Furthermore Alternative Dispute Resolution (ADR) should be introduced as an effective, less costly and less procedural way to settle medical malpractice claims in Sri Lanka. Through ADR, doctors can resolve their disputes with patients without going to the court. Mediation can be recommended to settle disputes among doctors and patients. With the less procedural environment, doctors, patients and also the other necessary hospital staff can take a joint effort to prevent future errors while reducing the trauma attached to the injurious patient and the family members. It is the responsibility of the legislature to pass legislations recommending ADR mechanisms, especially mediation to resolve disputes of doctors and patients. The special characteristics of mediation, helps patients to relieve non-monetary stresses. Adversarial fault based litigation procedures are very traumatic, complex and lengthy. Victimised patients are not always satisfied by financial awards. What they usually want is a platform to open exchange of information and the acknowledgement of the error and remorse by the physician. Neutral mediator in the Informal environment can lead parties to facilitate negotiations to narrow the issues in dispute, while satisfying the emotional concerns of parties and also the interests of the physician. Court annexed mediation is the best suitable method to settle medical negligence cases in Sri Lanka.

Right to life, patient's safety and patient's autonomy have to be recognized as fundamental rights under the Constitution in Sri Lanka. In order to strike a balance between the conflicting parties, it is the responsibility of the legislature, judiciary, and also the media to respond positively to the problems which are associated with medical malpractice claims.

V.CONCLUSION

Medical negligence law suit is a very complex situation which involves extensive review of records, expert interviews, which takes long hours. The precise meaning of the term standard of care is unclear in a medical malpractice claim and also it is hard to prove the causal link between the breach and the injury. Even a huge number of malpractice cases come before the court in countries like USA, UK and Australia, Sri Lankan society is less aware of medical negligence and ill treatments. High number of malpractice claims can be harm to the medical profession and it will lead to reduce the trust between doctors and patients. On the other hand, it is essential to protect an innocent patient who is coming to a doctor with lots of expectations about their health and life. In a country which respect rule of law, the court should be given the opportunity to take the ultimate decision with regard to standard of care required by the doctor. ADR with no fault compensation mechanisms have to be introduced in to the Sri Lankan legal system with the aim of ensuring doctor's clinical freedom and reducing defensive actions practiced by doctors.

A hybrid of no fault compensation system with Alternative Dispute Resolution will be immense helpful for patients both who are rich or poor and educated or uneducated. Due to granting compensation without waiting until proving fault or negligence, this system enhance the scope of patients who can obtain compensation. Also this system do not have procedural barriers, time consuming, and less expensive, because no need to pay for lawyers and the claims can proceed faster than a lawsuit in the court. Doctors are not being sued and rather than concentrating on defensive medicine, doctors can concentrate more on patient's lives. The data and the ideas which derived from discussions and negotiations can be used to make future improvements for both doctors and patients.

The most appropriate way to reduce malpractice claim is to prevent before the error occurs. This can be done by developing a good relationship with the patient by doctors. In Sri Lanka there's a huge knowledge gap between doctors and patients. Patients should be given a chance to ask questions regarding the medical treatment and an opportunity to involve in the decision making process about their lives. This communication is a platform to identify patient injuries before they become a law suit.

In summary, with the developments and the complexities in the world, it is utmost needed a system which equally protect both parties rights in an injurious situation due to medical negligence. The practices which are used by other countries around the world can take as an example by Sri Lankan authorities to develop a more effective approach in the area of medical negligence in the future.

REFERENCES

AppelbaumP.S, Assesment of patient's competence to consent to treatment.New England Journal of Medicine.2007;357:1834-1840

Bryden.D, Storey. I, Duty of care and medical negligence - Continuing Education in Anaesthesia Critical Care & Pain Volume 11 Number 4 2011

Douglas.T, Meidcal Injury Comensation:Beyond'No Fault',Medical Law Review,2009,Vol 17,p30-51

Fernando.R, Medical Negligence, Attorney generals Law Journal, 2013

Goldberg.R, Medical Malpractice and Compensation in the UK,87 Chi.-Kent.L.Rev.131,2012

Hitzhusen.M, Crisis and Reform:Is New Zealand's No-Fault Compensation System a Reasonable Alternative to the Medical Malpractice Crisis in the United States?,22 Ariz. J.Int'l & Comp.L.649,2005

Johnson.L.L, Pre-trial screening of medical malpractice claims versus the Illinois constitution,The John Marshall Journal of Practice and Procedure(Vol. 10:133)(1976-1977)

Kennedy. I,&Grubb.A, Medical Law: Text with Materials 452,Butterworths,2ed,1994

Kumar S., The relevance of humanism in medical profession,Indian J .Urol 2001;18:103-9

Lawrence H.Brenner JD, Alison Tytell Brenner MPH, Eric J. AwerbuchBA,DanielHorwitz MD ,Beyond the Standard of Care-A New Model to Judge Medical Negligence, 2012,Vol 470,pp1357-1364

Liang.B.A, et al.,Medical Liability Insurance and Damage Caps:Getting Beyond Band Aids to Substantive Systems Treatment to Improve Quality and Safety in Healthcare,30 AM.J.L.& MED, 2004,vol 30:501-541, discussing how reducing medical errors will reduce medical malpractice

Liyanage.U, Applicability of the defence of informed consent against medical negligence in the scope of a patient's autonomy: A Sri Lankan perspective

Macintosh.J.C, Scoble.N.C, Negligence in Dellict(3rd ed.)Cape Town: Juta& Co.Ltd.,1948 at p.7

Mayberry MK, Mayberry JF, Consent with understanding: a movement towards informed decisions.Clin Med 2002:2;523-526.

Montrose.A, Is negligence an ethical or sociological concept? Med LR 1958;21;259

Samanta.A,Samanta.J,Legal standard of care: a shift from the traditional Bolam test by - Clinical Medicine Vol3, No 5 September/October 2003

Sonny Bal. B, An Introduction to Medical Malpractice in the United States,Clinical Orthopaedics and related research,2009

Sohn.D.H,SonnyBal.B, Medical Malpractice reform: The Role of Alternative Dispute Resolution,2012,Vol 470,pp1370-1378

Teff H.,The standard of care in medical negligence-moving on from Bolam? Oxford J Legal Studies 1998;18;473-84.

BIOGRAPHY OF THE AUTHOR

The author is a lecturer in the Faculty of Law of General Sir John Kotelawala Defence University, Sri Lanka. She is a Law graduate from University of Colombo, Sri Lanka and she has her LL.B with Honours. Her research interests include Law of Delicts, Family Law and Human Rights Law.

Corresponding Trade Union Laws in Sri Lanka with that of International Standards to Enable Professional Recognition

NKK Mudalige
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
namudi.mudalige@kdu.ac.lk

Abstract- *As a facet of professional recognition, identifying trade union rights in a country indeed is of immense importance. A "trade union" can be defined as a combination of people who are in the same or identical profession with common goals relating to their field where they raise voice for the conditions of their profession. It is worthy to note that trade unions make the foundation for collective voice and thereby framing a sort of professional recognition. Accordingly it can be pointed out that proper recognition of trade union within the legal background can be one approach to inculcate professionalism for national development where the quality raised by the collective voice is attended. Whether laws in Sri Lanka correspond with the international standards in order to provide the proper legal foundation to trade unionism requires to be inquired. Governing laws regarding this in Sri Lanka are 1978 Constitution, Trade Unions Ordinance No. 14 of 1935 and its amendments and Industrial Disputes Act No. 43 of 1950 and its amendments. Objectives of the study would be mainly to identify the relevant international standards covering trade unionism, to recognize Sri Lankan legal approach to trade unionism and to compare and evaluate the compatibility of Sri Lankan laws with that of international standards regarding trade unions. Legislations and international instruments will be used as primary sources and as secondary sources text books, scholarly articles, monographs, electronic sources will be utilized in this study. Study is carried out to discover whether laws governing trade unions in Sri Lanka are satisfactory when corresponding with international standards in order to provide a proper professional recognition which can be operated as a centre of initiative to enable national development.*

Keywords— *Unionism, Professional Recognition*

I. INTRODUCTION

Recognition of trade unions in the Sri Lankan legal framework can be traced back to 1935 which spots the enactment of the Trade Unions Ordinance No 14 of 1935.

A collection of people making the collective voice towards the betterment of their working conditions and other related requirements are the common objectives of most of the trade union movements. Thus being recognized and fulfilment of the demands which are justifiable inevitably demonstrate a satisfactory working environment which promotes professional recognition. Utter professional recognition ultimately establishes a satisfactory workforce who will be providing the full strength towards the accomplishment of the business objectives which drives towards the national development.

The reason for articulation of international standards into the arena of legal recognition of trade unions must be discussed. International standards were introduced in order to protect workers and establish universality to ensure equal protection for all.

Indeed it is worthwhile to compare trade union laws in Sri Lanka with that of international standards. Accordingly it will evaluate whether the international standards align with the Sri Lankan legal criteria on the topic.

I. METHODOLOGY

Used methodology is qualitative since the topic under discussion is based on social sciences which limit the usage of quantitative methods due to its nature. Primary and secondary sources were used accordingly.

Primary sources were the legislations relating to trade unions in Sri Lanka and the international standards formulated by internationally recognized organizations pertaining to the topic.

Secondary sources were research papers and journal articles.

It was compared the Sri Lankan legislations and international standards to evaluate the level Sri Lanka has gone to correspond with the accepted criteria. Further the recommendations were placed to accommodate and promote further developments in the legal framework of Sri Lanka in this regard.

II. ANALYSIS

Professional recognition offers the general meaning of the acknowledgment of the professional status and ensuring the right to practice the profession. Enhancing the working conditions, best working practices and connected infrastructure integrate the professional recognition.

A trade union means an association carried on mainly, for the purpose of protecting and advancing the members' economic interests in connection with their daily work according to G.D.H. Cole (1918). Dale Yoder (1977) defined it as a continuing long term association of employees formed and maintained for the specific purpose of advancing and protecting the interest of the members in their working relationship.

Essence of the definition of trade union indicates that it ultimately drives on the purpose of advancement of the employee condition which is one facet of professional recognition aforementioned. Thus it shows the idea that idealizing the legal framework of trade union in Sri Lanka, taking international standards as the prototype ensures the professional recognition in one hand.

A. Right to Form a Trade Union, Become a Member of a Trade Union and Engage in Trade Union Activities

Universal Declaration of Human Rights (UDHR) in Article 23 (4) reads that;

> Everyone has the right to form and to join trade unions for the protection of his interests.

International Covenant on Civil and Political Rights (ICCPR) in Article 22 reads that;

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) reads that;

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

It is evident that more or less world's leading human right documents marks the necessity for recognition of freedom of association inter alia the right to form trade unions, join them and engage in trade union activities.

Positive sight is envisaged in terms of ensuring the right to form a trade union and other related rights in Sri Lanka. Article 14 (1) (c) and Article 14 (1) (d) of the Constitution of the democratic socialist republic of Sri Lanka expressly recognizes the freedom of association and the freedom to form and join a trade union which connotes the respect towards the international standards abovementioned. Also it is worthwhile to indicate that Articles 14 (1) (d) and 14 (1) (c) of the Constitution are restricted by way of Articles 15 (2) and 15 (4) of the Constitution respectively in order to preserve the interests of a democratic society as expressed in most of the international standards.

In 1935 the Trade Unions Ordinance saw the light of the day which introduced more specific trade union rights to Sri Lankans. In its inception the Trade Unions Ordinance did not allow public offers to form, join or actively participate in the trade union movement. But later in 1948 by way of an amending Act to the same, articulated trade union rights to public officers. But, as warranted from international standards mentioned before few categories of public offers were restricted their trade union rights namely; judicial officers, members of the armed forces, police officers, prison officers and members of any corps established under the Agricultural Corps Ordinance. Logic behind the restriction is to

prevent unnecessary obstacles to the administration and security of the State from trade union actions which had been recognized internationally as a justifiable aspect.

B. Anti-union Discrimination

Labour standards introduced by the International Labour Organization (ILO) are also pertinent in this discussion since ILO is structured in a tripartite manner; bringing together the voice of workers, employees and government in one platform.

Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) provides from Article 2 that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. Article 3 of the same recognizes the right to be represented and the right to participate in trade union activities. By way of the Convention of 1948 the right to organize is recognized making further smooth the surface to practice trade unionism. Following such mechanism domestic enactments were passed in Sri Lankan legislature with corresponding standards.

In the Right to Organize and Collective Bargaining Convention, 1949 (No. 98) Article 1 (1) reads that workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. It describes the anti-union discrimination acts such as prohibition of membership in trade unions to a specific employment category (other than legal restrictions) and dismissal of employees by reason of joining a trade union.

Although the Convention No 98 had interwoven in 1949, Sri Lanka codified the relevant law by way of an enactment in 1999. No matter what the delay occurred an amendment to the Industrial Disputes Act passed in 1999 blended the protection against anti-union discrimination into the list of trade union rights available to Sri Lankans. Sections 32 A (a) – (f) of the amendment prohibits an employer from requiring a workman to join or refrain from joining a trade union, dismiss a workman by reason only of his membership of a trade union or of his engaging in trade union activities, give any inducement or promise to a workman for the purpose of preventing him from becoming, or continuing to be, a member, office bearer or representative of a trade union, preventing a workman from forming a trade union, interfere with the conduct of the activities of a trade union, dismiss, or otherwise take disciplinary action against, any workman or office-bearer of a trade union. The amendment provides a thick protection towards the anti-union discrimination following the Convention No. 98 of labour standards.

C. Recognition of Trade Unions

The Right to Organize and Collective Bargaining Convention, 1949 (No. 98) Article 4 states that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. It is worthwhile to analyze whether such measures had been taken.

Industrial Disputes (Amendment) Act No. 56 of 1999 Section 32 A (g) provides that no employer can refuse to bargain with a trade union which has in its membership not less than forty *per centum* of the workmen on whose behalf such trade union seeks to bargain. Prevention and elimination of disputes through discussion is the best way to avoid conflicts in the industry. Thus collective bargaining which is one way of discussion enables conflict free dispute resolution mechanism that promotes sustainable industrial harmony. Thereby recognition of collective bargaining and preserving the right in every way in the legal framework corresponds with internationally recognized labour standards. Therefore a positive angle in the legal framework of Sri Lanka can be seen with the introduction of Section 32 A (g) to the amending act of Industrial Disputes in 1999.

Right to Strike

Trade Unions Ordinance No. 14 of 1935 does not specifically recognize the right to strike in a crystal clear way. But few indications of the said enactment can be used to justify that Sri Lanka's formal recognition of such right. First and foremost it can be noted that Section 2 of the said Act interprets "strikes" which gives an implication that trade unions are guaranteed such right in the enactment. Further in Section 18 (b) reads that unless a trade union is registered according to the procedure prescribed, it cannot take-part in strikes which indicate the fact that right to strike is available for the registered trade unions under the Act.

Judicial recognition of the right to strike can be pointed out in Rubberite Company vs. Labour Department, Court of Appeal Case No.104/86, in which Justice Sarath Silva held "… the basic right of workmen to strike to express their grievances and to win their demands is not only consistent with the international obligations undertaken by the Government of Sri Lanka in ratifying the Covenant on Economic, Social and Cultural Rights but also

consistent with the accepted standards in other national and regional jurisdictions. Therefore, I hold that under our law, workmen have a basic right to strike as a measure of Collective Action directed against the employer to express their grievances and to win their demands."

But the lacuna is, where the International Covenant on Economic, Social and Cultural Rights in its Article 8 proposes the State parties to take measures to ensure the right to strike, still legal framework of Sri Lanka is founded upon an implied right, providing room for controversial interpretation.

IV. RECOMMENDATIONS

Aligning domestic laws on trade unions with that of international standards finds its foundation from the supreme law of the country, the Constitution of the democratic socialist republic of Sri Lanka. Further positive indications demonstrate in the enactments such as Trade Unions Ordinance No. 14 of 1935 and Industrial Disputes (Amendment) Act No. 56 of 1999.

But it is worthy to evaluate whether the attention on the matter is satisfiable.

Since Sri Lanka is a dualist country it requires the procedure of enacting legislation in order to incorporate the international standards which it has ratified. Therefore activist role of the legislature in terms of such incorporation is required which brings up the need for being concerned towards better international standards thoroughly by the State. For instance the right to strike requires an express recognition within the legal framework. It forms a conflict-free workplace relationship with a strong legal foundation.

Also it can use more judicial participation towards incorporation of international standards in the domestic legal arena. Without waiting for the action of the legislature which is a prolonged process, when it is needed judiciary can involve in the incorporation of international standards within the legal capacity in the process of attainment of justice. India is one such example where judiciary is actively participating on this objective.

Reason of the need for recognizing more labour standards on the subject in the domestic environment is to have a proper administration on the labour relations, to improve working conditions as pin-point by the union movements, improve quality and satisfaction of employees and improve the voice of togetherness in the industry.

When an approach of harmonized industrial relation is followed it inevitably will lead to better professional recognition where the voice of employees are heard and actively answered. Thereby a satisfied work-force will serve towards national development.

For such consequence a pure recognition of trade union rights taking international standards as prototype is more practical and possible.

V. CONCLUSION

Legal framework of Sri Lanka has its positive indications towards corresponding international standards in the area of trade union laws which inevitably enable professional recognition. It assists towards decision making in a way that promotes social justice as recognized in the international arena. It also provides platform to enhance human right aspect of labour relations.

REFERENCES

Sri Lanka, *Constitution of the Democratic Socialist Republic of Sri Lanka, 1978*

Sri Lanka, *Industrial Disputes (Amendment) Act No. 56 1999.* Colombo: The Department of Government Printing.

Sri Lanka, *Trade Union Ordinance No. 14 1935: Chapter 174* (1935). Colombo: The Department of Government Printing

United Nations. 1948. *Universal Declaration of Human Rights.*

United Nations. 1976. *International Covenant on Civil and Political Rights.*

United Nations. 1976. *International Covenant on Economic, Social and Cultural Rights.*

International Labour Organization. 1948*. Freedom of Association and Protection of the Right to Organize Convention* 1948 No. 87.

International Labour Organization. 1949. *Right to Organize and Collective Bargaining Convention* 1949 No. 98.

Rubberite Company vs. Labour Department, Court of Appeal Case No.104/86

Cole, G.D.H. (1918) *Labour in the commonwealth; a book for the younger generation*. London: Pelican Press

Yoder, D. (1977) *Personal Management and Industrial Relation.* New Delhi: Prentice Hall

BIOGRAPHY OF AUTHOR

The author is a Lecturer (Probationary) at the Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka. She has obtained LLB (Hons) from Faculty of Law, University of Colombo. Her research interests include Labour Rights, Environmental Rights and Constitutional Law.].

The Absolute Protection Available for the Disabled Children Under the Prevention of Domestic Violence Law; Sri Lankan Perspective

IK Munasinghe
Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka
isharakumudumalee@gmail.com

***Abstract*—** *The Prevention of Domestic Violence Act (PDVA), No. 34 of 2005 of Sri Lanka specifies the domestic violence as a statutory offence and the law prevails in any circumstances, where a child subjects to or about to be subjected to a domestic violence incident in every instance whichever the statute specified. The study is focused on assessing the accuracy and the effectiveness of the domestic legal mechanisms established in order to protect the rights of the children from refraining domestic violences. The objective of this qualitative study is to appraise the efficiency of the existing domestic legal mechanism established by the statute in order to protect the rights of the children from domestic violence situations with reference to relevant domestic and international legal standards. Furthermore, the study is focused to examine few recognized rights of the children in relation to the domestic violence situations; i.e. Right of equality, right to privacy, right of social security etc. The study specifies few practical difficulties on implementing the introduced mechanism under the statute and appraises the level of protection available towards the rights of the children. The study concludes with pointing and recommending the necessity of guarantying effective intervention of the law and policy makers towards developing sound legal protection for the issues recognised in order to protect the rights of the victimized disabled children of domestic violence.*

Keywords - *Disabled Children, Domestic violence, Sri Lanka*

I. INTRODUCTION

Children are considered to be a precious group in any kind of society. Children with disabilities do need a special care and attention from the peers in order to fulfil their special needs. As Convention on the Rights of the Child (1989) (herein after referred as CRC) specified that, it is the responsibility of the state to comprehend the childhood is entitled to special care and assistance and convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance.
Also, according to the Article 12(4) of the Sri Lankan Constitution (1978), nothing shall not prevail the duty of the state in enacting any special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.

Consequently, Protection of the Rights of Persons with Disabilities Act, No. 28 of 1996 (hereinafter referred as PRPDA) was passed by the domestic legislature enabling the Convention on the rights of persons with disabilities, which defines a disabled as a person with disability means any person who, as a result of any deficiency in his physical or mental capabilities, whether congenital or not, is unable by himself to ensure for himself, wholly or partly, the necessities of life. (Protection of the Rights of Persons with Disabilities Act, 1996)

The existing legal regime on domestic violence of Sri Lanka is the Prevention of Domestic Violence Act (PDVA), No. 34 of 2005, which provided sound coverage on many issues in relation to domestic violence situations.

The statue defines the term domestic violence under Section 23 and the definition consist of two limbs; whereas (*a*) an act which constitutes an offence specified in Schedule I;(*b)* any emotional abuse, committed or caused by a relevant person within the environment of the home or outside and arising out of the personal relationship between the aggrieved person and the relevant person. The part (a) of the aforesaid definition refers to all offences contained in Chapter XVI of the Penal Code, Extortion-Section 372 of the Penal Code, Criminal Intimidation-Section 483 of the Penal Code and finally attempt to commit any of the above offences. Emotional abuse means a pattern of cruel, inhuman, degrading or humiliating conduct of a serious nature directed towards an aggrieved person

However, it is a crucial fact to define the protection available from the exiting domestic legal mechanism established under the PDVA (2005) in order to protect

the rights of the disabled children from domestic violence situations.

III. RESEARCH QUESTION

Does the existing domestic legal mechanism established in order to protection of the rights of the disabled children from domestic violence situations is accurate and sufficient enough?

IV. OBJECTIVE

The objective of this study is to assess the efficiency of the available domestic legal mechanism established in order to protect the rights of the disabled children refrain from domestic violence situations with reference to relevant domestic and international legal standards.

V. METHODOLOGY

The study is totally based on qualitative methodology, which largely focused on critically analyzing the provisions and approach of PDVA (2005) of Sri Lanka, Constitution of the Democratic Socialist Republic of Sri Lanka (1978) and other relevant domestic legal instruments.

Though, there are many international legal instruments can be found in relation to the topic, which had been ratified by the Sri Lanka, basically, the study focuses on and limits to the analysis of the Convention on Rights of the Children (CRC)(1989) and the Convention on the rights of persons with disabilities (CRPD) (2006). Further, the study is limited to analyze few recognized rights of the disabled; i.e. Right of equality, right to privacy, right of social security etc.

V. DISCUSSION

A. Introduction

The following discussion is on the existing protection available for the disabled children under the PDVA (2005) and evaluates the relevant provisions in the light of the CRC (1989), Constitution (1978) and Children's Charter (1992). Further, it focused in necessity of reading the provisions of the PDVA with the provisions of

- The National Policy on Disability for Sri Lanka (2003)
- Protection of the Rights of Persons with Disabilities Act, No. 28 of 1996
- The Constitution (1978) provisions with the Convention on the rights of persons with disabilities *(2006) (herein after referred as CRPD) , in order to* reinterpret a comprehensive protection framework that shall be applicable in terms of protecting the rights of the disabled children, as the second phase of the study.

B. Protection available for the disabled children under the PDVA

The PDVA (2005) does not specify any special provisions in relation to the disabled children. However, the general protection provided for the citizens shall applicable to the category of the disable children as well.

C.PDVA and protecting the rights of the disabled children

1) Right of equality, equal protection before the law and right of access to justice: Initially, it is essential to emphasis the relevant standards applicable to the children in relation to the above mentioned rights. Article 2 of the CRC (1989) upholds the right to non discrimination, while Article 3 guarantees the best interest of the children in all the instances, in relation to public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Besides that, Article 12 of the CRC (1989) held that the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Sri Lankan state has guaranteed the right of non discrimination and right to equality under the Article 12(i) and (ii) of the constitution in terms of access to justice. Further, the Article 2 of the children's' Charter (1992) states that, the state shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, guardians, or family members.

According to section 2 of PDVA (2005) states person, in respect of whom, an act of domestic violence has been, is, or is likely to be, committed (hereinafter referred to as "an aggrieved person") may make an application to the Magistrate's Court for a Protection Order, for the prevention of such act of domestic violence. The statute specifies three possible jurisdictions for the victimized persons to access to justice, namely, jurisdiction of the aggrieved person or the relevant person (the one who commits the offence) temporarily or permanently resides, or the act of domestic violence has been or is likely to be committed.(Prevention of Domestic Violence Act, 2005)

2)Right of remedy/reparation: The following parties can forward an application to the court whenever child becomes a victim of a domestic violence situation;

(i)by a parent or guardian of the child ;

(ii) a person with whom the child resides;

(iii) a person authorized in writing by the National Child Protection Authority established under the National Child Protection Authority Act, No. 50 of 1998. (Prevention of Domestic Violence Act, 2005)

It is established that, the right to non- discrimination, right of equality and equal protection of the law and right to access to justice had been hypothetically assured by the statute.

Rights of social security, right to remedy and right to reparation

It is emphasized that, the right of the child to obtain benefit from social security under Article 26 of the CRC, imposing the sentences to the offenders while ensuring the basic rights of right to remedy and right to reparation for the harm suffered by the victimized child.

Reflecting the provisions of the PDVA it specifies that, an prospect of obtaining an interim protection order as temporary remedy for the victimized child for not exceeding for fourteen days to avoid the respondent from committing or causing the commission of any act of domestic violence, while the application been heard by the primary court. Apart from that a victimized child is able to plead for a protection order for a period of 12 months. (Prevention of Domestic Violence Act, 2005)

The Court may, by means of an interim order or protection order prohibits the respondent from;

(*a*) entering a residence or any specified part thereof, shared by the aggrieved person and the respondent;

(*b*) entering the aggrieved person's -
(i) residence;
(ii) place of employment;
(iii) school;
(*c*) entering any shelter in which the aggrieved person may be temporarily accommodated; etc. under the section 11 of the PDVA (2005).

Additionally, the court may order supplementary orders, where a protection order has been granted and where the court is satisfied that, it is reasonably necessary to protect and provide for the immediate safety, health or welfare of the aggrieved person. (Prevention of Domestic Violence Act, 2005)

The court has the authority to make alteration, modification, variation, extension, or revocation for the previously issued orders, if any change of circumstances found. This can be decided by the court after careful hearing to the victimized child and the respondent. (Prevention of Domestic Violence Act, 2005)

Where respondent against whom an Interim Order or a Protection Order, as the case may be, has been issued and has failed to comply with such Order, such respondent shall be guilty of an offence and shall be liable on conviction after summary trial before a Magistrate to a fine not exceeding ten thousand rupees or to imprisonment of either description for a term not exceeding one year or to both such fine and imprisonment under the section 18 of the PDVA. (Prevention of Domestic Violence Act, 2005)

3) Right to privacy: It is the responsibility of the state to recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedom of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society under the Article 40 of the CRC (1989).

Right to privacy is recognized under Article 16 of the Children's Charter (1992), whereas no child shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

It is documented in the PDVD that a person's printing or publishing any matter in relation to domestic violence cases to be punished with the imprisonment of either description for a term which may extend to two years or to a fine or to both such imprisonment and fine. (Prevention of Domestic Violence Act, 2005)

C. The necessity of reading PDVA with other related laws and policies in order to protect the rights of the disabled children

The CRPD (2006) specified that the principles of the present Convention shall be:
(*a*) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
(*b*) Non-discrimination;
(*c*) Full and effective participation and inclusion in society;
(*d*) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
(*e*) Equality of opportunity;
(*f*) Accessibility;

(*g*) Equality between men and women;
(*h*) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.
Also, a special descriptive provision with regard to the equality is drafted and it upholds the necessity of state responsibility towards the guarantying equal and effective legal protection against discrimination on all grounds.

With regard to the children the Convention prescribes that it is a responsibility of the state to take all necessary measures concerning best interest to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.(Convention on the rights of persons with disabilities, 2006)

Moreover, the states parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that rightThe needs and the situations occur on the disabled children are differ from the ordinary children, same as to the incidents arise from the incidents of domestic violence. (Convention on the rights of persons with disabilities, 2006)

This has been recognised by the Article 12 (4) Constitution (1978) which specifies that," Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons'' and provided a platform to the rulers in order to make any special provisions or set of rules available which ultimately benefited by and the uplift the standards of the lives of the persons with disabilities.

The National disability policy (2003), in particular emphasizes for these children who have disability (being a particularly marginalized group) the inherent right to life, and to survival, protection and development to the maximum extent possible. Within this context, the following strategies promote and protect the rights of children who have disability:
(1) Support to the child who has disability;
(i) Equity in participation in family life and interaction, including participation in family decision-making processes
(ii) The enjoyment of a full and decent life in conditions which ensures dignity and promotes self-reliance in an atmosphere of happiness, love and understanding

(2) Support to parents and other family members:
(i)Knowledge, skills, advice and counseling required to support each child who has disability related to the rights of the child recognized in the UN Convention on the Rights of the Child will be made available to parents and other family members to enable them to fulfill their responsibilities

Whatsoever, the provisions contained in the enabling statute for the CRPD, Protection of the Rights of Persons with Disabilities Act, No. 28 of 1996 do not have any operational value. Yet, the content of the statute of PDVA would be much appreciable, if the judiciary and the relevant authorities shall interpret the rights of the disabled children in a liberal approach considering the aforesaid laws, conventions and the policies made for the best interest of this special category of children

VI. CONCLUSION

An incident of domestic violence may change the whole peaceful environment of the child's world. Specially, the disable children are much vulnerable than the ordinary children. However, the nature of the children makes them vulnerable since it is hard to find a helping hand in order to seek justice against his/her own family member who commits or above to commit the violence.

Nevertheless, the PDVA (2005) can be appreciated as a piece of law with a sound legal framework which inherits its own practical difficulties in terms of the implementing the phrase introduced by the statute itself.

Occasionally, there may be instances where a disable child may disappoint with the remedy provided by the court where a huge issue arises with the practical situation of the implementing phrase of the order; i.e. where an order been granted to respondent refraining from entering the residence pace of the aggrieved child..

Therefore, the PDVA (2005) must read with the Act of Protection of the rights of persons with disabilities, National Policy for the disables and follow the standards of the CRDP for much emphasis of the rights of the disables.

The Constitution of 1978 which included a chapter on fundamental rights and provided a procedure for their enforcement did not include specific provisions on children's rights. However one of the Directive Principles or guidelines for State Policies referred to the obligation

of the State to promote "with special care" the interests of children "to ensure their development and protection from exploitation and discrimination.

Finally, it is the responsibility of the state to bring immediate effect to the Act of Protection of the persons with disabilities (1996) and need to guarantee the improvement of the level of the rights in danger. Further the scope of the definition of the disable person must be broad in accordance with the CRPD (2006).

REFERENCES

Office of High Commissioner of Human Rights (1989) Convention on the Rights of the Child http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx [Accessed 11 April 2015].

Office of High Commissioner of Human Rights *(2006)* Convention on the rights of persons with disabilities http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx [Accessed 11 August 2015].

Human Rights Commission of Sri Lanka (1992) 'Children's Charter Available at:http://hrcsl.lk/PFF/The%20Charter%20on%20the%20Rights%20of%20the%20Child.pdf [Accessed 11 April 2010].

Ministry of Social Welfare (2003) 'The National Policy on Disability for Sri Lanka 'Available at: http://www.dohc.ie/publications/vision_for_change.html [Accessed 11 April 2010].

Sri Lanka. *Constitution of Democratic Socialist Republic of Sri Lanka.* 1978 Colombo: Government Publication Bureau

Sri Lanka. *Prevention of Domestic Violence Act (PDVA). 2005* Colombo: Government Publication Bureau

Sri Lanka. *Protection of the Rights of Persons with Disabilities Act*. 1996 Colombo: Government Publication Bureau

BIOGRAPHY OF AUTHOR

Author is a Lecturer in Law of General Sir John Kotelawala Defence University, Sri Lanka. Her research interests are Intellectual Property Criminal Law, Family Law and Human Rights.

The Application of Public Trust Doctrine as a Mechanism to Ensure Environmental Protection by Means of Law: A Comparative Analysis between Sri Lankan and Indian Legal Context

GJHK Siriwardana
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
jinathmas@gmail.com

Abstract— *World community is nowadays largely focused on the process of achieving sustainable development. In this process the public trust doctrine (PTD) is the most promising legal norm upon which the citizens can rely to realize their right to a sound environment. The main idea behind this doctrine is that the government as the trustee of the natural resources must manage them in the sole interest of its citizens. Thus in order to achieve sustainable development and inter-generational equity the public trust doctrine provides the legal foundation which imposes accountability upon the government of maintaining the environment in the interest of the public. The PTD appears in International treaties as well as in domestic laws. India is a country where the Public Trust Doctrine was highly applied in deciding environmental issues. Therefore, the main objective of this research is to analyze how Sri Lankan legal jurisdiction applies this doctrine as a tool to guarantee environment protection and sustainable development with special attention to the application of this doctrine in Indian law. This research focuses on the problem of whether the public trust doctrine can be applied as an effective mechanism for ensuring the protection of the environment ultimately realizing sustainable development. As India has developed public trust doctrine as an effective mechanism to ensure the realization of the right to a sound environment, in Sri Lanka this is an area which requires further developments. The researcher intends to adopt qualitative research methodology to conduct this research. The researcher will examine the necessary conventions, treaties, journals, relevant domestic laws as primary sources and books, journal articles will be used as secondary sources.*

Keywords - *Public Trust Doctrine, Sri Lanka, India*

I. INTRODUCTION

The rapid development of the technology, growing population, industrialization, expansion of new sources of energy etc. have led to a threat of losing the balance of the eco system of the world. This has led to variety of environmental issues such as deforestation, pollution, loss of bio diversity, global warming, climate changes etc. Thus world community now largely focused on the achieving balance between economic development and environmental protection. In the last decades a large number of international conventions, declarations, protocols and other legal instruments have been introduced which are largely focused on achievingsustainable development, Inter- generational equity and they address wide range of environmental issues. Apart from the conventions and other legal instruments, The United Nations Conference on the Human Environment (Stockholm 1972), The World Charter For Nature drawn up by World Conservation Union, The World Commission on Environmental Development, The United Nations Conference on Environment and Development, The World Summit of Sustainable Development are some of the great examples which shows the positive approach of the world community in protecting the environment.

The importance of environmental protection was emphasized by the Justice Weeramanthri in the *case concerning the Gabcikovo- Nagymaros project, Hungary v Slovakia(1997)* where he stated that "..... After the early formulations of the concept of the development, it has been recognized that development cannot be pursued to such a point as to result in substantial damage to the environment within which it is to occur. Therefore development can be prosecuted in harmony with the reasonable demands of environmental protection. Whether development is sustainable by reason of its impacts on the environment will, of course, to be questioned to be answered in the context of the particular situation involved...."

In order to achieve sustainable development and inter-generational equity, the public trust doctrine is the most promising legal norm which imposes accountability upon the government to manage the environment for the sole interest of the citizens. The public Trust Doctrine has its roots in both Roman law and English common law.

The Roman emperor Justinian in his Justinian code pronounced that "By the law of nature these things are common to mankind---the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore" Thus it highlights these recourses cannot be held for private ownership, but commonly dedicated for the benefits of the public.

In English common law The Public Trust Doctrine was developed through the concept of the equity. In the early case *Gann v Free Fishers of Whitstable(1865)* it was upheld the Public Trust Doctrine by the House of Lords stating that "....the bed of all navigable rivers here thetide flows, and all estuaries or arms of the sea, is bylaw vested in the crown. But this ownership of thecrown is for the benefit of the subject...."
Present, The United Nations also has accepted the Public Trust Doctrine through its conventions and declarations. Principle 2 of the Rio Declaration provides that States have, in accordance with the Charter of the United Nations and theprinciples of international law, the sovereign right to exploit their ownresources pursuant to their own environmental and developmental policies, andthe responsibility to ensure that activities within their jurisdiction orcontrol do not cause damage to the environment of other States or of areasbeyond the limits of national jurisdiction.

The Stockholm Declaration of United Nations on Human Environment also emphasises the Public Trust Doctrine and principle of Inter- generational Equity. It provides that"The natural resources of the earth including air, water, land,flora and fauna and especially representative samples of natural system, must be safeguarded for the benefit of present and future...."Further the World Heritage Convention and Treaty on Plant Genetic Resources for Food and Agriculture also includes the notion of trusteeship for beneficiaries.

This Doctrine gained its acceptance in International Environmental law in *Hungary v Slovakia* case *(1997)* when Weeramanthri J. Pronounced that "....the natural recourses are not individually, but collectively, owed and a principle of their use is that they should be used for the maximum use of the people. There should be no waste and there should be maximization of the use of plant and animal species, while preserving their regenerative powers. The purpose of the development is the betterment of the condition of the people....".

II. THE APPLICATION OF THE PUBLIC TRUST DOCTRINE IN INDIAN JURISDICTION.

Before adopting Public Trust Doctrine in India, it was applied in settling environmental issues within the United States legal frame work. In the case *Illinois Central Railway Co. v. Illinois* (1892) it concerns the legislature granting estate lands underlying the Lake Michigan to a private company. The Supreme Court of the United States held that navigable waterways were to be held in trust for the benefit of the entire population.Through this judgement the US Supreme court has attempted to protect the natural recourses highlighting the fact that the state does not have power to grant waterways to private companies, but such water recourses are meant for public use.

After the judgement of this case there was a tendency of adopting state legislations concerning the protection and preserving the environment incorporating with the public trust doctrine. In United States the Public Trust Doctrine is incorporated in most of the statutes relating to water resources management in most of the states including California, Minnesota, Wisconsin, Texas, Vermont etc. For an example Texas water code 2009 sec. 11.0235 providesthat waters of the state are held in trust for the public and the right to use the state water may be appropriated only as expressly authorized by law.

Following the decisions hold by the United States, India uphold the Public Trust Doctrine in environmental issues for the first time in the case *Mc. Mehetha v Kamal Nath(1997).*In this case it dealt with a private company building a club encroaching the substantial forest land. The regulations were made and the lease was entered when the Nath was the Minister of the Environment and Forest who also had the direct links with the private company. As a result of the encroachment there hadbeen swelling of the Beas river and change in the course of the river.Kuldip Singh J. Delivering the judgement and applying the Public Trust Doctrine stated ".... The ancient Roman Empire developed a legal theory known as the Doctrine of the public trust. It was founded on the idea that certain common properties such as rivers, seashore, forest and air were held by the government in trusteeship for the free and unimpeded use of the general public..... under the English common law, however, the sovereign could own these recourses but ownership was limited in nature; the crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation and

fishing...." Further court stated that " … our legal system-based on the English common law- includes the public trust doctrine as part of its jurisprudence. The state is the trustee of all natural resourses which are by nature meant for public use and enjoyment. Public at large is the beneficiery of seashore, running waters, air, forests and ecologically fragile lands. The state as a trustee is under a legal duty to protect the natural resouses. The resourses meant for public use cannot be converted in to private ownership…." More over in delivering the judgement court cited several Us judgements including the famous *Mono lake case (1983)* which stated that the public trust is more than an affirmation of the state power to use public property for public purposes. Court held that lease should be cancelled and awrded compensation for the damages caused to the environment.

Thus in this case court used PTD as a mechanism to protect the natural resouses emphasizing that it is paramount obligation of a state to protect its naturan resouses for the benefit of its citizens. More over this case points out that although the state is the trustee of the natural resouses, the powers vested upon the state is subjected to the interset of its citizens. And also by awrding the compensation it invokes the polluter pays principle. The court had the power to grant such comensation because through the PTD it has imposed an obligation upon the state to protect its natural resourses. This is a land mark case in Indian environmental law where Supreme Court of the India adopted public trust doctrine for the first time in India in environmental matters.

Following the judgement in the Kamal Nath case, in the case *Th. Majra Singh v Indian oil corporation (1998)*it affirmed that Th Public Trust Doctrine has become a part of the Indian legal system. In this case petotioner abjected locating a plant for filling cylinders with petrolium gas. Court decided that the doctrine is incorporated with the article 21 of the Indian Constitution which deals with the protection of life and personal liberty. It was stated in this case that,there can be no dispute that the state is under an obligation to see that forest, lakes, wild life and environment are duly protected.

In the case *M.I Builders v Radhey Shyam Sahu (1997)*it challenged the decision of the Lucknow Nagar Mahapalika permitting a private company to build a underground shopping complex in a historical park. The builder was also given permission to lease out the shopts in the complex according to its own terms and conditions. Court decided that it deprived the citizens their amenity of the old historical park. It was observed by the court that handing over the land of immmense value to a private company for the construction is a violation of the public trust doctrine since maitainance of the park was a public purpose due to its historical and environmental importance. Further it was held that construction was led to depriving citizen's right to a quality life guaranteed by the constitution. It is important to note that court applied the Public Trust Doctrine alone with the article 21 of the Constituton and give effect to it as a part of right to safe and healthy environment.

There are recent cases reported in India which applied this doctrine and further developed Indian jurisdiction relating to Public Trust Doctrine.

In the case *Intellectuals forum, Thirupathi v State of AP and others (2006)*the petitioner challenged the alienation of tank bed lands for housing purposes. The petitioners asserthed that it amounts to violation of the Public Trust Doctrine and indicates the failure of the authorities to protect the environment. In this case court recognizing the Public rust Doctrine stated that "…. When the state holds the resourse that is freely available for the use of the public, it provides a high degree of judicial scrutinity upon any action of the government,no matter how consicting with the existing legislations, that attempts to restrict such free use.To properly scrutinize such actions of the government the court must make destinction between the government's general obligation to act for thepublic benefit and the special more demanding obligation which it may have a trustee of certain public resourses…."This case highlites that soverign holds in trust for common good where the public has the right to protection of the natural resouses. Thus citizens are entitle to use PTD as a tool to protect the natural resourses for their interest and to impose an obligation upon the government to protect the natural resourses.

In another recent case ie. *Karnataka Industrial Areas Development Board v c. Kenchappa and others (2006)* similer veiw was adopted. The petitioner was affected by the acquisition of lands of different villages, filed a writ petition under Article 226 of the Constitution of India with a prayer that the appellant Karnataka Industrial Areas Development Board be directed to refrain from

converting the lands of the respondents for any industrial or other purposes and to retain the lands for use by the respondents for grazing their cattle. In this case it was observed that experience of the recent past has led to the realization of the deadly effects of development on ecosystem and theentire world is facing a serious problem of environmental degradation due to indiscriminate development. The court held that the Public Trust Doctrine requires that the reasonable balance is struck between the development and the protection of the environment.

The basis of this decision is that these resources are so inherently common in their nature that their permanent assignment to exclusive, private ownership is inappropriate. Further this judgement reflects how PTD underline achieving the sustainable development by protecting natural recourses.

In addition in most of the states in India including, Kerala, Tamilnadu, Rajasthan they have passed legislations relating to environmental protection incorporating with the Doctrine of Public Trust. For an example n the case *PerumattyGramaPanchayat v. State of Kerala (2003)* it was upheld the Public Trust Doctrine.

Therefore it is clear that in India The Public Trust Doctrine has applied by the Indian courts in deciding environmental matters and thereby it is firmly located within the laws and principles relating to environmental law.

III. THE APPLICATION OF THE PUBLIC TRUST DOCTRINE IN SRI LANKAN JURISDICTION.

When considering about the evolution of Public Trust Doctrine in Sri Lanka it runs in to the period when arhatMahinda arrived in Sri Lanka and preached to king Dewanapiyathissa that even birds and animals have a right to live and remembered that he is only the guardian of the land.

The constitution of Sri Lanka by article 27(14) provides that the state shall protect, preserve and improve the environment for the benefit of the community. Furthermore article 28(f) it imposes a responsibility upon every person in Sri Lanka to protect nature and conserve its riches. Even though these are state directive principles and does not have a binding effect one, cannot simply ignore this since they are included in the fundamental law of the country, the constitution.

Bulankula v Secretary, Ministry of Industrial Development (2000) is a significant case with regard to application of Public Trust Doctrine in environmental matters in Sri Lanka. In this case petitioners filed the case challenging the Phosphate mining in Eppawala stating that their Fundamental rights are violated. The Government entered in to an agreement with a US company for mining of the said phosphate and export. There was a widespread concern that such mining would bring negative environmental impacts. In this case Amarasingha J pointed out the connection between article 3 of the constitution and Public Trust Doctrine. He stated that ".... the constitution declares that the sovereignty is in the people and is inalienable. Being representative democracy the powers of the people are exercised through persons who are a time being entrusted with certain functions...." In this case *(Bulankulama case)* the natural environment is protected by virtue of the PTD underlying the fact that it is immoral and illeagal for private parties to arrogate natural resousers which provided by the nature and what is necessary for humans health and hapiness. By this agreement eventhough the economical beneifits may gain, on the other hand villegers right to sound environment will be violated. Therefore this judgemenet can be considerd as a very progressive judgement where court used PTD as a tool to protect natural resourses and impose an obligation upon the state to protect such resourses.

Further Citing the decision of the Weeramanthri J. In *Hungary v Slovakia*he Amarasigha J established that the state is the guardian who is required to exercise the power in the trust.

Furthermore, he extended the Public Trust Doctrine to a broader sense through the idea of shared responsibility. The idea of shared responsibility is significant because it imposes responsibility upon all the organs of the government to protect the environment as well as responsibility is vested upon all the people to protect the environment.

In the case *WattegedaraWijebanda v Conservator General of Forest and Others(2004)* the petitioner was a person who was subjected to refusal for granting a permit for mining of quarry in close to a national reserve. In this case ShiraneeTilakawardana J stated referred to the judgment in the *Bulankulama case* and stated that public trust doctrine requires all the organs of the state

to ensure that all the natural recourses are protected and preserved for public benefit. More over it was stated that state must consider the principles of sustainable development, inter- generational equity, Public Trust Doctrine in making any decision relating to natural resources.

In the case *Environmental Foundation Ltd. V Urban Development Authority of Sri Lanka and Others (2004) – Galle face Green case,* there had been an attempt made by Urban Development Authority to lease out the Galle face green to a commercial entertainment company . The petitioner who was a registered environmental NGO made a request for further information and it was refused by the UDA. In this case a one of the issues addressed by the court was whether UDA had the authority to leaseout the Galle face green. Here it was considered the fact that Galle Face Green has been open to the public, established and maintained as a public utility for the past 150 years. Court stated that".... The Galle Face Green should be maintained as a public utility in continuance of the dedication made by Sir Henry Ward and necessary resources for this purpose should be made available by the government of Sri Lanka, being the successor to the colonial governor who made the dedication....".Therefore court held that the agreement is ultra vires and no force or avail in law. Further it was held that Galle Face Green should be maintained as a public utility. This judgement also articulates the Public Trust Doctrine.If the commercial entertainment company was build, then the general public has to pay money to enter in to Galle face green and also environment of the gall face green will also be polluted due to commercial activities. Therefore by invoking PTD in this case court has prevented such violation of natural recourses by private entities.

In *SugathapalaMendis and Others v C.B Kumarathunga and Others (2007)* the petition was filed challenging the transfer of a land of the state dedicated for public use to a private golf course. The court observed the importance of protecting bio diversity rich areas and pointed out that the government should protect environment for the benefit of the citizens and to avoid inconveniences and disasters.If this private Golf course was constructed the ordinary people will not be able to access the area for which they had the access earlier. The construction can also cause damages to the environment. Therefore court very correctly used PTD and protected the natural resources in the area as well as recognized the environmental justice.

Further in 2003 when Supreme Court determined the water resources' bill court made an order against the privatization of the water resources. In this case court held that since water resources amounts to natural heritage of people , the law which deals with privatisation of water resources' required special majority in the parliament and approval of the people at a referendum.

IV.CONCLUSIVE REMARKS.

The Public Trust Doctrine has its roots both in Roman law and English common law. PTD can be effectively used in the cases concerning the environmental matters.

When analysing the case laws it is evident that state is not the owner of the natural resources, but the trustee of them, who is obliged to protect, preserve and improve them for the benefit of the public. Thus state is bound to protect the natural resources for the interest of the people and generations yet to come. It also stresses the importance of striking balance between development and environmental protection.

Countries like US and India has developed this doctrine through the case laws indeciding environmental matters and has used this doctrine as an effective tool to safe guard the people's right to sound environment, right to life and right to health. Most of the recent cases reported in Sri Lanka concerning environmental matters indicate that the Public Trust Doctrine is part of the Sri Lankan law and has expanded this doctrine as to include the idea of the shared responsibility by the case laws. The Public Trust Doctrine has become a significant plat form to ensure the environmental justice today.

Though the developments are needed the state must take necessary care to ensure that such developments are not against the environment and rights of the people. Though there are instances where Sri Lankan courts have effectively upheld the Public Trust Doctrine it is recommended that in deciding environmental matters judges have a significant and active role to play in order to interpret the doctrine to realize the rights of the people. As it is most correctly stated by the Justice Bhagawathi in Global Judges Symposium on sustainable Development and the Role of Law, judges should create laws. In developing environmental law judges have to keep in mind the balance which has to be achieved within human rights which also consists with right to development and environmental protection.

And also it is suggested that the law making bodies and law implementing bodies should have the idea in mind that they are the trustee of the natural resources for which the citizens are the beneficiaries. Not only that, but also every citizen of a country has a responsibility to protect and preserve the environment in order to safeguard the rights of the generations yet unborn.

ACKNOWLEDGMENT

I would like to acknowledge the guidance and the support of the Dean, Faculty of Law, KDU and I would like to express my appreciation for Ms BMK Jayasekara, Lecturer in Law, KDU and all the other lecturers of the faculty. Then I would like to express my sincere gratitude to my parents. Family members and my friends for giving me their support and encouragement to make this reseach a success.

REFERENCES

Bento, L. (2011). **"**Searching for Intergenerational Green Solutions: The Relevance of the Public Trust Doctrine to Environmental Preservation" <file:///C:/Users/HP/Downloads/Documents/Common%20Law%20Review.htm> Accessed 12 June 2015

Doctrine of Public Trust <http://www.lawteacher.net/free-law-essays/public-law/doctrine-of-public-trust.php> Accessed 12 June 2015

Government of Sri Lanka, (1987) Democratic Socialist Republican Constitution of Sri Lanka.

Kameri, P. (2007) " The Use of the Public Trust Doctrine in Environmental Law- Environment and Development Journal" <http://www.lead-journal.org/content/07195.pdf> Accessed 12June 2015

Kapoor, T. (2013) "Public Trust Doctrine" <file:///C:/Users/HP/Downloads/Documents/Public%20Trust%20Doctrine%20-%20Author%20-%20Tanvi%20Kapoor.htm> Accessed 12 June 2015

Klass A.B, Huang L,Y, (2009) " Restoring the Trust"" <http://www.progressivereform.org/articles/cpr_public_trust_doctrine_manual.pdf> Accessed 12 June 2015

Samararatne, D. (2010). "Public Trust Doctrine, The Sri Lankan Version" <http://www.noolaham.net/project/127/12619/12619.pdf> Accessed 11 June 2015

Shelton. D & Kiss. A, (2005), Judicial Handbook on Environment Law, United Nations Environment Programme (UNEP).

The Global Judges Symposium of Sustainable Development and Role of Law (2002) <http://www.unep.org/delc/judgesprogramme/GlobalJudgesSymposium/tabid/106158/Default.aspx> Accessed 14 June 2015

Bulankulame v. Secretary Ministry of Industrial Development [2000] 3 Sri.L.R

Environmental Foundation Ltd. v. Urban Development Authority, SCFR 47/2004

GabcikovoNagymaros Project (Hungary v Slovakia) [1997] ICJ Rep. 7.

Gann v. Free Fishers of Whitstable [*1865*] 11 H.L.C. 192.

Illinois Central Railway Co. v. Illinois 146 US 387 (1892).

Karnataka Industrial Areas Development Board v C Kenchappa, AIRSCW 2546 (India *2006*)

M.C. Mehta v Kamal Nath and Others (1997 1 SCC 388)

M.I. Builders Pvt. Ltd. *v. RadheyShyamSahu* (1999) 6 SCC 464.

PerumattyGramaPanchayat v. State of Kerala W.P.(C) No. 34292 of 2003

The Majra Singh v Indian Oil Corporation (AIR 1999 J&K 81).

Tirupathi v. State of AP and Others, (*2006*) 2 SC 568,

Sugathapala. Mendis and Another *v. Chandrika Bandaranaike Kumarathunga and Others* (S.C.F.R.. 352/*2007*)

Wijebanda v. Conservator General of Forests, (2009) 1 S.L.R. 337

Contemporary Validity of Customary International Law with Reference to International Law Making Process

W Seneviratne
Department of Public and International Law, Faculty of Law, University of Colombo, Sri Lanka
wasanthas.law@gmail.com

Abstract *- In the absence of a designated institution for making or passing international law the international law creation process has created a conundrum. Which authority or institution has the power to originate international law, who has granted the mandate for the task of making law and the validity and acceptance of customary international law are some associated problems with the main issue. The main research problem of this paper is 'in spite of the significance of international customary law how international custom can continue to provide the same connotation and the validity in the wake of the changes happened in the present international legal system?" Although with the adoption of the Statute of the International Court of Justice the impasse related to the sources of international law has been partly resolved, the contemporary significance and the complex formula related to proving the existence of customary international law remain controversial. Much debate exists on its consistent application and pragmatism. Treaty law seems as taken over the primacy of customary law at the international arena. In this backdrop, the main objective of this research is to examine the actual position of customary international law in the current world as a source of international law. This is a qualitative research, mainly based on secondary sources, i.e., textbooks, journal articles, case law and relevant international instruments. The key findings of the research shows the continued validity of customary law is as unabated but priority-wise it has become secondary to treaties as a source of international law. The two elements involved in the satisfactory establishment of customary law- (state practice and opinio juirs) – have made the burden of proof of a new customary norm rather difficult. However, there prevail interesting examples with regard to the creation of such important norms in the present international legal system as evidence to the sustainability of customary international law in the years to come. Therefore, the research concludes by reiterating the validity and usefulness of custom as a source of international law despite the fact that it has diminished its significance as a source of law in most of the domestic legal systems. Nevertheless, it is emphasized the need to minimize or eliminate the influences of more powerful states on the creation of customary international law norms to get their strategic political goals accomplished in order to depoliticized international law making process.*

Keywords *- sources, customary international law, international legal system*

I.INTRODUCTION

Laws are necessary for regulating behaviour of the subjects of any given legal system. In domestic legal systems a designated organ of the government generally formulates laws. In commonwealth countries parliaments with one chamber or two chambers are entrusted with the responsibility of passing laws for their subjects. However, in the international plane the law making process is rather different and complex. In the absence of a nominated institution for making international law, such as a 'world parliament' similar to a domestic legislature, the process of international law creation has created a conundrum. Which authority has the power to originate international law, who has granted the mandate for the task of making law and the validity and acceptance of customary international law are some of the problems associated with the main issue.

The main research problem of this paper is "in spite of the significance of customary international law how can international customs continue to provide the same significance and validity in the wake of changes happened at the international legal system?". Although with the adoption of the Statute of the International Court of Justice the dilemma related to the sources of international law has been partly resolved, the contemporary significance and the application of customary international law remain controversial. Much debate exists on the definition of this source of law and its consistent application. Therefore, the main objective of this research paper is to examine the actual position of customary international law as a source of international law in the contemporary world in the backdrop of more practical and feasible sources of international law such as the treaty law and the influential resolutions adopted by the United Nations. The impact of international power politics on the creation of customary international law is also discussed.

The 'sources' articulate what the law is and where it can be found. (Wallace, 2003) Accordingly, referring to the sources of law of any legal system can bring information on an issue of law together. The 'sources' of international law constitute that reservoir of authoritative rules and principles to which the international lawyer must refer in order to ascertain the content of the law. (Jenson, 1984). However, determination of the sources of Public International Law has become an academic exercise. As a result, at the international level, there is a vigorous ongoing controversy as to what is meant by the expression "sources of international law" and which sources are the most important (Starke, 1994). Unlike at the international plane, ascertainment of the law on any given point in domestic legal systems in not usually too difficult process. For example, in the Sri Lankan legal system, when a legal issue arises one can resort to the Constitution of the country at first to see whether the matter is covered by any provision of this highest source of law in Sri Lanka. If the issue is not governed by a Constitutional provision, it should be checked by examining the plethora of statutes passed by the legislature of the country. Therefore, if an Act of Parliament of Sri Lanka deals with the issue at question the matter can be resolved through the application of the relevant statutory provision. However, in the absence of such relevant rule, court decisions of appellate courts such as the Supreme Court and the Court of Appeal should be examined. In our country, we are inherited 'judicial president theory' by the British as a result of the colonial occupation of the country. Therefore, the decisions of apex courts are considered binding on lower courts as judicial precedents where relevant. Although in general in the municipal law at least three primary sources, i.e., Constitution, Acts of Parliament, decisions of appellate courts help to determine the relevant legal rules applicable to a given issue, this determination is not easy at the International Level due to a number of reasons, which will be discussed in below sections of this paper. The matter has become more complicated due to the non-applicability of the judicial precedent theory as stated in the Article 59 of the International Court of law Statute. (The decisions of the court have no binding force except as between the parties and in respect of that particular case).

II. CUSTOM AS A SOURCE OF INTERNATIONAL LAW

Rules of customary law are regarded as one of the primary sources of international law. Although controversies prevail with regard to the priority of the sources of international law, treaties, custom and general principles of law of the civilized nations are considered the main sources as stipulated in the Article 38(1) of the Statute of the International Court of Justice (ICJ). This Statute provides a list of sources, which can be used by the world court (ICJ). Article 38(1) of the Statute, is widely recognised as the most authoritative and complete statement as to the sources of international law. It provides that:

> *…the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

This formulation is technically limited to the sources of international law, which the International Court must apply. Since all member states of the UN are *ipso facto* parties to the Statute by virtue of Article 93 of the UN Charter and even non-member states of the UN also can specifically become parties to the Statute of the Court, Article 38(1) sources are considered as important.

III. FORMATION OF A NEW CUSTOMARY LAW RULE

Article 38(1)(b) of the Statute of the International Court of Justice indicates the technical aspects of a valid customary law. According to this provision, the Court shall apply "*international custom, as evidence of a general practice accepted as law.*" When analysing this phrase two elements of an international custom can be identified; first, general practice and second, practiced as law. However, the Statute does not define these two elements. Therefore, number of questions would arise, such as, the following: What constitutes a general practice? Who decides the underlying concepts? At what point does law come into existence? What are the relevant circumstances, contexts, time-frames and political climates, if any? (Shaw). State practice is considered the physical or the material element of a valid international custom. The practice of states is reflected in variety of governmental acts. As Jenson aptly describes the practice of a given state can be derived from the following *inter alia*; diplomatic correspondence between foreign ministries, official instructions from a government to its diplomatic missions, press releases, opinions of official advisors, domestic legislation, domestic court decisions on matters of international concern and comments of states on draft treaties. ICJ has decided in several cases with regard to this element and would be useful in determining the establishment of this element.

As Judge Cassese, 1995 has observed: [G]iven the rudimentary character of international law, and the lack of both a central lawmaking body and a central judicial institution endowed with compulsory jurisdiction, in practice many decisions of the most authoritative courts (in particular the ICJ) are bound to have crucial importance in establishing the existence of customary rules.

A. Advantages and disadvantages of custom as a source of international law

Custom is the oldest source as well as the broadest source of international law. Similarly, as Weeramantri states that much more than treaty law, customary international law (CIL) has the potential to universalize international law because all the other rules of law emerged from customs. Even the rules of treaty law emerged from CIL. *Pacta sunt servanda* is the underlying principle of international treaty law. It means that treaties are binding upon the parties to them and must be performed in good faith. It was reaffirmed in article 26 of the 1969 Vienna convention on Law of Treaties. It too stipulates that every international agreement for, in the absence of a certain minimum belief that states will perform their treaty obligations in goofaith, there is no reason for countries to enter into such obligations with each other. According to Weeramantrie this *pacta sunt servanda* principle itself a product of customary international law because it is customary international law that tells us that treaties are to be obeyed. So, the very strength of treaties is derived from a principle of customary international law. Therefore, the competing other source of international law that is treaty law has derived its force from CIL. Weeramantrie says

> "Treaty law grew out of customary international law; it derives its validity from the customary international law and therefore, customary international law is the mentor or guru, out of which treaty law has grown as a sort of disciple. "

Another advantage of CIL is that while rules under a treaty are binding only on the parties to the treaty to the extent that the treaty includes rules of customary law, such rules continue to bind all other states as well. Thus, even non-state parties to a treaty can be bound by the underlying customary law principles of a treaty. For an example, Sri Lanka is not a state party to 1977 Additional Protocol II of 1949 Geneva conventions on the Amelioration of the effect of Armed Conflicts. This particular teary governs non-international armed conflict situations and Sri Lanka was having such an armed conflict for more than three decades. The treaty provisions could not bind the country but the most of its principles are considered as customary law. Therefore, Sri Lanka is required to apply those principles in dealing with the conflict situation. Unlike treaties, custom does not require any express act of ratification or further acceptance by states. A state becomes a party to a treat by signing and ratifying he said treaty or by acceding to it as stipulated by Vienna Convention on the Law of Treaties. But, custom does not require such acts. Nonetheless, customs require the establishment of two elements, as discussed in the above sections.

CIL has numerous disadvantages as well. Proving the existence of a valid customary law is rather difficult. It is difficult to produce evidence of its recognition in particular. In the case of Colombia v. Peru ICJ held that the physical element of the argued regional customary law principle was unable to be satisfied. In Anglo Norwegian Fisheries Case between Norway and the United Kingdom it was emphasized the need of establishing both the physical as well as the psychological elements to establish a valid CIL principle. If a state wishes to be not bound by an emerging new CIL it should resist the establishment of which from the very beginning. Then such a state is considered a persistent objector. However, if a state agrees at the outset but begin to reject it after some time it cannot get away from the obligations arising out of such a CIL principle since it is considered as a subsequent objector. As Judge Weeramanthri pointes out customary laws may be limited in acceptance to a few states only and different group of states or different regions of the world may follow different customary rules. Even in a general rule of customary law there may be lack of agreement on matters of details.

B. Issues relating to Custom as a source

There are disagreements with regard to the continued validity of customary laws in international law. Some writers deny the continued significance of custom as a source of law in the contemporary world, claiming that it is too clumsy and slow moving to accommodate the evolution of international law any more (Shaw, 2005). Some others say that it is a dynamic process of law creation and more important than treaties since it is of universal application (De Amatao, 1998). Nevertheless, another view recognises that custom is of value since it is activated by spontaneous behaviour and thus mirrors the contemporary concerns of society (Cheng, 1985). However, certain scholars perceive that the role of custom is as much diminished due to the massive increase in the pace and variety of state activities and the impact of different cultural and political traditions over the creation of customary international law. For example, Shaw, 2005 states that

> *There is a continuing tension between those rules already established and the constantly evolving forces that seek changes within the system. One of the major problems of international law is to determine when and how to incorporate new standards of behaviour and new realities of life into the already existing framework, so that, on the one hand, the law remains relevant and, on the other, the system itself is not too vigorously disrupted. Changes that occur within the international community can be momentous and reverberate throughout the system.*

According to Shaw, if a new customary rule is created in contrary to an existing legal norm, such a rule will replace the already established legal norms to the contrary effect. This is the most current status of mind of the international community and the intention of the law creating actors in the international plane. In international law, law making authority lies with the sovereign states. Nevertheless, the dominance of powerful states in such a creation is inevitable. For example, Schachter, 1997 states that "*customary law, new and old, are products of political aims and conditions" while* Visscher, 1960 states that "[e]very international custom is the work of power". Byers, 1999 states:

> *Although States are equally entitled to participate in the customary process, in general, it may be easier for more 'powerful' States to behave in ways which will significantly influence the development, and maintenance or change of customary rules.*

IV. KEY CONCERNS

Although the above comments show the inextricable link between power and customary law the significance of customary international law is hardly disputed. The underlying flexibility surrounding the customary international law tends towards the argument that customary international law in some instances is more robust than treaty law within the context of power in international relations.' For example, Byers, 1999 argues that more powerful states have larger and more resourced diplomatic corps to influence and monitor developments in international customary law. This consideration is even stronger if Koskenniemi's (1970) notion of law is accepted. He argues that

> *….the distinction between the relevant and the irrelevant, and between law and power, can be achieved by introducing a psychological element into law... laws are effective because they have been internalised, and so are obeyed as a matter of course, not because of some external constraint.*

The examples pertain to the continued significance of CIL demonstrates the belief that treaty law is more important than customary law is not accurate. Cheng emphasizes the possibility for the creation of instant CIL as pointed out in the above discussion. Recent codification of customary international humanitarian law (IHL) principles by the International Committee of the Red Cross (ICRC) shows the relevancy and the current place of CIL principles as a source of international law. The ICRC has gathered the widely dispersed CIL principles pertain to different types of war situations and has found 161 Rules as well established. The importance of these CIL rules is that they can be applied to both international and non international armed conflict situations whereas this is not the case with regard to the application of treaty law principles since they require different applications depending on the nature of the armed conflict. Ass a result, CIL rules of IHL are proved to be very useful to fill the gaps in terms of application to both categories of armed conflicts and thus bind even the non state parties to some of IHL treaties as illustrate in the above discussion with regard to the case of Sri Lanka.

CIL has shown a remarkable significance in relation to human rights law jurisprudence. Many fundamental human rights are so well established customary practices amongst states and as a result they can be applied to make those states obliged for implementation of such valuable human rights principles. *Jus cogens* are recognized by the Vienna convention on Law of treaties as inviolable peremptory norms. Well known examples for *jus cogens* are prohibitions against genocide, slavery, war crimes and crimes against humanity. All the inviolable norms are widely considered as well established CIL principles. In the contemporary world another emerging trend is the established norms pertain to the protection of the natural environment to ensure sustainable development without harming the environment and the rights of people. For this purpose established CIL principles provide a strong legal basis. CIL of Law of the Sea was used greatly in codifying the Law of the Sea Conventions because most of the Law of the Sea priciples are customary in nature.

There are many other examples to the contemporary application and significance of CIL principles. Therefore, these findings show the continued validity of customary law is as unabated. Nonetheless, priority-wise it has become secondary to treaties as a source of international law in particular before the International Court of Justice due to practical reasons such as the difficulty of proving, uncertainty of the actual scope, the current trend of making treaties to govern many areas of international law. However, CIL as the repository of international law

very often fills gaps in treaties. For an example, there can be difficulties in the interpretation of treaties since there are several interpretations possible and customary international law can tell us which of those interpretations is preferable. There prevail interesting examples with regard to the continued significance and validity of CIL principles in the present international legal system as evidence to the sustainability of customary international law in the years to come.

V. CONCLUSION

The key findings of the research prove the continued validity of customary law is as undiminished but priority-wise it is secondary to treaties as a source of international law. The two elements involved with the satisfactory establishment of customary law- namely state practice and *opinion juirs* – have made the establishment of a new customary international law norm rather difficult. But there prevails interesting examples on the creation of such important norms in the present international legal system as evidence to the sustainability of customary international law in the years to come.

The research concludes by reiterating the validity and usefulness of custom as a source of international law despite the fact that it has diminished its significance as a source of law in most of the domestic legal systems. Nevertheless, it is emphasized the need to minimize or eliminate the powerful states being more influential on the creation of customary international law norms in order to get their strategic political goals to be accomplished.

REFERENCES

A Theory of Customary International Law Jack L. Goldsmith1 & Eric A. Posner, Chicago Working Paper Series, http://www.law.uchicago.edu/ Lawecon/workingpapers.html visited on 23 July 2015

Bake B. R(Rudy), Customary International Law in the 21st Century: Old Challenges and New Debates,*The European Journal of International Law Vol. 21 no.1, 2010*

Byers, M., Custom, Power and the Power of Rules, 1999

Cheng , B., International law teaching and Practice, *The American Journal of International Law, Vol. 78, No. 2 , 1984.*

D'Amato, Concept of Custom, 1999

D'Amato, A., Trashing Customary International Law Source: *The American Journal of International Law, Vol. 81, No. 1 , 1987.*

De Lupis, The Concept of International Law, 1987.

De Visscher, D., Theory and Reality in Public International Law, 1960.

Friedmann, W., The Changing Structure of International Law, 1964.

Jenson, E., international law in the context of Sri Lanka, 1984

Pearce,J., Customary International Law Not Merely Fiction Or Myth, *Australian International Law Journal, 2003.*

Scott, G.L., and Craige L. Carr, The ICJ and treaty custom dichotomy, *6 Tex.as International Law journal, 1981.*

Shaw, M., International Law, 2005

Tunki, G., Is General International Law Customary Law Only? *4 European Journal of International Law, 1993.*

Wallace, R., International Law, 2003

Weisburd, M., The International Court of Justice and the Concept of State Practice, *31 American Journal of International Law, 2005.*

BIOGRAPHY OF THE AUTHOR

Author is a Senior Lecturer attached to the Department of Public and International Law of the Faculty of Law, University of Colombo, Sri Lanka. She is the Head of the Department of Public and International Law at present. She is the Deputy director (Acting) of the Centre for the Study of Human Rights (CSHR), a Research Institute attached to the Faculty of law, University of Colombo She serves as the Executive Editor of the Sri Lanka Journal of International Law published by the Faculty of Law, University of Colombo and an editor of the Sri Lanka Journal of International and Comparative Law published by the Faculty of Law of KDU.

Cassandra Complex: Analysis on Law Relating to Climatic Change in Sri Lanka

GIM Liyanage
Department of Law, Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka
isurumaduka@yahoo.com

***Abstract*—*According to the strategic report of Ministry of Disaster Management in Sri Lanka, a sever landslide occurred in Meeriyabedda area in Kotabatha Grama Niladari Division in Haldemulla Divisional Secretariant Division in Baddulla Distrci in 29th October 2014 at 7.30 a.m. Due to this landslide number of people lost their lives and lives of their closed ones also number of people lost their housings. This happened due to sudden and heavy rains caused by the changes in the rain cycle in Sri Lanka. Washington Department of Ecology identifies very severe landslides as a result of climatic change. Therefore, now it is high time to identify Sri Lanka as another victim of Climatic change in the world. It is clear that we have certain laws pertaining to the climatic change, but nor key legislation. Number of environment related legislations are indirect contributors in mitigating the issue. However, still there are issues in implementing and practicing. In this backdrop, author seeks to analyse the laws, regulations and policies relating to the climatic change in Sri Lanka and to suggest possible recommendations in order to mitigate the impacts of climatic change in Sri Lanka. The research would follow the legal research methodology which is mainly based on the literature review of Environment Law Legislations, Regulations and Policies. Particularly, the research is based on primary sources of law such as international documents, statutes, and judicial decisions. Further, this study engages in a comparative analysis of the concepts of International Environmental Law principles with domestic Environmental Law.*

***Keywords -** Natural hazardous, Climatic change, Environmental laws*

I. INTRODUCTION

'Cassandra Complex' is a historical mythology in Greek culture. Cassandra in Greek mythology, was one of the princess of Troy, daughter of Priam and Hecuba. According to the Myth, Cassandra was astonishingly beautiful and blessed with the gift of foreseeing the future. Her curse was that no one believed her, a fact that weighed heavily on the destruction of Troy during the Trojan War(Greek Myths and Greek Mythology).There are several different versions explaining the gift and curse of Cassandra; the most popular one is that God Apollo fell in love with her and granted her with the gift of prophecy. When Cassandra denied the God and his advances, he placed a curse on her, so that no one would believe her words or her predictions. He gave her a gift that would bring frustration and despair to her(Greek Myths and Greek Mythodology). Therefore, it is evident that she had a power to predict future correctly but because of the curse no one believes her words. This Cassandra Complex has been used for psychological interpretations. A famous psychologist Melanie Klein provided an interpretation of Cassandra as representing the human moral conscience whose main task is to issue warnings. Cassandra as moral conscience, "predicts ill to come and warns that punishment will follow and grief arise." (Klein, M.,1975) Cassandra's need to point out moral infringements and subsequent social consequences is driven by what Klein calls "the destructive influences of the cruel super-ego," which is represented in the Greek myth by the godApollo, Cassandra's overlord and persecutor. (Klein, M.,1975) . Many environmentalists have used Cassandra myth in explaining different environmental problems. Such as climate change, flood, rise in sea level and pollution issues etc. Environmentalist Atkisson has stated that, 'many environmentalists have predicted looming environmental catastrophes including climate change, rise in sea levels, irreversible pollution, and an impending collapse of ecosystems, including those of rainforests and oceanreefs'(Atkisson.A,1999).

Environmentalist Alan Atkisson states that to understand that humanity is on a collision course with the laws of nature is to be stuck in what he calls the 'Cassandra dilemma' in which one can see the most likely outcome of current trends and can warn people about what is happening, but the vast majority can not, or will not respond, and later if catastrophe occurs, they may even blame you, as if your prediction set the disaster in motion (Atkisson.A,1999).So it is very clear that present day most of the people and state parties may heard about the environmental issues and hazardous but very reluctant to take necessary precautions to overcome it. Further people know about the impacts of their behaviors but not ready to accept the repercussions. However their

hesitation to acceptance becoming a curse made by the nature. The Haldemmulla Landslip in Sri Lanka also this kind of a curse made by nature. For the Haldemulla landslip basically inappropriate house location has affected prominently and also according to the Washingto Ecology Department this nature of high landslips are kind of a result of climatic change. However in this Haldemulla incident, it was not considered as an issue in climatic change. But if we look in to the root cause of the incident is the change of the rain cycle and sudden changes in climate. When it comes to the laws relating to the climatic change, it is really a sad situation. Because Sri Lankan law has not identified this as a cardinal problem. The establishment of theclimate change secretariat is a mile stone in overcoming the issue. Apart from these there are some gazette notifications which planning to mitigate the releasing of emission gas to the air. Therefore, in this paper author seeks to analyse the laws, regulations and policies relating to the climatic change in Sri Lanka and to suggest possible recommendations in order to mitigate the impacts of climatic change in Sri Lanka. First the paper will focus on the issue of climate change then certain Sri Lankan examples will analyse. After that paper will focus on domestic laws and international standards. Finally paper will suggest possible recommendation based on the conclusion

II. CLIMATE CHANGE

The Earth's climate has changed throughout history and just in the last 650,000 years there have been seven cycles of glacial advance and retreat, with the abrupt end of the last ice age about 7,000 years ago marking the beginning of the modern climate era — and of human civilization (NASA). Climate Change can be occur due to two basic reasons. Firstly natural reasons and secondly human involvereasons. For many people, climate change is both a cause for concern and a source of confusion (Deplege. M, 2007) the sheer range of underlying causes and emerging consequences coupled with the threats posed to physical, social and economic well-being make climate change seem at once urgent but also beyond the reach of the public and private sectors (Deplege. M, and Carlarne. C2007). While climate change originated as an environmental problem , it now impinges on every aspect of human life including international peace and security (Christoper. P,2007). Global warming is the cardinal feature in the climate change. The current warming trend is of particular significance because most of it is very likely human-induced and proceeding at a rate that is unprecedented in the past 1,300 years (IPCC, 4th Assessment Report).

Certain gases in our atmosphere known as greenhouse gases allow the lower atmosphere to absorb the heat released by the Earth's surface, trapping it within our atmosphere, greenhouse gases, such as water vapor, carbon dioxide, and methane, are important to our ecosystem because their entrapment of heat prevents Earth from turning into a block of ice. (Kaita. C,). Due to these gases global temperature has been changed and global warming has been started. As a result of that the climate of the earth has started to changed drastically. If the warning continue there is growing consensus that the prospect of adverse climate change is not going to diminish in the near future, unless dramatic mitigation and adaptation measures are adopted and implemented (Downing. T, 1997). This is a crucial situation because as a result of the climate change many natural disasters are happening and human lives and many things are destroying. Therefore, it is important to examine environmental hazardous facing due to the climate change.

III. ENVIRONMENTAL HAZADOUS

Vulnerability to climate change refers to the extent to which countries will be adversely affected by climate change as well as their capacity t cope withthose impacts in an effective and timely manner(UNEP., 2011). When it comes to the impacts on climate change we can identify much social, cultural and environmental harm. Further, scholars identify that it will have a disproportionately harmful effect on developing counties-and in particular poor communities who are already living at or close to the margins of survival(Atapattu. S, 2011). The impacts of climate change on food security, access to water, human health, ecosystems, urban areas, and frequency of disasters will have sever implications for the achievement of sustainable development. (Atapattu. S, 2011). Furthermore, in 2008 report of Greenpeace noted that; 'climate change is the biggest environmental threat faced by SouthAsia and may well be the biggest humanitarian and economicchallenge that the developing world will have to face in the comingdecades. While the world has woken up to the threat of climatechange, the true enormity of what this implies is still sinking in.Governments are yet to face up to the extraordinary social andeconomic problems in the future, not to mention environmentalimpacts that unchecked global warming would generate'(Blue Alert, 2008). Basically

water storages, food insecurity, increased salinity, inundation of low lying cities, soil erosion, costal erosion, extreme weather events , sudden land slips and land slides and finally loss of endemic species are crucial environmental harms that can occur due to the climate change. In this scenario author would like to focus more in to the incident of the sever landslide occurred in Meeriyabedda area in Kotabatha Grama Niladari Division in Haldemulla Divisional Secretariant Division in Baddulla Distrci in 29th October 2014 at 7.30 a.m. This was a sad situation occurred in Sri Lanka. Mainly scientist authorities found that this was due to heavy rain. Currently many scientist have examined that in Sri Lankans rain system has changed rapidly. Due to this rapid change of raining system this nature of sudden landslides are occurring very frequently in Sri Lanka. Therefore, it is utmost important to identify this as a direct consequences of the climate change in Sri Lanka. In other words, we can labelled Sri Lanka as a another victim of climate change.

IV.INTERNATIONAL STANDARDS

The international community can achieve an effective and equitable response to climate change by strengthening its commitment to mitigate response to climate change by strengthening its commitment to mitigate, adapt, funds and innovate (Burleson. E, 2010). Climate change was identified as a environmental threat in 1992 by the United Nations Convention on Climate Change (UNFCCC, 1992), it plays a vital role in eliminating climate change in the world. This significance of this instrument is it commits all parties to 'common but differentiated responsibilities'. In the Article 2 of the UNFCCC it states that; stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous human interference with the climate system. In the UNFCCC it makes a distinction between Annex –I and non- Annex I countries. Developed countries comes under the Annex-I and developing countries comes under the non-Annex-I countries. Under these two separate demarcations the said instrument tries to impose different responsibilities to countries in the same world. Secondly Kyoto protocol(1997) comes to the force. This discuss the importance reduce greenhouse gas emission 5% below 1990 levels during the first commitment period (2008-2012). Also they tried to implement this for the Annex-I countries whereas Non-Annex I countries have no emission reduction obligation under the protocol. Therefore, it is clear that even the Kyoto Protocol also based on the 'common but differentiated responsibility principle'. Further when examining the Kyoto Protocol provisions we can see that this is based mainly on the mitigation, and in that context we can identify the precautionary principle also been affected for this. The Kyoto Protocol entered in to the force in year 2005 and now there are 190 countries signed for this document. Then Bali Action Plan (2007) need to discuss in this context and significance of the Bali Action Plan is it is the first time developing countries acknowledged that they will have to adopt binding obligations during the 2nd commitment period. 2009 Copenhagen Accord comes to the picture. 136 countries have signed the Accord now and it endorsed the continuation of basic framework of Kyoto. However no binding document yet formed. In Copenhagen, the 2050 target was dropped and the term 'verify' was reduced to the following compromise: 'Non-Annex-I parties will communicate information on the implementation of their action through National Communications, with provisions for the international consultations and analysis under clearly defined guidelines that will ensure that national sovereignty is respected ' (Burleson. E, 2010) Then Cancun Meeting is important.

The Intergovernmental Panel on Climate Change (IPCC)has called upon industrialized countries to reduce Green House Gas (Hereinafter GHG) emissions by twenty five to forty percent from 1990levels by 2020, and cut global emission by half before 2050(Burleson. E, 2010). The 2007 IPCC report reflected political and scientific consensus between 2000 and 2005(Porritt, J, 2008). Therefore, it is clear that through the international instruments several attempts are made in order to reduce climate change. However, due to the acceptance by different countries some of these international instruments are merely in discussions only.

V.SRI LANKAN LEGAL EXPERIENCE RELATING TO CLIMATE CHANGE

According to the National Climate Change Policy of Sri Lanka 'Being a developing island nation subject to tropical climate patterns, Sri Lanka is highly vulnerable to climate change impacts. Extreme weather events such as high intensity rainfall followed by flash floods and landslides, and extended dry periods resulting in water scarcity are now becoming common occurrences in Sri Lanka. Any adverse changes in already volatile weather patterns are likely impact adversely on the socio-economic activities in the country. Therefore urgent action is necessary to take adaptive measures to build resilience of the country to

face the adverse impacts of climate change'. Sri Lanka being an island nation climate change is a critical environmental issue need address. Sri Lankan being a dualist country mostly we are sort of hesitant to take international laws into the domestic affairs. Yet, Sri Lanka is very proactive in being a signatory party to many international instruments. Sri Lanka ratified both UNFCCC and Kyoto Protocols. As a party to the UNFCCC, Sri Lanka has already submitted its first national communication in 2000. National Environmental Act No. 47 of 1980 (Hereinafter NEA) and subsequent amendments in 1988 and 2000 are the key environmental legal instruments in Sri Lanka. Still, NEA does not provide a sound legal coverage for the climate change in Sri Lanka. When it comes to the air pollution and vehicular emissions part IV of the NEA is important. With relating to the Part IV of the NEA there are several Gazette notifications are set up to reduce the emission of certain GHG's. Specially Ozone Depleting Substances and Natural Environment (Ambit Air Quality) Regulations which was published by the Gazette No. 850/4 of 20.12.1994 is relevant. Under this regulation certain standards have been introduced. The use of materials listed in this regulation has been banned effect from 1st January 2000. The National Environmental (Ambient Air Quality) Regulations published by Gazette No. 1562/22 of 15.08.2008 introduced permissible air quality in relation to the classes of air pollutants have been introduced. National Environmental (Air Emission, Fuel and Vehicle importation standard) Amended Regulations Gazette No. 1295/11 of 30.06.2003 and National Environmental (Air Emission, Fuel and Vehicle Importation Standards) Regulations Gazette No.1557/14 of 09.07.2008 are relevant for the introduction of vehicle exhaust emission standards accordingly. Intention of these gazette notifications was to discourage the use of GHG's through vehicles and other means.

Furthermore, National Climate Change Policy of Sri Lanka has seven objectives such as ; Sensitize and make aware the communities periodically on the country's vulnerability to climate change, to take adaptive measures to avoid/minimize adverse impacts of climate change to the people, their livelihoods and ecosystems, Mitigate greenhouse gas emissions in the path of sustainable development, Promote sustainable consumption and production, Enhance knowledge on the multifaceted issues related to climate change in the society and build their capacity to make prudent choices in decision making, Develop the country's capacity to address the impacts of climate change effectively and efficiently, and Mainstream and integrate climate change issues in the national development process.

Moreover, under the Ministry of environment and Natural Resources in Sri Lanka, there is Climate Change Secretariat, which is establish to control and mitigate climate change effects in Sri Lanka.

Sustainable Energy Authority Act in 2007 also relevant in this regard. Its main objective to develop renewable energy resources, to declare energy development areas, to develop energy efficiency measures and conservation programms, to promote energy security, eliability and cost effectiveness in energy delivery in Sri Lanka. Therefore, to eliminate GHG's this act also important however, it does not directly discussion about the climate change issue.

Additionally, in Sri Lankan there is s National Advisory Committee on Climate Change (NACC) to address issues in the climate change in Sri Lanka. NACCC is formed under the Ministry of Environment and Natural Resources in Sri Lanka and all activities pertaining to climate change will be coordinated by NACCC. The main objectives of the NACC are as follows;to ensure that climate change policies and programmes are consistent with national development priorities and objectives, to function as the forum to address climate change issues in the context of national development agenda and as a consultation forum in the development of climate change related policies and actions, and to recommend research studies on mitigation, impacts and adaptations to be undertaken by researchers, promoting private sector participation in Clean Development Mechanism (CDM) projects (CCSSL, 2014). Also to fulfil those objectives they are bound by certain responsibilities such as;provide overall guidance for the preparation on National Communication on Climate Change including an inventory of greenhouse gas (GHG) emissions and removals from anthropogenic activities such as energy (generation), agriculture, forestry and land use changes and waste management, and the ongoing Second National Communication preparation process,Provide guidance to formulate policies, and strategies that would mitigate emissions of Greenhouse gases and enhance sinks and reservoirs of all GHGs,Provide policy options for adaptation and response strategies for climate change impacts on key socio-economic sectors,Make recommendations on suggested policies, strategies and plans for adaptation to adverse impacts of climate change including appropriate capacity

building and research studies on the likely impacts of climate change for the management, protection and rehabilitation of areas vulnerable to the impacts of climate change,Facilitate developing negotiating positions and strategies for the Government of Sri Lanka for meetings of the COP of the UNFCCC,Provide guidance to promote and cooperate in scientific, technological, technical, socio-economical and other research, systematic observation and development of data archives related to climate system and enhancing networking and information sharing / exchange amongest all stakeholders , Advising to formulation of the Second National Communication (SNC), including recommendations and decisions of the Technical Working Group & review the activities of the Clean Development Mechanism (CDM) Process and To have strategies and programmes to promote awareness and generate action to reduce Greenhouse gas emission levels through the wider participation of members of the public. (CCSSL,2014)

VI. CONCLUSION

Currently, Sri Lanka becoming a major victim of the climate change. Due to its natural location and the nature of the country effects will affect critically. Nowadays , sudden changes in raining system in Sri Lanka occurred due to the clime changes in Sri Lanka. Sri Lanka been a signatory party to the UNFCCC and Kyoto needs to take more steps to reduce GHG's. However, major Act pertains to the environmental protection that is NEA does not address this issue comprehensively. It in way shows the commitment to address this issue. However, CCSSL plays a vital role in this context. Still it needs more authority to eliminate climate change. Also the national policy to address this issue is progressive attempt but need more formalized manner to activate it. Giving more significance to Copenhagen Accord is really important because it gives both developed and developing countries a platform to address the issue. Climate change is a major issue to the world and this will be the next fundamental environmental harm to the world. Therefore, trusting the words and working towards to the mitigating its effects are utmost important. Otherwise Cassandra curse will come to the man kind in the world.

ACKNOWLEDGMENT

Author would like to express gratitude for Professor Veerle Heyvaert, Associate Professor of Law, London School of Economics and Political Science, for giving valuable remarks to the research at the conference and also I would like to express my sincere gratitude to Dr. Kokila Konasinghe , Senior Lecturer in Law, Faculty of Law, University of Colombo for encouragement and for constructive comments for the improvement of the research .

BIOGRAPHY OF AUTHOR

Author is a Lecturer (Probationary) in Law attached to the Department of Law, Faculty of Law, General Sir John Kotelawala Defence University. His research interests include Public and International Law. He has done research in the area of public and international law and presented papers in national and international conferences

REFERENCE

Depledge, M. and Carlarne. C, Sick of the weather: Climate Change, Human Health and International Law, Environmental Law Review,p.231 (2007)

Christoper. P, Greening the Security Council: Climate Change as an Emerging threat to International Peace and Security , International Environmental Agreements, P35-71 (2007)

NASA., Climate Change How Do WE Know?, Global Climate Change,http://climate.nasa.gov/evidence/ Accessed on 1st May 2015.

IPCC, Fourth Assessment Report,

Klein, M., Envy and Gratitude- And Other Works 1946–1963, p.293 (1975)

Atkisson, A., Believing Cassandra: An Optimist Looks at a Pessimist's World,Earthscan (1999)

Kaita. C, 'How Does Climate Change Occur',Why – Sci,http://why-sci.com/climate-change/ , (Accessed on 15th July 2015)

UNEP, Guidebook on National Legislation to Climate Change, United Nations Environmental Programme, (2011).

Downing. T, Hulme. M, and Waughray. D, Mitigation and Adaptation Strategies for Global Change, Kluwer Academic Publishers, (1997)

Atapattu. S, Sustainable Development Law on Climate Change, International Development Law Organization(2011)

Blue Alert, Climate Migrants in South Asia: Estimates and Solutions – A Report by Greenpeace, Executive Summary, (2008)

Burleson. E, Climate Change Consensus: Emerging International Law, WM & Mary Environmental Law & Policy Review, Vol:34:543, (2010)

Porritt. J, Press the Public Button,GUARDIAN.CO.UK, Dec. 10, 2008,http://www.guardian.co.uk/commentisfree/2008/dec/10/comment-porritt-poznan-openhagen-environment.

Climate Change Secectreant Sri Lanka,(CCSSL) http://www.climatechange.lk/About_us.html, (2014) Accessed on 14th June 2015.

Sustainable Development and the Challenge of E-Waste in Sri Lanka

UM Sapukotana
Legal Draftsman's Department, Sri Lanka
upekshasapukotana@yahoo.com

Abstract— *Sustainable Development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. However, loosely discarded, surplus, obsolete, broken, electrical and electronic equipment which are called e-waste have become a huge challenge in achieving sustainable development in the modern world endangering public health and the environment, due the release of harmful and toxic substances contained therein. This research addresses the problem whether the legal system of Sri Lanka has adequately responded to the challenge of e-waste management in order to uphold the concept of sustainable development in the country. Data collection was done through literature survey and interviews with government authorities, company officials and experts on the subject. For comparative purposes, legal developments in India were taken into account. It was found out that Sri Lanka has taken efforts to address the issue through introduction of regulations on disposal of hazardous waste, in keeping with the obligations under the Basel convention. National policy on e-waste management is still at the draft stage and the legal framework needs much improvement in comparison to the developments that have taken place in other jurisdictions. Introduction of regulations that specifically deals with the issues pertaining to e-waste with provisions on responsibilities of various stakeholders such as producers, dealers, collection centers, recyclers and consumers, introducing the concept of Extended Producer Responsibility making the manufacturers liable for safe disposal of electronic goods, promoting the import of electronic equipments with less hazardous materials, streamlining e-waste recycling and collection system through legal means, enhancing public awareness on e-waste management and promoting research and development activities are the major recommendations to be made to meet the challenge e-waste management in upholding the concept of sustainable development in Sri Lanka.*

Keywords— *Electronic Waste, Sustainable Development, Environment*

I. INTRODUCTION

The concept of sustainable development emphasizes the importance of preserving the environment and its riches in the process of development. The Brundtland Commission Report (1987) defines sustainable development as:

> *"the development that meets the needs of the present without compromising the ability of future generations to meet their own needs".*

Development of technology and the globalization of the economy have made a whole range of electronic and electrical equipments making them an integral part of our daily lives providing us with more comfort, security, ease and faster acquisition and exchange of information. However, the unrestrained consumption, increasing demand and the rapid obsolescence in the electronic and electrical equipments due to technological updates have resulted in the generation of one of the fastest growing waste streams in the world called "e-waste", which can be broadly defined as loosely discarded, surplus, obsolete, broken, electrical or electronic equipment (Samarakoon 2014).

The rapid generation of e-waste has become a huge challenge in achieving the goals of sustainable development in the developed as well as developing countries like Sri Lanka and India. E-waste consists of all waste from electronic and electrical appliances which have reached their end- of- life period or are no longer fit for their original intended use and are destined for recovery, recycling or disposal and includes computers and their accessories, mobile phones and chargers, remotes, compact discs, headphones, batteries, TVs, air conditioners, refrigerators and other household appliances (Central Environmental Authority, 2010). Solving the E-Waste Problem (StEP) Initiative (2014), reported that the world e-waste generation in 2014 was 41.8 metric kilotonnes and predicted that it will swell by a third in the next five years, led by the United States and China.

Improvement of the electrical and electronic industry is essential for the development of the mankind. However the concept of sustainable development emphasises the balance between the technological improvements, environmental sustainability and the interest of the

present and future generations. The damage caused by e-waste on the human health and environment has become a challenge towards maintaining this balance. This study seeks to addresses the problem whether the legal system of Sri Lanka has adequately responded to the challenge of e-waste management in order to uphold the concept of sustainable development in the country. Data collection was done through literature survey and interviews with government authorities, company officials and experts on the subject. For comparative purposes, legal developments in India were taken into account.

II. WHY E-WASTE IS A CHALLENGE?

The Greenpeace Organization (2013) says that the estimated amount of e-waste generated on the planet every year put into containers on a train would go at least once around the world**.** E-waste consists of non-hazardous materials such as iron, aluminium, plastics and glass as well as hazardous materials. It is because of these hazardous materials E-waste has become a challenge which undermines the objectives embedded in the concept of sustainable development due to its possible dangerous environmental and health impacts. E-Waste is more hazardous than many other municipal wastes because electronic gadgets can contain thousands of components made of potentially harmful chemicals such as lead, cadmium, chromium, mercury, beryllium, antimony, polyvinyl chlorides (PVC), brominated flame retardants, and phthalates (Sinha 2007).

When e-waste is loosely discharged and dumped in open yards, these hazardous substances are released to the environment and lead, brominated dioxin, beryllium cadmium, and mercury and other toxic metals are leached into the ground water and gets contaminated and toxic. They get deposited in rivers and other water sources through rain and acidify soil, fish and flora (Sangal P, 2010). Open burning of e-waste releases harmful gasses and substances like brominated dioxins, heavy metals and hydrocarbons into air. Long term exposure to these toxic compounds affects the nervous system, kidneys, bones, and reproductive and endocrine systems (Kumar and Jain 2014).

The need to face the challenge of e-waste is special to developing nations such as Sri Lanka and India because developing countries often become e-waste dump yards of the developed industrial countries. The consumers of the developing nations are unable to purchase electrical and electronic equipments with latest technology and they tend to buy second hand products which become e-waste in few years. Also e- waste has a growing market value where it is exported mainly to developing countries to extract valuable substances such as copper, iron, silicon, nickel and gold as an industry. Therefore many legal measures have already been adopted nationally as well as internationally to address the issue of e-waste.

III. INTERNATIONAL LAW ON THE SUBJECT

E-waste contains constituents which fall under the category of 'hazardous waste' and there exist a number of international instruments on the subject which can be listed as follows:

A. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal - 1989

The Convention aims at protecting human health and the environment against the adverse effects of hazardous wastes. It seeks to:

(i) reduce hazardous waste generation and promote environmentally sound management of hazardous wastes,
(ii) the restriction of transboundary movements of hazardous wastes except where it is perceived to be in accordance with the principles of environmentally sound management system; and
(iii) a regulatory system applying to cases where transboundary movements are permissible. (Widmer R. et al.2005)

The Convention covers a wide range of wastes defined as "hazardous wastes" based on their character and composition under Article I and Annexes I, III, VII and IX. Waste electronic and electrical equipments such as mobile phones, Polychlorinated Biphenyls (PCBs) and compounds used in industry as heat exchange fluids, in electric transformers and capacitors containing hazardous wastes as defined in the convention are among the wastes regulated by the Basel Convention.

Article 11 of the Basel convention encourages the parties to enter into bilateral, multilateral and regional agreements on hazardous waste to help achieve the objectives of the convention

B. Bamako Convention 1998

Many African nations felt that Basel Convention was not successful in prohibiting movement of hazardous waste to Africa (Koko case in Nigeria, Probo Koala case in Ivory Coast) and accordingly Bamako convention came into force with much stronger prohibition of imports of hazardous waste. It does not make exceptions on certain hazardous wastes (Eg. radioactive materials) made by the Basel convention.

C. Waigani Convention 1995

The Convention seeks to prevent the import of hazardous and radioactive waste into the South Pacific region while minimising production within the region and ensuring the environmentally sound management and disposal of already existing waste. It covers a broad range of hazardous wastes but excludes those derived from the normal operations of a vessel and some radioactive wastes.

D. Rotterdam Convention 2004

The convention promotes obtaining and disseminating information through prior informed consent procedure so that decisions can be made by importing countries as to whether they wish to receive future shipments of certain chemicals. It promotes shared responsibility between countries to protecting human health and the environment from the harmful effects of such chemicals.

E. Waste Electrical and Electronic Equipment (WEEE) Directive of the European Union No. 2012/19/EU

The Directive lays down a comprehensive legal framework on waste from electrical and electronic equipment (WEEE) within the European Union. According to Article 1, the directive lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of WEEE thereby contributing to sustainable development. Article 4 requires the producer to design the products in such a way that will facilitate dismantling and recovery while Article 5 imposes the obligation to collect waste electrical and electronic equipment at its end of life. It emphasises that 'best available treatment' must be used when treatment of the WEEE done in the recycling and disposal process.

F. Restriction of Hazardous Substances (RoHS) Directive 2011/65/EU

This Directive lays down rules on the restriction of the use of hazardous substances in WEEE with a view to contributing to the protection of human health and the environment, including the environmentally sound recovery and disposal of WEEE (Article 1)

The Directive requires the substitution of various heavy metals, namely lead, mercury, cadmium, hexavalant chromium and brominated flame retardants like poly-brominated biphenyls or poly-brominated diphenyl ethers in new electrical and electronic equipment in order to prevent the generation of WEEE.

IV. E-WASTE IN INDIA

Article 48A of the Constitution of India 1949 makes the state responsible to protect and improve the environment and to safeguard the forests and wild life of the country. The United Nations (2015) reported that India is the fifth biggest producer of e-waste in the world, discarding 1.7 million tonnes of electronic and electrical equipment in 2014. Jog (2008) states that there are 10 states that contribute to 70 per cent of the total-waste generated in India, and Maharashtra ranks first followed by Tamil Nadu, Andhra Pradesh, Uttar Pradesh, West Bengal, Delhi, Karnataka, Gujarat, Madhya Pradesh and Punjab among the top e-waste generating states. The main sources of electronic waste in India are the government, public and private (industrial) sectors, which account for almost 70 per cent of total waste generation and the contribution of individual households is relatively small at about 15 per cent (Sinha 2007). Indian Market Research Bureau survey of 'E-waste generation at Source' (2009) found that out of the total e-waste volume in India, televisions and desktops including servers comprised 68 per cent and 27 per cent respectively. Mobile phones comprised of 2 per cent of the e-waste.

India is one of the largest waste importing countries in the world. All types of wastes are imported into the country, in the form of cheap raw materials including hazardous and toxic wastes. Customs Department reveal It generates about 3, 50,000 tonnes of electronic waste every year and imports another 50,000 tonnes (Sangal 2010). A study conducted by the Research Unit of Rajya Sabha Secretariat (2011) revealed that so far, India has been the destination of the hazardous and industrial wastes like mercury, electronic and plastic wastes from the United States; asbestos from Canada; defective steel and tin plates from the European Union, Australia and the United States. These wastes contain toxic components which are damaging to the public health and environment.

Accordingly e-waste has become a huge challenge to India and the Indian government has taken steps to introduce number of legal measures that deal with the subject which can be listed as follows:

A. E-waste (Management and Handling) Rules, 2011

These rules can be viewed as a progressive step in the battle against e-waste and lays down a comprehensive legal mechanism in relation to proper control and management of e-waste.

Rule 3 defines E-waste as "waste electrical and electronic equipments whole or in part or rejects from their manufacturing and repair process which are intended to be discarded". It makes the producers of the electrical and electronic equipment responsible for the collection

of e-waste generated during the manufacturing process and to channel them for recycling or disposal.

Introduction of the concept of extended producer liability is very important and It imposes the responsibility of e-waste management not only on individual consumers but also bulk consumers such as government and commercial institutions (Rule 6). It also makes responsible dismantler, recyclers and collection centres as well (Rules 7 and 8).

State Pollution Control Board is the responsible government authority on the subject and It establishes an authorising mechanism on e-waste to ensure that the collection and recycling process in done in a legal manner. To address the issue of health and environmental impact created by careless storage of e-waste, it introduces a procedure for the storage of e-waste.

Recycling and controlling the existing e-waste is not an adequate solution to meet the challenge of e-waste. There needs to be a mechanism to reduce the use of hazardous substances in the manufacture of EEE. This need has been catered under rule 13. Additionally Rules 12, 16 and 17 deals with storage, transportation and reporting of accidents while transportation of e-waste respectively. Schedule I deals with the categories of EEE covered under these rule and includes information technology and communication equipment and consumer electricals and electronics.

B. The Hazardous Waste (Management and Handling) Rules, 1989 as amended in 2003

These rules were introduced under the Environmental Protection Act, No. 29 of 1986. Under Schedule 3, E-waste is defined as "Waste Electrical and Electronic Equipment including all components, sub-assemblies and their fractions except batteries. Schedule 1, 2 and 3 are relevant to certain hazardous components of e-waste. Electrical and electronic scraps as a hazardous waste are covered under Sl.No. A 1180 in List A and Sl.No. B 1110 in List B. Wastes under List A are not allowed to be imported into the country without the Director General of Foreign Trade licence(Rule 12).

C. The Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008

These rules prohibit transboundary movement of hazardous waste parallel to the Basel Convention, to which India is a signatory (Johri R., 2008). Accordingly, every person desirous of recycling or reprocessing hazardous waste including electronics and electrical waste is required to register with the Central Pollution Control Board (CPCB). The waste can be sent or sold only to a registered or authorized re-cycler or re-processor or re-user having environmentally sound facilities satisfied by the CPCB. The Ministry of Environment and Forests is authorized to grant permission for the movement of hazardous wastes through any part of India. The rules categorises hazardous waste imported to India into 3 categories namely substances that can be imported with prior approval, free imports under Open General Licence and substances which are prohibited for importing into the country.

D. Guidelines for Environmentally Sound Management of E-waste, 2008

This provides guidance for the identification of various sources of e-waste and the approach and methodology for handling and disposal of e-waste in an environmentally sound manner. These Guidelines apply to all those who handle e-waste including generators, collectors, transporters, dismantlers, recyclers and stakeholders of e-wastes irrespective of their scale of operation. The guidelines include:

(i) details such as e-waste composition and recycle potential;
(ii) identification of possible hazardous contents in e-waste;
(iii) the recycle, re-use and recovery options, treatment and disposal options and
(iv) the environmentally sound e-waste treatment technologies.

Most importunately the guidelines emphasises on the concept of Extended Producer Responsibility as well.

E. Draft Electronic Waste (Handling and Disposal) Bill, 2013

The objective of this draft law is to provide for proper handling and disposal of electronic waste generated by discarded electronic devices by prescribing norms and fixing responsibilities and duties on manufacturers, re-cyclers and consumers with regard to disposal of electronic waste. It defines "e-waste as waste generated from discarded television, personal computer, floppy, audio-video CD, battery, cell phone, refrigerator, air conditioner, electronic toys, telephone, washing machine, electronic switch and such other products (Clause 2 (d)).

Clause 4 places the responsibility of ensuring that all the electronic waste generated within its territorial jurisdiction is handled and disposed of by the state governments in accordance with compliance criteria and procedure which shall be prescribed under the Bill. Clause 5 states that it shall be the duty of every

manufacturer, to ensure that every electronic product offered for sale in the market contains—

(i) the procedure for its handling and disposal;
(ii) the information about the parts which can be re-cycled and which cannot be re-cycled;
(ii) to set-up adequate number of collection centres for the hazardous electronic waste; and
(v) To create public awareness through advertisements, publications and other electronic media about the hazardous substances in their products which may cause ill effects on human body.

The Bill also seeks to introduce penal provisions and accordingly whoever violates the provisions of this Act or the rules made thereunder shall be punished with imprisonment for a term which may extend to one year and with fine which may extend to five hundred thousand rupees (clause 8).

V. SRI LANKAN EXPERIANCE OF E-WASTE

Sri Lanka acquired an economic growth rate of 7.3 per cent in 2013 (Central Bank of Sri Lanka, 2014) and it was largely owing to the growth of exports and investments. Telecommunication and information technology industry was increasingly developed and as a result computers and their accessories and mobile phones flooded into the country. With the growth of the economy, consumer needs increased and a large demand for electrical and electronic products for household use and for commercial and industrial use was developed (Rodrigi C. 2013). As a consequence generation of e-waste also increased at an alarming rate in the country.

The sources of e-waste generation in Sri Lanka is either household, industrial or commercial. A study conducted by the Basel Secretariat of Sri Lanka in collaboration with the government of Japan (2007) identified nine major types of e-waste in Sri Lanka. Accordingly, computers and their accessories form a large portion of e-waste in Sri Lanka. Mobile phones also form of large portion of e-waste. The study revealed that current market size of mobile phones in Sri Lanka is 1.0-1.2 million per annum and due to the estimated short life span of a mobile phone it ends up as e-waste within few years.

New technology makes the day today life easier and accordingly the demand for household electronic equipments increased during the past 20 years of Sri Lanka. Accordingly, televisions, washing machines and refrigerators which are at the end of their life span also contributes to the growth of e-waste in Sri Lanka (Bandara 2014). Apart from these air conditioners, photocopy machines and batteries from commercial and industrial entities also end their life as e-waste. Accordingly e-waste has become a huge challenge for Sri Lanka endangering the environment and the public health.

A. Impact of International law

Sri Lanka as a member of the United Nations Organization, is bound by the principals of sustainable development embedded in the in the Rio Declaration (1992) and Stockholm Declarations (1972). Accordingly the concept of sustainable development have been recognised and applied in a number of Sri Lankan Judgements such as *Bulankulama v Sec. of Minnistry of Lands and Wijebanda v Conservator General of Forests.* In the judgement of *Bulankulama v Sec. of Minnistry of Lands,* while giving reference to the principles of the above declarations, It was held that,

> *"Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. (Principle 1, Rio de Janeiro Declaration). In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."*

Furthermore, Sri Lanka ratified the Basel Convention in.1992 and accordingly bound by the obligations under the convention. Implementation of the National obligations on import, export and transit of waste listed in the Basel Convention is carried out by the Central Environmental Authority (CEA) as the national competent authority for the convention. According to the **a**pproval procedure of CEA for importation of hazardous waste, the importation of List A waste of the Basel convention is not allowed as Sri Lanka does not have disposal facilities. A proposal needs to be submitted by the Importer to the CEA .for the importation of List B waste which will be evaluated by a Technical Evaluation Committee of CEA. The Ports Authority and the Sri Lanka Customs are also informed of the decision taken. However, importation of post consumer waste to Sri Lanka and establishment of new recycling industry based on any imported waste/ recycled material is prohibited

B. Domestic Legal Framework

Sri Lankan Constitution of 1978 does not recognise an explicit right to a clean environment as in the Constitution of India. However, the Directive Principle of State Policy places an obligation on the state to "protect, preserve and improve the environment for the benefit of the community" (Article 27(14)). Also under fundamental duties, it states that every person in Sri Lanka has a duty "protect nature and conserve its riches" (Article 28(f)).

National Environmental Act, No. 47 of 1980 as amended by Act, No. 56 of 1998 is the principal piece of legislation that deals with the protection of environment. Section 23 A of the Act states that no person shall discharge, deposit, or emit waste into the environment without a license obtained under section 23 B. Accordingly National Environmental (Protection and Quality) Regulations, No. 1 of 2008 was introduced under section 32 read with Section 23A and 23 B of the Act which established a mechanism to regulate "scheduled waste" in keeping with the obligations under the Basel Convention..

1) National Environmental (Protection and Quality) Regulations, No. 1 of 2008

Regulation No. 13 states that no person shall generate collect, transport, store, recover, recycle or dispose waste or establish any site or facility for the disposal of any waste specified in the Schedule VIII (herein after referred to as "scheduled waste") except under the authority of a license issued by the Authority and in accordance with such standards and other criteria as may be specified by the Authority.

Schedule VII identifies Waste Electrical and Electronic Equipments (N 301 Discarded Computers and accessories and N 302 Discarded Mobile phones) as scheduled waste. Electrical equipment or parts, Mercury wastes containing metallic mercury from manufacturing of fluorescent lamps, discarded or off specification batteries containing lead, mercury, nickel, cadmium, lithium and Electrolyte from batteries and accumulators also falls under this category. Accordingly, regulations place the duties on a holder of a license to maintain records and send annual return to CEA in relation to the scheduled waste managed by the license holder. Additionally, scheduled waste sites of generation or storage, vehicle used for transportation, containers or tanks used for collection and storage and disposal site needs to display , the statement "Warning, contains waste, Dangerous to human, health and the environment"(Regulation31).

2) Draft Electrical and Electronic Waste Management Policy in Sri Lanka

The objective of the policy is to:

(i) Prevent or minimize negative impacts to the environmental and health of the people due to haphazard use of e-products and disposal of e-waste.
(ii) Promote integrated e-waste management by looking at all phases of the life cycle of the product and taking action where it is most effective.
(iii) Secure Social Responsibility towards sustainable production and consumption of e-products.

Accordingly the policy seeks to prohibited/restricted imports and exports of E waste while minimising of e-waste generated in the country. It recognizes the importance of controlling the import of usable used electrical and electronic equipment, practicing Extended Producer Responsibility to facilitate life cycle management, regularising waste collection, disposal, capacity building and awareness raising, institutional mechanism and coordination, monitoring, evaluation and reporting and strengthening the legal framework on E-waste. However, this policy is still at the draft stage.

V. RECOMMENDATIONS

Based on the findings discussed above, it is suggested that the following recommendations to be made for the purpose of facing the challenge of e-waste management in keeping with the principal of sustainable development in Sri Lanka.

(1) Introduction of a proper law on e-waste management.

Since e-waste is a special type of waste containing hazardous impacts which needs special attention, the existing National Environmental (Protection and Quality) Regulations, No. 1 of 2008 seems not adequate. It covers only a restricted number of items (computer accessories and mobile phones) as e-waste. Therefore a regulation can be introduced under section 32 read with sections 22A and 23B of the NEA on the subject of E-waste management as in the Indian context. E Waste needs to be clearly defined and the definition provided in the European Union directive No. 2012/19/EU can be used as a guideline. The regulation should cover the following areas:

(i) All the stakeholders (manufacturers, consumers, producers, importers, exporters, distributors, retailers, collectors, transporters, storers, recyclers and disposers) must be made responsible for proper management and handling of e-waste.
(ii) Definition for a consumer must include both individual consumers as well as bulk consumers such as private, state and industrial entities as in the Indian context.
(iii) Extended producer liability needs to be introduced to make the manufacturers responsible to take back and recycle the products at its end life stage.
(iv) Provisions relating to transport, storage, accident reporting, public warning instructions and safety of the employees of the recycling centres must be covered.

(v) Compliance, reporting and continue monitoring of the responsibilities of the stakeholders.

Apart from this the following recommendations are also suggested:

(2) Promoting the manufacture and import of electronic equipment with less hazardous materials.
(3) Streamlining e-waste recycling and collection system through legal means.
(4) Enhancing public awareness on e-waste management.
(5) Encouragement of manufacturers to be complied with the extended producer liability and the green production strategies through granting tax incentives, concessionary loan facilities for hazardous free green technology.
(6) Promoting research and development activities on productions free of hazardous materials and on safe e-waste recycling technology.

VII. CONCLUSION

While electrical and electronic equipments make our lives comfortable and easy-going, they have become a nuisance to the public health and environment at their end life point. Responding the challenge of proper management and control of e-waste is very important and introduction of a proper legal mechanism on e-waste plays a major role in this process. Therefore, the recommendations made in this study would assist to meet the challenge of e-waste management in upholding the concept of sustainable development in Sri Lanka.

RFERENCES

Bandara, S., "The urgent need for e-waste management in Sri Lanka," *Institute of Policy studies, Sri Lanka*, January 2014.

Government of India, Research Unit of the Rajya Sabha Secratariat, 'E-Waste in India', 2011, Delhi

Jog S., 'Ten states contribute 70% of e-waste generated in India', The Financial Express, 13 March 2008.

'India Fifth Biggest Generator of E-Waste in 2014: UN Report', All India, April 19, 2015 http://www.ndtv.com/india-news/india-fifth-biggest-generator-of-e-waste-in-2014-un-report-756259

Rodrigo C., "Utility Vs. Environment: Sri Lanka's policy outlook on managing e-waste," *Institute of Policy studies, Sri Lanka*, June 2013.

Samarakoon M., 'A Review of Electrical and Electronic Waste Management in Sri Lanka', International Conference on Chemical, Civil and Environmental Engineering (CCEE'2014) Nov 18-19, 2014 Singapore

Sangal P., 'The challenge of hazardous waste', The Economic Times, 19 May 2010.

Sinha S., 'Downside of the Digital Revolution',Toxics Link, 28 December 2007, http://www.toxicslink.org

Status Report on e-Waste Management In Sri Lanka. *Central Environmental Authority*, August 2010.

'The Koko Incident', Journal of National Resources and Environment Law 8 (1992/1993

The Probo Koala Inquiry', Environmental Policy and Law, 39/4 – 5, 2009

The report of outcome of the study on "Development of a National Implementation Plan for Electrical and Electronic Waste Management in Sri Lanka," Ministry of Environment and Natural Resources, 2007.

The Report of the World Commission of Environment and Development (Brundtland Commission Report) (1987)

United Nations University / Step Initiative, www.step-initiative.org/

'Where does all the e-waste go?', 2008 http://www.greenpeace.org/international/en/news/features/e-waste-toxic-not-in-our-backyard210208/ accessed on 11.06.2015

Widmera R. , , Krapfa H.O. , Khetriwalb D.S., Schnellmannc M., Bönia H., 'Global perspectives on e-waste',Environmental Impact Assessment Review, Volume 25, Issue 5, July 2005, Pages 436–458

Treaties and Statutes

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal – 1989

Bamako Convention 1998

Constitution of India 1949

Constitution of Sri Lanka 1978

Draft Electronic Waste (Handling and Disposal) Bill, 2013

E-waste (Management and Handling) Rules, 2011

Guidelines for Environmentally Sound Management of E-waste, 2008

Hazardous Waste (Management and Handling) Rules, 1989

Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008

Restriction of Hazardous Substances Directive 2011/65/EU

Rio Declaration on Environment and Development 1992

Rotterdam Convention 2004

Stockholm Declarations 1972

Waigani Convention 1995

Waste Electrical and Electronic Equipment (WEEE) Directive of the European Union No. 2012/19/EU

Cases

Bulankulama v Sec. of Minnistry of Lands (2000) 3 Sri L.R. 243

Wijebanda v Conservator General of Forests SCFR 188/2004)

BIOGRAPHY OF AUTHOR

Author is an Attorney-at-Law working as an Assistant Legal Draftsman at the Legal Draftsman's Department of Sri Lanka. She holds Bachelor of laws (LL.B.) and Master of Laws (LL.M.) degrees offered by the Faculty of Law, University of Colombo and a Post Graduate Diploma in Human Resource Management offered by the University of Kelaniya. Her research interests include Environmental Law and Information Technology Law. She is an M.phil/Phd candidate at the Sir John Kothalawala Defence University.

The Link between Right for Development, Right for Clean and Healthy Environment; and Essentiality of Including These Rights in National Constitution

MLSM Perera
Faculty of Humanities and Social Sciences, University of Sri Jayewardenepura, Nugegoda, Sri Lanka
pererasandamali@gmail.com

Abstract— *The United Nations Declaration of Human Rights provides an international standard to uphold basic moral dignity among human beings, though different states select particular fundamental rights that may or may not intersect with the UN Human Rights framework. As an instance, ten articles an included at the first amendment in 1789 Constitution of USA. Sri Lanka's 1978 constitution includes a third chapter that outlines articles such as 10 to 17 and 126 which emphasize national standards of human rights. Stability and protection of fundamental human right is a prominent responsibility of government according to the article 4 (d). ' The fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided. '- Article 4 (d)However, these provisions for human rights are notably incomplete, and ought to be amended for a number of reasons. As example the country does not ensure the basic human right to a clean and healthy environment, and instead focuses exclusively on a development paradigm to the detriment of basic human and environmental well-being. Each human being depends on protecting the environment as the resource base for all life. Therefore People started to see that a clean and healthy environment is essential to the realisation of fundamental human rights. Human rights cases of environmental disruption, like the Bhopal and Chernobyl disasters, it has become more acknowledged over the years. The General Assembly Resolution, Article 1(1), mentioned the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. The Preamble of UN Declaration on the Right to Development states "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. For these reasons, Sri Lanka should specifically amend its constitution to include the right to a clean and healthy environment and the right to sustainable development in its third chapter.*

Keywords— *The 1978 Constitution of the Democratic Socialist Republic of Sri Lanka, The right to a Clean and healthy environment, The right to Sustainable Development*

I. INTRODUCTION

Before global industrialization, the scope of human needs in the world was fairly limited. Subsequently, however, human demands vastly expanded with the advent of population growth and the competitiveness of a global economy. In the early era of industrialization, governments worldwide concentrated almost exclusively on economic growth and ignored basic concerns of human and environmental well-being. As a result, global problems have arisen such as, ozone depletion, deforestation, rising atmospheric temperatures, sea level rise, and climate change. These problems threaten the health of human beings worldwide, and actually pose both direct and indirect threats to the economic productivity of nations. Therefore, Sri Lanka should amend the third chapter of its constitution to ensure both the right to development and the right to a healthy and clean environment so that these objectives are both mutually attainable. Without such explicit parameters, there can be no accountability to the Sri Lankan state.

II. METHODOLOGY

The aim of this research was to identify how Sri Lankan government concerns the sustainable development. In this research the researcher selected more Development projects and examines the governments' decisions for sustainable development.

III. RESULTS & FINDINGS

'The right to clean and healthy environment is not to be threatening human beings by the environment, right to water, food, employment & development.'

- *Prof. Jemy Batram*

'The natural resources of the nation are the heritage of present and future generations. The right of each person to clean and healthful air and water, and to the protection of the other natural resources of the nation, shall not be infringed upon by any person'

- *Proposed Amendment to the U.S. Constitution (1996)*

Several diseases can be occurred due to the imbalance of clean and healthy environment. Approximately 14000 people have died pertain to the lack of water daily. Approximately 500 million deaths reports from China annually. 656000 people had lost their lives while the air pollution arisen highly. More fundamental human rights are lost due to lack of clean and healthy environment. Therefore, the right of clean and healthy environment mentioned as a Human Right in international law.

Advocates, NGO organizations, Conventions (Kyto Protocol, Vienna Convention on the Protection of the Ozone Layer, Rio Declaration on Development and Environment, 1987 Montreal Protocol, The report of the World Commission on Environment and Development; Our Common Future) and many other organizations accept that. Human have a right to a clean and healthy environment through moral. Some Legal Advocates argue that right is not only human right but also constitutional right, because China, South Africa, South Korea, Spanish and some more states include this right as a human right in their national constitutions. The Constitution of the Republic of Korea declares in Article 35, 'All citizens shall have the right to a healthy and pleasant environment,' Article 45 of the Spanish Constitution declares that everyone has 'the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.' Article 225 of the Brazilian Constitution declares that everyone has 'the right to an ecologically balanced environment which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.' Article 56 of the Turkish Constitution declares 'Everyone has the right to live in a healthy, balanced environment. It shall be the duty of the State and the citizens to improve and preserve the environment and to prevent environmental pollution.' The 1993 Russian Constitution declares in Article 42, 'the right to a favorable environment, reliable information about its condition and to compensation for the damage caused to his or her health or property by ecological violations.' The 1996 South African Constitution gives everyone the right 'to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

Figure 1. Nations recognizing constitutional right to a healthy environment as of 2012- (The Constitutional right to a healthy environment, http://www.lawnow.org/right-to-healthy-environment/ Accessed 03/09/2014,12.51P.M.)

Figure 2. Nations recognizing the right to a healthy environment in constitutions, legislation, or international agreements as of 2012 (The Constitutional right to a healthy environment, http://www.lawnow.org/right-to-healthy-environment/ Accessed 03/09/2014,12.51 P.M.)

Alan Boyle (2011) says many national legal systems that lack comparable constitutional provisions nevertheless allow quite liberal use of public interest litigation and judicial review in environmental cases. This is particularly true of common law countries such as the USA, UK, Canada, Australia and India.

*Sierra Club v.Morton (*405 US 727(1972))*, Friends of the Earth v. Laidlaw Environmental Services (*120 SCt 693(2000))*, Lujan v. Defenders of wildlife (*504 US 555 (1992)) *(American cases), Environmental Defense Society v. South Pacific Aluminium* (No.3)(1981) 1 NZLR 216 *(New Zealand case), Rural Litigation and Entitlement0 Kendra v. State of Uthar Pradesh* (AIR 1985 SC 652) *, Damodhar Rao v. Municipal Corporation of Hyderabad (*AIR 1987 AP 171)*, M.C.Mehetha v. Union of India ((*1987),1 SCC 395; id., (1987), 4 SCC 463) *(Indian Cases), Shela Zia v. WAPDA* (PLD 1994 SC 416) *(Pakistan Case), Minors Oposa v. Secretary of the Department of Environment and Natural Resources(*33 ILM (1994),173)*, (Philippine Case), Vereninging Milieudefesie v. Hoofdingenieur (*Directeur van de Rijkswaterstaat 11 Neths. YBIL (1980), 318; Environmental Protection Act of 1993 and the Collective Actions Act of 1994.) *(Netherlands Case)* above mentioned cases would manifest the statement of 'Common law states used to mount environmental rights by defining other fundamental right combined with environment.'

*Sierra Club v.Morton (*405 US 727(1972)), The Sierra Club is a non-profit corporation organized and operating under the laws of the State of California. The United States Forest Service permitted development of Mineral King near Sequoia National Park. Issue of this case was whether the permitted development would cause the Sierra Club sufficient injury to give them standing to sue to block the permit. The Supreme Court held that the Sierra Club, in its corporate capacity, lacked standing, but that it may sue on behalf of any of its members who had individual standing because the government action affected their aesthetic or recreational interests. *Friends of the Earth v. Laidlaw Environmental Services (*120SCt693(2000)),In this case South Carolina's North Tyger River had standing to sue an industrial polluter, against whom various deterrent civil penalties were being pursued. The Court noted that the polluter still retained its license to operate such a factory, and could reopen similar operations elsewhere if not deterred by the fine sought. *Lujan v. Defenders of wildlife (*504 US 555 (1992)) the court held that a group of American wildlife conservation and other environmental organizations lacked standing to challenge regulations jointly issued by the U.S. Secretaries of the Interior and Commerce, regarding the geographic area to which a particular section of the Endangered Species Act of 1973 applied. The case arose over issues of US funding of development projects in Aswan, Egypt and Mahaweli, Sri Lanka that could harm endangered species in the affected areas. The government declared that the act did not apply to projects outside of the United States and Defenders of Wildlife sued. *Rural Litigation and Entitlement0 Kendra v. State of Uthar Pradesh* (AIR 1985 SC 652) case the Supreme Court observed that Article 21 of the Indian Constitution guarantees the fundamental right to life and personal liberty to include the right to a wholesome environment. *Kinkri Devi and Anr. v.State Of Himachal Pradesh And Ors.*Cited (AIR 1988 HP 4 ,on 29 May, 1987) loss of right to environment, will effect loss of right to human reputation. Finally it causes for the disappearance of right to life.

The right of clean & healthy environment had been included to the right of life in *Dr. Mohideen Farooque v.Govt. Of Bangladesh* (1997) 49 DLR (AD) 1. The right to life includes their right to clean and healthy environment in *Chhetriya Pardushan Mukti Sangharsh Samiti v.State of Uthar Pradesh (*AIR 1990 SC 2060)*, Dehra Dun Quarrying Case* AIR 1988 SC 2187*, Mathiw Locose v.Kerala State Pollution Control Board* WP(C) No. 20026 of 2007(H)*, Inre Noise Pollution Case* (manu/SC/0415/2005)*, and Advisory Opinion on Legality of the Threat or use of nuclear weapons Case*1996 ICJ reports p.226*. Ahangama Vithanage Deshan Harinda and 4 others v.Ceylon Electricity Board & 7 others* case (SC Application No.323/97), the noise generated by the diesel power plant, disturbed the day to day work of people lived in surrounding areas. The generated smoke caused illnesses to children. It was decided to compensate the people and close down the power plant to protect the rights of the people to live in a healthy environment.

Every Development Projects appertain the right to development & right to healthy and clean environment. Therefore it must need a balance. Sustainable Development is a best solution for it. Sustainable development is most popular topic in this century. Sustainability is important because all the choices we pursue and all the actions that we make today will affect everything in the future. We need to make sound decisions at present in order to avoid limiting the choices of generations to come. Sustainable Development notices the needs of future generation as well as current generation. If person, institution or government doing some development project, parallel they have to make Environmental effect Evaluation Report including analysis of environmental cost & returns. According to the report, in sustainable development concerning the place of development project is done, Social Threats, Duration of

Project, Commercial Development Issues, and make a balance of development and environment. Brundtland Commission, Johannesburg assembly mentioned the clean and healthy environment and development cannot be dividing. Sustainable development was defined in the Brundtland Commission report 1 as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Principle 4 of the Rio Declaration states that "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." John D Leeson says in his book "Environmental Law" in 1995, sustainable development attempts to assess or quantify development in relation to the impact of its range of effects or potential effects on the local and global environmental media at risk." The United Nations Framework Convention on Climate Change (1992) defined in Article 3 (4), the parties have a right to and should, promote sustainable development. Policies and measures to protect the climate system against human- induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change." United Nations Desertification Convention says in Article 5, "Establish strategies and priorities, within the framework of sustainable development plans and/or policies, to combat desertification and mitigate the effects of drought."

Hungarian had to cope with several interrogations due to the Gabcikovo-Nagymaros project undergone near the Danube River. Therefore, H*ungary v.Slovakia* case (C-364/10), Weeramanthry j. cited government must concern economic & environment factors and necessity of sustainable development. Thuldeep j. Cited in *Vellore Citizen Welfare Forum v.Union of India* (AIR 1996 SC 2715)*,* the contradiction of development & environment would not exist anymore and he had emphasized sustainable development is an essential concept. In *Narmada Bacho v.Union of India* (AIR 2000 SC 3751)*,* if the Narmada Dam & Electricity Power Plant will not be constructed, there will be a enormous economic crisis, and the poverty will be increased due to the economic crises mentioned above. And the environmental pollution will have occurred. Therefore court had been given the decision to construct the dam. In *Nayama Devi v.State case,* the petitioners cited that the government proposed Biological Park tend to destroy the forests. But the state government proved that the objective of building the Biological Park is to protect the forest & bio diversity. Therefore court approval was given to the project as it has adopted sustainable development.

In KandalamaCase (*Environmental Foundation v. Land Commissioner (*1994 1(1) SAELR 1)) the relevant private hotel made under the naturalism. They made it with minimum damage to the environment. As well as they provided more job opportunities to the villagers. Therefore court gave permit to done it.

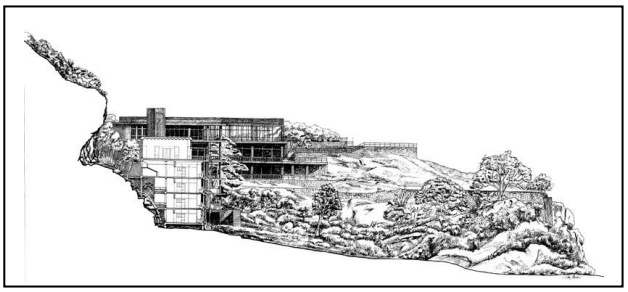


Figure 3. The Plan of the Kandalama Hotel

In Embilipitiya Paper Factory Case untreated 'Black liquor' was released to the Walawe Lake which was a waste from the production. This would not take place if they have adopted sustainable policy into the production.

Samanala Wawa Project has caused an immense damage to the environment. The tank was built destroying an area with large biological diversity. This would have being avoided if it was done according to the sustainable policy. Hambanthota Airport is another major scale project done without adopting sustainable policy. It has caused air pollutions and damaged bio-diversity of the area.

Amarasinha j. said in Eppawala Case (*Bulankulama and six others v. Ministry of Industrial Development and seven others* (S.C. Application No 884/99 (F.R), 2000 Sri L R 243*)* that proposed contract must be done under the national development and environmental policies. He cited the Stockholm & Rio Declarations. And he said essentiality of sustainable development. By leasing out Eppawala phosphate deposit to a private company, it will reduce in 1.2 metric tons yearly and will be over in 30 years; which has direct effect on peoples' right to live and therefore the project was disconfirmed.

Although Laxapana, Mahaweli Hydro power complexes, Hambantota Solar power plant, Hambanthota wind power plant projects done according to the sustainable development, Lakvijaya, Sampur Coal-fired stations,

Sapugaskanda, Kelanitissa fuel- oil power stations done without concerning the sustainable policy. Currently environmental organizations are arraigned for Colombo Port City Project. In Upper Kothmale Project not concern about these regulations. Therefore waterfalls in below figure, face lack of waters currently. The project contravenes the future generations' rights; The Right to development, the Right to Water & Right to clean and healthy environment because of lack of water & make drought.

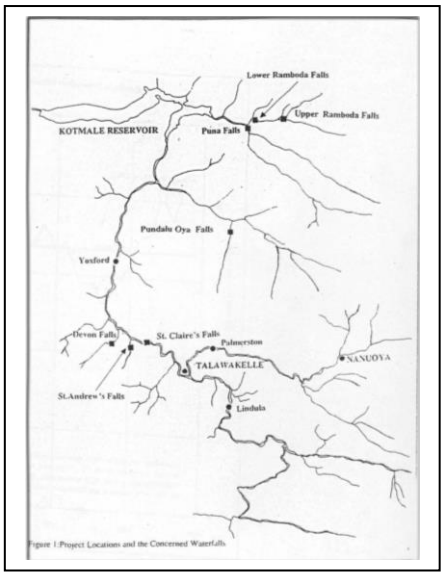


Figure 4. Upper Kotmale Project Locations and the Concerned Waterfalls

According to the above details, Government has concerned about the sustainable development only in few projects. Therefore this must be included in the 1978 constitution. Thereafter it will be a responsibility of the government to secure it when planning new developments.

III. CONCLUSION

The third chapter of the constitution 1978 ought to be amended for a number of reasons. Number one, the chapter itself has not been updated in more than four decades in light of dramatic changes in Sri Lanka. Second, the chapter is not a comprehensive framework, and leaves many areas for improvement in the insurance of basic human rights in Sri Lanka. Third, the fifteenth and sixteenth sentences of the chapter offer concessions to undermine the absolute preservation of these human rights. Fourth, in comparison to other states, Sri Lanka offers significantly fewer constitutional protections of human rights. Fifth, the country does not ensure the basic human right to a clean and healthy environment, and instead focuses exclusively on a development paradigm to the detriment of basic human and environmental well-being. For these reasons, Sri Lanka should specifically amend its constitution to include the right to a clean and healthy environment in its third chapter. It should also go in parallel with the right to sustainable development. Therefore the researcher suggested third chapter in 1978 constitution must be amended as the below figure.

REFERENCES

Alan Boyle, Human Rights and the Environment: A Reassessment (2011), P.7-10

ArunaVenkat, Environmental Law and Policy (2011) P.195

Arjun Sengupta, "The Right to Development as a Human Right", P.5

Tracy-Lynn Field, (2005), "Sustainable Development versus Environmentalism: Competing Paradigms for the South African Era Regime", the South African Law Journal, P. 409-436

Cases

Ahangama Vithanage Deshan Harinda and 4 others v.Ceylon Electricity Board & 7 others case (SC Application No.323/97)

Chhetriya Pardushan Mukti Sangharsh Samiti v.State of Uthar Pradesh (AIR 1990 SC 2060)

Damodhar Rao v. Municipal Corporation of Hyderabad (AIR 1987 AP 171
)

Dehra Dun Quarrying Case AIR 1988 SC 2187

Dr. Mohideen Farooque v.Govt. Of Bangladesh (1997) 49 DLR (AD) 1.

Environmental Defense Society v. South Pacific Aluminium (No.3)(1981) 1 NZLR 216

Environmental Foundation v. Land Commissioner (1994 1(1) SAELR 1)

Friends of the Earth v. Laidlaw (120 SCt 693(2000))

Hungary v.Slovakia case (C-364/10),

Inre Noise Pollution Case (manu/SC/0415/2005)

Kinkri Devi and Anr. v.State Of Himachal Pradesh And Ors.Cited (AIR 1988 HP 4 ,on 29 May, 1987)

Lujan v. Defenders of wildlife (504 US 555 (1992))

M.C.Mehetha v. Union of India ((1987),1 SCC 395; id., (1987), 4 SCC 463)

Mathiw Locose v.Kerala State Pollution Control Board WP(C) No. 20026 of 2007(H)

Minors Oposa v. Secretary of the Department of Environment and Natural Resources(33 ILM (1994),173)

Narmada Bacho v.Union of India (AIR 2000 SC 3751)

Nayama Devi v.State case

Rural Litigation and Entitlement0 Kendra v. State of Uthar Pradesh (AIR 1985 SC 652)

Shela Zia v. WAPDA (PLD 1994 SC 416)

Sierra Club v.Morton (405 US 727(1972))

Vellore Citizen Welfare Forum v.Union of India (AIR 1996 SC 2715)

Vereninging Milieudefesie v. Hoofdingenieur (Directeur van de Rijkswaterstaat 11 Neths. YBIL (1980), 318

The Role of a Judge - What it is and What it Ought to Be: The Independence of Judiciary and Judicial Activism Clothed in Judicial Review in Sri Lanka

TB Abeysekara
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
thusitha313@yahoo.com

Abstract — On 24th March 2015, the Indian Supreme Court struck down Section 66A of the Information Technology Act 2000, and termed it "unconstitutional". In this landmark judgment which perpetuates the freedom of expression, the Supreme Court struck down a provision in the Cyber Law which makes available power to arrest a person for posting allegedly 'offensive' content on websites. This shows that the provision 'clearly affects' the fundamental right to freedom of speech and expression enshrined under the Indian Constitution 1949. The recent phenomenon shows that the independence of judiciary in India and their judicial activism over constitution and lastly towards the society. Do we have the same, No! Sri Lanka does not give credence to the apex judiciary. Under the Art.125 (1) of Constitution 1978, the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution and it should however be read with Art. 80 (3) which states that a Bill becomes law upon the certificate of the President or the Speaker, as the case may be being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever. As per the wordings, 'any ground', the ultimate result of such an Act may be unconstitutional and/or unjust. Without having such a great weapon, judicial review, in the hands of judges, it is difficult to confirm the rights of the people and justice in the country. Judicial review needs to be crafted with the chisel of judicial activism which lay concrete on the way for adding personal or political consideration rather than on existing hard-hitting laws with the justice in mind. As a theory, judicial restraint which works on judicial interpretation encourages judges to limit the exercise of their own power. This is the point which should be addressed in the line of solidity of independence of judiciary and will be examined throughout the paper based on Sri Lanka experience.

Key words **-** *Independence of Judiciary, Judicial Review, Judicial Activism*

I. INTRODUCTION

This research paper inspects the role of the judge in light of the Independence of Judiciary and Judicial Activism clothed in Judicial Review in Sri Lanka. It does not unavoidably mean that there is no comparative analysis. Wherever and whenever possible this research will focus to the examples in other jurisdictions. Some of those other jurisdictions are enjoying the concept of the apex judiciary which provides more flexibility over judicial reasoning process. This is what we do not have in Sri Lanka. The lack of operation of an apex judiciary in the domestic jurisdiction corresponds to the flexibility of judges. One side of the flexibility of judges consists of the judicial review and other side consists of the judicial activism. The both are fueled by the concept of independence of judiciary. Therefore lack of one of them highly affects the independence of judiciary which vehemently confirms the rights of the people. Being a legal researcher it is strongly recommended by myself providing possible interpretations for the key elements of the paper.

II. INDEPENDENCE OF JUDICIARY

As adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders which was held in Milan from 26 August to 6 September 1985 and endorsed by the United Nations General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (The United Nation-Human Rights, 2015), there are six basic principles on the independence of judiciary. They are as follows;

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive

authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4 There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5 Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6 The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7 It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions." (The United Nation-Human Rights, 2015)

The gist of the aforementioned basics emphasizes that the principle of separation of powers provides the base for the judicial independence which means that the judiciary which requires that the proceedings be kept separate from the influences of other limbs of the government i.e. the legislature and the executive.

III. JUDICIAL ACTIVISM

When the Supreme Court and other judges are able to creatively interpret or reinterpret the provisions of the Constitution, there is judicial activism (Abeysekara, 2010). This is to be believe to be something beyond the contemporary role of judges. The reverse of this argument is that legislative actions and executive actions are subject to the active review by the judiciary. This is the point which connects judicial activism with judicial review. "The concept of judicial activism is the polar opposite of judicial restraint" (USLegal, 2015). This is what we practice in Sri Lanka at the moment. However, still Sri Lankans are enjoying some considerable level of results of judicial activism thanks to the creativity of Bench & the Bar. Preserve cases under the Chapter 3- Fundamental Rights of Constitution 1978 are a solid example for the creativity of the Bench & the Bar of Sri Lanka (Ex- Wimal Fernando v. SLBC (1996) 1 Sri LR 157, Karunathilaka and Another V. Dayananda Dissanayake, Commissioner of Elections and Others SC APPLICATION NO. 509/98 (1999) 1 Sri LR 157.)

IV. JUDICIAL REVIEW

The principle of Parliamentary Sovereignty is a weak arm against the unlawful executive and administration actions or sometimes legislative actions themselves. This means that the principle of Parliamentary Sovereignty does not always stand against the breach of' rule of law. In 1950s Stanley de Smith in his doctoral thesis stated that, "...it has become clear that judicial review is not merely about the way decisions are reached but also about the substance of those decisions themselves. The fine line between appeal on the merits of a case and review still exists...towards a 'culture of justification' (Stanley de Smith, 6th edn 2007).

The justification culture has been developed on the lap of judicial review. The concept of judicial review has been justified by the notion of qualities of the democratic society. However,'...judicial review of statutes on constitutional grounds tends to raise issues of high political importance'(John C. Reitz, 2008) though it has addressed the qualities of the democratic society.

Jurisprudentially judicial review was (and is) based upon the traditions of natural law (Richard H. Helmholz, 2013) which provide more freedom and flexibility in the mechanism of reasoning or justification.

IV. THE PROBLEM

This paper has already emphasised the thread that runs through the independence of judiciary and judicial activism coupled with judicial review. Finally the lack of the each of them follows the role of the judge. Eventually it affects the creativity of the judge. The judge's creativity would have been enhanced by the provisions of statutes which provide more independence of judiciary. However, this needs to be balanced by the principle of separation of powers since this principle needs to be quite separate from each limbs of the government. While maintaining the check and balances works out a space for independence for judiciary it is a must in order to ensure a smooth function of judicial review. Richard H. Helmholz states that "[t]he judges would probably have said that they were simply aligning 'open-ended' legislative enactments with the requirements of justice as established by the law of nature and as intended by the sovereign" (Richard H. Helmholz, 2013). Hence the open ended nature of the legislative offers room for creativity over reasoning of judgments. This means that lack of the open ended nature of the legislative still remains with the robust functions of the judges.

Richard A. Posner's wordings in his enormous piece of work 'The Role of the Judge in the Twenty-First Century', clearly identifies this nature that as he explains, "[s]o against Chief Justice Roberts' umpire analogy I set the story of the three umpires asked to explain the epistemology of balls and strikes. The first umpire explains that he calls them as they are, the second that he calls them as he sees them, and the third that there are no balls or strikes until he calls them. The law professor is the first umpire. The modest formalist judge, who has no illusions that his method yields demonstrable truth, is the second umpire. The judge deciding cases in the open area is the third umpire; his activity is creation rather than discovery." (Richard A. Posner 2006).

Therefore, the role of the judge extensively depends on the opportunity for the judicial review which fueled by judicial activism. All of this collectively denotes the independence of judiciary which finally enhances the creativity of judges. The creative decisions or judicial reasoning stand to protect rights of the people. The lack of one of them or collectivity of them eventually generates less protection of citizens' right.

VII. THE SRI LANKAN SCENARIO

Though the judicial officers in US and India are enjoying the concept of judicial review (Ex- Marbury v Madison 5 US (1 Cranch) 137 (1803) and Minerva Mills Ltd v Union of India AIR 1980 SC 1789 (1925-26) respectively), the Sri Lankan Bench does not have such a benefit in order to uphold the rights of the people. As Article 80 (3) of the Constitution 1978/SL states, "[w]here a Bill becomes law upon the certificate of the President or the Speaker, as the case may be being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever". The provision's wording of "any ground whatsoever" creates a situation which attacks the heart of the constitutionalism. Any unconstitutional provisions in other statutes cannot be challenged as they are shielded by the term "any ground" in the Article 80 (3). This simply means that it could be an unlawful provision which concretely devastates the rights of the people.

Article 120 of the Constitution 1978 states that "[t]he Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution". Therefore, judicial review ends up with the Bill stage at the legislative process. All creative measurers need to be taken before being passed the Bill. However, literary the concept of independence of judiciary stands with the Sri Lankan judiciary (Chapter XV, Article 107-111 of the Constitution 1978). This shows that there are some differences between the literary meaning of independence of judiciary and the practical aspect of the same. The constitution itself takes precautions to affirm the independence of judiciary, but still there is a lacuna to be fulfilled compared to the practicality of the concept.

VIII. RECOMMENDATIONS

Therefore the government of Sri Lanka must take effective stapes to confirm the independence of the judiciary and the rule of law which together corroborate the judicial activism and judicial review.

1) Need to setup a Constitutional mechanism to form the judiciary with special attention to the post of Chief Justice as the chief judicial arm of the government. In order to strengthen this, it is essential to setup an independent public commission as the Chief Justice has responsibilities for all aspects of the work of the Supreme Court and the justice of the Island.

2) Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR) states that "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." (United Nations Human Rights, 2015). In accordance with the Article 14 of the ICCPR, the Chief Justice could be granted the opportunity to conduct an impartial judicial panel and to make a just ruling which empowers the notion of 'rulers must be just!'.

3) To comply with the proposal made under the draft Constitution 2000, it is recommended that the required legislation be enacted in order to establish a tribunal consisting of three persons who served in the apex courts of any country of the commonwealth to inquire in to the misconduct of judges of the Supreme Court.

IX. CONCLUSION

Judges play many roles in the context of carrying out their

judicial functions. They interpret the words of statutes and cases in order to apply the law, to assess the evidence presented by both parties, and to control how hearings and trials unfold in their courtrooms. Most important of all, judges are impartial decision-makers in the pursuit of justice. It is worthwhile to bear in mind that law is not another meaning for justice. Law is and ought to be the mechanism which used to achieve the justice.

Judicial review is a version of check and balances as a part of the modern and developed version of principle of separation of powers. As the paper discussed throughout, the concept of judicial review closely connects with related concepts of judicial activism and judicial review. A judge's creativity enhances the arms of the protective mechanism of human rights in a jurisdiction. A judge's creativity is enhanced by the force of establishment of proper and meaningful judicial review which arises with judicial activism. Through the judicial activism, judges could be able to work out a political decision rather legal decision. The professional personality of judges dominates their reasoning. In judicial review, judges examine the constitutionality of a statue or its application. Therefore judicial activism is a legitimate (justification of reasoning) version of judicial review.

ACKNOWLEDGMENT

Author thanks extensively to Dr George A Cumming/Barrister at Honourable Society of the Inner Temple, the Royal Court of Justice, the United Kingdom, who was always by the side of author at the IALS Library, London where author spent all his LLM and PhD years.

REFERENCES

Abeysekara TB., "Need to Expand Sri Lanka's Fundamental Rights Jurisdiction: A Comparative Analysis of the USA, India and Trinidad and Tobago," (2010) 22 *Sri Lanka J. Int'l Law* 59.

Baragwanath J., 'Judicial review: tidying the procedures' (1999) April, New Zealand Law Journal 127.

Campbell E., 'Role of respondents to applications for judicial review' (1998) 6/1 November, Australian Journal of Administrative Law 5.

De Smith S., DE SMITH'S Judicial Review (6th edn, Sweet & Maxwell 2007).

Ferejohn J., 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 Southern California Law Review 353.

Helmholz RH., 'Judicial Review and the Law of Nature' (2013) 39 Ohio Northern University Law Review 417.

Holmes OW., 'Natural Law', (1918) 32 Harvard Law Review 40.

McNollgast, 'Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law', (1995)68 Southern California Law Review 1631.

Posner RA, 'The Role of the Judge in the Twenty-First Century' (2006) 86 Boston University Law Review 1059.

Reitz JC., Politics, 'Executive Dominance, and Transformative Law in the Culture of Judicial Independence' (2008) 5/3 University of St. Thomas Law Journal (Article 9) 743 available at <http://ir.stthomas.edu/ustlj/vol5/iss3/9> visited on 1 July 2015.

USLegal, 'Judicial Activism and Legal Defenision' (Internet 2015) <http://definitions.uslegal.com/j/judicial-activism/> visited on 28 June 2015.

United Nation-Human Rights, 'Basic Principles on the Independence of the Judiciary' (Official Website 2015) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> visited on 28 June 2015.

United Nation-Human Rights, 'International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49' (Official Website 2015) <http://www. ohchr.org/en/professionalinterest/pages/ccpr.aspx> visited on 22 September 2015.

Cases

Cohens v. Virginia 19 U.S. (6 Wheat.) 264 (1821).

Fletcher v. Peck 10 U.S. (6 Cranch) 87 (1810).

Karunathilaka and Another v Dayananda Dissanayake, Commissioner of Elections and Others SC APPLICATION NO. 509/98 (1999) 1 Sri LR 157.

Marbury v. Modison 5 U.S. (1 Cmnch) 137 (1803).

Martin v. Hunter's Lessee 14 U.S. (1 Wheat.) 304 (1816).

Minerva Mills Ltd v Union of India AIR 1980 SC 1789 (1925-26).

Respublica v. Duquet, 2 Yeates 493 (Pa. 1799).

State v. Parkhurst, 9 N.J.L. 427 (N.J. 1802).

Williams Lindsay v. East Bay Street Com'rs, 2 Bay (S.C.L.) 38 S.C.Const.App. 1796).

Wimal Fernando v SLBC (1996) 1 Sri LR 157.

BIOGRAPHY OF AUTHOR

Author, Dr Thusitha B Abeysekara, is a Senior Lecturer in the Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana. He completed his PhD in Computer Law in 2013 at University of Exeter/UK. He holds an LLM in Computer and Communications Law from Queen Mary/University of London, LLB (Hons)-University of Colombo, Dip in IR (BCIS-Sri Lanka), Dip in HR (Adam Mickiewicz University/Poznań-Poland) and Cert. in Digital Archives (Central European University/Budapest-Hungary). He was called to the Bar after completing his Attorney-at-Law (finals) with a 1st Class. He is an editor of the Sri Lanka Journal of International and Comparative Law published by the Faculty of Law/KDU.

Protection of the Rights of the People with Disabilities in Sri Lanka Need for New Legislation

DSR Jayawardena
Department of Public and International law, Faculty of law, University of Colombo, Colombo 3, Sri Lanka
supunkck@gmail.com

Abstract— *The right of every person to be treated with equality and human dignity is globally accepted. However, this common acceptance has not been able to sufficiently protect vulnerable groups, who need special care and attention to stand up independently within society. Among them, as a world largest minority, disabled persons are significant. Therefore, to ensure their wellbeing and social security, in 2006, United Nation's convention on rights of the peoples with disabilities (UNCRPD) was formed. Accordingly, persons with all types of disabilities have a right to enjoy all human rights and fundamental freedom without any discrimination. The convention specifically identifies the right to accessibility, medical treatment, rehabilitation and personal mobility as rights specific to develop their wellbeing and inherent dignity. Therefore, after its adoption, nearly 160 countries and regional organizations have ratified the convention and its optional protocol. Article 12 of the constitution of the Democratic socialist republic of Sri Lanka guarantees the right to equality and non discrimination as fundamental rights. Further, under Protection of the Rights of the People with Disability Act, National Council for persons with disability has formed as administrative body to protect rights of disabled People. Though there is an effective mechanism, Sri Lanka has been unable to comply its law system with aforementioned conventional provisions. Therefore it is timely to make necessary legislative enactments to provide adequate safeguard for the said community. Whether existing Sri Lankan legal framework is adequate to protect rights of the People with disabilities, or should there be new legislation to implement the rights expressed in disability rights convention is the main research problem. An objective is to identify the pros and cons of existing Sri Lankan disability rights legal framework, and submit suitable recommendations to form more disable friendly legislative enactment. Therefore, the area of study will be limited to existing Sri Lankan disability rights jurisprudence, and relevant foreign and international legal instruments. Primary data is collected qualitatively by interviewing disability rights activists and legal professionals. Secondary data will be from books, journal articles and internet articles. It is expected that the research will be an effective platform to protect rights of people with disabilities, under Sri Lankan human rights legal regime.*

Keywords— *International Disability rights, Persons with disabilities in Sri Lanka, New Legislation*

I. INTRODUCTION

Few decades before, the global community considered the concept of disability as a Para natural phenomenon (Karlan & Rutherglen 1996). Therefore, in most instances, people with disabilities were understood as a separate community and excluded from the society. 1 Article 2 (equality close) of the Universal Declaration of Human Rights (U D H R) also states, "all human beings are born free and equal in dignity and rights" and are "entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". After its adoption, while including aforementioned praise into the 7 united nation core human rights treaties, the global community had shown their lack of understanding regarding the necessity of special legal protection for people with disabilities (Stein 2007). Though there is a practical constrains, there is no argument about the theoretical application of the above declaration or conventions subject to the disabled people. However, as a result of this implicit recognition, in the last 6 decades, those disabled people were unable to expressly bring their claim into legally enforceable human rights mechanism.

Today, it is estimated that over 600 million people or more than 10% of the global population are suffering with some form of disability. Out of them, nearly 400 million are living in developing countries (Kanter 2003). Therefore, since the last 3 decades, through multiple regional and international programmes, the international community has taken various positive steps to identify the specific problems and find necessary solutions to improve their living standards.

In the above context, the United Nation's Decade for Disabled Persons (year 1983 to 1992 time period) is

mostly significant. In that duration, UN human rights commission had appointed LeandroDespouy and Erica-Irene Daes as special reporters to examine the worldwide pattern of abuse against people with disabilities. Their reports found that individuals with disabilities experience discrimination in voting, employment, housing, health services, public accommodations, education, transportation, communication, recreation, and opportunities for political participation on every continent (Despouy 1991). As a solution to the said problem, disability rights scholars have emphasized the necessity of binding disability rights instrument with treaty based rights enforcing mechanism (Kanter 2003). As a result of this discussion, the pioneer ship of the Organization of American States (OAS) was established in 1999.

Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities was formed as a first intergovernmental instrument as a solution for the aforementioned issue. After a short period of 4 years, in 2003, the Parliamentary Assembly of the Council of Europe delivered it's recommendation 1592(2003), entitled "towards full social inclusion of persons with disabilities". Under this recommendation, the Europa parliament emphasized it's members to certify the effective and meaningful enjoyment of right to education, right to work and right to private and family life etc, for the disabled peoples within their territories.

Parallel to the adaptation of 2 aforementioned instruments, UN and other regional organizations have initiated a number of agreements, statements, world conferences,

And other meetings focused on the well been of the disabled people(Rioux and Karbert, 2003). Meanwhile, up to 2002, there were 39 countries have instituted non discrimination and equal opportunity legislation relevant to the field of disability rights protection(Quinn &DeGener, 2002). In this context, the said global forum set the ideal platform to hold final discussions to establish a universal framework to address the disability related issues. In 2006, United Nation's Convention on the Right's of the Persons with Disabilities (UNCRPD) was formed as a major framework on the global disability rights arena.

The UNCRPD convention and its optional protocol

After it's adaptation on 13th December 2006, over 160 countries and regional organizations have ratified the convention through the enabling legislation. Furthermore, during the last 8 years, the global community uses disability rights as a yardstick to measure the human rights context of an individual nation. Under these circumstances, it is necessary to examine the effectiveness of the UNCRPD convention in the global disability rights perspective.

The CRPD's 25 preamble paragraphs and 50 articles provide a framework within which disability rights may be addressed in the global context. The aim of the drafts was not to create 'new' or special rights for persons with disabilities, but instead to articulate how existing human rights obligations apply specifically to disabled persons (Lord and Stein, 2013).

In the preamble to the convention, drafters mainly emphasize the right to inherent dignity, right to equality and non-discrimination, right to full and effective participation etc as the basic human rights which have to be assured by the state parties, in the context of policy implementation(paragraph A B and C). Further, most importantly, the preamble identifies the concept of disability as an evolving concept and requests all parties to remove all the social attitudinal and environmental barriers, which hinder the full and effective enjoyment of their rights and fundamental freedom (paragraph E).

To ensure the meaningful implementation of the above paragraphs, the convention emphasized that state parties must

(A) Adopt legislative, administrative and other measures to implement enumerated rights;

(B) Abolish or amend existing laws, regulations, customs and practices that discriminate against persons with disabilities;and

(C) Adopt an inclusive approach to protect and promote the rights of persons with disabilities in all policies and programmes as the general obligations (C R P D article 4). Further, the convention identifies thepublic awareness and equal accessibility to physical environment, transportation, and communication as the necessary elements to realize the equal treatment for the people with disabilities(C R P D article 8 and 9).

However, for economic social and cultural rights, these obligations only extend to the maximum level of available resources (Lord and Stein, 2013). In article 10-30, convention specifies the civil political and economic social and cultural rights specified for the well been of the people with disabilities. Among them, apart from the Human rights accepted in the united nation's 7 core human rights treaties, right of Equal access to justice(article 13), freedom from abuse and exploitation (article 16), right to personal mobility (article 20) and

right to habilitation and rehabilitation(article 27) are most significant. The CRPD has further established a system of monitoring andImplementation (articles 31-40) and includes final provisions that governthe treaty's operation (articles 41-50).

Apart from the conventional protection, under its optional protocol, the committee on the protection of the rights of persons with disabilities was established to receive communication from individual and groups of people who live in state party to the protocol(C R P D optional protocol article 1). However, prior to the complain, all the domestic remedies should be exhausted (C R P D optional protocol article 2). If the complain fulfils all the requirements in article2, the committee should submit the communication to the relevant state party and request a report within the 6 month period(C R P D optional protocol article 3). At the same time, after the submission, the state should take appropriate measures to prevent any human rights violation against the complainant(C R P D optional protocol article 4). After the examinations, the committee shall forward its recommendations if any to the state party. If they are not satisfied with the state action, or if committee observes further systematic or gross human rights violation against persons with disabilities, they may conduct an inquiry incorporate with the state party. At the end of the inquiry, committee may request the state party to submit the report under article 35 of the convention, including measures taken in response to their recommendations(C R P D optional protocol article 7).

II. SRI LANKAN SITUATION

Sri Lanka is a country, which has over 30 years conflict experience, from 1978-2009. However,

After the completion of humanitarian operation on 2009 in the post conflict era, Sri Lanka rapidly continued its development activities in a growing manner. However, parallel to the country's infrastructural development, it is needless to say about the necessity of a proper human rights protection mechanism to up bring the economic and social condition of the citizens, especially for those who have spent over 3 decades under conflict situation. In such a transitional period, among the other group of individuals, as a most vulnerable people, protection of the rights of the people with disabilities is most significant. Therefore, it is necessary to examine the effectiveness of the existing legal framework and available mechanisms to protect the rights of the Sri Lankan disabled community.

Article 12 (1) of the Sri Lankan constitution guarantees the right to equality and non-discrimination as a fundamental rights. Further, according to article 12(4) of the constitution, the government may allow to take any affirmative action for the benefit of the persons with disabilities (Jayawardena, 2014). In accordance with the said provision, government had e public administration circular no. 3 of 1988 to grant the 3% of vacancies in public services and public companies, for the disabled candidates who had appropriate qualifications. Further, under Social Security Board Act (1996), national health policy (1996), and Ranaviruseva act (1999) also included the relevant provisions to ensure the wellbeing and security of persons with disabilities. Further, in 1997, under general educational reforms, the government had taken a landmark decision to give inclusive education to children with disabilities in the ordinary classrooms. However, lack of data collection and disorganization of monitoring mechanisms, made it further difficult to find necessary groups of disabled people, who need special care andbenefits under aforementioned schemes and policies (Aloysius, 2002). As a solution to the aforesaid problems, in 1996, protection of the rights of persons with disabilities act (number 28 of 1996) was formed as a key legislation to address the issues related with Sri Lankan disability rights perspective.

For its interpretation clause, persons with disabilities" means any person who, as a result of any deficiency in his physical or mental capabilities, whether congenital or not, is unable by himself to ensure for himself, wholly or partly, the necessities of life (protection of the rights of the persons with disability act, section 37).

Therefore, according to the preamble, the purpose of this act is set the platform for the promotion, advancement and protection of the rights of the persons with disabilities. In its' means, it further established the" National Council for the persons with disabilities", as a main administrative body to take appropriate decisions on behalf of the disabled community. Apart from the minister, who was officially appointed as a president, membership of the council consists of 21 total members, with 11 from voluntary organizations and other 9 from government representation.

According to section 12 of the act, the principle function of the council is taking appropriate measures to promote and protect the rights of persons with disabilities. Contrary to the said provision, under section 13, the council granted powers to submit it's advises and consultations for relevant ministries and government authorities, in the interests of disabled people. Further, the council has power to make necessary policy frameworks as a guideline to government and private institutions.

In 2003, under the supervision of the council, the National Policy on Disability (N P D) was prepared by the government to comply with the Sri Lankan disability rights sector with existing global developments. Most importantly, this policy was able to address newly identified disability related factors such as promoting accessibility(N P D paragraph 12), introducing assistive technical devices(N P D paragraph 14) and making barrier free environment(N P D paragraph 3(1)). Further, on the basis of the concept of inclusive society, the policy proposed community based rehabilitation (N P D paragraph 21), and active participation of the private and public sectors, and nongovernmental organizations for the protection and promotion of disability rights (N P D paragraph 22, 23). Although such important rights are included, unfortunately N P D have no appropriate mechanism to implement any of it's provision through any court or tribunal (N P D paragraph 26).

In 2006, under the disabled persons accessibility regulations (regulation 1 of 2006), the government took a landmark decision to make all the public places and public buildingsaccessible for persons with disabilities. According to section 2 of the regulation, within a 3 year time period, all the existing public buildings and places had to be made accessible. After 9 years of implementation, today also, most of the public buildings have no appropriate accessibility facilities for people with disabilities. In Dr.Ajithperera vs AG (2009 SC) while considering the fact, supreme court had emphasized the necessity of implementation of said regulation in a progressive manner.

However, with the commencement of said judgment, Sri Lankan disability rights movement restarted their U N C R P D ratification campaign with more energy and international cooperation. As a results of the series of discussions held within the state officials and disability rights activists, the proposed disability rights draft bill is prepared with 65 clauses (Hettiarachchi, 2009). In comparison to the present act, it guaranties the right to medical treatment, personal mobility and habilitation and rehabilitation as a right of peoples with disabilities. Further, it proposes to grant more powers to national disability authority, as an independent body consistent with disability rights activists and disabled peoples. However, lack of consensus among the powers of proposed disability authority made a huge contention among disability rights activists and government officials. Unfortunately, due to this endless contention, SriLanka stillhas not been able to present new legislation to the parliament.

III. CONCLUSION

Over the years, people with disabilities are considered as a marginalized group within the society. As a result, until the last 2 decades of 20th century, they were unable to represent their views as a community in national or international decision making forums. Because of the great struggle led by disability rights activists and members of the nongovernmental organizations, in 2006, United Nations Convention for the Rights of the Persons with Disabilities and it's optional protocol was formed as a first Human Rights Treaty within the 21st century.

During the last 8 years of it's adoption, over 160 countries and regional organizations have taken appropriate measures to ratify the convention.Most surprisingly, the world's poorest countries like republic of Congo, Ethiopia, Mozambique are also in this category. Further, mostly war affected countries like Rwanda and Sierra Leone have enabled their citizens to bring their claims to disability rights committee by enabling its optional protocol(Lord and stein, 2013).In Sri Lanka,, although right to equality has been accepted as a fundamental right, till today, it has been unable to realize equal treatment for the persons with disabilities by enforcing an appropriate human rights mechanism(Campbell, 2009). In 1996, although National Council for the Persons with Disabilities was established, due to it's minimum powers and continuous political interference, it was unable to fulfil the adequate expectations of the disabled community. In this context, to certify the adequate protection for the persons with disabilities, it is necessary to legally enforce the rights of the U N C R P D convention within the Sri Lankan law system. Further, due to various accessibility problems and procedural errors in the existing court system, it is appropriate to establish a special tribunal for disability related issues

Therefore, as a nation it is most suitable to come to a final consensus regarding final draft of the proposed disability rights bill and necessary to take immediate steps to present it to the parliament.

REFERENCES.

Alloycius C., 2002. Winning the battle against poverty and disability. The Sunday observer, 1September. Campbell,. 2009. Geo-disability knowledge: Watching for Global North impositions. Disability disadvantage and development in the Pacific and Asia papers and case studies. Development studies network.

DespouyL. 1991. Worldwide pattern of abuse against people with disabilities. United Nations, Economic and Social Council, Commission on Human Rights, Sub-

Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and Disability, U.N. Doc. E/CN.4/Sub.2/1991/31

Hettiarachchi K., 2009. Handicapped soldiers adding to our disabled population, rights activists stress the urgency, with the Ministry dragging its feet. the Sunday times, October 18

Janet Lord , Michael Ashley stein., 2013.Prospects and practices for CRPD implementation in Africa. African disability rights yearbook. Pretoria university law press, faculty of law, university of Pretoria South Africa.

Jayawardena D. S. R., 2014. Protection the rights of copyright user with special attention to visually handicap people under Sri Lankan intellectual property regime. Proceedings (law) in international research conference, General Sir John Kotelawala Defence University, Ratmalana Sri Lanka.

Kanter A S.2003. THE GLOBALIZATION OF DISABILITY RIGHTS LAW.Syracuse Journal of International Law and Commerce.Syracuse university press.

Rioux M and Carbert A.,2003. Human rights and disability: the international context. Journal on developmental disabilities volume 10 number 2.

The constitution of democratic socialist republic of Sri Lanka, department of government printing Sri Lanka-Convention on the Rights of Persons with Disabilities. 2006. GA Res 61/106,

UN Doc A/RES/61/106(13 December 2006)

Optional Protocol to the Convention on the Rights of Persons with Disabilities.2006.

GA Res61/106, UN Doc A/RES/61/106 (13 December 2006

Protection of the rights of the persons with disability act. 1996. Department of government printing.

National policy on disability.2003.department of government printing.

Right to Information and Sustainable Development: A Development Agenda for Sri Lanka

B Wickramsinghe
220/3, Katawala, Lewla, Kandy, Sri Lanka
bhagya913@gmail.com

Abstract - *Right to Information has been accepted as a fundamental right in International Law. In the modern democracies right to information has emerged as a sine qua non of transparency and public participation and to encourage participation for better discourse in the development process to ensure sustainable development. The main objective of this research is to analyse the significance of right to information in environmental protection in Sri Lanka. The research problem is to identify why right to information law is crucial to attain the sustainable development goals and to identify the correlations between right to information and sustainable development in Sri Lanka. The research also would engage in an analysis of the existing framework of law in Sri Lanka relating to environmental protection to identify whether those laws have incorporated the principle of sustainable development. This research intends to focus on the concept of sustainable development as an important requirement of any development agenda and to analyse how right to information would be the stepping stone to realising the principles of sustainable development. For this end the research would also anaylse the components of sustainable development, to identify the relevance of right to information in each component. The research will also analyse the conceptual relationship between sustainable development and right to information, through an analysis of the international instruments relating to sustainable development. Moreover the focus of the research would also include an analysis of the institutional structure relating to environmental protection and climate change with a view to appreciate how they have included public participation, good governance and free flow of information in to the system; and an analysis of the judicial decisions on the subject with the objective of critically analysing the attitude of the judiciary towards these concepts. The research methodology would involve the legal research methodology, based on qualitative data including the primary sources of law such as the international instruments and constitutional provisions, statutes and case law of the relevant countries; and secondary sources of law such as text books and scholarly articles on the relevant concepts of law and development.*

Keywords *- right to information, sustainable development, environmental protection*

I.INTRODUCTION

The main objective of this research is to analyse the significance of right to information in environmental protection and combating climate change in Sri Lanka. The research problem is to identify why right to information law is crucial to attain the sustainable development goals and to identify the correlations between right to information and sustainable development in Sri Lanka.

The research also would engage in an analysis of the existing framework of law in Sri Lanka relating to environmental protection to identify whether those laws have incorporated the principle of sustainable development. This research intends to focus on the concept of sustainable development as an important requirement of any development agenda and to analyse how right to information would be the stepping stone to realising the principles of sustainable development. For this end the research would also anaylse the components of sustainable development, to identify the relevance of right to information.

II.INFORMATION IN EACH COMPONENT

Link between right to information and sustainable development can be seen in a number of levels. While on one hand it is a mechanism for ensuring the implementation of sustainable development, on the other hand it is an integral part of the goals sought to be achieved. None of the possibilities envisioned through the implementation of the concept of sustainable development would be a reality without a cogent law on right to information.

Along with the significant step that Sri Lanka has taken towards recognition of the right as a fundamental right enshrined in the Constitution, through the 19th Amendment (Article 14A, as per the 19th Amendment to the Constitution), this recognition would be a practical reality only if there is a strong law that sets out the mechanism for implementation.

The research is focused on making a strong case for a law on right to information in order to give effect to sustainable development. The justification for the premise is that sustainable development is an umbrella concept which brings together a plethora of norms in to one whole.

This is evidenced through the fact that the three main pillars of sustainable development: economic development, environmental protection and social development again envision a host of other objectives to be achieved. Therefore the main grounds for introducing and ensuring the implementation are to be found within the three pillars of sustainable development.

The research methodology used in the research is the legal research methodology, based on qualitative data including the primary sources of law such as the international instruments and constitutional provisions, statutes and case law of the relevant countries; and secondary sources of law such as text books and scholarly articles on the relevant concepts of law and development.

III. RIGHT TO INFORMATION AS A FUNDAMENTAL RIGHT

Access to information is a different species of right, which involves a number of conflicting ideas and the need to balance a number of conflicting interests(Calland R., 2010). It has as its object (the thing which it is a right to) neither a concrete thing (such as healthcare or housing) nor the duty of forbearance on the part of the state and others (the hallmark of classic rights as freedoms)

It can be argued that this is right that empowers the right holder and creates a corresponding liability on the hands of the duty bearer. Hence in jurisprudential terms it can successfully be argued that RTI is a power, whereupon people gain much more confidence in the democracy they inhabit upon being granted this right. This is relevant for the research in light of the fact that RTI is a fundamental aspect in an effective and participatory democracy. It has also been noted that RTI is a multifaceted right and as would be dealt with in Chapter 3 the UN instruments have noted that it is a fundamental right in light of the fact that RTI gives rise to a number of other rights.

Furthermore RTI is an essential for the functioning of a democratic society. As noted by many commentators participatory democracy is founded upon free flow of information. In terms of the American context it has been observed in a democracy the citizens have a wider role to play than placing of the vote, each vote is supposed to have fullest possible participation and all citizens should understand the issues of governance that affect their daily lives.(Muyot A.T., 1998)

It has also been noted by Emerson that the right to know can be used as a guideline for formulating affirmative government controls and the government is supposed to take directs steps in regulating the expansion of freedom of expression to maintain and ensure free exchange of ideas.

RTI has emerged in the recent years as a fundamental right as well as a democratic value that buttresses transparent and accountable governance. Therefore it is asserted that as the statement of ideals that the country is expected to uphold the values embodies in the constitution in lofty terms.

It has been noted that 'depriving human beings of information is to rob them of an important opportunity to develop their potential to the fullest and is a violation of their human rights'(Reynolds M., 2003) For more than fifty years, the international community has recognized that the right to access information underpins the realization of other rights. Furthermore the right holds within it the right to seek information as well as the duty to enable access to information rests with the government. However the duty to release information is increasingly expanding to include multilateral organization, international financial institutions, commercial and corporate bodies and civil society organizations, where their activities affect the rights of citizens.

Right to information is well grounded in the international jurisprudence as it has been recognised as a core freedom since the inception of the United Nations, itself.

UNGA Resolution 59(1) has recognised that RTI has been in the forefront of debates since the inception of the UN, since its first session in 1946, RTI is a fundamental human right. Binding on all States as a matter of customary international law, UDHR guarantees the right to freedom of expression and information "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The ICCPR Article 19 guarantees the right to freedom of opinion and expression, in very similar terms to the UDHR. Moreover in the recent most General Comment 34 on Article 19 the UNHRC has acknowledged that Article 19 embraces a general right of access to information held by public bodies. Drafters of international human rights

treaties were far sighted in their framing of the right to freedom of expression, including within its ambit the right not only to impart but also to seek and receive information and ideas. The importance of the right has been noted in the 1995 Report to the UN Commission on Human Rights, which stated: "Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked". UN Doc. E/CN.4/1995/32, para. 35. In the consequent reports by the rapporteur has stressed the various facets of RTI and significance of the right democracy and freedom, and also to the right to participate and to realization of the right to development. He also reiterated his "concern about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs". 1997,1998, 2000 Annual Reports by the UN Special Rapporteur to the Commission on Human Rights, Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14, Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 42

In Sri Lanka there was ray of hope shed on this right through the 19th Amendment whereby the right was recognized as a constitutional right enshrined in Chapter 3 of the Constitution. The Amendment also ensures that no restrictions can be placed on the right declared by the Article "other than such restrictions 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"(Article 14 A (2), 19th Amendment). This article creates a wide range of issues for which the public authorities can restrict the right to information, making the working and implementation of the right very impractical.

IV. SUSTAINABLE DEVELOPMENT

In the international level, An important lesson from the MDGs has been the need for clear goals, targets and indicators that can be measurable in order to ensure proper and efficient tracking of the achievement of the goals. It is also important since governance is a complex concept as envisioned in the post-2015 development agenda: For governance to have a credible place in the post-2015 agenda, goals and targets must be well understood by the relevant stakeholders , based on sound evidence as to their relevance, and politically feasible.
Formation and ensuring a well grounded understanding of the concept of sustainable development goals among the relevant stakeholders therefore play an important role in ensuring the implementation of the sustainable development goals.

Right to information has an inherent connection to sustainable development in terms of environmental protection, social development and economic development apart from the overall connection to these aspects.

V. RIGHT TO INFORMATION , ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: INTER-LINKAGES

Openness and transparency are essential to achieve sustainable development, they are also inherently linked to good governance and accountability. There is evidence that informed citizens and the private sector are better able to engage in developing policy; they are better collaborators and partners with government on service delivery, and also better able to hold governments to account, leading to improved development outcomes. (UNDP, 2014) Transparency in government sends a positive indicator for the citizens and investors, and evidence shows that the more information a government releases, the greater the investment and subsequent affect on growth (UNDP, 2014). There is also evidence that transparency in budget, expenditure and procurement processes lead to increases in service delivery. (UNDP, 2014) Transparency also has an intrinsic value (endorsed in various international conventions), namely, that citizens have a right to know how revenue and resources are being used in their name.

Justice and the Rule of Law , also have inherent links to the social justice component of suitable development. The rule of law is a principle of governance and is critical for sustainable development. It has been shown that countries adhering to the rule of law have higher levels of growth and investment through the protection of property rights. (UNDP, 2014) It can also contribute to promote equity, gender equality, and inclusion through, for example, the protection of legal identity and more equitable access to resources for both women and men(UNDP, 2014). Furthermore in view of the close linkages between rule of law and the aims of poverty eradication, is also linked up to property rights. In this respect it is essential that the relevant authorities are

accessible for the citizens and that they have a informed opinion about their rights.

The next aspect of sustainbale development Participation is both a right, and a means to more sustainable development. Participation in policy development and the design of development interventions by communities and the society at large, in any society or community, enhances trust between those who decide, those who implement the decisions, and the population at large(UNDP,2014).

Political participation, right to information, freedom of association, freedom of speech and freedom of the press, are also fundamental human rights and are widely seen as development objectives and in ensuring public participation is effective. There have been many calls, not least from parliamentarians, for a governance goal to include targets on political and civil rights including, freedom of expression and access to information(UNDP, 2014)

In the international level, the link between right to information and one of the thrust areas of sustainable development, namely environmental protection has been established through a number of international documents, in a more substantive and grounded manner.

1992 Rio Declaration on Environment and Development, Principle 10: Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided Agenda 21, the "Blueprint for Sustainable Development", the companion implementation document to the Rio Declaration, states: [I]ndividuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information protection measures.

In 1998, as a follow-up to the Rio Declaration and Agenda 21, Member States of the United Nations Economic Commission for Europe (UNECE) and the European Union signed the legally binding Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [the Aarhus Convention].

This Convention, which is expected to come into force in 2001, will require State Parties to take legal measures to implement the Convention's provisions on access to environmental information. Another imporntat soect Cartagena Protocol on Biosafety to the Convention on Biological Diversity requires States Parties to promote and facilitate public awareness, education, and participation relating to the safe transfer, handling and use of GMOs.

VI. SRI LANKAN LEGAL FRAMEWORK ON RIGHT TO INFORMATION

Apart from recognising right to information as a fundamental right enshrined in Article 14 A of the Constitution, through the 19th Amendment, Sri Lanka has also taken steps to introduce the Draft Right to Information Law. The process of Right to Information as a Bill was not a recent attempt in Sri Lanka, there was a initial drafting process in 2003, which culminated through the Freedom of Information Act, No.of 2010 and this had many salutary features, as well as provisions which were inherently weak, such as RTI commissioners being under the control of the Ministers.

Any legislative at introducing a law would need to address the existing laws that act as a threat to free access to information in Sri Lanka, such as the *Official Secrets Act* No. 32 of 1955, *The Press Council Law* No. 5 of 1973, *Public Security Ordinance (PSO)* No. 25 of 1947, *Prevention of Terrorism Act (PTA)* No 48 of 1979, and other Administrative rules and regulations and public service culture that undermines access to free and easy access of information.

Despite the lack of a legislative initiative towards upholding the right to information, the judiciary has delivered a number of judgments which support the citizens right to access information. In Visuvalingam v. Liyanage (1984) Wimalaratne J held “Public discussion is not a one sided affair. Public discussion needs for its full realization the recognition, respect and advancement by all organs of government, of the right of the person who is the recipient of information as well. Otherwise the freedom of speech and expression will loose much of its value.”

In Galle Face Case’ the Supreme Court interpreted the constitutional right to free speech, expression and publication as including within its ambit, a right to information. The Supreme Court observed: lack of “This is an application filed in the public interest. … the

Petitioner, being a well recognized entity working for the preservation of the environment is entitled to act in the public interest …. In several cases the Petitioner has assisted this Court in important matters with regard to the preservation of the environment. In this instance too the Petitioner has acted in the public interest and exposed acts on the part of the UDA that are clearly ultra vires"

VII. CONCLUSION

The core of sustainable development is meeting the needs of the present without compromising the ability of future generations to meet their own needs (Bruntland Commission Report).

The concept of sustainable development is a far reaching and a wide ranging concept. Achieving the goals that have been accepted upon by the states, would involve the participation of a wide spectrum of stakeholders.

Citizen and private sector participation is key to ensuring advancement of human life in the modern state. This wide participation and active involvement of all the parties would not be a reality without the proper infrastructure both in a social and a legal sense.

One of the key legal mechanisms that need to be in place is an effective and efficient way for the citizens to demand public information.

Governance and development is no longer the reserve of the state, especially in a country where the development efforts of the parties in power have had no or little effect , it is essential that people are integrally involved in the development efforts, and in the modern context, being a country that is doubleyvulnerable to the adverse impacts of climate change, Sri Lanka needs to have a system of good governance and a cogent legal framework which underpins the principals of rules of law and transparency.

In the current context ensuring peoples rights and accountability of the government and rule of law are no longer luaxary legal items in the check list for the elected representatives, this was clearly proven by the past Presidential Election where the mandate of the candidate who won the election, extensively dealt with ensuring good governance. It is indeed salutary that Sri Lanka has taken steps to constitutionally recognise right to information, however there is still a long way to go in practically implementing the right and guaranteeing the effectiveness of the rights.

It has been recignised that the developing countries have a good opportunity to not commit the same mistakes of the developed countries which caused an irreversible destruction of the environment in their development efforts, therefore in order to ensure that the development efforts of the country to be more people centric right to information is key in any democracy.

REFERENCES

1992 Rio Declaration on Environment and Development

1995 Report to the UN Commission on Human Rights

Aarhus Convention

Agenda 21

Cartagena Protocol on Biosafety to the Convention on Biological Diversity

General Comment 34 on Article 19

UNGA Resolution 59(1)

UNDP, (2014), Discussion Paper, Development Integrating Governance in the Post-2015 Development Framework

Constitution of the Democratic Socialist Republic of Sri Lanka

19th Amendment to the Constitution

Gomez M., (2012) 'Keeping the Right to Information Alive', OPA Journal, (The Official Publication of the Organisation of Professional Associations of Sri Lanka , Volume 27 -)

Udagama D., (1999) 'The Right to Information in Sri Lanka', *Sri Lanka: State of Human Rights* 1999, Law & Society Trust, Colombo

Mendel T., (2008), *Freedom of Information: A comparative Legal Survey,* 2nd ed., UNESCO, Paris,(2008),<http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf

Muyot A.T., (1998) 'The Cornerstone of Democracy: Transparency, Accountability andthe Constitutional Right to Information', Philippine Law Journal, Vol.73 No.2

BIOGRAPHY OF AUTHOR

Bhagya Wickramasinghe LLB (Hons), Attorney-at-Law, LLM (Colombo) is keen on research relating to Environmental Law, Human Rights and International Law. This research deals with the cross cutting issues of human rights and sustainable development.

Ensuring Good Administration through the Development of Judicial Review in Sri Lanka

UAT Udayanganie
Department of Public and International Law, Faculty of Law, University of Colombo, Colombo 3, Sri Lanka
uathakshila@yahoo.com

Abstract- *Administrative Law relating to judicial control in Sri Lanka has developed several principles such as proportionality, legitimate expectation, public trust doctrine and right to equality by two ways of challenging the discretionary powers of public authorities: writs and fundamental rights. Application of these grounds reflects the tendency of upholding the rule of law. However these have nurtured the scope of exercising the power of judicial review of a given jurisdiction and accordingly have given finer meaning to the exercise of judicial power of the people by the judiciary and attempt to uphold the concept of 'good administration'. In this discussion, though defining the concept of good administration is one of the objectives of the research, it is a difficult task. Good administration is a polysemic and evolutionary concept which means different things in different national systems and its content tends to evolve according to the necessary changing social and economic environments and community interests. In this backdrop, the study seeks to define the concept within the scope of Administrative Law in Sri Lanka. Further, the study will look at the concept as an aspect of lawfulness and from its function perspective. Hence, the development of judicial review has been considered mainly for an in-depth analysis. Therefore, the main problem of the research is that does the development of judicial review is compliance with the principles of good administration and if so to what extent the standards of judicial review contribute to the attainments of the regulatory goals of administrative law. For providing an answer, the study examines the relationship between administrative procedures, the duty of giving reasons, and the citizens' participation in relation to the quality of the administrative behavior. Further, the research takes into account some national experiences and will reflect about crucial issues connected with fundamental rights and writs to challenge administrative actions and how those ensure good administration. In line with these reasoning, researcher attempts to draw the relationship between good administration and the development of judicial review and suggest recommendations to ensure good administration. The research will adopt a qualitative approach and as sources of the research, secondary resources such as library research and internet that include books, journal articles are utilized. In addition, as primary sources, the study will consider the role of the Constitution and other relevant legislation. Case law intervention is discussed for analyzing the compliance with the concept.*

Key Words - *Good Administration, Judicial Review, Fundamental Rights, Public Authorities*

I.INTRODUCTION

Administrative Law relating to judicial control in Sri Lanka has developed several principles such as proportionality, legitimate expectation, public trust doctrine and right to equality by two ways of challenging the discretionary powers of public authorities: writs and fundamental rights. Application of these grounds reflects the tendency of upholding the rule of law. However these have nurtured the scope of exercising the power of judicial review of a given jurisdiction and accordingly have given finer meaning to the exercise of judicial power of the people by the judiciary and attempt to uphold the concept of 'good administration'.

The emergence of welfare state resulted in the emergence of administrative agencies without a statutory basis. Under this, more power had to be accorded to the agencies in view of the wide range of functions assigned to them. In this background, though the wide range of powers assigned to these agencies required judicial intervention, which could not be rationalized on parliamentary intent. Therefore, judiciary intervention was justified on broad principles of good administration. The concept ascertains the idea that "a framework concept draws together a range of rights, rules, and principles guiding administrative procedures with the aim of ensuring procedural justice, public administration adherence to the rule of law and sound outcomes from administrative procedures.[31] These principles have been developed with close relationship

[31] H.C.H. Hoffman, G.C. Rowe, A.H. Turk, Administrative Law and policy of the EU, Oxford University press, 2011, p.190

with the rule of law and percept of procedural justice in public administration. Under the European administrative law good administration is considered as two perspectives which includes as a general principle and as a fundamental rights.

Considering the applicability of the concept to the Sri Lankan Law, it can be seen that there is no direct applicability of the concept due to the reason that Sri Lanka is not a member state of European Union. However, the positive argument can be raised based on the English Law applicability. In the case *Abdul Thasim vs. Edmond Rodrigo*[32]held that the words 'according to law' in section 42 of the Court Ordinancedirects the court to issue the writs according to English Law. This interpretation was established by the decision in *Nakkuda Ali vs. Jayarathne*[33]. In light of this basis it is clearly express the view that Sri Lankan administrative law is based on English Law. If this applicability extends to present scenario, UK is being as a member state of EU, several grounds of judicial review have been developed such as legitimate expectation and proportionality. However, these developments are grappled by the Sri Lankan judiciary in a considerable extent at presentand these grounds are promoting principles of good administration. The paper is arguing that this approach has facilitated the adoption of the principles of good administration.

Therefore, the purpose of this article is three fold. Firstly, paper will try to find out the meaning, nature and functions of the principles of good administration. Secondly, the interplay between good administration and judicial review and further qualitatively assess till what degree they mold each other with regard to their legal content. Thirdly, the paper provides possible suggestion to ensure good administration through develop grounds of judicial review.

II.THE CONCEPT OF GOOD ADMNISTRATION

A. *Grappling the Meaning*

Good administration is a complex and multi faceted concept[34] and it has been gradually developed with the certain legal actions of European Union. Under the concept several principles were defined such as equality, good administration as useful administration (in the meaning of proportionality and legitimate expectations), proper functioning of public administration, establishing procedures for hearing users before hand and providing them with information, the principle of appointing an ombudsman, justifications of administrative decisions, the principle of access to administrative documents, the principle of establishing independent administrative authorities, and principle of establishing judicial protection. [35] The concept has been codified in two legal documents which are The European Ombudsman's Code of Good Administration Behaviour and the EU Charter of fundamental rights. In this background, good administration is considering both as a general principle of EU administrative law and as a fundamental right.

In addition, the Council of Europe recommendation 2007 of the Committee of Ministers to Member states on Good Administration was a recent effort to promote the relationship between administrative agencies and public. That notion is accepted by KlaraKanska, who says that "the notion 'good administration' developed as an umbrella principle, comprising an open-ended source of rights and obligations"[36] Article 41 of the EU Charter of Fundamental Rights lays down good administration as a fundamental right by declaring the right of every person to have his or her affairs handled in a certain way by the institutions and bodies of the Union. But, as per this article few procedural rights and duties are included. As defined in this article paragraph one, good administration is based on the principles of impartiality, fairness, and reasonable time limit.

[32]Howard CJ stated :This writs specified in the section are unknown to Roman Dutch and Ceylon law and without calling in aid the English law the mandate could not issue and the legislature must be deemed to have enacted a meaningless provision.[1947] 48 NLR 121

[33][1950] 51 NLR 457

[34]Joana Mendes, Good administration in EU Law and the European Code of Good Administrative Behavior, EUI Working Papers, Law 2009, p.4

[35]Fortsakis,T., Principles of Governing Good Administration, European Public law, vol 11, no02, 2005, pp.207-217

[36]KlaraKanska: Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights. European Law Journal, Vol. 10. No. 3. Blackwell Publishing Ltd. 2004. p. 305

On this basis, two features of good administration can be identified. It comprises procedural guarantees that are primarily directed at protecting the substantive rights of the persons dealing with the European administration. And also it encompasses legal rules that structure the exercise of the administrative function primarily by reference to the objective interests. [37]

B. *Philosophical Basis of the Concept*

Considering the underlying philosophy of good administration, it is pertinent to take in to account the procedural aspects of administration and its rationales. Searching of an answer for this, one may argue that it is linked with the personal dignity because the administrative procedure is directly combined with the outcome of the decision. If that decision will affect the rights of an individual, he should have a proper remedy for that. Concerning this dignified approach, it can be discussed on the basis of Kant's idea of human dignity.[38] According to him, "free will" is essential; human dignity is related to human agency, the ability of humans to choose their own actions[39]. Further, the extension this idea in the light of administrative agencies, when there is an imbalance of power that exists between the public administrative authorities and individuals needs to be effectively controlled to restore citizens‟ rights, which have been infringed by an administrative authority. It is the judicial control of administrative actions, which guarantees that the State is fully subject to the law.[40] On this basis, author argues that the control of administrative discretion which is one of the core functions of administrative law has taken the philosophical foot print from the idea of human dignity. Moreover, this idea is facilitated as an evidence of recent grounds of judicial review such as legitimate expectation, proportionality and reasonableness that are checking the quality of the decision.

Promotion of citizen participation is another underlying philosophy of the concept which reflects both deliberative democracy of Heberma's and participatory democracy of Pateman's. Simply, participatory democracy outlines as democratic legitimacy is exclusively based on an active and enduring participation of ordinary citizens. Deliberative democracy characterizes "political choice, to be legitimate, must be the outcome of deliberation about ends among free, equal and rational agents (Elster, 1998.5). Therefore, it implies that deliberative democracy rest on argumentation, not only in the sense that it proceeds by arguments, but also in the sense that it must be justified by arguments. In the purview of this rationale, reasonably argue that principles of natural justice were developed associated with this idea. Natural justice represents higher procedural principles developed by the courts, which every judicial, quasi-judicial and administrative agency must follow while taking any decision adversely affecting the rights of a private individual. It encompasses two rules which are no one should be made a judge in his own cause or the rule against bias *(Nemojude excausasua*) and hear the other party or the rule of fair hearing or the rule that no one should be condemned unheard(*audialterempartem*). In addition, the right to be given reasons for an administrative decision is an essential component of a fair administrative procedure in a democratic state. This is emerging as a third rule of natural justice. It encourages rational and structured decision-making, while minimizing arbitrary and biased outcomes thereby facilitating accountability and openness on the part of the administration.

This philosophical background has finally crystallized the view that rationale behind the concept of good administration is directly linked with the protection of the rights of individuals against public authorities and focuses the procedural fairness of the administrative decision making process.

C. Good Administration as a General Principle of Law

These principles were incrementally developed with the close relationship of the role of European Ombudsman. In July and September 1999, the Ombudsman made draft recommendations to 18 Community institutions and bodies adopt rules concerning good administrative behaviour for their officials in their relations with the public.[41] This draft contained twenty Seven articles. With

[37]Page 05, Supra 04

[38] P.P. Craig, Procedures and Administrative Decision Making, A Common law Perspective,5, European review of Public law, 55, (1993)

[39]O'Hara, Phillip Anthony (1999). "Human dignity". *Encyclopedia of political economy*. Routledge. p. 471.

[40] Council of Europe, The Rule of Law and Justice – Achievements of the Council of Europe, Strasbourg 1997: Judicial Control of Administrative Acts, Madrid, 13-15 November 1996 (p. 93)

[41] Special Report from the European Ombudsman to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of

minor modifications, European parliament was approved the draft in 2001. Under Article 03 of the draft code has demarcated material scope of the application. In terms of that this Code contains the general principles of good administrative behaviour which apply to all relations of the Institutions and their administrations with the public, unless they are governed by specific c provisions. The rules are a combination of general principles of administrative law, principles of administrative procedure and non-legal standards related to service ethics. In the purview of general administrative law principles, lawfulness, non- discrimination, absence of abuse of power, impartiality and independence, objectivity, fairness, proportionality, legitimate expectation and right to a hearing before and adverse decision taken by a public authority. However, in the nature of the code, these principles are not legally binding. Therefore, this has only a guiding role and difficult to enforce it. It is reasonably argue that though these principles are effectively protect the rights of citizens in countries like Europe, it would be less effective in developing countries like Sri Lanka. The reason is that there is a huge gap between the political culture and personal liberty in these two segments.

D. *Good Administration as a Fundamental Right*

Initially, the EU Charter of Fundamental Rights had been listed right to good administration as a fundamental right. Article 41 of the EU Charter of Fundamental Rights lays down good administration as a fundamental right by declaring the right of every person to have his or her affairs handled in a certain way by the institutions and bodies of the Union.[42] Under article 41(1), the right defines as every person has the right to have his or her affairs handled impartially, fairy and within reasonable time. Further, article 41(2) stipulated sub rights including the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to give reasons for its decisions. These rights are closely related with principles of natural justice which include *audialterempartem* and duty of giving reasons for the decision made. On the basis of these rights, it can be reasonably argue that natural justice has been enforced by the right to good administration. Further, 'the right provided by the charter concerning good administration implies the explicit and visible confirmation of the existence of a legal duty for public authorities to be in the best position to be able to make appropriate decisions, thereby resulting in a common European inheritance. Therefore this duty implies important support for the procedural issues, which have now passed to a higher position. [43]

Concerning the relevancy of the right in Sri Lankan context, it was noticed that there were many issues on violating proper administrative procedure. The removal of former chief justice ShiraniBandaranayake was created a big controversy. The Parliamentary Selection Committee which was appointed for the purpose of investigating the charges against her was problematic. Allegations against the this PSC included personal bias of some PSC members against the Chief Justice, not informing the Chief Justice or her lawyers of the procedure to be adopted, not providing the Chief Justiceadequate time to respond to the charges, and treating the Chief Justice in a derogatory manner. From the outset it was clear that some allegations against the Chief Justice were deeply flawed, which created apprehensions about the entire process. These apprehensions were further fuelled by the hurried manner in which the proceedings of the PSC were terminated and the report released overnight.[44] In this scenario, it is essential such a right to good administration to protect the individual rights of the citizens against administrative authorities.

1.3 Case Law Jurisprudence

European Court has decided the necessity of adhering to the principles of good administration. In the case of *Interpoc vs. commission*[45] court finds that compliance with certain rules, principles or rights are "in conformity with the interest of good administration", or in a restricted version are "in the interests of sound

Good Administrative Behaviour (OI/1/98/OV), Available at http://www.pedz.uni-mannheim.de/daten/edz-b/omb/07/special_11-4-2000_en.pdf, Accessed on

[42]MargrétValaKristjánsdóttir, "Good Administration as a Fundamental Right", Icelandic Review of Politics and Administration Vol. 9, Issue 1, 2013, Pp.237-255)

[43]Juli Ponce, Good administration and administrative procedures, Indiana journal of Global Legal Studies, vol.12, Issue 02, 2005

[44]http://groundviews.org/2013/01/10/a-legal-primer-the-impeachment-of-the-chief-justice-in-sri-lanka/

[45] [2003] ECR I-2125

administration of the fundamental rules of the Treaty. Further, the same view is taken by Advocate General Slynn in his opinion in *Tradax.*[46]

"Nor do I consider, as is submitted, that there is any generalized principle of law that what is required by good administration will necessarily amount to a legally enforceable rule. To keep an efficient filing system may be an essential part of good administration but is not a legally enforceable rule. Legal rules and good administration may overlap (e.g. in the need to ensure fair play and proportionality); the requirements of the latter may be a factor in the elucidation of the former. The two are not necessarily synonymous. Indeed, sometimes when courts urge that something should be done as a matter of good administration, they do it because there is no precise legal rule which a litigant can enforce."[47]

Tillack v Commission [2006] ECR II-3995 held that the principle of sound administration, which is the only principle alleged to have been breached in this context, does not, in itself, confer rights upon individuals (Case T-196/99 *Area Cova and Others* v *Council and Commission* [2001] ECR II-3597, paragraph 43), except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000.

III INTERPLAY BETWEEN THE GOOD ADMINISTRATION AND JUDICIAL REVIEW

Second objective of this study is to figure out the interplay between these two concepts. This section discusses about judicial review in light of promoting good administration. Administrative law deals with the powers and functions of administrative authorities, the manner in which the powers are to be exercised and remedies which are available to the aggrieved persons when those powers are abused by these authorities. In order to fulfill these tasks, Administrative law deals with one of its main aspects[48] which are prescribes the procedure to be followed by these authorities in exercising such powers. Focusing on this aspect, Administrative Law it is suggested the judicial review litigation as a regulatory mechanism in pursuit of good administration with in government. Empowering this goal,administrative law embodies the principle of good administration is sufficiently prominent with in UK administrative law and scholarship that positing of good administration as a regulatory goal for judicial review. [49]

According to John Laws, "In the elaboration of principles of good administration the courts have imposed and enforced judicially created standard of public behavior. Their existence cannot be derived from the simple requirement that public bodies must be kept to the limits of their authority given by parliament."[50]An important function of administrative law, including the contribution of the courts, is the vindication of the rule of law. The challenge is to amplify the concept in a way that is compatible with the democratic claims of majoritarian government and the tasks with which it has charged the modern administrative state, including the regulation of private power, the promotion of social equality, and the redistribution of wealth. That is where the situation can good administration play a major role. For achieving this objective judiciary has created certain new grounds of review rather than the doctrine of *ultra vires*.

The significance of changes in judicial review was reflected to the Wednesbury case[51], Ridge v Baldwin[52] and the GCHQ case[53]. This, in turn, raises important questions relating to placing limits on judicial intervention. The Wednesdbury test imposed a high threshold, keeping the courts from being drawn into the political process.The HRA and proportionality has tended to increase the profile of the courts. The principle of Legitimate Expectation has achieved an important place in developing the law of administrative fairness. The procedural legitimate expectation highlights the fact that ' … when a public body has promised to follow a particular procedure, it is in the interests of good administration that it should act fairly and implement its promise, so long as implementation does not interfere

[46] [1984] ECR 1385-6

[47] Ibid

[48] Jain & Jain , Administrative Law

[49] Simon Halliday, Judicial review and Compliance with Administrative Law, Hart Publishing, 2004

[50] John Laws, Law and Democracy, Public Law 72, 1995 ,

[51] [1948] 1 KB 223

[52][1964] AC 40

[53][1985] AC 374

with its statutory duty…'[54].

A. Good Administration and Administrative Discretion

Administrative discretion, it is ordinarily meant that there are various alternatives that the executive authority can choose to take in a situation. This confers a wide power to choose a course of action and smells of arbitrary power being given in this case. However, the law has imposed a check such that this discretionary power is subject to fetters in the sense that the authority must exercise powerwithin parameters laid down by the statute. This context is proved a famous statement called, where statute ends, tyranny begins. Therefore, only effective tool for the protection against tyranny is judicial review.

English law developed based on a theory of judicial review of administrative action. However, scholars began to recognize that smooth governance required that discretion be not eliminated completely, but check by the courts against improper exercised. Therefore, traditional administrative law is not specially interested in good administrative decisions but in the judicial review of illegal decisions.[55]Balancing point here is that discretion cannot be eliminated completely from the hands of the executive and similarly neither can unfettered discretion be granted. This was held in the case of Padfield vs. Minister of Agriculture, Fisheries and Food[56].

Traditional notion of judicial review was mainly based on the doctrine of *ultra vires* and it was the central ground for questioning the lawfulness of an administrative decision. The doctrine of ultra vires means that discretionary powers must be exercised for the purpose which they were granted. Therefore, traditional ultra vires model is based on the assumption that judicial review is legitimated on the ground that the courts are applying the intent of the legislature.[57] This approach is negative in the sense of good administration.

However, new view point is concerned with the quality of decisions. This trend focuses merits of the decision rather than the issue of legality. It is important that public administration makes both legal and correct decisions with proper reasoning back to them.[58] Particularly, welfare states have to balance development policies and individual rights both. Cases where mega development projects such as highway constructions, generating power plants and building new airportscitizen's rights are severely affected and they expect good decisions in this regard. Therefore, it can be argued that new grounds of judicial review such as proportionality, legitimate expectation, non discrimination, fairness are catered for achieving this goal.

IV.DEVELOPMENT OF JUDICIAL REVIEW IN SRI LANKA

The Constitution of Sri Lanka has carried into effect the frame work of judicial review. Article 140 of the Constitution grants the power to Court of Appeal to issue writs and Article 154 P (4) of the constitution grants powers to Provincial High Court to issue writs. Article 140 explicitly provides that 'Subject to the provisions of the constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any court of first instance or tribunal or other institution and grant and issue, according to law orders in the nature of writs of *certiorari, prohibition, procedendo, mandamus and quo- warronto* against the judge of any court of first instance or tribunal or other institution or any other person.' In addition, Supreme Court in the exercise its entrenched fundamental rights jurisdictions from the Concept of People's Sovereignty. [59]

In this scenario, judicial review of administrative actions in Sri Lanka hardly met the development of English Law. This was highlighted Dr. Shivaji Felix as follows;'In Sri Lanka the foundation of judicial review is constitutional and it is not referable to an incremental development of the Common Law.'[60] Whereas, it is necessary to argue that there is no obstacle to admit development in English Law .Because by judicial interpretation 'according to the

[54] Attorney General of Hong Kong vs. Ng Yuen Shui [1983] 2 A.C.629

[55] Supra *note* 13

[56][1986] QB 716

[57]Chamila Thalagala, The Doctrine of Ultra Vires and Judicial Review of Administrative Action, Bar Association Journal of Sri Lanka, Vol. XVII, 2011

[58] Supra *note* 13

[59] Article 3 read with Article 4(c) and (d) of the Constitution of Sri Lanka, Gunarathne J.A., "The Scope and content of the Doctrine of Legitimate Expectation", Junior Bar Law Journal, [Bar Association of Sri Lanka-]

[60]Felix. S, "Substantive Protection of legitimate Expectation in Administrative Law", Sri Lanka Journal of International Law, [university of Colombo-2006],p.75

law' means English Law. In the case *Abdul Thasim vs. Edmond Rodrigo*[61]Howard CJ stated :This writs specified in the section are unknown to Roman Dutch and Ceylon law and without calling in aid the English law the mandate could not issue and the legislature must be deemed to have enacted a meaningless provision.

Having reminded this argument, it is important to notice that Sri Lanka has currently developed its own improvements; the use of administrative law concepts to define constitutional rights, the reliance of constitutional provisions to expand the ambit of the writ jurisdiction, adopting merit base review in judicial review etc. As per, Dr. Mario Gomez pointed out these developments have been accompanied by a relaxation in the rules of standing and the permitting of a larger category of persons to bring claims before courts. [62]

Though these developments are facilitated by the process of judicialinterpretation, on the other hand recent cases were reflected the negative approach on protecting individual rights based on political bias. That is why Sri Lanka needs a proper framework for promoting good administration in the country.

A. Compatibility with Good Administration

This part of the paper scrutinise that to what extent develop grounds of judicial review are compatible with the requirement of good administration in European notion. As traditional grounds of review, Sri Lankan courts assertthe view of administrative acts must be lawful, reasonable and comply with the rules of natural justice. In conventional approach, natural justice applied only in cases of judicial and quasi judicial action and not in cases of administrative action. Recent decisions have taken a different approach. In *Dissanayake vs. Kaleel*[63], the Supreme Court stated that article 12 demanded an expansive, rather than a restrictive interpretation of the principles of natural justice. Further, in *Rajakaruna vs. University of Ruhuna*[64]Justice Sri Pavan held that natural justice is an integral part of equality assured by Article 12 and actions taken by the respondents must fair, just and reasonable.

Pertaining to the doctrine of legitimate expectation, When analyzing Sri Lankan case law, the generally emerge idea is that earlier courts were reluctant to explicitly recognize the doctrine of legitimate Expectation. This negative minded view of the courts reflected in the case *Laub vs. A.G*.[65] . This was a matter regarding grant of an extension for petitioner's visa. The controller for immigration and emigration was refused to grant a further extension. As per Ismail J, 'A foreign alien has no right and I could add no legitimate expectation of being allowed to stay. He can be refused; without reasons and without hearing once his time has expired he has to go.'[66]

In the case of *Gunawardana vs. Perera*[67]and *Meril vs. De Silva*[68]it is apparent that the substantive character of legitimate expectation has been recognized by our judiciary. Ensuring, this progressive development is in *Wickkramarathne vs. Jayarathne*[69] case, Gunawardana J. provided explicit recognition of substantive legitimate expectation. According to his statement; "The doctrine of legitimate expectation is not limited to cases involving a legitimate expectation of a hearing before some right or expectation was affected but is also extended to situations even where no right to be heard was available or existed but fairness required a public body or officials to act in compliance with its public undertakings and assurances."

The new approach of Sri Lanka is that Supreme Court has also made use of the concept of substantive legitimate expectations where the fundamental right to equality was engaged.[70]

Danapala vs. Disnayake case[71], the doctrine of legitimate expectation was interpreted with Article 12 (1) of the Constitution. These developments indicate that the judicial review based on legitimate expectation also gradually turning in to merit based review. However, it

[61] 48 NLR 228

[62] Mario Gomez, Blending Rights with Writs: Sri Lankan Public Law's New Brew,

[63] 1993 2 SLR 135

[64] Court of Appeal Minutes of 19th July 2004

[65] [1995] 2 SLR 88

[66] *Ibid* p.96

[67] [1997] 2 SLR 222

[68] [2001] 2 SLR 11

[69] [2001] 3 SLR 161

[70] . Supra note 3, Felix, P.79

[71] .[1997] 1 SLR 400

may argue that unlike Canada[72], Sri Lanka has not transplanted the doctrine of legitimate expectation from English law to Sri Lankan Law. We have developed our own way with the constitutional basis.

As my opinion, this new approach can also be subjected to critic .In light with fundamental right jurisprudence; the decisions that affect fundamental rights are covered by judicial review. However, the Sri Lankan law should be developed in a way that how to protect the rights which are not guaranteed by the Constitution.

The principle of proportionality requires a reasonable relationship between an administrative or legislative objective and particular legislative or administrative means.[73]Therefore, the principle would be an effective principle to examine the effectiveness of action taken by the executive and administration ensuring that the executive's interference to the individual's interests is necessary and proportionate.[74] In the context of administrative law, this ground is based upon the assertion that 'a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure.'[75] However, in Sri Lankan approach reveals that though this ground has used several judicial decisions, it is too lack an analysis of the scope of the doctrine. [76]

Focusing on the application of the ground of proportionality, it is noticed that case law interpretations are drawing a line of relationship between the offence and the punishment. It is hardly to see the analysis of the applicability and scope of the principle within the context of controlling discretionary power. Therefore, with regard to the applicability of the ground in judicial review as a mean of questioning administrative discretion, we are far behind.

Several recent cases brought examples that administrative actions should be within the scope of article 12(1) of the Constitution in Sri Lanka. In *Perera vs. Prof. Daya Edirisinghe*[77]stated that;

"Article 12 of the Constitution ensures equality and equal treatment even where a right is not granted by common law, statute or regulation, and this is confirmed by the provisions of Articles 3 and 4(d). Thus whether the Rules and Examination Criteria have statutory force or not, the Rules and Examination criteria read with Article 12 confer a right on a duly qualified candidate to the award of the Degree and a duty on the University to award such degree without discrimination and even where the University has reserved some discretion, the exercise of that discretion would also be subject to Article 12, as well as the general principles governing the exercise of such discretions." This statement caught up equality as a limitation of discretionary power. Public authority can exercise its discretion till this requirement fulfills.
Examining the existing position in Sri Lanka, it is reasonably noticed recent development in judicial review. Several grounds were developed in their own nature. Though the applicability of these grounds is not

[72] .Wright,D., "Rethinking the doctrine of Legitimate Expectations in Canadian Administrative Law", Available athttps://doc-10-94-docsviewer.googleusercontent.com/viewer/securedownload/dsn1aovipa7l846lsfcf94nedj8q2p4u/mt189p2ddrr6q1il0k9qvpmigufv9em6/1333607400000/Ymw=/AGZ5hq8BgbJY1gwaOYx83cPOdNw6/QURHRUVTaGxEN1dlMlhvay14OHZnY1lZZlVXel9vSUFBSVU4ZE1xdEwwV0F1RHUzbG1DTVEyNDRkR3ZueEkwNzEwbGRYVFJGU3VOUjd1bzQ4ckFXX3FDckVWWWdLR2pyNnUzWGNYN2JaRURwSkNlM0VoNkxka2hUcnZmNXJObVc1LTFCSXdDUXR0Qlg=?docid=f804e2595d2630a3b0c028187a8b2887&chan=EAAAAG9RUGNOKHHFLz6SiP/y1L8iRBAXReo/1/aClWvsTHtX&sec=AHSqida721vFWNilA7lxR8235rMV1mx3A5Q3p_CrHjNhUD43FH1oXafJuUraydWJjvl-_PRXvcp_&a=gp&filename=35_1_wright.pdf&nonce=lon4h8dmdtfds&user=AGZ5hq8BgbJY1gwaOYx83cPOdNw6&hash=91t3r5ntb8t252dbl6j703b6h0bos4bc, Accessed by 05.03.2012

[73] H.A. Barnett & M. Diamantides, Public Law Study Guide, [London: University of London Press-2004],p.227

[74] R. Thomas, Legitimate Expectation and Proportionality, [Oxford: Hart publishing-2000],p.77

[75] J. Jowell , "Is Proportionality an Alien Concept", European Public Law,Vol.2,[Netherlands: Kluwer Law International-1996], p.401

[76]See Premarathne vs. UGC [1993]3 SLR 395, Caldera vs. University of Peradeniya (C.A. Writ No.572/2004), Niedra Fernando vs. Ceylon Tourist Board and Others [2002] 2 SLR 69

[77] [1995] 1SLR 148

similar with the applicability of English Law and European Law, Sri Lankan judiciary has tried to internalize the rationale of these grounds in Sri Lankan administrative law.

1) Adopting the Concept of Good Administration in Sri Lanka

When adopting the concept certain issues are remaining to resolve. The major issue is that the possibility of adopting European concept in to Sri Lankan legal system. Prima facie, it seems to be a persuasive authority only. Another problem here is that Code of Good Administrative Behaviour which includes general principles of good administration and European Charter of Fundamental Rights which includes right to good administration both are not internationally binding legal documents. Therefore, this cannot be done in a similar way of adopting international law in to domestic law. Moreover, it is difficult to build up a rationale link to adopt European regional law in to our legal system. These difficulties push our argument towards establishing our own Code of good administrative behavior within the boundaries of our Constitution. In this regards, Code of Good Administrative Behaviour can be considered as a model law.

On the other hand right to good administration can be ensured through fundamental rights under the constitution. It would be a better approach in a country like Sri Lanka. This right is closely linked with a set of other rights such as right of every person to have access to his or her file, give reasons for their decisions etc. Tough the principle of natural justice was established by judicial decisions, if the constitution protects individual rights against arbitrary administrative actions it will gain a trust of people in a highly beaurocratic society. Moreover, as an umbrella right of certain other sub rights Constitutional recognition provides undisputable acceptability for it.

However, it is worth to look at the gradual development of judicial review in Sri Lanka. Though there are differences between English law and our law, any one cannot argue the fact that English law development did not influence for the development of Sri Lankan Law. Applicability was justified in earlier parts of the paper. As a member of EU, UK adopts its rules and principles. It is argued that as a member of commonwealth,Sri Lanka can import and associate with rules and principles which are applying to them. On that basis, it is a possibility to adopt UK development in to our law.

Finally, it is interesting to note that Sri Lanka should draft their own code on good administration and include it in to the constitution by considering inherent factors of the country. EU examples shouldtake in to account as a model.

V.CONCLUSION

The analysis of the concept of good administration in Sri Lankan context shows that it is not kept in with the phase of EU context. In European Union and United Kingdom the concept is ensured and applied in a very formal manner. As a result of that they have a codified law relating to that. It leads to establish procedural fairness, justice and human dignity and participation in a decision making process. Sri Lankan judiciary also has acquired its own developments in the field of judicial review by using certain grounds which leads to merit review such as legitimate expectation, proportionality and right based approach. The development of judicial review has tried to enforce the rationale of good administration; it is entirely depend on the interpretation of the judiciary and creative role of the judges. It reflects the uncertainty of the applicability and inequality. Therefore, it is remains that the necessity of a written law of ensuring good administration while balancing the administrative discretion. Finally, the paper suggests that codification of the principles of good administration as a right or as a general principle; but with certain exceptions to exercise administrative discretion will provide a better and novel approach for protecting individual rights against arbitrary actions of the administration.

BIOGRAPHY OF AUTHOR

Ms. U.A.T. Udayanganie, is a Lecturer (Probationary) in Law, attached to the Department of Public and International Law, Faculty of Law, University of Colombo. She has completed her LL.B (Hons) and LL.M from University of Colombo. And currently she is reading for her Ph.D at National Law School ff India University, Bangalore. Her research interest is, on Administrative Law and Constitutional Law.

Voluntary Repatriation as a Durable Solution to Sri Lankan Refugees in India: A Critical Analysis with Legal Perspective

Y Kathirgamathamby
Department of Legal Studies, Faculty of Humanities and Social Sciences,
Open University of Sri Lanka, Nugegoda, Sri Lanka
yashoda175@hotmail.com

Abstract *- Assimilation, voluntary repatriation and third country resettlement are generally accepted as durable solutions for refugees. Among these, voluntary repatriation is considered to be the most welcome. Sri Lankan refugees who went to India have lived in that country for more than three decades. Although they are provided with basic facilities they lack legal status, which denies them certain human rights. India is not a party to the Convention on the Status of Refugees 1951 and also does not have a law to deal with refugees. However, India is obliged to uphold human rights of non- citizens under the human rights treaties for which India is a state party. There had been an outflow and inflow of refugees from time to time before 2009. With the defeat of LTTE in 2009 May, there was a probability of a flux of refugees to Sri Lanka. However, as of October 2014 the total number of returnees was 6840 out of around 110000. There are several reasons for this situation. It is in this context this paper seeks to analyse the causes for this low level of return even after the armed conflict had come to an end. The paper is dived into four parts. First part analyses the protection of Sri Lankan refugees in India. In this part the author has explained the legal and administrative provisions and judicial decisions in relation to refugees and situation of their rights. Second part examines how right to return has been guaranteed under international refugee and human rights law. Third part describes obligation of the country of origin in absorbing refugees and the final part concludes the article with some suggestions.*

Keywords *— Refugees, Durable Solution, Voluntary Repatriation*

INTRODUCTION.

All States are accountable and are internationally responsible to protect their own citizens and to provide them basic human rights. States are bound by the general principle not to create the conditions leading to refugee outflows. [78]When such situations occur it not only becomes the responsibility of the country of origin but the entire international community as a whole to find amicable solutions for the crisis. [79] The terms of international refugee law places the burden on the country of origin to readmit its nationals when situation returns to normalcy. [80]

The arrival of refugees in Indian, from its neighbour Sri Lanka has occurred many times in the past. Certain events that took place in 1983 in Sri Lanka led to a large influx of SL refugees to India. 134,053 refugees are reported to have come to India during the period between 1983 and 1987. There was a reverse flow in 1987. At this time the total number of refugees who came back to SL was 25,885. [81]Once again in 1989, there was a flight of refugees to India. Between 1989- 1991 alone 122,037 refugees arrived in India. [82]The total Number of refugees in India in 1992 was 210,193. In 1995, UNHCR rendered assistance to 31000 refugees to return to Sri Lanka. The return of refugees continued with the assistance of UNHCR and the number came down to 110,000. [83]

However despite the return of peace in 2009 the number of returnees decreased sharply. [84] The primary inference for this reduction is lack of due care in meeting the expectations of the refugees for resettlement. [85]As of 31st December 2014, 68, 152 SL refugees continue to live in camps in India. [86]

[78] http://global.oup.com/booksites/content/9780199207633/ch

[79] Guy.S. Goodwin Gill and Jane McAdam 2007

[80] (ibid.,)

[81] (SAHRD REPORT1996)

[82] (ibid.,)

[83] IBID

[84] (UNHCR,2012)

[85] (IRIN Asia 2012)

[86] (isidelhi,2012)

Refugee status imposes restrictions through legal and other measures. Due to their legal status, refugees face problems with regard to civil, political, economic and social rights. Though the war ended in 2009 the returning process remained slow and refugees did not exercise the right to return at an expected level. The objective of this paper is to examine the constraints that prevent return of Sri Lankan refugees and elucidate the reasons behind the lethargic approach towards the practising of this right even after restoration of peace. The paper is based on the following research questions.

Research Questions

- To what extent does India's domestic law recognize Rights of refugees in accordance with International obligations under human rights treaties?
- How has the Right to return/voluntary repatriation been recognized under different branches of International Law with specific reference to International Refugee Law?
- To what extent are Sri Lankan refugees in India able to exercise their right to return after 2009?
- What are the steps taken by Sri Lanka to resettle the refugees who return from India?
- What are the main reasons that restrain and inhibit refugees returning from India?

METHODOLOGY

This paper adopts an amalgam of investigative and descriptive methods in its approach to the topic. Primary and secondary data have been used. Analysis is structured in the context of the International Refugee law and within the international human rights law framework. UNHCR documents and Executive Committee (ExCom) conclusions on voluntary repatriation have been extensively discussed. Journal Articles, conference proceedings, and books are also used as reference. Indian domestic laws/policies in relation to refugees have been examined. This paper has also made an evaluation of the policy and legal measures taken by Sri Lanka in ensuring the return of Refugees.

A. Protection of Refugees in India -Domestic law and Role of Judiciary

India has not ratified the 1951 Convention relating to the status of refugees (CSR) or the 1967 Protocol to the CSR. However, it is important to note that India has undertaken international human rights obligations under different international treaties and conventions. India is also a member of the UNHCR ExCom which approves and supervises material assistance programs of the UNHCR.

India has no specific law that is applicable to refugees whereas other countries like Canada, Australia and the US have specific legislation to deal with refugees. Convention relating to status of REFUGEES 1951 Article 1A(2) defines a refugee as "*any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.*"

Section 2 of the 1939 Registration of Foreigners Act defines foreigner as "*a person who is not a citizen of India" and* The Foreigner's order 1948 under 1946 Act governs the entry of foreigners. The absence of a proper legal definition for a refugee has led to the applicability of the above legislations to define refugees. [87]Registration and movement of refugees are also been governed by these legal provisions. Refugees are segregated into two categories after a primary inquiry; one category consisting of ordinary refugees, and the second consisting those who are suspected to have links with the LTTE. The latter are kept along with refugees who had violated the rules relating to registration under the Foreigners Act 1946. [88]

Indian Constitutional provisions are an important source for refugee law in India. Article 14 of the Indian Constitution guarantees the principle of equality. Article 21 ensures the right to life of everyone including non–citizens.

The judiciary in India had played a major role through case decisions in protecting rights of refugees. Several decisions emphasise that refugees are covered under Article 21 of the Indian constitution. In the case of *State of Arunachal Pradesh vs. Khudiram Chakma*[89], the SC India emphasized the provision that no one shall be deprived of his or her life or liberty without the due process of law. [90]

---

[87] (Arjun Nair, 2007).

[88] (T.Anantachari, 2007)

[89] *State of Arunachal Pradesh v. Khudiram Chakma; Khudiram Chakma v. State of Arunachal Pradesh and Others*, 1994 Sup (1) Supreme Court Cases 615; Civil Appeal Nos. 2182 and 2181 of 1993

[90] (Anatachari, 2007)

The importance of voulnatary repatraion of SL refugees was emphasised in *Gurunathan and others vs. Government of India and others* [91]and in the matter of *A.C.Mohd.Siddique vs. Government of India and others* , In *P.Nedumaran vs. Union Of India*[92] the Madras High Court, permitted UNHCR officials to check on the voluntariness of the refugees in going back to Sri Lanka, and to permit those refugees who did not want to return to continue to stay in the camps.

According to Article 19 of the Indian constitution, which governs the right to movement of refugees, it is said that the right of movement within India is only guaranteed to citizens. Accordingly the movement of refugees both special and ordinary are subject to certain limitations. The right to movement of refugees in special camps is curtailed and all refugees must obtain permission to move from one State to another. [93]

The State of Tamil Nadu issues special "*refugee identification cards*" connoting the civil status of the said refugees. Special welfare schemes are being implemented for Sri Lankan refugee camps and special medical schemes are available for women and child refugees. India has spent 667 crores in providing assistance to such individuals up-to-date.

Rights of Refugees

Shelter

CSR 1951 requires states to provide shelter for refugees. According to the International covenant on Economic, Social and cultural rights, and Convention on the rights of the child, India is obliged to provide shelter for refugees. Refugee camps in India are classified into three categories. *The first category* comprises of an individual temporary house measuring 10 X 10 in length and breadth. The second type known as *go down camp*s, are huge halls that could accommodate 100 families of four or five members each. *Special Camp* is the third category, which lacks basic facilities such as water and sanitation. In the year 2012 and 2013 a few families have been settled in some houses built by NGOs with the assistance of the government. In 2014 a case was filed in the Madurai HC to enhance the facilities for Tamil refugees. However the Court made an order stating that facilities have already been provided.

Right to Education

Article 22 of the CSR recognizes the right to education. Article 13 and 14 of the ICESCR also recognizes this right. Similar articles could be found in the CRC and UDHR. Article 22 of the CRC requires State parties to provide protection for child refugees. Child refugees receive opportunities for school education in Tamil Nadu and thereafter higher education at national universities. A special residential school has also been established in the State of Karnataka for the SL child refugees. Certain other welfare schemes and scholarships have also been offered to the school going child refugees, to pursue in their higher studies. However after obtaining the necessary qualifications many fail to acquire suitable employment opportunities that match their qualifications.

The Special Educational Reservation in higher education which had been in existence till 2002-2003 has now been withdrawn. Even though education facilities are being provided there is no access to medical and engineering courses. In 2014 a girl who obtained high rankings and was selected for medicine was denied admission to the medical college. [94]A case has been filed in the Madras high court, pending decision.

Right to Employment

CSR 1951 requires State parties to safeguard the rights of refugees, including the right to employment. In ***Chapter III*** of CSR which is titled 'Gainful Employment,' the contracting States have been urged to provide employment and self-employment opportunities and also allow them to carry on professions on the basis of favorable treatment to be given to foreign nationals. Article 17 refers to wage earning employment, Article 18 to self-employment, and Article 19 refers to the recognition of professional diplomas.

Although India is not obliged under CSR, it must be noted that by acceding to ICESCR in 1979, India has undertaken the obligation to protect the rights enshrined in this convention without any discrimination. This convention imposes on India the duty guarantee the rights of non-citizens with available resources

Right to work has been entrenched in Article 6 of the ICESCR. This right is linked with the "right to minimum wages" and the "right to fair working conditions and decent life". Sri Lankan refugees however do not enjoy

[91] Gurunathan and Seven Others v. Union of India (WP Nos. 6708 and 7916 of 1992)

[92] P. NEDUMARAN V/S UNION OF INDIA , decided on Monday, June 14, 1993. [In the High Court of Andhra Pradesh, W. P. 3792 Of 1993

[93] Article 19 in The Constitution Of India 1949

[94] (Sunday times 2015)

these rights. Further they are not permitted to work in the State sector due to their lack of legal status and also due to the unemployment problems faced by the India itself. Refugees therefore work in the informal sector which mostly does not adhere to conditions established under international human rights conventions.

Humanitarian assistance such as the provision of shelter, cooking utensils, and minimum rations on subsidized rates are made available to the refugees. Considering the limitations of these resources, refugees are constrained to work to provide for their own needs. Most of the employment opportunities available are only outside the camps. Invariably they are forced to work for low wages under poor conditions.

Even in the occasion where women are able to find employment in Middle East as domestic aids, they are not able to take these opportunities due to the restrictions on their right of movement.

B -Voluntary Repatriation - UN Refugee Law Regime

The 1951 CSR and 1967 protocol to the convention are important sources of international refugee law. It is stated that "both instruments reflect a fundamental human value on which global consensus exists and are the first and only instruments at the global level, which specifically regulate the treatment of those who are compelled to leave their homes because of a rupture with their country of origin." [95]

International refugee law prescribes three types of durable solutions in this regard. They are (a) voluntary repatriation (b) local integration and (c) resettlement in third countries. Voluntary Repatriation is the most desirable and durable solution among the three. It was stated that voluntary repatriation means that after reviewing all available information about the conditions in the country of origin, refugees decide to freely return home. [96]

The principle of voluntariness is the cornerstone for the return of refugees. It connotes that the subjective fear had ceased. Refugee status can end once meaningful national protection is re-established.[97]

Neither the CSR nor the Protocol address the question of voluntary repatriation or require the application of the standard for voluntary repatriation. [98]The gap can be filled by UNCHR conclusions 18 (1980). Accordingly whenever necessary, UNHCR can be involved in establishing the voluntary character of repatriation, cooperate with governments to assist refugees by arranging for guarantees to be provided by the country of origin, advising refugees of such guarantees and providing information regarding conditions prevailing in the country of origin, and monitoring the situation. [99]

According to UNHCR though there are no express provisions in CSR and protocol, several provisions are of relevance to UNHCR's statutory functions in regard to voluntary repatriation.[100] Article 33 of the CSR (on-refoulement) prohibits a State from expelling or returning ("refouler") a refugee in any manner whatsoever to the frontiers of territories where he or she would be exposed to persecution.

The principle of non-refoulement is not subject to reservations or derogations. [101]It provides that no one shall expel or return ("refouler") a refuge against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom. [102]Right to return is motivated by a desire to return home.[103] As pointed out by Dowty "*The right to return, no matter how justified in principle may in execution be impractical where causes of the original refugee flow remain"*[104] The UNHCR has affirmed that the principle of non-refoulement constitutes a norm of customary international law and is thus obligatory for all States. [105]

[95] (Volkertu¨ RK & Frances Nicholson, 2002)

[96] (UNHCR 2005)

[97] (J.C. Hatheway, 2005)

[98] (UNHCR handbook).

[99] (ibid.,)

[100] UNHCR 2005

[101] (Introductory note to Convention on the Status of Refugees 1951)

[102] (ibid.,)

[103] (Dowty, 2000)

[104] http://www.badil.org/phocadownload/Badil_docs/bulletins-and-briefs/Brief-No.8.pdf accessed on 12. O3.2015

[105] (UNHCR 2005)

Right to Return under International Human rights Law

Right to return has been established under different branches of International law. Article 13 (2) of the Universal Declaration of Human Rights provides: *'Everyone has the right to leave any country, including his own, and to return to his country.'* Article 12 (4) of the International Covenant on Civil and Political Rights, states "*No one shall be arbitrarily deprived of the right to enter his own country.*"

Article 13 is important in the context of refugees since it relates with article 33 of the CSR which establishes the right of *non-refoulement.* The *ICCPR* applies to non-citizens and has been interpreted as prohibiting return when there is a probability of being subjected to torture. *ICCPR* and CAT also provide for protection from refoulement, or forced return, in situations where there is a substantial risk of torture.[106] Article 5 (d) (ii), of the Convention on the Elimination of Racial Discrimination also recognizes this right.

Refugees retain the fundamental human right to return to the country of origin regardless of the conditions of repatriation or conditions in their country. However, this right becomes meaningless where conditions exist that impair its free exercise. [107]

Refugees are free to exercise their right to return, however article 3 of the UNCAT states that "*no State shall return refugees if there is a risk of torture"*. In Suresh V Minister of Immigration, Suresh was granted refugee status and his involvement with the LTTE was later discovered. The Canadian judiciary felt that although Sri Lanka is a party to CAT, if Suresh is sent back go to SL, he stands the risk of undergoing torture. Therefore was given the status as a "person in need of protection'[108]. This decision reaffirms the absolute obligation of States not to return ("refouler") a person to a country where he or she is at risk of being subjected to torture or other cruel or inhuman treatment.[109]

Even though the rights against torture are not assured under CSR 1951, the *UN committee against torture* has recognized a complementary rule which supplements the prohibition of torture against refugees**.**[110] The committee in its general comment on Guyana's State report (May 2007) reminded that the government of Guyana should give prior importance to Article 3 of CAT and the committee further said that *"the State party should submit in its next periodic report, information regarding implementation of article 3 of the Convention in cases of extradition, expulsion or return (refoulement) of foreigners."* It is therefore understood that that states are obliged to implement Article 3 of the UNCAT.

UN resolution 194 greatly stresses on the importance of the international legal principles on the right to return, which are already established in different international human rights instruments. It imposes the states to allow refugees to return to their places of origin without any discrimination.

C Right to Return - Responsibility of Country of Origin

CSR 1951 makes it clear that the "refugee status" is temporary and will cease once a refugee resumes or establishes national protection[111]. J.C .Hatheway states that "*once the receiving State determines that protection in the country of origin is viable, host country is entitled to withdraw refugee status*". [112] According to Hatheway "Even when the circumstances in the country of origin have undergone a fundamental change, individual refugees may continue to have a well-founded fear of persecution or compelling reasons not to return arising out of fear of previous persecution"[113].

As far as the obligation of the country of origin is concerned, the State has to allow refugees to return without any issues. The state should restore national protection, provide repatriating refugees with the necessary travel documents, entry permits, and any other documentation required for the return. The State should

[106] Ibid.,

[107] (UNHCR handbook, 2005)

[108] Suresh V Minister of Immigration ([2002] 1 S.C.R. 3, 2002 SCC 1)

[109] Article 3 of the CAT 1984- Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides that no state shall expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

[110]

[111] Voluntary Repatriation – International Protection, Handbook by UNHCR 1996 , P, 8 available at http://www.refworld.org/pdfid/3ae6b3510.pdf

[112] J.C. Hathaway, 1997

[113] Ibid.,

generally be responsible for the elimination of the root causes of refugee flows[114]

States are required to ensure the creation of minimum legal conditions through free and fair elections, maintenance of law and order, and supply of basic services. These are necessary elements for successful and permanent repatriation[115].

Sri Lanka took a few measures to address the issues of IDPs and refugee returnees. The foremost action that was taken in this regard was the establishment of the LLRC in 2010. Having analysed various documents, the LLRC made recommendations with regard to issues in the areas of governance, devolution, human rights, international humanitarian law, socio economic development, and livelihood. [116]

LLRC made specific recommendations with regard to land ownership and resettlement, right to water, right to livelihood, right to education, and right to health[117] of IDPs and refugee returnees. Recommendation 9.108 specifically emphasizes "the need of a formal bilateral consultation process between Sri Lanka and India to enable the displaced persons living in India to take considered decisions with regard to their return to Sri Lanka"[118]. However, so far no MOU has been signed between India and Sri Lanka. Although there was no MOU SL has encouraged voluntary return of Sri Lankan refuges presently in Tamil Nadu through its mission in Chennai. [119] A reintegration grant and a host of other benefits are also being made available to them upon their return.[120]

After 2009 two general elections have been held in the war affected area and the people from north & east enjoy their rights to participation. Infrastructure facilities including roads, school, and hospitals have been developed.

Further specific measures have been taken to address issues of women-headed households, children and the elderly affected by the war, and disabled persons. Various ministries are the major stakeholders in this regard. National Policy on resettlement is being implemented by the Ministry of Resettlement along with other institutions to provide stable living environment with basic needs for IDPs and returnee refugees. However it must be noted that the intended objective is yet to be fulfilled.

Apart from the above broad category of rights primary importance is given to the rights of IDPs, and to women and children affected in armed conflict. National plan of action on promotion and protection of human rights[121] has a particular section dedicated to resettlement of IDPs and returnee refugees. These articles are yet to be put to action.

As a result of the 30 year conflict, a significant number of land owners lost their lands along with the rights attached to the said lands. Their lands have since been occupied by the army or other persons. LLRC has urged the government to bring an amendment to Prescription ordinance. As per the exisiting provsions anyone who could prove 10 years continuous, uninterrupted possession will able to claim ownership. There fore this is an urgent need for amendment to bring justice to the people who could not enjoy their land rights reasons beyond their control. As per the recommendation The Prescription (Special Provisions) Bill, which seeks to restore the rights of land owners was taken up for its Second Reading in Parliament on Aug. 7, 2014[122]. The bill is yet to pass.

Right to return as a Durable Solution

As discussed in the second part of this paper, voluntary repatriation will be the best solution for SL refugees in India, provided that suitable conditions are created for them to return and find livelihood sources.

[114] Article available at http://www.un.org/WCAR/1.9e.pdf accessed on 14.05.2015

[115] Gorman and K,ibreab ' Repatriation Aid' p, 68

[116] Report of the Lessons Learnt and Reconciliation commission, Sri Lanka ,2011

[117] IDPs awareness on Land Circular No. 2011/4

[118] http://llrcaction.gov.lk/en/news/628-unhcr-commends-sri-lanka-s-efforts-in-reintegrating-idps.html accessed on 18.12.2014

[119] Ibid.,

[120] lrcaction.gov.lk/en/news/628-unhcr-commends-sri-lanka-s-efforts-in-reintegrating-idps.htmls

[121] Prepared on the request of Universal Periodic Review

[122] According to prevailing laws under the Prescription Ordinance, a person holding uninterrupted, "adverse" possession of property for 10 years is entitled to ownership of that property.

Some of the Sri Lankan refugees have had a prolonged stay while others have gone as refugees in recent times. Although India spent large amount on SL refugees, as a developing country it has its limitations. Refugees are therefore expected to go back to their own country when peace is re-established. The refugee situation is always a temporary protection. They will not able to enjoy rights as the citzens of India. Their legal staus will afftect the property rights, movement. They are also not in a status to choose their political representatives. Their legal status as Sri Lankan nationals is of no use in this context. Humanitarian assistance will be given to them.

In international, law the concept of repatriation has to be on a voluntary basis. In 1987 India tried to send SL refugees forcibly. A Public Interest Litigation was filed in the Madras High Court and the court accepted the principle that repatriation has to be voluntary. Even though VR is considered as the durable solution even after end of conflict in 2009 the number of returnees is at a low level. According to UNHCR, it has helped more than 11,400 Sri Lankan refugees to return voluntarily. At the global level, refugees across the world show greater interest towards irregular migration to countries like Australia, Italy etc., than to return to their country of origin.

As of July 31.2015, 7128 refuges out of 102,000 from India returned to the island. [123]Not even 10% out of the total number 102,000.

Although they live in India there is no assurance about their future. The following issues have been identified as the reasons that lead to the reluctance to the return of country of origins, and also their desire to leave country of origin immediately after their return.
Majority of the refugees want to stay in India because their lives have been made easy with generous doles and concessions given by successive Governments of Tamil Nadu. They continue to believe that in Sri Lanka there is no safety, lack of livelihood opportunities and also the fear of probable violations of their human rights. A survey by the Tata Institute of Social Sciences (TISS), Mumbai, states that ""among the one-lakh-odd Sri Lankan Tamil refugees in India it was found that 67% want to remain in India. Only 23 per cent of the 520 families surveyed wanted to return to the island nation, while 4% wanted to migrate to a third country where they had relations".

[123] Report of the (Ministry of Resettlement)

Some refugees have returned to SL with lots of hope. However they are disappointed[124] because of the lack of a comprehensive national policy on land rights. According to the special Rapporteur on IDPs in Sri lanka[125] large number of refugees still live in very precarious conditions. IDPs and refugees who returned in the last phase of the war and in the previous decades could not find a durable solution. Lack of infrastructure facilities, quality education, livelihood opportunities, and safety issues are major deterrents. The continuation of the Prevention of the Terrorism Act (1978), and the continued heavy presence of military forces in the former conflict zones have acted as a source of discouragement and disincentive.

A survey conducted by the UNHCR on durable solutions for IDPs reveals that "an estimated 57 % of the respondents reported of a military presence or a checkpoint less than a mile from their homes and 87% said they had been registered by the military and had been interviewed by the military or the Criminal Investigation Department".[126] It was further found that the involvement of the military in civilian issues has a negative impact on the security climate. This condition is specifically hostile towards women, whose position is made vulnerable by the breakdown of social networks and communities, and the hope to return to their land and rebuild their lives.

X. CONCLUSION AND RECOMMENDATIONS

The above study shows that India is neither a party to CSR 1951 nor does India have any specific law to deal with refugees. Constitution of India however has provisions which serve as a resource for the rights of the

[124] http://unhcr.lk/wp-content/uploads/2014/03/HELPING-SRI-LANKAN-REFUGEES-Leaflet.pdf accssed on 27.09.2014

[125] In accordance with the mandate bestowed on him by Human Rights Council resolution 23/8, and at the invitation of the Government of Sri Lanka, the Special Rapporteur on the human rights of internally displaced persons (hereafter the Special Rapporteur), Chaloka Beyani, conducted an official mission to Sri Lanka from 2 to 6 December 2013.

[126]UNHCR, *A Protection Assessment of Sri Lankan Internally Displaced Persons who have Returned, Relocated or are Locally Integrating: Data and Analysis*, June 2013, pp. 13–14.

refugees. Judicial decisions have reinforced these constitutional provisions.

India has several administrative arrangements to safeguard the rights of refugees, and these have been helpful not only in providing humanitarian assistance but also to extend protection that is normally applicable only to citizens.

International refugee law and human rights law both stipulate that refugees cannot be repatriated without their consent. Voluntariness is the corner stone of repatriation. CSR and CAT require states to repatriate refugees to countries of origin only if their life is not under threat or risk. Indian judiciary has categorically upheld this view.

Even after the war has ended there are several reasons why refugee return is not to an expected level. The reasons for this are to be found in the fact that that there are many shortcomings in settlements of IDPs in Sri Lanka. They are not provided with the necessary facilities in resettled areas and continue to have sense of insecurity about their future. In the contrary refugees are able to enjoy certain rights and have a sense of security while in India

Sri Lanka has taken steps such as establishment of LLRC, introduction of national policy on resettlement of IDPS and refugees with basic needs, education, livelihood opportunities and concrete measures on land matters. However the younger generation born and brought up in India is confronted with uncertainties and is in need of greater reassurance.

There are a number of issues that ought to be settled between the authorities in India and in Sri Lanka in order to guarantee suitable environment to the returnees. It is of vital importance that there should be an MOU between SL and India. The MOU should be drafted in such a manner as to make the absorption of refugees gradually in stages.

Unless meaningful steps are taken in implementing the recommendations of the LLRC, along with amicable solutions to the pertaining land problems, livelihood difficulties, and the circumstances to live as dignified citizens, the problem is bound to be complex and difficult.

REFERENCES

Arjun Nair, 2007 National Refugee law for India : Benefits &Roadblocks IPCS research Paper Institute of Peace &Conflict Studies New Delhi

Guy S. Goodwin-Gill and Jane McAdam, 2007 "The Refugees in International law Oxford University press 3rd ed,

James Hathaway 1997 "The meaning of Repatriation ", International Journal of Refugee Law, Vol.9 NO. PP 551-558

T. Ananthachari ,. Refugees in India: Legal Framework, Law Enforcement and Security

Sri Lankan Tamil Refugees in Tamil Nadu Camps - Voluntary Repatriation or Subtle Refoulement", South Asia Human Rights Documentation Centre, New Delhi,

The Right of state to former Repatriates refuges James Hathaway Michigan law school available at http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1297&context=articles accessed on 19.11.2014

Voluntary Repatriation – International Protection, Handbook by UNHCR 1996, P, 8 available at http://www.refworld.org/pdfid/3ae6b3510.pdf

Convention on the status of refugees
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights
UN Convention against Torture

UNHCR Handbook on Voluntary Repatriation
Report of Lessons Learnt and Reconciliation Commission
National Policy on Resettlement

National plan of action on promotion and protection of Human Rights 2011-2016

http://www.isidelhi.org.in/hrnews/HR_THEMATIC_ISSUES/Refugees/Refugees-2012.pdf

http://www.refworld.org/pdfid/4124b6a04.pdf accessed on 19.11.2014

http://www.online.sundaytimes.lk/news-online/indian-high-court-dismisses-petition-seeking-better-facilities-lankan-refugee-camps.html.,

http://www.unhcr.org/4371fa4f2.pdf

http://www.unhcr.org/3b66c2aa10.html accessed 16.08.2014

http://www.badil.org/phocadownload/Badil_docs/bulletins-and-briefs/Brief-No.8.pdf

http://www.globaldetentionproject.org/law/legal-framework/international/treaties-and-protocols.html

http://www.badil.org/phocadownload/Badil_docs/bulletins-and-briefs/Brief-No.8.pdfaccssed on

http://llrcaction.gov.lk/en/news/628-unhcr-commends-sri-lanka-s-efforts-in-reintegrating-idps.html accessed on

http://llrcaction.gov.lk/en/news/628-unhcr-commends-sri-lanka-s-efforts-in-reintegrating-idps.html accessed on

Indian and Sri Lankan Newspapers

The Contradiction between Sustainable Development and Economic Development: Special Reference to the Colombo Port City Project of Sri Lanka

SU De Silva, DMTM Sachindrani, HACD Hatharasinghe and I Bogahawatte[#]
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
[#]irangiwinnie@gmail.com

Abstract— *The Colombo port City project is one of the largest investment projects implemented in Sri Lanka. The effect the constructing of the Port city has on the economy is positive. Nevertheless, there are lots of environmental concerns that should be addressed to ensure whether the project is sustainable. The concept of sustainable development has been related throughout this research, to maintain the standard of the economy as well as the protection of the environment. When larger projects are conducted there are particular boundaries and restrictions to protect the environment which is included in The National Environment Act No 47 of 1980, Mines Mineral Act No.33 of 1992, and the United Nations Convention on the Law of the Sea. Before any construction relating to the environment is in process it should be done according to these rules and regulations which have preferred standard requirements by the relevant authorities. By relating the general principle of sustainable development, the environmental resources could be protected for the future generation. The balance between sustainable development and economic development should be considered when such projects are conducted. The objective of this research is as follows: to distinguish the relationship between the construction of the port city and the concept of sustainable development, legal, non violating environmental recommendations, the legal mechanism specially focuses on the port city before processing the project and the loopholes of the legal system which currently exist relating to the port city project. How sustainable development is achieved by the port cities implemented by developed and developing countries shall be studied and compared in order to ensure the economic and sustainable development outcomes which will be expected from this project. This research is conducted using secondary sources. The paper concludes with observations on the balance between economic development and sustainable development.*

Keywords— *Sustainable Development, Economic Development, Port City, Environmental Concerns*

I. INTRODUCTION

Many preparative cities were initiated in ports .A port is a location on a coast containing one or more harbors where ships can dock and transfer people or cargo to or from land. And port city is a city erect around a port, to have a defence around infrastructural support .Most of the countries used this concept in common for gain economic development with the expectancy of leisure.As a result of long maritime and continual trade affairs these cities become world famous and highly developed eventually. The cities with ports are not only large but also they are eminent cities. In ancient times as a sea around country Sri Lankan Colombo port beseem symbolic in trade. Colombo Port city Project was formulated as one of the mega project introduced by the government to accelerate development of the country in order to open for globalization. When such major projects are formulated it is mandatory for the authorities to examine, not only the economic development but also the sustainable development expected as requirement of achieving millennium goals set out by the United Nations. Therefore ,it is required to analyze the project ina broad way to ascertain the sustainable development .The analysis is Environmental analysis and economic analysis hope to be analyzed to see whether the project is sustainable .Additionally the Colombo port city will compare with other extensive port cities in the world .Among, Hong kong, Dubai and Helsinki port cities are high power cities which deal with massive economic outcomes. The impacts of this project will be examined according to the national laws.

The environmental assessment of the port city project was published in certain standards but with limited additions. The China Harbor Engineering Co. Ltd., a wholly owned subsidiary of state-owned China Communications Construction Company invests thousand five hundred million US dollars for the sea fill project. It is a controversy that such a huge project was started without methodical Environmental impact Assessment

done by Coastal Conservation Department of Sri Lanka.The project was approved by coast department of coast conservation and the standard cabinet review committed on behalf of the Sri Lankan. Ports have various impacts on their cities, both positive and negative. Most of the positive impacts are related to economic benefits. Main negative impacts include environmental and land use impacts.

II. ECONOMIC DEVELOPMENT

The latest addition to the long resume of government`s development project is the Colombo Port City development project .The Colombo Port City project will be the biggest private sector development in the history of Sri Lanka. The Colombo Port City project was started by the previous regime and was finalized with the signing of different agreements in 2014 with the Sri Lanka Port Authority, Board of Investment (BOI) and Urban Development Authority with China. This project is a business venture done together with one of Sri Lanka's long-standing friends China. The main objective of the project is to create not only a major maritime hub, but also a harbor city for attracting major overseas private investors with tax holidays. The main investor of the CPC stated that the vision of the port city is to establish Colombo as ultimate business and tourist destination in South Asia. In Dubai twenty years ago, it was nothing more than a sleepy fishing village in the Arabian Gulf. But now after the constructing of the Dubai Port city, it stands as the commercial, financial, logistics and tourism capital of the Middle East. Last year Dubai economy grew up by 16 percent, the 94 percent of the economy was non-oil related and making Dubai the most disified economy in the Gulf. Likewise, after the Colombo Port City Constructed, Colombo shall be the developed capital of the world. According to media reports, this land will be developed by constructing a formula 1 race track, yacht marina, a mini golf course plus hotels, skyscrapers, apartment residences and high-end shopping malls to cater for the ultra-rich from developed countries as well the oil-rich countries in the Middle East and China. This land will attract local and international investments. And also this project consists long term apart from the short term benefits to Sri Lanka such as employment to local construction workers, companies as well as employment opportunity in the hotels, shopping malls, etc. Also china has stated that, this project will bring between 80,000 and 100,000 new jobs and 90 percent of employees will be available for Sri Lanka. This project provides an excellent opportunity to create a significant employment opportunities. This project creates a large number of construction jobs for a few years. If the port city comes with all the infrastructure facilities that are needed to promote investments. This land is to be offered to foreign investors for income generating activities, but the government will have to spend millions of dollars to develop the land with roads, parking areas, housing complexes, hotels, and office buildings and should provide services such as telecommunication, electricity and other facilities. If the Chinese side offer better facilities and china has opportunities to promote income generating activities that Sri Lanka cannot imagine undertaking.

III. ENVIRONMENT CONCERN

The modern economy is a resource based economy and the development of a country is based on its resources. There are numerous environmental effects refer to port affairs .In the Colombo port city project assume on effects are related to transport, construction and other port affairs. Major effects can be assuming compare with other port cities in the world. Water and marine pollution, Soil pollution, Air pollution, Co system and waste and dumping are the major fields. These environmental impacts can have severe repercussions health of the people in the port city.

If this project is built there are lots of environmental problems foreseen by the environmentalist. And they assume environmental impacts compared to other massive port cities in the world. (Hong Kong, Dubai and Helsinki).

Air pollution is the result of the combined effects of several pollutants. Most of the air emissions in this project arise from man made. Pollutants can be classified as being produced in Combustion, transportation emissions, industrial process and use of solvents. Even though maritime activities are considered as less pollutant, still in shipping activities the air pollution high and the probability of the hazard emissions are high. In particular Hong Kong Environmental Protection Department (HKEPD, 2013) stated that marine vessels behooved the major emission basis for respirable suspended particulates in 2011.Measures for containing Air pollution in port cities are not under satisfactory level. Therefore, as a modern ,innovativecity,the Colombo port city can adopt to measure, control and develop the air pollution measurements. Such as, the industrial areas

must locate at a certain distance from residential areas. Productions should be based on effluent treatments.

Water pollution is the higher pollutant source in a port. The spread of oil and illegal dumping practice in the sea has become a common feature nowadays. Oil is transported across oceans through tankers and either due to some accident or leakage oil spills on to water and causes the degradation of aquatic and marine environment. A dramatic incident was that M/T Granba Chemical tanker Accident at Trinkomalle 2009 is which the pollution caused widespread destruction of many forms of marine life despite strenuous efforts to clean up the spill. Other sources discharge of ballast water from cargos and use residual chemical products and discharge wastes into the sea without proper water quality measurements. There should be a proper methodical process in all industrial effluents and should be drained in water bodies only after proper treatment.There also needs to conserve several water purifying organisms. The Dubai port city faces several challenges today and the main ones are water and energy consumption. Even there is plenty of water in the Gulf, water requires to be desalinated before use. Thus, desalination plants are the only solution and plants produce Carbon Dioxide emissions. This is menacing to sea biodiversity. In this perspective the solutions are not mere solutions for the sustainable development concept.

Soil pollution arises in certain indirect effects. The oil spills have their effect over evaporation. The industrial effluents which contain several types of chemicals are also responsible for the loss of fertility. These effects are resulted the soil acidification and acid rains. Soil erosion is one of the most important from all. This has become environmental degradations in near coast and deep sea.
Dumping at sea is a popular and an inexpensive means of solid waste disposal. Open dump is the largest acceptable method, but prevalent notion that the ocean is an inexhaustible sink. There were major categories of wastes, viz., port dredging, industrial wastes, and construction and demolition debris. The environmentalists have warned that ocean dumping is neither is a safe nor a desirable method for disposal of wastes. Incineration is a method that can be used for which the volume of wastes reduces sixty percent. This method is adaptable over a wide range of capacities from small domestic incinerators to large centralized municipal plants. It also aggravates the problem of air pollution. Chemical processing of solid wastes is also applied, but it is not costly and technically feasible for our port city project. Apart from refuse and recycling of wastes, there are methods through which wastes can be utilized properly.

Noise pollution arises in ports where Sirens noise from cargo ships, cranes and other industrial actives. According to the European Sea Port Organization stated that various countries such as Denmark, the ship should be berthed more than 600 meters away in order not to exceed the noise limit (Lloyd's Register ODS, 2010).

According to most recent constructions, there are many aspects to be looked for and how the rocks are obtained: Environmental issues of obtaining rocks from country hill side, filling the city with sand obtained from the nearby sea, large sale of mining creates ecological problems, expansion of barren sea land . The depth of the sea filling is four hundred fifty meters and the height of the land is another four hundred fifty meters from the ground. It is a sea field island of two hundred hectares equaling to a total area of more than 5.3 million square meters and out of this about hundred million square meters will be given to Chinese investors on 99 year lease to and balance for the other investors. For this unplanned and unorganized construction is a danger to the environment and the measurements that can be seen as leveling of mining areas, reuse of waste material, measures to check air and land pollution , health and safety measures should be taken, policy of resource conservation should be adopted and alternative material should be developed and adopted.

This island ,creating deep sea and destroying the natural slope from the ground to the deep sea and water wave's brake by this Island will be speeded back to other areas of coastal belt up to Panadura in the South and up to Negombo in the North. This will influence the coral reef and the fisheries industry of the area. The process of urbanization in port city has to considerable impact both in terms of controlling not only rates of erosion ,but also the delivery of pollutants in the sea and influencing the nature of runoff and other hydrological characteristics

IV. THE CONCEPT OF SUSTAINABLE DEVELOPMENT RELATED TOWARDS THE PORT CITY PROJECT

The concept of sustainable development is a development that meets the needs of the present without compromising the ability of future generation to meet their own needs. The concept of sustainable

development requires complementary under the development of Trade law and Environment law, Environmental law and Human rights law, and between development of liability and compensation regimes to meet the requirements of environmental law.

When considering the Sri Lankan legal system, there is no any specific definition provided regarding sustainable development. But under the concept of State Policy and Fundamental Duties it is discussed. According to Article 27(14) and 28(f) of the 1978 Constitution, it directly highlighted about the environment. Article 27(14) states as, "the state shall protect, preserve and improve the environment for the benefit of the community." And also Article 28(f) of the constitution state as, "to protect nature and conserve its riches." The state is an instrumentalities trustee of the state, and it is the duty to protect and preserve the natural resources. Due to that the state as a trustee of all natural resources is under a legal duty to protect them, and that the natural resources are meant for public use and could not be transferred to private ownership.

Considering the case laws in Sri Lanka relating to sustainable development, there are many. Mainly in our research, we focus on four (4) cases. Those are: *Bulankulam*vs. *Secretary, Ministry of Industrial Development* (SCFR Application No.884/99)[Eppawala Phosphate Mining Case], *SugathapalaMendis and other* vs. *C B Kumaratunga and others* (SCFR No 352/2007)[Water's Edge Case],*Environment Foundation Limited* vs. *Urban Development Authority* (SCFR Application No 47/2004) [Galle Face Green Case],*Environmental Foundation Limted*vs. *The Land Commissioner* (CA Application No 573/1992) [Kandalama Hotel Case]

The common legal regime also provides that environmental protection needs to be considered as an integral part of the development process to achieve sustainable development. But, the environmental impacts of the project highlight that these principles for sustainable development have been ignored when adopting the Port City Project.

V. LEGAL ISSUES RELATED TO THE PORT CITY.

According to the prepared environmental report under the National Environment Protection Act had only looked into the aspect of the landfill area. The definition of the environmental assessment as it stands says that it should be a report where they have to look as several aspects. One such area that they have to look into is the renewable and non-renewable resources that is required for the project, which this environmental impact assessment has not looked into.

As it stands the Environmental Impact Assessment has only been done for the filled up area and therefore they have to do another EIA to determine the amount of sand they need to fill the reclaiming area and also from where this sand will be taken. That is a big issue as they have to get the sand from the offshore sand deposits and we are not sure if there is enough sand in these deposits. Further they also have to do a study to determine if by excavating this sand if it will have an impact on marine life which will directly have an impact on the livelihoods of the fisher folk. They will also have to assess the areas which will be affected and the number of fisher folk that will be affected and also for how long and how they plan to compensate these fisher folk.

All these aspects should have been assessed prior to them embarking on this project. But now they have not looked at these aspects and as far as they have only conducted an initial environmental report which is not a good thing.

Other non-renewable resource is stones, which has to be obtained from inland sources. According to the latest news they are going to obtain this requirement of gravel or stones from Kaduwela and it are usually obtained by breaking up rocks or hillocks and by breaking those from inland areas could have other environmental implications.

The EIA is based on the data which vary. There are further allegations that the report covers only 300 acres, whereas the port city expands to over 500 acres. The project is also deemed to create issues to marine biodiversity which will be impacted by the rock blasts as well as the large construction activities carried out. In addition to this, there is also a large amount of water needed for the construction on a daily basis, which amounts to around1,000 cubic meter of water per day. However where the water shall be provided also is remains unanswered.

Therefore what we find is that this so called EIA assessment they have done for the Colombo Port City

project is an incomplete document, which does not address the resources issues adequately.

The Coast Conservation ActNo. 57 of 1981Sri Lanka has legislated extensively to bring in a plethora of piecemeal legislations that address various aspects of environmental protection whilst establishing enforcement mechanisms therein. The Port City Development project which is entirely within the coastal zone requires approval under the Coast Conservation Act (CCA).

Under section 15 of the CCA 'No permit shall be issued by The Director cannot issue a permit for a proposed development activity which may have any adverse effect on the stability, productivity and environmental quality of the Coastal Zone'

Under Section 16 of the CCA it is required for an Environmental Impact Assessment to be conducted before the commencement of a project in the coastal zone. An IEA is carried out for projects that may produce significant environmental impacts

Furthermore, Section 24 of the CCA states that even in instances where permits may be issued, the occupation ofany part of the foreshore or bed of the sea lying within the Coastal Zone can only bepermitted for any period not exceeding three years after which the permit may or maynot be renewed.

An enormous quantity of rock in the form of large boulders and off shores and obtained by dredging the sea floor is required to construct the artificial offshore structure.

The extraction of such non-renewable resources are governed under Mines Mineral Act No.33 of 1992 and it should be queried whether mining permits have been issued for such extraction by the GwologicalSurvay and Mines Bureau (GSMB) and whether royalties and other fees collected as government revenue.

The construction of artificial structures including islands is governed by the United Nations Convention on the Law of the Sea (UNCLOS) Part VIII Regime of Islands.

However, since the artificial structure is connected to the sea, the provisions of Article 121 of UNCLOS may not apply.

The artificial offshore structure will be subject to Part XII of UNCLOS – Protection and Preservation of the Marine Environment Section 1 General Provisions Articles 192 to 196.

The balance 108 hectares will be handed over to Chinese company under a 99-year lease basis. The company, at the initial stage, owns only the seabed.

Granting approval for the project with a complete ownership of the seabed for a considerable period of time with a view of significantly and permanently altering the marine landscape was against the statutory obligations of the Coast Conservations Act which restricts the use and occupation of the seabed.

And also laws and regulations and the associated legal and judicial structure and systems of Sri Lanka should apply for the Port City project and the reclaimed sea area.

VI. HOW THE ECONOMIC DEVELOPMENT AND SUSTAINABLE DEVELOPMENT IS CONTRODICTED

In the port city project, more weight has been given to the economic development. Generally, in a project of this nature the economic development must be considered in par with sustainable development. Therefore a contradiction has befallen as no prominence is given since the inception of the project, to the concept of sustainable development which can be considered as an important element in here. That is the cause that the EIA hasn't been accurately prepared. If only any concurrent significance is given in the first place to the sustainable development same as the economic development, no contradiction gives rise to an issue and, also both of these should have had been equally balanced.

And another thing that should be reflected is thata State has no right to give any land which belongs to it for lease. What the State can do is to develop that land/property. A state has a duty to act as a public trustee towards its citizens, and in this occasion the State failed to act so. If a State utilizes its properties in this nature, no property will be ultimately left out, for the usage of the future generation. Because of this project, a massive damage is caused to the coastal area as well as the internal environment. Thereby we are depriving our future generations of enjoying the magnificence of the nature. That's why we state that, by proceeding with this project, a contradiction can occur between the economic development and sustainable development.

The only development that is effected from this project is the 'transpiration of new job opportunities'. And the income that is generated from the port city project goes to the account of China for 99 years. Therefore no specific economic development is to be happened to the benefit our country.

VII. CONCLUSION

The construction of the Port City project is not done according to the approved reports. Due to that the environment is gradually going too polluted. According to our view, in this project they have mainly focused on the economic development rather than environmental aspects in Sri Lanka. If the construction of the port city is done under the require reporting of the relevant authorities, the environment is protected as well as the economy will be developed. We recommended, Amend or Introduce new laws and regulations relating to port cities in Sri Lanka, Appoint a particular committee from the National Environment Authority to investigate the ongoing activities and effect to the environmental standards, Re-conduct the Environment Impact Assessment(EIA).

REFERENCES

[1978]The Constitution of the Democratic Socialist Republic Of Sri Lanka .Department Of Government Printing.

Ports of Helsinki, [2010] ESP0 Award on the Societal Integration of Ports: Ports of Helsinki.Seconf edition .Available from :http://www.portofhelsinki.fi/download/13834_espo_application.pdf[Accessed: 5 th June 2015].

Merk, O., Hilmola, O-P, Dubarle, P. (2012) The Competitiveness of Global Port-Cities: the Case of Helsinki", OECD Regional Development Working Papers, 2012/08, OECD Publishing : Available from :http://dx.doi.org/ 10.1787/5k92z70x5v7g-en [Accessed: 6 th June 2015]

Merk, O., Li, J. (2013) The Competitiveness of Global Port-Cities: the case of Hong Kong – China, OECD Regional Development Working Papers, 2013/16, OECD Publishing, Available from: http://dx.doi.org/10.1787/5k3wdkjtzp0w-en[Accessed: 6 th June 2015]

CILTSL. [2012] Port City Concept Of Colombo.(Online) Available from:http://blog.ciltsl.com/archives/2012/08/port-city-concept-for-colombo/ [Accessed: 2 th June 2015]

Prof Tull , M . (2006)The environmental impact of ports: an Australian case study. (Online) Available from:http://www.helsinki.fi/iehc2006/papers2/Tull.pdf [Accessed: 2 th May 2015]

Port City Helsinki . Available from:http://www.portofhelsinki.fi/environment/environment_effects[Acessed : 7 the June 2015]

Wijenayake ,V.[2015] Colombo Port City Project: A threat to sustainable development? [online] 03 th June Availablefrom:http://www.dailymirror.lk/65601/colombo-port-city-project-a-threat-to-sustainable-development- [Accessed: 4th June 2015].

Ground Views [2014] The Colombo Port City. Development Project [online] 29 th May . Available From :http://groundviews.org/2014/05/29/the-colombo-port-city-development-project/ [Accessed : 5 th March 2015]

Jayawardana. D [2015] Critical Analysis Of Colombo Port City Project. Mirror Of Buisness (online) 16thFebruary.Available from: http://www.dailymirror.lk/63749/critical-analyses-of-colombo-port-city-project [Accesses : 7 th June 2015]

(2015) Port City: Is it a priority for Sri Lanka at this juncture?. Daily Ft (Online)23th February 2015.Available from: http://www.ft.lk/2015/02/23/port-city-is-it-a-priority-for-sri-lanka-at-this-juncture/ (Access :15 th May 2015)
National Environmental (Amendment) Act, No. 56 of 1988

The Coast Conservation ActNo. 57 of 1981Sri Lanka

Mines Mineral Act No.33 of 1992

United Nations Convention on the Law of the Sea (UNCLOS) Part VIII

United Nations Convention on the Law of the Sea (UNCLOS)Part XII

Modern Imperialism: A Legal Insight to North-South Dimension in Global Governance

K Konasinghe
Department of Public and International Law, Faculty of Law, University of Colombo, Colombo 3, Sri Lanka
kokila_konasinghe@hotmail.com

Abstract- *This paper presents a critical reflection on institutional and governance structures of global governance in context of international legal framework. Reflecting a descriptive analysis of legal, political and historical approach in International Law making process, it illustrates the global political dimensions of North-South differences, which have been shaped by a sequence of historical events originating during the colonial period and extending up to the present. Global decision-making forums often deal with the unequal positions between the developed industrialised countries and the developing countries. However, when the institutional and structural basis of the contemporary international legal and political system was established in the 1940s, the creators of the present system did not consider North-South complexities to be a key consideration. Consequently, the South was not significantly represented in the establishment of post-World War Two governancestructures. A number of factors caused this omission including those Southern countries that had gained their independence were newcomers on the global scene and were still under the political and legal influence of their former colonial powers and the North was planning significant post-war economic and political reconstruction, hence,the priorities of its leaders had been to influence global governance structures and institutions to the greatest possible extent in their own favour. This paper argues that for all these reasons the current governing structures did not reflect Southern aspirations at the initial developmental stage. Since then, even though the South has made several attempts to voice its concerns, both individually and collectively, at the decision-making forums, a number of concerns are yet to be resolved. The findings of this paper are based primarily on a critical analysis of the literature, and the methodology embraces an interdisciplinary approach to International Law and international relations in order to establish a broader and more contemporary application of traditional international legal formats.*

Keywords *- Global Governance, North-South Conflict, International Legal Frameworks*

I. INTRODUCTION

The complex nature of the global governance system often acts in contradiction to the idea expressed in the above statement – all states are equal. Several instances illustrate the doubts expressed by developing countries regarding the equality of all states in global governance. For example, why, in 1965, did developing countries stress the importance of the "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty" and, in 1970, of the"Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations"? These initiatives, which had been intended to ensure the principles of sovereign equality and non-intervention, had been taken because of the excessive influence that had been exercised by developed countries over developing countries during the colonial past. (Anghie, 2005)Global decision-making forums often deal with the unequal positions between the developed industrialised countries (which will be called, for the purposes of this thesis, the North) and the developing countries (which will be called the South). However, when the institutional and structural basis of the contemporary international legal and political system was established in the 1940s, the creators of the present system did not consider North-South complexities to be a key consideration. Consequently, the South was not significantly represented in the establishment of post-World War Two governance structures. (Anand R.P., 1987) A number of factors caused this omission: (i) many Southern states were still under European colonial control, therefore they could not participate as sovereign nations; (ii) those Southern countries that had gained their independence were newcomers on the global scene and were still under the political and legal influence of their former colonial powers; (iii) the Southern countries‟ decision-making experiences was minimal; and (iv) the North was planning significant post-war economic and political reconstruction, hence, the priorities of its leaders had been to influence global governance structures and institutions to the greatest possible extent in their own favour. (Anghie

A., 1999) For all these reasons the current governing structures did not reflect Southern aspirations at the initial developmental stage. Since then, even though the South has made several attempts to voice its concerns, both individually and collectively, at the decision-making forums, anumber of concerns are yet to be resolved. This paper outlines the political, historical and international legal background against which the North-South debate about international law and global governance has been framed. The broad aim of this chapter will be to analyse the effects on the North-Southdimension of the international system of governance of a chain of global landmarkevents. It will start with the colonisation of Africa, Asia and South America, known today as the „Third World" or the „Global South", which has played a major role in dividing the world into „haves" and „have nots". The colonisation process established a wide political, economic, military and social gap between developing and developed worlds. The era following World War Two, which saw the escalation of the decolonisation process, marked an important turning point in the international system in every aspect andn inspired critical debate about the North-South dimension. The central theme of this chapter, therefore, will be the many institutional changes in international law, global politics and economy that took place during this period, since they are still dominant in contemporary political discourse.

III. THE NORTH-SOUTH DIMENSION

The elements of the North-South dimension have been developed over a significant period of time as part of the development of the international system. This chapter is mainlyconcerned with two stages of the historical evolution – (a) the beginning stage, which started with the colonization, by several European countries, of certain states situated south of the equator; and (b) the stage that followed the Second World War, which signalled the end of colonization and the establishment of global institutions. The chapter will not explore the evaluation of the North-South dimension as it extends to more contemporary issues, or, especially, environmental issues, since these themes will be dealt with in the following chapter. Here, the main focus will be on how the North-South dimension has been differently determined, historically, socially, politically, culturally and economically, within the countries of the South, and how those factors continue to influence their participation in global governance. This account, therefore, begins in these countries"

Colonial pasts. (Anand R., 2004)

A. Creating the North and the South dimensions in the context of

1) Colonialism

Signs of the division between the imperial North and colonized South became apparent with the European expansion during the fifteenth century. During this „Age of Empires", many critical events took place within the colonial territories that ultimately divided the world into the two divisions, recognised now in the international system as the „North" and the „South.[43] As Marian Miller states, "the South has been shaped by colonialism and imperialism" experiences which have left the South with distinctively different socio-economic characteristics from the North. (Miller M., 1995) Europeans took control of the other parts of the world in three different ways: (i) the occupation of vacant territory where no other state claimed authority, otherwise known as the *terra nullius* doctrine, which established the legitimate right to occupy a land through„discovery"; (ii) occupation by way of treaty between the colonial state and the local leaders[46], by which method many Asian and African states were brought under the European authority (Cassese A., 1986); and (iii) by war. Casper however, refers to Twiss"s reduction of these categories to two – „primitive" acquisitions, via discovery and settlement, and „derivative" acquisitions, via treaty or war. (Casper S., 2008).

Colonization is recognized as a major factor that has had a significant impact upon the partitioning the world into the „powerful" and the „powerless". Clive Ponting, quoting Letwein, the first German Governor, illustrates the nature of power dominance created in the context of colonialism: "Colonization is always inhumane. It must ultimately amount to an encroachment on the rights of the original inhabitants in favour of the intruders." He states further that the outcomes of colonialism were invisible, but that they heavily

influenced every aspect of the international system: „The Europeans also brought with them an innate sense of superiority, tinged with a strong degree of racism. Although some Europeans initiated some steps towards improving the life of the natives through medical and educational programmes, many undermined the local culture by forcing them to adopt European ways."

Throughout the colonisation process attempts were made to carve the western thoughts and civilization patterns into the so-called uncivilized peoples in the colonies. Anghie statesthat by 1914 virtually all the states in Asia, Africa and the Pacific became colonies under the authority of western nations, and that ultimately "these major European nations forced all these non-European peoples into a system of law that was fundamentally European and derived from European thoughts and experience". Anghie suggests that international law became a key tool for European colonial powers by way of, treaty, recognition,colonization, and special treaty – called a „protectorate agreement".

Another consequence of the colonial process that influenced the North-South dimension was an imbalance in political and social development. The historical process of takingpolitical and economic control over a large part of the world"s natural and human resourcesenabled the colonizing nations to firmly establish their positions in the international system. Thus the colonized Third World was forced to pay the price for First World achievements by continued poverty, lack of resources, lack of technology, lack of knowledge and, lack of recognition, and, most importantly, lack of power to influence the international system. It is within this broad context that the North-South dimension should be recognized today. During the colonial era six major factors can be recognised that have led to the North-South dimension.

2) Economic Empowerment

Before European expansion through colonisation, although different countries encountered similar problems in agriculture and trade, interactions between them was minimal due to the lack transportation and technology. With the development of industries and maritime technology, European states began to explore new world beyond their territories. The first concern of colonial nations, therefore, was strongly related to economic empowerment and the exploitation of their colonies" natural resources, where their immediate goal was to enrich their individual economies. Then, as these countries became more powerful, they created new patterns of development, from agricultural to the industrial, which led to the colonies becoming the main source of supply of raw materials and crops for the European market. (Ponting C., 1991)

B. The European Industrial Revolution

The European industrial revolution of the 17th and 18th centuries impacted powerfully ondecision-making patterns in the colonies. As Anand states, the needs and demands of thecolonial powers were largely responsible for the creation of their empires in Asia and Africa, leading to the critical situation whereby decision-making powers regarding economy and trade were denied to the local populace. Thereafter factories and plantation were developed, completely changing the way colonised countries had survived prior to their surrender; thus, most colonial economies were transformed into European-dependent Systems(Anand R.P., 1987)

C. Changes in Agricultural Practices

A particular example of how changes in agricultural practices affected a colonial country is Sri Lanka. When the British took power in 1796, the economy had been based on subsistence agriculture, which meant that the main source of agriculture was rice and grain.

However, under the British, the main focus of Sri Lankan agriculture changed from consumption to commercial production and trade, when coffee, tea and other commercial cultivation was introduced. Ultimately this rapidly cost Sri Lankan land, human resources and life styles, changes that have continued to this day, in that the export of tea is a key earner of foreign income. (Mazumdar, S. 1981)

Such wholesale transformations of agricultural sectors in the colonies created a dependency culture that continues to the present day, since, even after independence, developing countries have found it difficult to move ahead with their own agricultural systems, because such a large amount of their foreign income is based on supplying the European market. Consequently, the commercial agricultural system was developed at the expense of the South"s subsistence system. In this context, therefore, the agricultural patterns that emerged from the colonization process are further factors in the current North-South dimension of the international system. (Anand R.P.,1987)

D. Trade and Commerce

One of the key incentives for colonization was for colonial countries to enter other territories for trading and commercial purposes, a major part of which was managed by private companies, such as the British and Dutch East India Companies, which were vested with a great deal of power. As Anghie

explains, "Company charters granted them not merely the right to trade in particular areas, but also the right to make peace and war with natives and the power to coin money." The operation of international trade within theseThe territories, being beyond local control, meant that the general population of the colonies suffered from the absence of their own political and legal authority. The consequences ofmbecoming a colony, therefore, meant that native laws were no longer valid regarding trade and control of their own natural resources.

E. The introduction of European based administrative and legal systems

Another manifestation of the North-South divide was the introduction of European based administrative systems in colonised states. It is important to note that, up to the point of colonisation, some states already had civilised systems of governance, but as a result of colonisation, these native systems did not develop further. Also, by familiarising the locals to a European system of governance the rulers‟ task was made easier, since they could rule in a system familiar to them. The impact of this transference of powers is still visible in most former colonies. In some instances, though, formal government was totally alien, and these countries did not become states until after colonization. In such cases, rules were centralised to form administrative structures that were bound by European based legal formalities. (Lange M.K., 2004)

In general, the introduction of western style administrations, foreign to the native societies, completely changed the existing structures of governance, resulting in the implantation of Northern power structures in the political systems of their Southern colonies.

F. Religious and Cultural incursions

The impact of the colonial powers on colonies was not only confined to structures of governance. Religious and cultural changes played major roles in transforming the lives of the people living in the colonies. This process, which took place parallel to the introduction of a Christian/European education system, ultimately led to the growth of confusingly different cultural and religious identities within the various native communities. The whole structural and procedural changes within the administrative and education system established a Euro-based social and political structure within the colonial parts of the world.

As can be seen from the above, the whole structure of governance in the South has been designed according to European political and legal principles that have gradually changed the native governance system of those countries most affected by colonial regimes. Anghie observes this transformation thus: [the] sovereignty doctrine is understood as a stable and comprehensive set of ideas that was formulated in Europe and that extended inexorably and imperiously with empire into darkest Africa, the inscrutable Orient, and the far reaches of the Pacific, acquiring thecontrol over these territories and peoples and transforming them into European possession. The colonial era in world history highlights the power division between the developed and the developing world. The North-South debate is framed on the basis of the various differences created during the colonial times. The argument in this chapter, therefore, is that colonialism forged the world community into two main groups – colonial and colonising countries – which developed into the South and the North.

G. The importance of maintaining equity, fairness and justice in mitigating North-South inequalities in governance

This chapter has raised the argument about whether the global governance system guarantees both developed and developing states equal enjoyment based on principles of equity, fairness and justice. Its central argument has been that the global governancesystem cannot be considered to be a complete system of governance until it creates adequate mechanisms to ensure those principles in its decision making processes and procedures. Writing about the completeness of a legal system, Vaughan Lowe states,"[Only] when the elements of a legal system can be combined to build up a normative structure adequate for the needs of the society to which it applies, we may think of the legal system as being complete". Any governance system would not be complete unlessits subjects can enjoy both equal participation in decision-making *and* the fruits that the system generates.

Such an argument raises a critical question about the present global governance system, which is whether it has truly been able to provide adequate mechanisms and normative structures in order to safeguard the fundamental ideologies of equity, fairness and justice in practice. This thesis does not consider that an equal vote-casting system equates to equal participation, since equal representation in the decision making

process, as well as the outcome of a particular decision, should reflect every party‟s interest in the subject in question.

In this respect the interlinked concepts of justice, fairness and equity contribute to enrich the argument of inequality of North and South parties at global decision making forums. Justice, fairness and equity concepts are integral to any normative and procedural aspects of environmental decision making forum. Anand further emphasises the linkage between these three concepts in terms of environmental decision making process at the global level: I contend that procedural aspects of international policy-making are closely related to justice issues. How decisions are made and what voting procedures and decision-making structuresare adopted to formulate international environmental policies are questions that are crucial to a "just, fair and equitable" treaty, policy or law at the international level.

The concept of justice involves discussion of two main areas: procedural justice and distributive justice. Distributive justice is about addressing the inequitable social, economic and political burdens faced by certain groups of people, which often result from thedifferent levels of their development. For example, in the climate change debate, the level of social, economic and political burden to comply with the international obligations is largely dependent on each party‟s development capacity. The degree to which different states experience the effects of climate change or are able to carry out their obligations, depends on their level of development. Procedural justice is about addressing inequitable participation in the decision–making process as a result of different levels of development of different parties. For example, among some of the procedural injustices in the climate debate are the inability to conduct scientific research up to the level that of a developed country, and the inability to send the climate experts to the negotiation table due to lack of resources. Such procedural injustices prevent Southern states from participating as effectively as their Northern counterparts in the climate debate.

The concept of fairness involves considering on what grounds the rules of governance are formulated. Referring to Franck, Anand explains fairness is judged by two criteria. Firstly, fairness is decided by how rules distribute costs and benefits among its participants, and secondly, the process by which the rules are made and applied.

Concepts of equity are closely linked to the concepts of justice and fairness. Equitable decision making processes lead to laws and policies which distribute costs and benefits evenly among everybody affected by the decision making. In the climate debate, theeffects of the climate change are not evenly distributed among each state of the world.The ability to face the challenges created by climate change is also different according to the economic and political strength of each state.

As has been explained in the discussions about the North-South dimension in this chapter, principles of equity, fairness and justice should be considered in the wider context of equal recognition, capacities, distribution and participation of both North and South. If the final outcome of either a convention, a declaration or of any other regulation, does not represent the interests of every party concerned, then the whole system of governance will be destabilised. The heart of the argument of this thesis, therefore, is that the global governance agenda and global decision making process should represent the concerns of both North and South equally. The North-South debate regarding environmental negotiations provides many instances where decision-making powers have not been enjoyed equally by the world community. For instance, in the climate change debate, the South criticises the priority-setting that has given less importance to the South‟s concerns than to the North‟s. Theinequalities in science and research between the South and the North are a prime reason for the North‟s dominance of the priorities agenda in climate change negotiations, and this has created unfairness at the highest level of climate negotiations. As a consequence of these failures – and others described earlier in this chapter – to meet the primary principles of global governance, the South has voiced the need for "new orders" to be incorporated into global governance structures.

The fundamental ideologies of equality, justice and fairness should be interwoven in any system of governance that determines equal treatment to all its subjects; these concepts have been developed in line with the justice theory of Rawls, whose "A Theory of Justice" equates justice with fairness, which, he argues, should be the social contract at the base of a well-ordered society. Rawls‟s ideas on distributional justice also depend on a fair allocation of resources among diverse members of the society. (Kelly E., 2001), Many scholars later argued that defining justice solely on distributional principles is only a normative

approach to the concept, therefore, they have focused on addressing the process by identifying individual and social recognition as being key elements for attaining justice, since recognition, capabilities, distribution and participation are important points in any discussion about justice. (Schlosberg D., 2007)

Anand places justice issues into two categories: procedural justice and distributive justice. Procedural justice, which is the process adopted by the decision-making authority, assures the right to self-determination, equal participation, representation, respect and justice for all people regardless of their social, economic and political status. As Ebbesson explains,"the procedural element of justice is evident in the ways the global agreements are negotiated and debated", he further states that in order to achieve procedural justice it is necessary that all states can participate equally in the decision making process of international agreements. (Ebbesson J., 2009) Distributive justice, on the other hand, looks at the outcome of the decisions made, which includes all matters relating to inequitable distribution. In terms of environmental harm, distributive justice means the distribution of costs and measures for avoiding predicted harm. A good example of this was the interpretation of justice by both North and South during the several environmental negotiations leading to the "Montreal Protocol on Substances that Deplete the Ozone Layer" (Montreal Protocol), which acknowledged differentiated states" obligations to combat the depletion of ozone layer based on the principles of justice. (Mickelson K., 2009)

The concept of equality and justice in relation to rich and poor countries has failed to promote equality because it fails to narrow the gap between North and South, because, as Shelton states, the injustices of the past have proved disadvantageous to the South, especially in the area of trade. In the 1960s and „70s the concerns for equality and justice in global trading governance, Shelton goes on to say, "led newly independent and economically disadvantaged states to join in efforts to construct a „New International Economic Order", which would reconstruct international economic arrangements to achieve equitable distributions of global wealth." (Shelton D., 2009) She further explains that Article 29 of the "Charter of the Economic Rights and Duties of States", adopted by UNGA in 1974, states that the "seabed and its resources" are the common heritage of mankind, consequently provisions ought to be established to ensure that the natural global resources be equally shared by all states, with particular attention being given to the specific needs of developing countries.

The differences between the developing and the developed world are critical features in the debate about global governance. The assumption that „all states are equal" becomes dubious in light of the political and economic power gaps between North and South. For example, as Cassese points out, Article 27.3 of the UN Charter grants veto powers only to the permanent members of the Security Council, even though Article 2.1 proclaims sovereign equality for all members". Such power in the Security Council, therefore, explains the power politics currently underlying the global governance system that has created a major imbalance between North and South. Some authors argue that, given that only five states among nearly two hundred hold veto power in the Security Council the assertion that „all states are equal" is clearly untrue. Antonio Cassese"s view is that „the sovereign equality of all members of the United Nations, as a general guideline, is weakened by the veto power that has been specifically laid-down as a legal exception".

North-South debate explains many instances that these fundamental ideologies are not equally enjoyed by the world community. In the climate change debate the South criticises the priority setting of the Northern agenda that gives less importance to Southern immediate concerns over Northern climate concerns.[186] Inequality of the adequacy ofscience and research base between the South and the North is a main reason for this dominant authority in priority setting in climate change negotiations. This situation has created unfair position for the South at the highest level of climate negotiations. Unless the governing process and procedures follow equality, justice and fairness principles the international system remains imbalanced and incomplete.

III. CONCLUSION

The North-South dimension has played a key role in global decision-making processes and procedures during every period of the creation of the international governance system. A series of historical events have contributed to the North-South dimension that have affected how decisions have been made, on what principles they have been taken, how votes are recorded and who sits on the highest decision-making bodies. Southern countries have resisted, and

continue to resist, the global solutions presented with Northern agendas. The primary Southern demand is the genuine equality of states in political, economic, and social decision-making, which would ensure their right to be involved in global decision-making forums as equal partners to the North, thereby achieving the universal principles of equality, justice and fairness. As Najam states, "[…] „Southness" stems not just from a sense that the international system is ineffective in responding to Southern concerns, it grows out of the belief that the system is less than legitimate in terms of its commitment to Southern interests".

In conclusion, I quote Agarwal and Narain: "How can we visualize any kind of global management in a world so divided between the rich and the poor, the powerful and the powerless, which does not have a basic element of justice and equity?" The argument of this thesis is that this absence creates so many divisions between North and South that it has ultimately led to a serious imbalance in the system of global governance. This chapter has discussed the origination of the concept of the North-South dimension in context of global governance and how this has played a crucial role in the political, economic and social areas of the international system. It has explored how this concept takes on difference shapes, depending on changes to the overall global atmosphere at different times but notes however, that the actual problems that have been created as a result appear never to change. This thesis will show that, although they have been built into the structure of the global institutions, the principles of equality, justice and fairness, by their very absence have been very closely connected with divisions in the North-South dimension throughout the evolution of this divided system of world governance.

REFERENCES

Anand R.P., (2003) Family of Civilised States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation, *Journal of the History of International Law*, Volume 5, Number 1, pp:1-76

Anghie A. and Chimni B.S. (2003), Third World Approaches to International Law and Individual Responsibility in Internal Conflicts, *Chinese Journal of International Law*,, Volume 2, Number 1, pp.77- 103

Anghie A. (1999), Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law, *Harvard International Law Journal*, Volume 40, Number 1, pp: 1-71

Casper S. (2008),"Our Passion for Legality": international law and imperialism in late nineteenth- century Britain, *Review of International Studies*, Volume 34, pp:403-423

Lange M.K. (2004), British Colonial Legacies and Political Development, *World Development Issue*, Volume 6, pp.905-922

Payslian S.(1996), The United Nations and the Developing Countries in the 1990s, *University of DetroitMercy Law Review*, Volume 73, Number 3, pp: 525-549

Ponting C. (1991), *A Green History of the World: The Environment and the Collapse of GreatCivilizations*, Penguin Books Ltd

Shelton D. (2009), Describing the elephant: international justice and environmental law in *Environmental law and justice in context*, edited by Ebbesson J. and Okowa P., Cambridge University Press, pp:55-75

Schlosberg D. (2007), *Defining Environmental Justice*, Oxford University Press, p.3., Young I.M. (1990), *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press

BIOGRAPHY OF AUTHOR

Author is a Senior Lecturer in Law at the Department of Public and International Law-Faculty of Law, University of Colombo. Her research interests include North-South dimension in environmental governance, Non-state actor participation in international governance, Justice, equity and fairness issues in global environmental governance, International forest policies, Cultural relativism and universality of human rights. She has published several research articles and presented research papers in diverse disciplines at National and International level. The author has won her PhD from University of Keele, United Kingdom and successfully completed her LLM at Erasmus Law School, Rotterdam, Netherlands.

Identification of Non-State Armed Groups in Non-International Armed Conflicts: A Legal Analysis

K Jayasekera
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
kalyajayasekera@gmail.com

Abstract— *The globe was ravaged with heinous wars during the dawn of the 20th Century with World War I and II having caused millions of people throughout the world death, torture, imprisonment and destruction. Major participants placed their entire economic, industrial and scientific capabilities at the service of the war effort. International Humanitarian law is this regime of laws which originally dealt with armed conflicts. The subject of Non-State Armed Groups in context of armed conflicts is a less explored area of study, while importance of such studies are much pressing today, given the multitude of armed conflicts throughout the world. In this study, attention is given to find out a proper definition for non-state armed groups within non international armed conflicts while removing isolated terrorist attacks that may take place without an armed conflict situation and other non-state actors, within the purview of International Humanitarian law. The purpose of this research is to examine proper criteria to identify non-state armed groups. The study shall be done on basis of available primary sources including relevant legal text of Conventions, Additional Protocols, National policy papers and Codifications of customary international law and international norms and secondary sources will include books, articles and relevant internet sources. However, identification of non state armed groups and finding out proper definition raise several problems, as there are several armed groups called non-state actors, non-state armed groups, belligerents, liberation movements etc. that should be identified distinctly from each other. All written laws apply only to state parties to written laws, whereas non-state armed groups are not party to any treaty or convention or any written law. Therefore unwritten laws are applicable to non-state armed groups. Ultimately, aim of the research in formulating a proper legal definition for non-state armed groups is to make room for them to be brought before justice and make them accountable.*

Keywords *- Non-State Armed Groups, Non-International Armed Conflict, International Humanitarian Law*

I. INTRODUCTION

Non-state armed groups fight for different purposes: some fight for their racial freedom, some groups fight for their security. Some fight to protect their cast, race, religion, language and custom etc. Therefore non-state armed groups are based on ethnic, left-wing, and religious and other motivations. In many countries, there are armed groups fighting especially for separatism and for change of governments. These armed conflicts often lead to brutal massacres, assassinations, rapes, thefts, burglary and many other illegal activities. These conflicts may also take place in land, in sea or very rarely in the air.

First this study examines the definition of armed forces. Armed forces are mostly coming under the state armed groups. Those are defined by the international conventions and by the domestic level statutes. According to the Article 43 of Additional Protocol I(AP I) of Geneva Conventions the “armed forces” are defined as follows:

“43.1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict.

43.2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

43.3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.”

However, this Article 43 of AP I of the Geneva conventions is applicable to international armed conflict situations. Therefore the above definition of armed forces is applicable to high contracting parties of international armed conflicts. That means it is applicable to the state armed forces involved in international armed conflicts. According to the applicability of AP I of Geneva

Conventions, this definition of armed forces is not applicable to the non-international armed conflicts. In NIACs state armed groups and non-state armed groups take part. Anyhow, state armed groups will have all the characteristics of the above definition of armed forces. But the difficulty is applicability of this definition to the non-state armed groups. According to the Common Article 3 of the four Geneva Conventions of 1949 and Additional Protocol II (AP II) the non-international armed conflicts are only between states armed groups and non-state armed groups or between non-state armed groups.

Non-state armed groups generally fight against the government armed groups. These groups may have made a *de facto* government within the state and they may control part of the territory or the group of people. Therefore, for the identification of non-state armed groups, this article discusses the nature of the non-state armed groups and the historical development of the concept of non-state armed groups in the context of NIACs. For that purpose this Article gives attention to the difference between non-governmental organizations and NSAG in NIAC situations. Then it discusses the difference between the non-state actors such as rebels groups, insurgents, belligerency and national liberation movements and NSAG in NIAC situations. Further it gives attention to the differences between terrorist groups and NSAG in NIAC situations. Also it discusses the differences between transnational armed groups' attacks and the NSAG in NIAC situations. Finally the evolution of the NSAG in NIAC will be discussed. This includes definitions of the different authors and scholars to indentify NSAG in NIAC situations.

The study shall be done on the basis of the available primary sources including the relevant legal text of Conventions, Additional Protocols, National policy papers and Codifications of customary international law and international norms and the secondary sources will include books, articles and relevant internet sources.

II. DEFINITIONS OF NON-STATE ARMED GROUPS GIVEN BY DIFFERENT SCHOLARS

A. Nature of Non-State armed Groups

To apply the characteristics mentioned in Article 43 of AP I to the NSAG in NIAC, sometimes non-state armed groups wear specific uniforms to have specific recognition to their armed group. For an example the Liberation Tigers of Tamil Elam (L.T.T.E.) had a proper uniform/ dress code for their army. But Al-Qaida or Taliban armed groups do not have any specific dress code for their armed groups. Sometimes these non-state armed groups do not wear any specific dress and they roam like civilians but with arms. Therefore, it is hard to identify the non-state armed groups in the battle field as an armed group who are fighting against the government armed forces.

Not only that, non-state armed groups have commanders and other rank soldiers similar to the government armed groups. For example, the Syrian non-state armed groups and the Yugoslavian non-state armed groups have commanders in the conflicts situations. They also have training programmes for soldiers. Proper maps, targets, capturing areas, medical officers and all the preparations for the battle fields are with the non-state armed groups, as it is with the government armies. They are directly participating in the battle field in hostilities.

However, NSAG do not and cannot sign and ratify any international treaty. All these conventions or agreements or any other treaty have to be signed and ratified by the state and any other group cannot sign and ratify these instruments. Therefore applicability of the existing standards given by law for these non-state armed groups is problematic.

Because Article 43 of AP I is applicable only to the international armed conflict situations, this definition can not be used for the non-international armed conflict situations. But, customary international humanitarian laws are there for the identification of armed forces. This Article says that,the armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates. The definition in Article 43 of Additional Protocol I is now generally applied to all forms of armed groups. However, armed groups may be state armed groups or non-state armed groups. They belong to a party to an armed conflict and it must be determined whether they constitute armed forces. According to this argument, it is no longer necessary to distinguish between regular and irregular armed forces (state and non-state armed forces). So, all the armed groups who are fulfilling the conditions in Article 43 of Additional Protocol I can be identified as armed forces. Therefore NSAG also can be identified according to these characteristics.

B. Non-State Actors and Non-State Armed Groups

Relationship between non-state armed groups and non-state actors is not always easily distinguishable. All the non-state actors are not non-state armed groups. But some actors can be non-state armed groups. According to Rynaert (C. Rynaert, Non state Actors and International Humanitarian Law) the non-sate actors are not fighters under the normal circumstances and remain to be civilians. There are different categories of non-state actors (NSA). Those NSA are rebels, insurgents,

belligerents and national liberation movements. Therefore, now this study examines the relationship and difference between NSA and NSAG, especially in respect of rebels, insurgents and belligerents categories.

1) Rebels as non-state actor and non-state armed groups in NIAC

Rebels also resort to violence in the society. However they are typically involved in random and isolated acts of violence and hostilities against governments. Internationally, Al-Qaeda and Jama'at al-Jihad al-Islami are the well known rebels groups. All these groups are prohibited under the domestic law. Their acts come under the domestic law of their respective countries. Therefore rebellions are coming under the non-state actors and they are not coming under the non-state armed groups in non-international armed conflicts/civil war.

There is no proper separation/ distinction between non-state armed groups in NIAC in the name of rebels and non-state actors in the present world. Sometimes non-state actors can also be a non-state armed groups. Identification of non-state armed groups in non-international armed conflict situations in respect of rebel groups is very difficult in the present world. In "Re-thinking violence: States and Non-States Actors in conflict", Chenoweth states that Arab Rebellion is worthwhile due to its historic importance.

2) Insurgents as a non-state actor and non-state armed groups in NIAC

Insurgents also keep arms. They often tend to disturb civilians in their day today life. Ranbir Singh in his article "Insurgency and International Law & its legal consequences"discusses the defenses. He says that "Insurgency and International Law & its legal consequences" despite conflicting views as to the exact definition of 'insurgency' there exists consensus that insurgency, can develop onto belligerency. McDougal and Reisman (International Law Essay, New York: Foundation Press Inc,1981, at P. 522) are of the view that "one distinction lies in on the fact that the insurgent has not yet established a territorial base which involves effective control over the population. Kelson (Recognition in International Law, 35 A.J.I.L.605 (1941) at 616) thinks that insurgency supposes a civil war. Another term for insurgency is insurrection. It has been described as a war of citizens against the state for the purpose of obtaining the power in the whole or in part (Dhokalia, Civil Wars and International Law, 65 A.J.I.L. 219 (1971) at p. 255).

For example, I.R.A. in Northern Ireland, the J.K.L.F. in Kashmir, the Hizbul Mujahideen in Afghanistan, the L.T.T.E. in Sri Lanka, the Iranian backed insurgents in Iraq, the Nicaraguan rebels are few such insurgents. After evaluating these facts, it can be concluded that insurgents most often behave like belligerents.

3) *Belligerents as non-state actors and non-state armed groups*

Singh discusses "[b]elligerency, thus, denotes such a state of civil war in which there are two contenders for power who can be placed on a somewhat equal platform and there is a state of war and not just civil strife."An appropriate example of belligerency is the status of L.T.T.E. in Sri Lanka which controlled a significant part of the North and East of Sri Lanka and running a de facto parallel government there with a line of control existing between the L.T.T.E. controlled areas and the rest of Sri Lanka.

According to the nature of belligerency, Ranbir Singh writes, its recognition entails some additional consequences. Those are: the belligerents can have bilateral trade with the recognizing state, belligerents can have diplomatic relations with the recognizing state, belligerents can enter into treaties with the recognizing state and the recognized states become entities to sue in courts of the recognized state. In *U.S. v. Pink (*1942) the U.S Supreme Court laid down that Court shall decide the case of only those states which have been recognized by the U.S.

Therefore belligerents as non-state actors every time can be taken into the category of non-state armed groups in non-international armed conflict.

3) National Liberation Movements as non-state actors and non-state armed groups

These national liberation movements display the necessity to recognize national identity. Masses get together to fight against repression by government of their country and against discrimination of their national identities. Finally national liberation movements hope to decide on the secession from the territory. For example, L.T.T E. behaved like a national liberation movement. They tried to find freedom for Tamils in Sri Lanka in a Tamil Elam. Further, national liberation movements are using transnational help.

Therefore, all national liberation movements are not non-state armed groups in non-international armed conflict. But some National liberation movements behave like non-state armed groups in armed conflict. So it is hard to find the border line between national liberation

movements and non-state armed groups in internal armed conflicts.

The difference between non-state actors and Non-state armed groups in non-international armed conflict is blurred. Sometimes non-state actors are behaving individually. But, at times Non-state armed groups in internal armed conflict employ their unique techniques. Thus Non-state armed groups in non-international armed conflict have to be identified according to the situation and evidence.

4) Transnational Armed Groups and Non-State Armed Groups in Non-International Armed Conflict

Marco Sassoli states that "[t]he 'war' against the only readily identifiable transnational armed group – Al Qaeda – has met with considerable interest from public opinion, politicians, and scholars. Yet the fact remains that most armed conflicts are either clearly international or clearly internal. Such traditional conflicts continue to cause the overwhelming majority of war victims. International armed conflicts are fought between states (e.g., the United States and Iraq) or between a state and an armed group that can be associated with another state (e.g., the Taliban in 2001 to Afghanistan or, possibly, Hezbollah in 2006 to Lebanon). Internal armed conflicts are fought between a government and rebels, sometimes with the involvement of foreign governments and rebels (e.g., in the Congo), but essentially on the territory of one state (e.g., in the Sudan, Sri Lanka, and Colombia). While armed groups cause more than half of the suffering of war victims (the other half being the result of governmental action), most are not transnational, but traditional anti-governmental rebel groups" (Marco Sassoli, Transnational Armed Groups and International Law).

Therefore occasionally Armed Groups with traditional characteristics also act as Non-state armed groups in civil armed conflicts. In spite of that, there are differences too. Thus it is not always easy to find the involvement of Transnational Armed Groups with Non-state armed groups in non-international armed conflict.

III. EVOLUTION OF CONCEPT OF NON-STATE ARMED GROUPS IN NON-INTERNATIONAL ARMED CONFLICT

This part examines the starting point of the identification of NSAG in NIAC and how it came into present discussion. To these end definitions of different scholars, different institutions and different authors for the identification of NSAG in NIAC will be considered.

As discussed in the Introduction of this study, "Military Balance"(The International Institute for Strategic Studies, London in 2001/2002, cited by Gray D. Sosil, The law of Armed Conflict, Cambridge University Press, 2010) introduced the new identification elements to non-state armed groups in NIAC. In the same manner, in the article, Casten Stahn and Mohamed M. El Zeidy also recognized the phenomenon of proceedings carried out by any non-state armed groups. Rome Statute relating to complementarity and their drafting history also mentioned the new attributes of NSAG in NIAC. The International Criminal Tribunal for former Yugoslavia's (ICTY) jurisprudence developed five broad sets of factors to identify non-state armed groups in NIAC.

Furthermore, Arpita Anant Non-state Armed Groups in South Asia, Pentagon Security international press, 2012) refers the above definitions and states that criminal acts of non-international armed conflict situations must also be included in the definition of NSAG and such groups do necessarily act independent of the states. In addition, the author discusses about NSAG in south Asian region, ethnic motivations, left-wing motivations and religious motivations for NSAG. This author has given a social perspective of NSAG and according to that he has analyzed the NSAG in NIAC situations. This study examines the legal perspective of NSAG in NIAC. But to find legal definition for the NSAG, the social aspects must also be analyzed.

Liesbeth Zegveld discusses the accountability of armed opposition groups (NSAG in NIAC) (2002) according to the international law and it argued that according to the Normative Gap and the Accountability Gap NSAG are liable for their violations of IHL. In the concept of Normative gap author recognizes the legal restraint on armed opposition groups and substantive obligation of armed opposition groups. Legal restrains on NSAG are Common Article 3 and Additional Protocol II of Geneva Conventions, other rules of humanitarian law, human rights law and international criminal law. For the substantive obligations of NSAG author discussed the humane treatment of prisoners, protection of civilians and underdevelopment of law.

In the accountability gap concept the author discusses the accountability of group leaders and accountability of armed opposition groups. However the author has identified the NSAG as "operate in internal armed conflicts. These groups generally fight against government in power, in an effect to overthrow the existing government, or alternatively bring about the secession so as to set up a new state. The objective of these groups may also include the achievements of greater autonomy within the state concerned. In other situations, where the existing government has collapsed

or is unable to to intervene, armed groups fight among themselves in pursuit or political power."Thus, identification of NSAG in NIAC is very suitable to the present situation.

John Gravingholt, Claudia Hofmann and Stephan Klingebiel, discuss, "[n]on-state armed groups are not a new phenomenon in conflicts anywhere in the world. Civil wars and other intrastate violent conflicts, which by their nature are characterized by the participation of NSAGs on at least one side, have dominated warfare since the end of the Second World War, so much so that war between states has increasingly become the exception rather than the rule." This is a new approach to the issue of NSAGs and these scholars point out the enormous extent of NSAGs growth after the Second World War as a new phenomenon, to the extent that wars between states have become very rare.

Dennis Rodgers and Robert Muggah in "[g]angs as non-state armed groups: the Central America Case" gave attention to non-state armed groups and said that "Gangs are routinely excluded from theoretical and policy debates on "non-state armed groups" or NSAGs. Rather, the acronym tends to be reserved to clusters of individuals who comprise rebel opposition groups, guerrillas, localized militia, or civil defense and paramilitary forces. In other words, discussions of NSAGs are narrowly confined to groups operating in opposition to the state – often impelled to action by "greed" or "grievance" – and generally with a view to taking it over. Conceptualizations are thus embedded in a state-centric framework wherein the state is not just a key referent, but according to Alston, 'the indispensable and pivotal one around which all other entities revolve'. Consequently, efforts to engage and contain NSAGs tend to focus on their (il)legitimacy and the extent to which they can be made to comply to the prescribed norms and rules of state action.

It can be seen that very often the authors disuses the ground situation and applied the NSAG identification criteria to the situation. But at present, it needs common method to identify the NSAG in NIAC. At the same time, however, as other authors in this make clear, significant ambiguity persists concerning the conceptual parameters of the concept. Interpretations are frequently dependent as much on the circumstances and motivations of the observer as the (actual) interests and characteristics of the observed.

Tellingly, human rights scholars such as Clapham advocate for as broad a definition as possible including "every entity apart from states". Likewise, Alston (2005) includes "[a] host of entities ranging from rebel groups and terrorist organizations to religious associations, militant civil society organizations, private corporations and businesses and even some international agencies. Certain researchers have also focused on the environment(s) in which non-state armed groups operate, or else their attributed or imputed motives, in order to articulate coherent forms of classification." There are lots of identifications by several authors. But still it is unclear to identify the non-state armed groups in non-international armed conflict in present scenario.

After analyzing all the categories of non-state actors, NGOs, terrorist attacks and transnational armed group actors, NSAG in NIAC it can be observed that the scholars differ in this regard considerably, while a unanimity in regard to parameters is not arrived at. Thus, Article 43 of AP I for the definition of armed forces is a proper guidance to define all armed groups and according to that identification of the high contracting parties of armed groups is possible.

IV. CONCLUSION

Jeremy Harrington (2005, Has a Non-State Armed Group conducted a Revolution in Military Affairs? A case study of Al Qaida) identifies "[f]our categories of non-state armed groups: insurgents, terrorists, militias, and organized crime. He writes that the authors note several aspects that all armed groups have in common. They seek to challenge the power, authority, and legitimacy of the state, either by overthrowing the state's government, or by weakening or co-opting it. All armed groups use violence in pursuit of their aims, and this violence can take conventional or unconventional and asymmetric forms. Armed groups operate both locally and globally and, enabled by information age advances, are able to challenge their state opponents at home and abroad. Armed groups are not democratically based organizations and do not rely upon the rule of law to resolve disputes."These identification characteristics also depend on the situation. Different NSAGs are behaving in their own particular manner. The same incidents are not occurring all the time. Thus, identification of NSAG and make a definition to NSAG are very difficult in these contexts.

This study discussed different forms of non–state armed groups and their evolution. Various forms of non-state armed groups including freedom fighters, terrorist groups and state sponsored paramilitary groups, national liberation movements, insurgents, non-governmental organizations and transnational armed groups were

discussed to identify their unique characteristics so that a test of differentiating between armed groups in the context of internal civil armed conflicts can be found. This article then tried to identify the non-state armed groups in non-international armed conflict separate from the other non-state actors. However, though the internationally recognized definition for armed forces which is included in Article 43 of AP 1 of Geneva Conventions applies to international armed conflicts, a definition closely similar to the said definition can and should be used for the identification of NSAG in NIAC too. Thus, it is appropriate to conclude that even though a group may be armed, it may not be an armed group within the meaning of non-international armed conflict and their identification depends on the material conditions and the background evidence that should be seriously considered. Their liability is a question that completely depends on this identification.

ACKNOWLEDGEMENT

I confer my sincere gratitude to the Librarian of South Asian University, the Librarian of the Law Commission of India, the Librarian of the Colombo University and the Librarian of General Sir John Kotelawela Defence University for the kind support.

REFERENCES

The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (Geneva Convention i)

The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (Geneva Convention ii)

The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva Convention iii)

Protocol I relating to the Protection of Victims of International Armed Conflicts additional to the Geneva Conventions, 1977, http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/

Protocol II relating to the Protection of Victims of Non-International Armed Conflicts additional to the Geneva Conventions, 1977, http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/

Protocol III relating to the Adoption of an Additional Distinctive Emblem.additional to the Geneva Conventions, 2005, http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/

The Kampala Convention and obligations armed groups, <http://www.fmreview.org/non-state/Ridderbos.html #sthash.UWXbeXB8.dpuf

Bianchi A. and Naqvi Y. (2012), International Humanitarian Law and Terrorism, Hart Publishing

Ryngaert C.(2008), Non-state actors and international Humanitarian Law, Institute for International Law

Schabas W.A. (2010), The International Criminal Court: a commentary on the Rome Statute, Oxford University Press

Sivakumaran S. (2012), The Law of Non-international Armed conflict, Oxford University Press

Segal A. (2001), Punishing Violations of International Humanitarian Law at the national level, Published by International committee of Red Cross

ICRC, http://www.icrc.org/eng/who-we-are/index.jsp [June 10, 2015]

Rynaert C., Non state Actors and International Humanitarian Law, http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP146e.pdf**;** [June 10, 2015]

Scheckener U., Engaging Armed Non-State Groups in areas of Limited Statehood, http://www.sfb-governance.de/publikationen/sfbgov_wp/wp21/wp21.pdf?1325771253 ; [June 10, 2015]

Singh R., Insurgency and International Law & its legal consequences, http://www.manupatra.co.in/newsline/articles/Upload/9E421587-72AB-4936-9CB9-2A9ECA0E93EA.pdf; [June 10, 2015]

** This Article is an adaptation from the Author's Dissertation submitted for the Author's Masters Degree at the South Asian University, New Delhi.

BIOGRAPHY OF THE AUTHOR

The Author is a lecturer at Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka. She is having LL.M in International Law. She is an Attorney-at-Law of the Supreme Court of Sri Lanka. She has been teaching International Law for both undergraduates and Post-Graduates. She also teaches Jurisprudence, Legal Method, Environmental Law and International Criminal Law. She has published papers in research conferences. She is one of the co-ordinator in Master of Laws programme at the Faculty of Graduate Studies, KDU. She is an editor in "EDU PERFECT" Magazine in India.

Should We Punish Drug Abusers?: Reconsideration of Laws and National Polices of Sri Lanka

DP Aluthge
Department of Military Law, Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
aluthgedilantha@yahoo.com

Abstract— *Elimination of illegal drug usage has been placed as one of the important objectives in the criminal justice system of Sri Lanka. In order to outmatch this challenge, Sri Lanka has enacted and adopted various laws and policies such as Penal Code, National Authority on Tobacco and Alcohol Act, Poisons, Opium and Dangerous Drugs Ordinance, Drug Dependant Persons (Treatment and Rehabilitation) Act etc in addition to the Sri Lankan National Policy for the prevention and control of Drug Abuse. But the risk is holding true. Incarceration and recidivism rates of the drug offenders are still high. Therefore the researcher strives to make ultimate goal to overcome the issue by overturning the problem towards new dimension. Main objective of this study is to explore the issues relating to rehabilitating drug offenders, especially drug abusers and to find out a professional solution to rehabilitate and make them part of National development. They were recognized as patients or vulnerable and aggrieved group among other offenders, both in legal and sociological aspects. This research paper focuses on justifiability and fairness of punishing drug abusers while having more appropriate solutions. Paper expects to compare expenses of prisoners and rehabilitation costs. Tax payers should not be paying such high costs for drug abusers to be incarcerated when rehabilitation costs are significantly cheaper. Researcher adopts legal research methodology and it is based on a library research. The researcher adopts quantitative research method where it is appropriate to establish research objectives. Field research includes interviews and discussions with Magistrates, Prison officers and Officers in charge of correctional authorities and collecting data relating to this area. However, it is important to note that obtaining statistics relating to rehabilitation of offenders through either incarceration, community based correction or by referring to treatments was one of main difficulties that the author had to face in the completion of this study.*

Keywords— *Criminal Justice, Drug Abuse, Recidivism and Rehabilitation*

I. INTRODUCTION

This paper intends to discuss productive alternatives that can be adopted to rehabilitate drug abusers who would be reintegrated to the society effectively. Significant age category of the drug abusers is between year 20 to 40, which is considered as the golden young generation. Best part of the society have neglected the drug abusers and labelled them as offenders. No remedies available for reintegration of drug abusers even for judicial officers before the existing laws. Hence the drug abuser has to suffer alone as a matter of the remarkable failure of inability of law to distinguish the drug abuser from drug trafficker. This paper intends to pay fair attention towards self victimized innocent aggrieved party of drug abusers in order to accomplish the justice for them and regulate the social omission.

Moreover this study aims to explore the issues relating to rehabilitating drug abusers and to find out a professional solution to rehabilitate and take part them to the National development. They were recognized as patients or vulnerable and aggrieved group among other offenders, both in legal and sociological aspects.

The reason why for the reconviction and recidivism rates are being increased even though the drug abusers are constantly punished by law? is the research problem which discussed in this paper.

It should be noted that this research does not include the statistics relating to rehabilitation of offenders through either incarceration, community based correction or by referring to treatments.

II. HOW TO IDENTIFY DRUG ABUSERS

Two basic offenders can be seen in drug related crime scenario; Drug traffickers and Drug abusers. Since this study is mainly focused on in search of optional method of reintegration of drug abusers it is desirable to identify the difference between drug abuser and drug trafficker. Drug traffickers are not in a position to rehabilitate

because they are particular criminals who engaged with malicious activity which harmful to the entire society. Drug abuser becomes an offender due to possession and consumption of drugs. Since the drugs are banded intoxicants, they become offenders automatically.

Drug trafficking is a new offence introduced later to the poisons, opium, and dangerous drugs Act No. 13 of 1984. Trafficking is consisting with several offences; sell, give, procure, store, administer, transport, send, deliver or distribute. This new offence covers a wide range of activities in relation to handling of drugs and it involves doing an act of one of the kinds specified above, and should be conveying with the object of parting with possession to some other person. According to the Sec 2 of Misuse of Drugs Act of 1971 mere possession is not trafficking and some further step is needed to be brought to the definition of trafficking. There should be evidence of more than mere possession and it requires an element of illicit trading or dealing. The amount in possession should be a commercial quantity and more than the necessary supply for an addict. Court should consider first, whether the accused had the drug in possession, and then whether or not he had it for the purpose of trafficking. The further steps should be proved from inferences. There is a presumption that if a person possessed more than two grams of heroin it is done for trafficking. (Sec 15 of Misuse of Drugs Act of 1971)

In order to prove drug offences both physical (*Actus reus*) and mental element (*Mens rea*) should be proved. The physical element in a drug case could be proved by possession, sale and trafficking of drugs and the mental element could be proved by the intention knowledge, awareness and consciousness. Alleged offence should be proved that the accused had positive knowledge as to the identity, characteristics and the quality of the substance which he was dealing.

According to the legislative interpretation possession is "anything in the order, disposition, power, or control of a person is deemed to be in his possession". (Sec 2(2) of Poisons Opium and Dangerous Drugs Ordinance No. 17 of 1929)

For an instance many cases have been discussed of drug possession such as, *Saraswathie Vs. AG* (CA No.212/95 decided on 30.06.1999) *Rajapaksha Arachchige Malani vs. The AG* (CA 9/97 decided on 13.10.1998) *Warner Vs. Metropolitan Police Commissioner* (Criminal Appeal Reports Vol. 52 1968) *Siddick Vs. The Republic of Sri Lanka* (CA 2/2001) *Sumanawathie Perera Vs. AG* (1988 - 2 SLR 20) *Tansley Vs. Painter* (1969 – Crim LR 139 DC) are name to few.

III. THEORIES OF PUNISHMENT

The modern criminal law regimes have developed several theories of punishment, in response of crimes to punish the offenders with the most appropriate method. The many factors that influence judicial thought in sentencing are retribution, justice, deterrence, reformation and protection. Modern sentencing policy reflects a combination of several or all of these aims. Penal provisions leave a wide discretion to the trial judge to determine the exact sentence that is imposed.

Society has generally justified punishment for moral reasons, and these reasons are identified as aims of punishment. Throughout the history, people in different periods justified punishment differently. Summarizing those different justifications there are four main aims/objectives of punishment which could be treated as fundamental of the same. They are retribution, deterrence, incapacitation and rehabilitation. (Gobert James and Dine Janet, cases and Materials on Criminal Law, 1993, Blackstone Press Ltd, London, P. 2) These four main aims of punishment, each with variants and complexities, are known as theories of punishment.

Every judicial system imposes punishments on drug offenders in terms of rehabilitating them. however drug abuser is not an actual offender whom committed an offence against the society; those theories cannot be applicable against him. The theory of retribution is probably the most ancient theory of punishment. The main purpose of retributive theory of punishment is that the offender needs to be punished because of his/her commission of the crime. In case of a drug abuser it is not practicable to punish him for the main offence upon that theory since he has not act against anybody.

Existing penal system of Sri Lanka considers the revenge concept as aim of punishment, not as a reflection of revenge but as either a reflection of denunciation or reparation or just desert. It is clear that the punishment prescribed by the legislature in the Penal Code on the basis of crime is a reflection of the social denunciation or the disapproval towards the crime by the society. The traditional explanation of the function of criminal law is that the threat of punishment for violation of law is a deterrent which supposedly operates at three levels such

as general deterrence, individual deterrence and educative deterrence. (For general and individual deterrence – see, Clarkson C.M.V. Understanding Criminal Law, 1987, Fontana Press, Collins Publishing Group London, PP 180- 181. And for Educative Deterrence- Gross Hyman, a Theory of Criminal Justice, 1979, Oxford University Press London, P. 400). In case of a drug abuser educative deterrence can be executed. However the performance of educative deterrence is not practicable in most of prisons due to overcrowding.

The Sri Lankan judiciary has taken some progressive steps to justify the punishment of deterrence in recent times of the post independence era of Sri Lanka. As per the decided cases such as *Piyasena Vs. The Attorney General* (1986 SLR 388) and Chandradasa Vs. Liyanage Cyril (1984 2SLR 193) it was clear that deterrence was one of the main objectives of punishment in Sri Lanka. These two cases are evident that Sri Lanka clearly accepts general and individual deterrence as one of the prime objective of punishment.

Incapacitation is another important theory of punishment. In addition to capital punishment severe corporal punishments were adopted in ancient Sri Lanka to disable the offenders committing similar offences in the future. Mutilation was the commonest corporal punishment justified under the incapacitation theory during the monarchies time. Banishment was another reprehensive mode of incapacitation which was imposed for severe crimes in ancient Sri Lanka. Sending the offenders to jail was also adopted as a punishment under this theory. However incapacitation of the present penal system in Sri Lanka might be seen only in the death sentence, life imprisonment and long term imprisonment. Since the prisons are full of availability of drugs, that theory also not a possible solution for drug abuse other than segregating offender from the society.

Rehabilitation is also an accepted penal theory in Sri Lanka. Treatment to the offender or in other words make the offender a better person, capable of being – reintegrated in to society by improving his/her character was recognized even in the Monarchy's period. The present penal system also took several measures to introduce the rehabilitating the offender as an aim of punishment. Offenders aged between 18- 22 years are recognized as a separate category and are referred to open correctional centres such as training schools for youthful offenders called the Borstal Institutes and Open camps. Most probably minor drug offenders are sent to separate rehabilitation camps.

Therefore, it is clear that no point of punishing drug abusers without taking rehabilitating effort. Since the most of prisons are not capable enough to rehabilitate drug offenders properly, it is desirable to think of an optional punishment method for the betterment of each and every stakeholder. As per the views of the minor judiciary officials, Community based correction system is more appropriate solution to rehabilitate drug offenders while undergoing a punishment and without affecting to the prison population.

Since this research was basically based on empirical data several interviews had to be conducted with following stakeholders in order to gather information regarding existing judicial practice, punishment procedure, health effects of the drug abusing, rehabilitation system and their suggestions on reducing the rate of reconvictions of drug offenders.

Minor judiciary officials, Coordinators of the Government Rehabilitation Centres, responsible officers of volunteer Drug rehabilitation Authorities, Probation officers observing drug offenders, Prison officers dealt with rehabilitation programmes for drug offenders, Police officers engaged with arresting drug offenders in Police narcotic Bureau, officers of the national dangerous drugs control board were the main stakeholders of this research.

Apart from the interviews, following sources were used to collect data. Secondary data were collected by library researches. Apart from that referred books, periodicals, journals, thesis presented regarding correction and Reports and Records published by the responsible authorities such as Department of prison and Department of police.

Some Qualitative data like critics on present correction strategies and suggestions on rehabilitations were gathered by interviews, library research and via internet.

Quantitative Data such as timely records and the relevant statistics on recidivists and reconvictions of drug offenders published by the Department of Prison and Department of Police were gathered by respective sources. As well as the court records and records maintained by the rehabilitation centres were much helpful to analyze the comparative doctrine pertaining to rehabilitations.

Contemporary data were helpful to proving the hypothesis**.** Court records, prison records and records of rehabilitation centres emphasized the fact that most of drug offenders were reconvicts or recidivists.

Rehabilitation is not a local concept and it has make use of several other developed countries. Accordingly international standers and comparative mechanisms which have applied by developed countries such as Australia and USA were much helpful to improve suggestions for drafting local rehabilitation principles.

IV. RATIONALE OF PUNISHING VICTIMLESS OFFENDER

There are several conflicted doctrines among scholars on whether drug abusers should be punished or not. However it is clear that they should be rehabilitated even though punished as per the statutory provisions. Main problem of punishing is drug abuser is a particular victimless offender. Main victim of the cause of action is drug abuser himself.

Victimless crime is involved with an illegal action, but not directly violates or threatens the rights of any other individual. In these types of crimes, one or more persons commit a criminal offence without involving other persons. Prostitution and gambling are other crimes which don't have a victim apart from consuming drugs.

Committing victimless crimes is an issue in many countries and it has highly affected to increase the prison population. The rationale behind this is that drug use does not directly harm other people. Since the victimless nature of the drug abusing, it is not fair to punish them solely for the offence of consumption of drug. As per the doctrine of the sociological theory of punishments, whole society has a duty to correct the drug abusers and help them to reintegrate with the society again.

According to the clinical and sociological schools of thought, treatment of the offender was the principal aim of punishment. (Gomperz T., Greek thinker, Vol. III, 1905, John Murray, London, p. 251) The main objective of this concept is to make the offender a 'better person' capable of being re integrated in to society by improving the offender's character. According to the socio economic theory the crime was seen as a symptom of illness that could with the appropriate remedy, be cured. Under this theory an opportunity is provided for the state to take steps to reform offenders and so to control crime. The ultimate aim of the punishment is to make the offender re- adjust as a law abiding person and to reintegrate him in to the society.

V. DRUG RELATED OFFENCES AND PUNISHMENTS

It is important to identifying that what are drugs, before categorizing offences and punishments. Mainly drugs have identified in Sri Lankan law under Chapter V of the Poisons Opium and Dangerous Drugs Ordinance. Dangerous Drugs are defined and listed in groups A, B, C, D and E in part 1 of the Third Schedule. Since Heroin or the Brown sugar was appeared in Sri Lankan market for the first time in 1981, it was included for the legislature by the Amendment of No. 13 of 1984.

There are many interpretations for "Drugs". A drug is, in the broadest of terms, a chemical substance that has known biological effects on humans or other animals.

In pharmacology, a drug is "a chemical substance used in the treatment, cure, prevention, or diagnosis of disease or used to otherwise enhance physical or mental well-being. Drugs may be used for a limited duration, or on a regular basis for chronic disorders. (The American Heritage Science Dictionary)

As per the Sri Lankan legislature several offences have been stipulated regarding drugs in following statutes.

a) The Penal Code (Ordinance No. 2 of 1983) Chapter 14 which covers public health and safely)

b) The Cosmetics, Devices and Drugs Act (Act No. 27 of 1980, as amended by Act No. 38 of 1984) The Act regulates manufacture, sale, distribution, labeling and advertising of all commercial drugs.

c) The Ayurveda Act (Act No. 31 of 1961 as amended by Act No. 5 of 1962) entitles ayurvedic physicians to, obtain opium and ganja for manufacture of their medicinal preperations.

d) The Customs Ordinance (Ordinance 17 of 1869, imposes prohibitions and restrictions of both import and export of substans prohibited under the Poisons opium and Dengerous Drugs ordinance)

e) Drug Dependent Persons (Internal and Rehabilitation) (Act No 54 of 2007)

f) Conventions Against Illicit Trafficking in narcotic drugs and psychotropic substances (Act No. 1 of 2008)

The standard drug associated arrests are taking place for trafficking, sale and possession. Under the Poisons, Opium and Dangerous Drugs Ordinance acts considered crimes include possession consumption and manufacture of illicit drugs. It is also a crime to sell, give, obtain, procure, store, administer transport, send, deliver, distribute, traffic, import or export such drugs and aid or abet in the commission of such offences.

Sri Lankan legal system has implemented very few categories of punishments upon drug offenders. The penalties for drug offences have ranged from fines and mere rehabilitation sentences to death or life imprisonment. As per the views of the responsible officers of the minor judiciary most probably drug abusers are awarded fines and simple imprisonment sentences. Those who were unable to pay fines also again referred to jail terms. Further according to the reports submitted to the court by responsible officers court referred drug abusers to correctional centres or rehabilitation centres. As well as any other miner punishments such as suspended imprisonments, community based sentences and observational terms also can be imposed.

As per the Sec 78 of amendment of the principle enactment of the Poisons, Opium and Dangerous Drugs Act No. 13 of 1984, every person guilty of an offence for drugs can be imposed to a fine not less than one thousand rupees and not exceeding ten thousand rupees or to imprisonment of either description for a period not exceeding five years or to both such fine and imprisonment by a magistrate. And on the same grounds the High court can impose a fine not less than ten thousand rupees and not exceeding than twenty five thousand rupees and imprisonment of either description for a period not less than six months and not exceeding than five years or to both such fine and imprisonment.

As per the Section 54A and 54B of amendment of Poisons, Opium and Dangerous Drugs Act No. 13 of 1984, drug manufactures can be imposed sentences of life imprisonment or death. It accrues for manufacture of heroin, cocaine, morphine or opium and the trafficking, possessions, import or export of a minimum amount of 500 grams of opium, 3 grams morphine, 2 grams of cocaine or 2 grams of heroin. Less severe offences including the regulatory ones warrant sentences of fines or imprisonment, the amount of the fine or the length of imprisonment depend on the quantity of drug, the gravity of the offence and the courts having jurisdiction.

According to the views of the high authorities of the country though the drug abusers referred to rehabilitative corrections, drug traffickers should be severely punished. As per the 2010 United Nations report there are thirty countries have prescribed for death penalty by the legislation for drug-related offences. (http://www.hr-dp.org/files/Prof-Schabas-Death-Penalty-for-Drug-Offences) In the post- World War II period, China was the first and only country identified as having the death penalty for drugs. By the start of the last decade number of states that imposed the death penalty for drugs had risen to as high as thirty- six. (Hood R and Hoyle C (2008) The Death Penalty: A Worldwide Perspective. Oxford: Oxford University Press, p. 137.)

VI. DISCUSSION

Though the drug abusers are a certain parasite to the entire society they should not banished from the society. Therefore proper system of rehabilitation should be established while punishing under existing statutory provisions. prison system of every country plays a vital role in the criminal justice system, an effective function of this institutions is essential for both crime prevention and crime control for successful criminal justice system. But due to the overcrowding and other cohesive problems of the prisons they have been unable to executed rehabilitation techniques properly. Hence Sri Lankan criminal justice system has introduced community based correction as an optional method of rehabilitating drug offenders.

Even though the community based correction is functioning in the Sri Lanka still the reconviction rate of drug offenders has not reduced. As per the findings of the research there are several practical defects has revealed that not to reduce the reconviction rate of drug offenders. Mainly the courts do not have a proper faith in community based corrections. Furthermore the criminal justice authorities has not provided proper staff and affiliated facilities to execute community correctional methods. Other governmental organs doesn't have an inter connection with the department of community based corrections. Though the community based correction is there, expected result of rehabilitation has not achieved, due to defects of affiliated infrastructure and faith.

Each Country is facing same kind of issues on drug rehabilitation such as negative perception of the community to ex-drug offenders which affect to find a suitable job, lack of institutional collaboration and networking among criminal justice agencies, other competent agencies and organizations such as public health centres, welfare offices, child guidance centres, mental hospitals and so on, insufficient crisis intervention at community-based treatment and the aftercare stage, no proper parole, probation and aftercare system, no sufficient networking and community involvement, no enough basic training for both institutional and field services staff , lack of specific programmes for drug abusers in institutional facilities.

The recovery process of individual drug abusers has a dynamic and chronic attribute. There are many factors to be considered for effective prevention of drug abuse and treatment with in the community, as stated above. In order to achieve the same goal, any country need to develop and enhance the proper system, as it is a process that supervises and supports the drug abuser in institutional and community based treatment and provides aftercare.

VII. CONCLUSIONS AND RECOMMENDATION

Existing statutory provisions should be amended as to providing proper discretion to the Judiciary (judiciary with judicial activism plus judicial review) to impose community correction orders on drug offenders without inquiring their consent. As same as after arresting drug offenders have to wait considerable period until produce to the courts and even after starting the trials offenders get embarrassed due to delaying of government analysis reports and other formalities. Hence some drug abusers will have to stay a long period in remanded prisons and it will affect to deteriorate them again and again. Even they refer to community sentences, they will not rehabilitate well due to uncertainty of the correctional programmes.

Rehabilitation methods such as release on license, work release scheme, home leave should be strengthened and expand as much as possible. Opportunities should be given them to be employed in some selected places and a percentage of the wages should be allocated to particular welfare fund. Expanding the capacity of offenders with modern facilities would enable the offenders to conduct the rehabilitation process effectively.

Classification of offenders is another recommendation. When imposing community based sentences they should be categorized according to the offenses they have committed, and the supervisors should have a special training on criminal behaviours. During the period of sentence continuously they should be provided counseling or treatment programmes to change their mind set to become law abiding citizens thereby recognizing and giving up their unlawful, anti social or immoral activities.

Institutionalizing the proper aftercare service is the next recommendation which needs for an effective rehabilitation system.

Increasing the involvement of civil society in the rehabilitation process will cause to promote and strengthen the community based correction in Sri Lanka.

ACKNOWLEDGEMENT

Author is grateful to Mrs Jeewa Niriella (HOD Public and international Law – Faculty of Law, University of Colombo and Dr Thusitha Abeysekara (Senior Lecturer – Faculty of Law KDU) for their endless support in his research activities. Also, author is grateful to Dr Prathiba Mahanamahewa (Dean Faculty of Law – KDU) for his kind guidance in advanced legal research and encouraging inter-disciplinary research.

REFERENCES

Andrews D. A. et al, Does criminal Treatment Works? A Clinically relevant and Psychologically informed meta-analysis – 1990

Christopher T., Owenkamp Edward j. Latessa Paula Smith – Does Correctional Program quality really matter? The impact of adhering to the principles of effective intervention – University of Cincinnati – 2006

Clarkson CMV – Understanding Criminal Law, Fontana Press, Collins Publishing Group London – 1987

Hyman G– A Theory of criminal Justice, Oxford University Press London – 1979

Niriella J – International Journal of Comparative and Applied Criminal Justice 2013 – The Emergence of restorative justice in Sri Lanka : A Review Essay – School of Criminal Justice, Michigan State University – 2013

Niriiella J – Reintegration of the Offender : A Critical Review of punishment in Some aspects of Criminal Law in Sri Lanka – University of Colombo

John Braihwaite, Crime Shame and Reintegration, new York, Cambridge university Press – 1989

MC Murray Harvey L, High risk parolees in transition from institution to community life: Journal of Offender Rehabilitation, 1993

BIOGRAPHY OF AUTHOR

Author is Head of the Department-Military Law in the Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana. He holds LLM and LLB from University of Colombo and Post Graduate Diploma in Criminology and Criminal Justice from University of Sri Jayawardenapura. His research areas are Criminal Justice, Environmental law and Military Law.

A Legal Obligation to Report Child Sexual Abuse? - A Review of National and International Standards

N Mendis
Faculty of Law, University of Colombo, Colombo 3, Sri Lanka
nisharasdocs@gmail.com

Abstract *- Several revelations on child sexual abuse that shocked the public and gained media attention worldwide in recent years have highlighted an extremely serious social and legal issue. The scale of predatory paedophilia committed by certain persons in institutions such as the Catholic Church, BBC (Jimmy Savile) and Pennsylvania State University (Jerry Sandusky) have raised issues that go beyond criminal liability of individual perpetrators. Questions have been raised about the responsibility of the Vatican and other institutions, regarding long term failure to report such suspected criminal activities to child protection and law enforcement authorities. Criminal activities in these kinds of situations were often conducted on institution premises itself and at times with knowledge of persons in positions of authority, who nevertheless decided to deny protection to the child in favour of maintaining the institutional image, thereby protecting perpetrators from criminal investigation. The failure of such persons to act according to their conscience or moral responsibility to protect children from further rape and sexual abuse and to support their access to justice by reporting such abuse when brought to their attention, means we need to ask whether such duty should be made mandatory by law and failure to do so a punishable offence. This research analyses Sri Lankan law (including Penal Code Amendment Act no.16 of 2006) with a comparative study of legislation and policy in different jurisdictions with regard to civil or criminal liability for omission to report child rape or sexual abuse. International standards set by the Child Rights Convention and the recommendations of the Child Rights Committee in this regard (in particular CRC/C/VAT/CO/2 of 31st January 2014), will be critically analysed. Objectives of the research are to ascertain whether the legal system ought to protect the best interests of vulnerable children by placing a legal duty to report such abuse. Findings indicate an emerging responsibility upon States to establish clear rules, mechanisms and procedures for mandatory reporting of all suspected cases of child sexual abuse and exploitation to law enforcement authorities. This has been both a domestic response and part of international standard-setting.*

Keywords *- Reporting Child Sexual Abuse, Omission, Civil and/or Criminal Liability*

INTRODUCTION AND METHODOLOGY

It is a tragic feature of human society that child sexual abuse occurs far too often as a feature of family and social life. Today, as the unjust social stigma against the innocent victims of child sexual abuse is lessening, legal procedures are becoming more protective of victimsand the social condemnation is shifting more towards punishing the criminality of the actual (or alleged) perpetrators of the criminal acts, we are witnessing more and revelations of child sexual abuse in daily life and in the media. The unjust social stigma and the mental trauma of initiating and going through legal proceedings usually prevents child victims from revealing the abuse they are/were suffering (Herman, 2003)and it sometimes discourageseven caring adults from reporting incidents for fear of causing post-crime victimisation(also referred to as 'secondary victimisation' or 'double victimisation)of the child. This paper does not focus on the admittedly very real problems of negative societal, law enforcement and judicial attitudes which re-victimise a child in need of special protection. While much more progress must be made for more compassionate and civilized social attitudes and legal processes in the situation of sexually abused children, there are a few welcome developmentsoccurring in this area (see e.g. the use of video evidence in the case of child abuse cases to prevent further traumatization of child witnesses - S. 163(A) of the Evidence Ordinance (Amendment) Act No. 32 of 1990).

However, this paper focuses on another area which must be developed parallel with actions to change attitudes and legal procedure: the issue of the responsibility of reporting suspected abuse as a legal obligation, especially when the criminal acts take place on the premises of an institution which employs the alleged perpetrator and thus (sometimes inadvertently) also provides him with opportunity to carry out criminal acts.

This research is an analysis of legal standards in international conventions and domestic legislation. Sri

Lankan law - mainly focusing on the Penal Code Amendment Act no.16 of 2006 – will be compared with legislation and policy in other jurisdictions with regard to civil or criminal liability for the omission to report child rape or sexual abuse. The internationalstandards (the Child Rights Convention and the recommendations of the Child Rights Committee in this regard, in particular CRC/C/VAT/CO/2 of 31st January 2014), will be critically analysed. The objectives of the research are to ascertain to what extent international and domestic law have identified that the legal system ought to protect the best interests of vulnerable children by placing a legal duty to report such abuse.

III. THE JUSTIFICATION FOR MANDATORY REPORTING

Society and the criminal justice system are both so flawed that reporting may not lead to justice for the victims and prevention of child sexual abuse through deterrence (refraining from the criminal acts due to fear of legal consequences) or punishment (long term imprisonment of perpetrators). However, the lack of reporting will definitely allow for abusers to continue harming the victim and other victims in the future as well. This is obvious, and has been proven in recent incidents relating to Jimmy Savile and Jerry Sandusky.

Savile was a celebrity media personality (BBC presenter) and philanthropist who used his influential position,place of employment and access to charitable institutions to act as a sexual predator for several decades. A majority of his victims were under the age of 18, some identified victims were very small children at the time. After his death at the age of 85, new investigations were initiated as a result of a television programme on his alleged activities. The Metropolitan Police Child Abuse Investigation Command created 'Operation Yewtree' (currently 30 detectives) to investigate Savile and similar cases that had been ignored or covered up. Approximately 600 persons have come forward so far, 450 of the allegations concern Savile (Grey and Watt, 2013). As noted by the joint report on the Savile Investigation:

> Central to the many questions being posed by both his victims and others are why did it happen and why was it not noticed and stopped by police, health, education or social services professionals, people at the BBC or other media, parents or carers, politicians or even 'society in general'?
>
> (Grey and Watt, 2013)

It appears that as the police and internal investigations and reports are being completed, victims may take civil action against the institutions where his abuse occurred. There is also a question whether further laws are needed with regard to responding to sexual abuse (See UK Parliament, Commons Select Committee, 2012)

Jerry Sandusky was a former assistant football coach at Pennsylvania State University (usually referred to as Penn State).He was indicted by a Grand Jury for 52 counts against 10 young boys and in 2012 he was found guilty of 45 charges of sexual abuse and sentenced to a minimum of 30 years. His abuse had gone on forfour decades, often happening on the premises of the University, but this child abuse and rape was ignored or covered up by his employers, perhaps due to wanting to maintain the national prestige of the Penn State football programme. This included the incident in which coaching assistant Mike McQuearywitnessed the rape of a 10 year old child by Sandusky on the University premises in 2001 and reported it to Head Coach Joe Paterno(Grand Jury, Sandusky, 2001, p6; Klein and Tolson, 2015, p479). The allegations were finally proven in a court of law, which created the possibility of criminal charges and civil suits against his employers. Former Penn State President Graham Spanier and other officials (Vice president Gary Schultz and athletic director Tim Curley – Head football coach Joe Paterno died in 2012) are still awaiting trial on charges of empowering Sandusky's abuse by covering it up once they became aware of it and lying to investigators (Thompson, 2015; Freeh Report,2012). By 2013 Penn State had paid a total of $59.7 million in out-of-court settlements to 26 men who claimed that they were abused by Sandusky. As of April 2015, Penn State trustees agreed to settle with remaining uncompensated victims (Thompson, 2015).

The child abuse scandals that have rocked the Catholic Church from the Parish to Diocesan toVaticanlevels are common knowledge and particular examples are not necessary. There have been criminal and civil outcomes in different jurisdictions in some cases of abuse. This paper will look at the Vatican response to its international responsibilities, particularly in the case of failure in reporting child abuse to the proper investigative authorities (the police) and thereby permitting abusive or rapist clergymen to continue their activities for decades.

III. LEGAL STANDARDS RELATING TO OMMISSIONS

In all three types of situations abovementioned, the institution/employer not only (inadvertently) provided the opportunity and premises for the criminal act, but also failed to or decided not to inform the police once they became aware of the rape and sexual abuse and

thereby failed to protect the victims. This is clearly a terrible moral failure – what kind of people can decide to protect a (serial) child rapist at the expense of the innocence of children? How can they protect serial child rapist with the idea that their actions protect institutional honour and reputation? When voluntary standards of morality and conscience fail to compel the desired behaviour in society, legal consequences may compel persons to take action. Criminal or Civil liability for failure to report child abuse is thus required when society recognises its own tragic failure of moral action.

The *actusreus* and *mens rea* of criminal law is usually applied in the context of intentional or reckless or negligent wrongful actions. However, criminal law can also punish *omissions*– or failure to act when the law imposes a duty to act, thus causing harm.This duty can be imposed by statute, by contract or common law standards such as legal relationship (parents) or voluntary responsibility (to look after a vulnerable person e.g. *R v. Stone and Dobinson* 1977 2 All E.R 341). There is also a common law standard for 'duty arising from commission of a fault' – when a person creates an unlawful situation without *mens rea* but then recklessly fails to seek assistance to stop further damage. This liability has been described By Lord Diplockin the following manner:

> I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence (Lord Diplock in *R v Miller* 1983 2 AC 161, emphasis added).

In the above case, a vagrant was convicted of arson, although he did not intentionally light a fire but failed to put out a fire which he knew was caused accidently by lit cigarette he had dropped.

Laws which impose liability for omissions are sometimes referred to as 'Bad Samaritan Laws' (See further, Herring, 2014, p109) and are described as part of a "communitarian social philosophy" of individual-social relationships and social responsibility (Ashworth, 1989, p431). This is a reference to the Bible New Testament parable of the 'Good Samaritan' - the person who helps another who is in need, compared with those who walked past without helping(The Holy Bible, Luke 11:30-37). It is significant that the 'Good Samaritan' parable was a reply by Jesus to the 'lawyer' who asks him 'but who is my neighbour' in response to Jesus' statement that we must love our neighbour as we love ourselves.

There are both defenders and opponents of 'Good Samaritan' /'Bad Samaritan' laws: both would agree that there is a moral duty but the opponents argue that society should not legislatesuch a duty (Kleinig, 1986).

The legal scholars who argue against this standard being imposed as a legal responsibility, mainly do so because it is difficult to prove *mens rea* for an omission (not doing something) than actually doing something wrongful - but also because it perhaps ought to remain merely an issue of social condemnation or individual conscience and autonomy (See Dressler, 2000, 981-9). It is true that the extent to which a society would support the imposition of legal duty and punishment is based on the seriousness in which it views the alleged wrongdoing as something which should be punished. That is exactly why it is necessary to look at whether 'turning a blind eye' to child sexual abuse ought to be punishable by law instead of merely left to public/societal or individual conscience.

Failing to adhere to the moral commandment of 'love thy neighbour' can result in civil as well as criminal liability. This part of the parable was famously quoted by Lord Atkin in*Donoghue v Stevenson* (1932 AC 562) in what later became known as the 'neighbour test' in Scottish Law of Delict and English Tort law:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question[emphasis added].

In the case of reporting/failure to report child sexual abuse, it is clear that the child/children would be directly affected in that the abuse would continue if the abuser is not stopped and other children could become new victims. To what extent should the law allow a person to walk away without criminal or civil liability for such a moral failure? – this is the question that each legal jurisdiction needs to answer.

IV. SRI LANKAN LEGAL STANDARDS

Sri Lanka being a mixed legal system is nourished by both Delict and English Tort law. The duty of care is well-established in our law and could be the basis of claims in

cases of failure to report child abuse. It may not apply as a duty to complete strangers/passers-by as it is in the Bible story, since it is usually interpreted restrictively in the legal context. However, it will cover any persons who can be seen as owing a duty of care with regard to an abused child. Persons in charge of institutions for children (orphanages, schools) could easily fall within this category. The question is whether all citizens should have such a duty towards all children and whether liability for failing should be according to delict or criminal law.

In 2006, an Amendment to the Sri Lankan Penal Code inserted two new sections into the principal Enactment: Sections 286B and 286C. These sections create the following legal duties:

- "Duty of person providing service by computer to Prevent sexual abuse of a child".
- "Duty to inform of use of premises for child abuse".

In light of this new development - this paper will assess where the Sri Lankan law is positioned in terms of international standards on child rights and developments in other jurisdictions.

The standards of the Sri Lankan Penal Code are as follows. With regard to use of computers, Section 286B(1) states that a person who provides such a service "shall take all such steps as are necessary to ensure" that the facility is not used for the sexual abuse of a child. In a practical sense could mean actions such as blocking content relating to child pornography or tracking employee computer use to prevent transmission of such material. This anti-child pornography intent of Section 286B of the Sri Lankan Penal Code appears to be connected with the State obligation in Article 34(c) of the International Convention on the Rights of the Child (CRC, 1989), since it states as follows:

> State parties undertake to … take all appropriate national, bilateral and multilateral measures to prevent: …
> (c) The exploitative use of children in pornographic performances and materials.

This is a part of Article 34 of the CRC, which sets out …the state responsibility for protecting children from unlawful sexual activity, sexual coercion or exploitation, prostitution or child pornography.

The "person who provides a service by means of computer" (inserted Section 286B of the Penal Code) needs further clarification, since it is individual criminal responsibility and not institutional delictual responsibility which is being referred to. The standard of responsibility is very high for failure to take all necessary steps for prevention of sexual abuse of a child and the *mens rea* is unclearunder 286B(1). It is clearer for failure to report in 286B(2), since liability arises for if such a person as abovementioned

> "has knowledge" of a computer being used for the commission of "an act constituting an offence relating to the sexual abuse of a child",
> [emphasis added]

according to Section 286B(2), he/she

> "…shallforthwith inform the officer in charge of thenearest police station of such fact and give suchinformation as may be in his possession withregard to such act and the identity of the allegedoffender."

According to 286B(3), the punishment for contravening subsections (1) or (2) abovementioned could be imprisonment (either simple or rigorous) not exceeding two years or to a fine or both. The same punishment applies for any person who contravenes Section 286C.

Section 286C(1) relates to

> "any person who, having thecharge, care, control or possession of anypremises…"

The standard required is knowledgeof such premisesbeing used for an act of child abuse. The responsibility to inform the OIC of the nearest police station and the punishment for being convicted of failing to do so are identical to Section 265B.This appears to be a fairly wide definition and covers the responsibility of different levels of authority of a premises ("charge, care, control or possession") and covers child abuse by any employees, visitors or outsiders who are using the premises for the commission of such acts. Child abuse in 286C(1)is wider than sexual abuse and can also include other forms.

Section 286B(3) identifies a "child" as meaning a person under eighteen years of age. This is the same standard as the International Convention on the Rights of the Child (CRC, 1989), which Sri Lanka ratified on July 12, 1991, accepting the international obligations to protect children. Sri Lanka followed the ratification of the CRC with the Cabinet approved National Children's Charter and the establishment of the National Child Protection Authority in 1999. The following sections discuss whether the Sri Lankan standard of reporting of child abuse is similar to the CRC standard and other comparable jurisdictions.

V INTERNATIONAL STANDARDS ON REPORTING OF CHILD ABUSE TO RELEVANT AUTHORITIES

The CRC standard on reporting of child abuse can be found in Article 19. States have a responsibility under Article 19(1) to take all

> "…appropriate legislative, administrative, social and educational measures" to protect the child from all forms of abuse including sexual abuse."

Article 19(2) provides that such protective measures include

> "…effective procedures for…reporting… instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

This has been interpreted by the Committee on the Rights of the Child, and the Committee recommends that

> In every country, the reporting of instances, suspicion or risk of violence should, at a minimum, be required by professionals working directly with children (CRC, GC 13, 2011, para. 49, emphasis added)

Since such individuals may face risks in making such reports, it was added that there is a State obligation to protect legally obligated persons making such reports in good faith (CRC, General Comment No. 13, 2011).But the General Comment does not go further than this to include a legal obligation to report child abuse on all citizens when there is good faith belief that such abuse has occurred. But it is possible to have a higher standard in domestic jurisdictions, since this is only a minimum recommended standard.

State parties to the CRC also have a responsibility to make State reports to the Child Rights Committee (Committee) on their progress in implementing Child Rights in within their jurisdiction. The CRC General Comment No. 13 stated with regard to the requirements under the Convention that it "consolidates and specifies" the measures already discussed with State Parties regarding treaty-specific reporting guidelines in Documents CRC/C/58/Rev.2 and Corr.1; General Comment No. 8, para. 53 and it own prior concluding observations (CRC, GC 13, 2011, para. 9).State reports to the Committee on progress should include laws and other regulations taken to prohibit violence against children and to intervene appropriately when violence occurs.

An opportunity to further clarify the obligations under Article 19 came when the Holy See submitted its report to the Committee, as a State Party, in 2014. The Committee reminded the Holy See that the consequences of ratifying the CRC require implementing the Convention not only on the territory of the Vatican City State but also through individuals and institutions placed under its authority as the supreme power of the Catholic Church (CRC/C/VAT/CO/2 of 31st January 2014, para.8).

In paragraphs 43 and 44 of the Concluding Observations by the Committee noted the failure by the Catholic Church to report members found to have committed sexual abuse against children, allowing them to continue causing harm. It was also noted that in some instances penalties were imposed on clergy who denounced child abusers (by ostracizing, demoting, terminating) and congratulations made towards those who remained silent about the abuses. A Commission was created by the Catholic Church in December 2013 to deal with the allegations of abuse. The Committee made recommendations to make the Commission more participatory, transparent and public. Paragraph 44 "strongly urged the Holy See" to:

> (b) Immediately remove all known and suspected child sexual abusers from assignment and refer the matter to the relevant law enforcement authorities for investigation and prosecution purposes;
>
> (d) Amend Canon Law in order for child sexual abuse to be considered as crimes and not as "*delicts against the moral*" and repeal all provisions which may impose an obligation of silence on the victims and on all those that become aware of such crimes;
>
> (e) Establish clear rules, mechanisms and procedures for the mandatory reporting of all suspected cases of child sexual abuse and exploitation to law enforcement authorities;
>
> (f) Ensure that all priests, religious personnel and individuals working under the authority of the Holy See are made aware of their reporting obligations and of the fact that in case of conflict, these obligations prevail over Canon law provisions [emphasis added];

Thus, the question is whether the Committee in its response to the Holy See goes beyond the previously stated standard of requiring professional working directly with children to report violence. It appears that the standard suggested is on all those that become aware of such crimes – and directly to law enforcement authorities rather than only to employer/superior. This author believes that this latest standardis preferable over more limited definitions of responsibility. The Sri Lankan Penal Code standard in 286C is similar, although clearly

specific to care, control etc., of premisesand does not require a 'Good Samaritan' response when there is knowledge of the existence of child sexual abuse on the part of a random member of the public and/or in a public place not under care, control etc.

VI COMPARATIVE DOMESTIC AND REGIONAL STANDARDS

Generally speaking a mandatory reporting law is a duty imposed by statute either:

- on specified persons (mandated reporters) or
- on all citizens,

…to report suspected cases of child abuse to child welfare agencies.Mandated reporters are specific types of persons having a duty to report specific types of abuse that they would come across in the course of their work e.g. doctors, nurses, teachers and school authorities, child welfare officers, police etc.

The nature of the specific duty also varies according to different domestic jurisdictions. The earliest jurisdictions to include such laws were some states in the United States of America, Australia and Canada (Mathews and Kenny, 2008; Council of Europe, 2014). All US states have laws for mandated reporters and may also require 'any other persons' to report (18 States); while New Jersey and Wyoming have not listed any specific professionals but require all persons to report (US Children Bureau, 2013). Interestingly, some of the States which list the mandatory reporters also impose duties on persons such as commercial film or photograph processors; computer technicians; animal control or humane officers; members of the clergy; and faculty, administrators, athletics staff, and other employees and volunteers at institutions of higher learning, including public and private colleges and universities and vocational and technical schoolsto mandatorily report child abuse (US Children Bureau, 2013).

There are also 'institutional reporting standards' – which vary from State to State, with some having no specific institutional obligation. In some States staff members who suspect abuse must notify the Head of the institution first, who is the person required to report to the law enforcement and/or child protection authorities (US Children Bureau, 2013). In some other states the individual reporter must make the report to the appropriate authority first (e.g. police, child welfare) and then notify the institution that a report has been made (US Children Bureau, 2013).

The abovementioned Penn State/Sandusky example falls under Pennsylvania law, *23 Pa. Cons. Stat. § 6311*, which creates a duty to report suspected child abuse, including sexual abuse, by a person who comes into contact with children in the course of employment, if his/her employer has care or supervision of such children. The staff member's legal duty is to notify the person or persons in charge of the institution who then hasthe legal duty to report to Child Protective Services. This is why Mike McQueary was seen as discharging his legal duty (although questions on morality and conscience may continue), and why Graham Spanier, Gary Schultz and Tim Curley are facing criminal charges.

In Victoria, Australia, the duty is only on doctors, nurses, teachers and police and only if the child does not have a parent who is able and willing to protect the child (Matthews, 2014). Butthe Northern Territory, Australia requires allcitizens to report suspected child abuse according to their *Care and Protection of Children Act* and *Domestic and Family Violence Act* (see online: Northern Territory Department of Health and Families).

In Ireland there wereoriginally only policy guidelines (*2011 Children First: National Guidance for the Protection and Welfare of Children*), now followed by the*Children First Bill No. 30 of 2014*. Part 3 of the Bill identifies the duty as a duty applying to mandated persons listed in schedule 2 of the Bill:

> …where a mandated person knows, believes or has reasonable grounds to suspect, on basis of information that he or she has received, acquired or becomes aware of in the course of his or her employment or profession as such a mandated person (Section 11, emphasis added).

In the United Kingdom, the list is much shorter than in Ireland, with the duty to report confined to particular social workers, health professionals and the police. The Irish list of mandated persons includes 27 different categories of professionals, including clergy and 'pastoral care workers' – a necessary response to the institutional-based abuses of children by the Catholic Church of Ireland (See further, Yallop, 2010: The Report of the Commission on Child Sexual Abuse ('Ryan Report, Ireland) 2009). There may also be professional codes of conduct for teachers and medical staff in the United Kingdom, but these are not legally binding.Apparently both the United Kingdom and Germany had examined the question of introducing the general obligation on all persons to report and had decided against it (Council of Europe, 2014, p5).

Thus, even despite the urging of the Council of Europe, all European Countries do not yet have mandatory reporting

of child abuse. In a Draft Resolution adopted unanimously on 30 January 2014 by the Committee on Social Affairs, Health and Sustainable Development of the European Parliament, it was acknowledged that both voluntary and mandatory reporting laws have shortcomings, and the best interest of the child should be the primary focus and relevant recommendations were made (Council of Europe, 2014, paras 3-4 and 8). This is in addition to the obligations undertaken (if any) according to Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse for professionals to report child sexual abuse and which also "encourages" any person acting in good faith to report (CETS No. 201, "Lanzarote Convention", Article 12). Presently few countries have imposed a general legal obligation to report child sexual abuse e.g. Estonia and Sweden (Council of Europe, 2014, para.20).

VII CONCLUSIONS

Thus it can be seen that the legal duty to report child sexual abuse can vary according to jurisdiction, based on whether the standards

- consist of legally binding duty, policy or professional code of conduct
- applies to all adult citizens or only certain mandated persons
- andalso whether mandatory reporting based on 'reasonable suspicion' or 'knowledge' – and reporting in good faith is protected.

The moral responsibility to report child sexual abuse is at the very least, on all adults with regard to all children – thus it can be argued that the mandatory legal responsibility – and consequent criminal or civil liability – should be on all adults (over 18) to report in good faith to the relevant law enforcement and child protection authorities. This must be supported by protections for good faith reporters and include other adjustments to the laws and procedures to encourage the best outcome e.g. good faith reporting as an exception to defamation law, alongside child-friendly healthcare/forensic, legal and social services procedures etc.

Sri Lankan law appears to combine duty of careand knowledge as the standard, and is on track with international developments in terms of legal standards. There is still room to improve and perhaps there is a need for a single clear statute on this rather than an overlooked and non-implemented Penal Code insertion. Comparison with best practices and further development of the Sri Lankan legal and child protection laws and procedures ought to be the subject of more research and investigation. There are also other related areas such as public knowledge of this responsibility and both police investigation and child protection training - that should go hand in hand for the law to be effective. Practical implementation is something that requires the co-operation of all relevant child protection authorities as well the support of the general public.

Introducing mandatory reporting of child abuse and consequent criminal and/or civil liability for failure to report is not like waving a magic wand that can save children from abuse including sexual abuse or provide them with justice when they have been violated. There are many other areas where society must progress and civilize itself, in terms of attitudes, institutions and social welfare and legal frameworks. Introducing mandatory reporting obligations on all citizens is just one of the many steps that may need to be taken.

ACKNOWLEDGMENT

I am grateful to Mrs. JeevaNiriella, Senior Lecturer in Criminal Law, Faculty of Law, University of Colombo for her valuable comments during discussions with her on this research topic. I must also acknowledge the courageous and moral actions of my former students at the Faculty of Law, University of Colombo, for an incident where they immediately informed the police of a situation of suspected child abuse. Their actions were the inspiration to write this paper.

REFERENCES

Ashworth, A., 'The Scope of Criminal Liability for Omission's, 1989, 105 Law Quarterly Review 431.

Committee on the Rights of the Child, 'General comment No. 13 (2011): The right of the child to freedom from all forms of violence', CRC/C/GC/13

CRC, 'Concluding observations on the second periodic report of the Holy See', CRC/C/VAT/CO/2 of 31st January 2014.

Dresssler, J., 'Some Brief Thoughts (Mostly Negative) about 'Bad Samaritan' Law', (2000) Santa Clara Law Review, 971 at 981-2

Freeh, Louis, 'Report of the Special Investigative Counsel Regarding the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky', July 2012. p. 14-15, available online at: http://media.pennlive.com/midstate_impact/other/REPORT_FINAL_071212.pdf.

Grand Jury Report, Pennsylvania, (2011), *Indictment against Jerry Sandusky*, available online at: http://cbschicago.files.wordpress.com/2011/11/sandusky-grand-jury-presentment.pdf.

Gray, David (Detective Superintendent, MPS) Peter Watt (NSPCC), *'Giving Victims a Voice': A Joint Metropolitan Police (MPS) and (National Society for the Prevention of Cruelty to Children (NSPCC) Report into allegations of sexual abuse made against Jimmy Savile under Operation Yewtree*, January 2013, available online at: http://www.nspcc.org.uk/globalassets/documents/research-reports/yewtree-report-giving-victims-voice-jimmy-savile.pdf.

Herman, J. L. 'The mental health of crime victims: Impact of legal intervention', Journal of Traumatic Stress, 16(2), 159–166, 2003.

Herring, Jonathan,*Criminal Law: Text, Cases, and Materials,* Oxford University Press, 2014.

Klein,Jennifer L. & Danielle Tolson,'Wrangling Rumors of Corruption: Institutional Neutralization of the Jerry Sandusky Scandal at Penn State University', (2015) Journal of Human Behavior in the Social Environment, 25:5, 477-486

Kleinig John, 'Criminal Liability For Failures To Act', 1986, Law and Contemporary Problems, Vol. 49: No. 3, 161.

Mathews, Ben and Donald C. BrossEds, 'Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect', Vol. 4 of Child Maltreatment, Springer, 2015.

Mathews, Ben and Kenny, Maureen, 'Mandatory reporting legislation in the USA, Canada and Australia: a cross-jurisdictional review of key features, differences and issues', (2008) Child Maltreatment 13(1):pp. 50-63.

Mathews, Ben, Mandatory Reporting Laws and Identification of Child Abuse and Neglect: Consideration of Differential Maltreatment Types, and a Cross-Jurisdictional Analysis of Child Sexual Abuse Reports, Social Science, 2014, *3*, 460-482 (Special Issue Contemporary Developments in Child Protection).

Northern Territory Department of Health and Families, available online at:http://remotehealthatlas.nt.gov.au/mandatory_reporting_overview.pdf.

Thompson, Charles, 'Penn State board acts to settle other outstanding Jerry Sandusky claims, April 9, 2015, http://www.pennlive.com/midstate/index.ssf/2015/04/penn_state_board_acts_to_settl.html

Parliamentary Assembly of the Council of Europe - Committee on Social Affairs, Health and Sustainable Development (Rapporteur: Mr ValeriuGhiletchi) (2014), 'Report: Increasing the reporting of suspected sexual abuse of children', Doc. 13430, 19 February 2014 (Draft resolution adopted unanimously by the Committee on 30 January 2014), available online at http://www.assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=20525&Language=EN.

UK Parliament, Commons Select Committee, 'Evidence on the BBC's response to the Jimmy Savile case – Questions to George Entwistle, the Director-General of the BBC', 23.11.2012, video available online at: http://www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/news/121023-bbc-and-js-ev/

United States, Children Bureau, 'Mandatory Reporters of Child Abuse and Neglect:State Statutes Current Through November' 2013, available online at: https://www.childwelfare.gov/pubPDFs/manda.pdf.

Yallop, David *Beyond Belief: The Catholic Church and the Child Abuse Scandal, Constable, 2010 [see extract online http://churchandstate.org.uk/2013/05/child-abuse-scandal-how-the-irish-government-protected-the-catholic-church/]*

BIOGRAPHY OF AUTHOR

Nishara Mendis is a lecturer in the Faculty of Law, University of Colombo, Sri Lanka, where she currently teaches International Law topics for undergraduates and Human Rights topics at the Postgraduate level. Her research interests are in Public International Law and related areas including Human Rights (especially economic and social rights), International Trade law, Humanitarian Law, Environmental Law, International Criminal Law and Law of the Sea. She received her LL.B (Hons, First Class) from the University of Colombo and LL.M from Yale Law School. She has also completed her PhD research at Maastricht University, The Netherlands.

One Up for Statutory Interpretation and Two Down for Separation of Powers

S Bulathwela and S Bulathwela[#]
169/B, Dalupotha, Negombo, Sri Lanka
[#]saumyabulathwela@ymail.com

Abstract— *The research aims to assess the impact of applying the rules of interpretation on the doctrine of separation of powers. The question is whether the judiciary performs its function of statutory interpretation as prescribed by the law or exceeds its legal limits relying on the context. Therefore, this study attempts to explore the link between the political and constitutional concept of separation of powers and the judicial approach of applying the rules of statutory interpretation. Furthermore, implications of concepts such as constitutionalism and parliamentary sovereignty would be concerned in establishing such position. Moreover, this would employ qualitative analysis of primary data and secondary data. Primary data would include statutes, case laws, and secondary data would include text books and journal articles. As widely accepted, doctrine of separation of powers is concerned with three main powers of governance as exercised by separate and independent bodies. Although one institution could have a check over the other, overwhelming influence is unpermitted since it leads to a violation of the said doctrine. The legislature is assigned the task of passing statutes while the judiciary is entrusted with interpreting them in order to arrive at a determination. Hence, the judges engage in statutory interpretation under the purview of four rules; the literal rule, the golden rule, the mischief rule and the purposive rule. The impact of the said rules on separation of powers differs according to their application. Thereby, the judges in different jurisdictions have been criticized for violating the said doctrine in applying the rules of interpretation in line with their own subjective levels of technicality and flexibility. Therefore, the judges are expected to be rational in deciding cases. It could be submitted that the functional value of statutory interpretation is protected as long as separation of powers is upheld and specific circumstances are taken into consideration to achieve justice.*

Keywords— *Statutory Interpretation, Separation of Powers, Constitutionalism*

I. INTRODUCTION

Judges incline to establish the link between judicial functions and political concepts when arriving at just decisions. Thus, the significance of statutory interpretation as a judicial function is to be reviewed with regard to its impact on the doctrine of separation of powers. Aristotle noted that the three elementary functions that are required for the organization of any state should be carried out by three separate organs under the concept of separation of powers. Hence, it follows that each body is vested with separate and independent powers, so that powers of one branch are not in conflict with the powers associated with the other branches[127]However, it seems that there are instances where statutory interpretation by the judiciary and separation of powers are in conflict. This is mainly with regard to the purposive rule of interpretation which is of a more flexible approach. Thereby, the application of different rules of interpretation by judges would decide whether separation of powers is upheld or violated. At first instance, it's important to know what is meant by interpretation of statutes. Statutory interpretation is simply referred to as the process by which the courts determine the meaning of a statutory provision for the purpose of applying it to the situation before them.[128] It implies that interpretation gives effect to the intention of Parliament by which the statute is passed, thus parliamentary sovereignty is assured through statutory interpretation. In a country based on constitutional supremacy, the constitution sets out the framework for the governance of a country. Governing requires the exercise of powers such as the legislative, the executive and the judicial powers[129] identified under the notion of separation of powers. In such instance, the judiciary has a legal obligation to comply with the constitution in performing their function of construing statutes. Therefore, it could be submitted that statutory interpretation is variable according to the political

[127]Montesquieu, B. (1948) *Sprit of Laws*, Newvell edn., France, Chatellain:.

[128]Bell, J. & Engle, G. (2005) *Cross Statutory interpretation*, 3rd edn, New York: Oxford University Press, p.34.

[129] The Constitution of Sri Lanka 1978, Art. 4

background of a particular country, whether having parliamentary sovereignty or constitutional supremacy. Therefore, the research aims at analysing the judicial approach of statutory interpretation in certain jurisdictions and its effect on separation of powers.

II. METHODOLOGY AND EXPERIMENTAL DESIGN

The research would employ qualitative analysis of primary data such as statutes, case laws and secondary data of text books, journal articles. Principally, this would be a case law based analysis since judges engage in statutory interpretation when a matter is presented before them to be determined. In line with that, the study attempts to engage in a comparative analysis on the Common law and Sri Lankan context. Furthermore, the Sri Lankan Constitution would be referred as it is the main source of law in a Constitutional sovereign country as opposed to Parliamentary sovereignty in England. Therefore, the discussion would be grounded on different approaches of statutory interpretation identified in these two jurisdictions.

III.RESULTS

It was found that application of the literal rule upholds the doctrine of separation of powers extensively whereas the application of the purposive rule is criticized for violating the said doctrine in certain circumstances. However, the former is engaged in ensuring the rule of law while the latter is concerned with serving the needs of the public and thereby achieving justice. In addition, the golden rule and the mischief rule are likely to protect the separation of powers as they are only adaptable in the settings of preventing absurdity and ambiguity. Therefore, it is established that the purposive construction immensely affects separation of powers than other three rules of statutory interpretation although it is able to meet the needs of the modern welfare state.

IV. DISCUSSION

Interpretation is only appropriate to statutes when there is a dispute about the meaning of a statuary word. If the words of a statute are clear and unambiguous it is the function of a Court of law to give effect thereto. However, if they are unclear or ambiguous or doubtful the judges do not stop at the words of the section. They call for help in every direction open to them. They look at the statute as a whole. They look at the social conditions which gave rise to it. They look at the mischief which it was passed to remedy. By this means they clear up many things which would be unclear or ambiguous or doubtful and give effect to the spirit of statutory words.[130]

A. Rules of Construction

The rule in law when construing a statute is to give the plain, literal and grammatical meaning of its words. Because, it's believed that the intention of parliament is expressed through the words of the statute. This is primarily identified as 'the literal rule' of interpretation. However, the primary meaning of a word varies in its setting or context and with the subject matter to which it is applied. The primary rule of construction may be deviated from only in exceptional circumstances to avoid absurdity and resolve ambiguity. When it would lead to absurdity or a result which is 'unjust, unreasonable or inconsistent with other provisions 'the golden rule' as expounded by Lord Wensleydale in the case of *Grey v Pearson*[131] may be used and the language modified. On the other hand when ambiguity is present 'the mischief rule' as expounded in *Haydon's case* may be employed. This rule permits an examination of the historical background for the statute from which the purpose of the legislation can be inferred and the words are then read in the light of that purpose. The purposive approach requires that interpretation should not depend exclusively on the literal meaning of words according to grammatical analysis. It indicates that the context of the words of a statute becomes relevant only when ambiguity or absurdity flow from the words' ordinary grammatical meaning.[132] In such occasions, the judiciary tends to fill in the lacuna of the law which parliament has left. This flexibility could be seen in the application of 'the purposive rule'. Early there was a tendency among some judges to over-emphasise a narrow version of the literal rule and refused to go beyond the meaning of a statutory provision in the light of its immediate and obvious context.[133]However, later it was proposed that judges should adopt a purposive approach to the construction of statutes. Moreover, the interpreter must endeavour to infer the design or purpose which lies behind the

[130] Denning, LJ, *Statutory interpretation again to the fore*, p.98.

[131] [1857] 6 HL CAS 61, 106

[132] Devenish, G.E. (1992) *Interpretation of Statutes,* p.28.

[133] *The Interpretation of Statutes* (Law Com no 21; Scottish Law Com no 11) para 80 (c)

legislation.[134] Lord Denning was of the opinion that the approach of the courts should be emulated because 'when they come upon a situation which is to their minds within the spirit, but not the letter of the legislation, they solve the problem by looking at the design and purpose of the legislation at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect.'[135] In *Carter v Bradbeer*[136] Lord Diplock states '…I'm not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used which would lead to results clearly defeat the purposes of the Act…'One aspect of interpretation rule is that the interpreter should treat the express words of the enactment as illuminated by consideration of its context or setting. Because the words are not deployed in a vacuum. Rather, as Steyn has said, "in law, context is everything".[137] The overall context of the Act provides the colour and background to the words used, and thus helps the interpreter to arrive at the meaning intended by Parliament.[138] Therefore, it seems that intention of parliament is an essential element of statutory interpretation where the court looks into, in performing their function of interpreting statutes. Referring to the parliamentary materials in seeking out such intention was initially identified in the case of *Pepper* v *Hart*.[139] Lord Brown observed 'the exclusionary rule should be relaxed so as to permit reference to parliamentary materials where legislation is ambiguous or obscure, or leads to an absurdity.'[140] However, later this approach was criticized on the ground that what is said in Parliament is manifestly unreliable as a guide to the legal meaning of an enactment.[141] Farewell LJ said of reference to parliamentary debates to interpret legislation 'would be quite untrustworthy'.[142] In *Black-Clawson International Ltd* v *Papierwerke Waldhof- Aschaffenburg AG* Lord Reid said,[143] 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.' The remark is somewhat cryptic, but it does point to the fact that the intention to be attributed to the legislator is to be determined from the objective words used, rather than from any subjective intentions which were not expressed in the text.[144] Thus, statutory interpretation gives effect to the parliamentary sovereignty as the judiciary must comply with what parliament has intended. In that sense, the legislature stands above the other two branches of government. However, in contrast constitutional sovereignty in Sri Lanka strikes a balance between powers of government as prescribed by the supreme law of the land. Furthermore, it governs functions of each institution according to the Constitution. Thereby, the application of interpretation rules must give effect either to parliamentary sovereignty or constitutional supremacy in construing statutes.

B. The effect of statutory interpretation rules on separation of powers

Cross comments that 'the essential rule is that words should generally be given the meaning which the normal speaker of the English language would understand them to bear in the context in which they were used'. This is the literal or ordinary meaning rule.[145] Thus words should be given their ordinary and grammatical meaning as the first step in the process of interpretation.[146] Although it is believed that the literal methodology ensures certainty of the law, its application does not necessarily lead to legal

[134] Devenish, G.E. (1992) *Interpretation of Statutes,* p.36.

[135] Denning, LJ. (1979) *The Discipline of Law.*

[136] [1975] 1 WLR 1204 at 1206-1207

[137] *R v Secretary of state for the Home Department* (2001) 2 AC 532,548.

[138] Jones, O. (2013) *Bennion on Stutory Interpretation*, 6th edn. p.540.

[139] [1993] 1 All ER 42

[140] Steyn, J.*Pepper v Hart*; *A Re-examination*, Oxford Journal of Legal Studies, VOL 21, No.1 (2001) p.62.

[141] Jones, O. (2013) *Bennion on Stutory Interpretation*, 6th edn. p.601.

[142] *R v West Riding of Yorkshire Country Council* [1906] 2 KB 676

[143] [1975] AC 591 at 613

[144]Bell, J. & Engle, G. (2005) *Cross Statutory interpretation*, 3rd edn., New York: Oxford University Press.p.26.

[145] ibid.p.1.

[146] Devenish, G.E.(1992) *Interpretation of Statutes,*p.26.

certainty, since what may be clear or reasonable to one person may be obscure or absurd to another.[147] However, it is assumed that the application of the literal rule upholds separation of powers since judges apply the meaning of the words as it is without any modification. It implies that separation of powers requires parliament to make the laws and the judiciary to interpret them. Where the meaning of the statutory word is plain and unambiguous, it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning. Because, they consider that the consequences of doing so would be inexpedient, unjust or immoral.'[148] Moreover, as stated in *Sussex Peerage case 'If* the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.'[149] Thereby, the literal approach preserves parliamentary supremacy. As Judges' personal beliefs and opinions are irrelevant when applying the literal rule, there would be less issues in arriving at determinations. This obligation to follow the plain meaning of statutory words thus protects the principle of separation of powers. Thereby, the law making power of parliament is not challenged by subordinate law making of the judiciary. Conversely, the literal rule is subject to criticism for its rigidity and thereby restricting the development of the law. Judges are criticised for being technical and too tide to the words of the statute. As a result, justice is avoided at certain instances and the law is upheld. This was demonstrated in *Whitely v Chappel*[150] where the defendant used the vote of a dead man. The statute relating to voting rights required a person to living in order to be entitled to vote. The court applied the literal rule and the defendant was thus acquitted. It is appeared that there are two units of enquiry in statutory interpretation, the text and the intention of Parliament that the judge must harmonize the two. However this appearance is deceptive. English law takes the view that the two are closely connected, but that primacy is to be given to the text in which the intention of Parliament has been expressed.[151] The argument is that it totally ignores the context and results in absurd consequences. The literal methodology functions as inflexible, hence judges have no opportunity of considering the context. These drawbacks of literal interpretation recognize the significance of the golden rule. The ordinary sense of the word is to be adhered to, unless it would lead to absurdity. The ordinary sense may be modified to avoid the absurdity but no further.[152] This provides a restriction on the function of judges as they cannot go beyond the extent of avoiding absurdity. However, in comparison to the literal rule, judges applying the golden rule have more independence when interpreting since they have power to modify the meaning of words. The absurdity required for contextual interpretation must be an obvious absurdity, it must be extracted from the whole instrument and it must lie in the words of the statute rather than in the consequences of the application of the statute to a particular case.[153] Thus the absurdity must be objective rather than relative. According to De Villiers JA, the golden rule is problematic in that 'what seems an absurdity to one man does not seem absurd to another.'[154] Nevertheless, it is to be born in mind that the office of the judge is not to legislate, but to declare the expressed intention of the legislature even if that expressed intention appeared to the court to be injudicious.[155] This reveals that although the ordinary meaning can be modified under the golden rule, judges are not permitted to make laws overriding the function of the legislature. Consequently the judiciary has only a check over Parliamentary function of making laws and is grounded on the basis of separation of powers. In application of both the literal and the golden rule, the words of the statute are to provide the intention of the Parliament. The intention of the Parliament can be different from the intention of the Parliament expressed through words. Therefore, there may be instances where the intention of the legislature cannot be found clearly from the words of the statute. Thereby the mischief rule and the purposive rule are applied concerning the

[147] ibid.p.31.

[148] Per Diplock LJ in *Duport Steel v Sirs* [1980] 1 All ER 529

[149] [1844] 11 Cl & Fin 85 at 143

[150] [1868] LR 4 QB 147

[151] Bell, J. & Engle, G. (2005) *Cross Statutory interpretation*, 3rd edn., New York: Oxford University Press.p.22.

[152] *Grey v Pearson* [1857] 6 HL CAS 61, 106

[153] Driedger, *The Construction of statues,* p.[48].

[154] *Shenker v The Master* & *another* 1936 AD 136 at 143

[155] *River wear Commissioner* v *Adamson* [1877]HL

context in which statutory words were born. Parliament intends that an enactment shall remedy a particular mischief. It is presumed therefore that Parliament intends the court, in construing the enactment, to endeavour to apply the remedy provided by it in such a way as to supress that mischief.[156] The famous resolution in *Heydon's case*[157] has been of great importance in the development of statutory interpretation. In this case it was found that for the sure and true interpretation of all statutes in general, four things are to be discerned and considered; What was the common law before the making of the Act, what was the mischief and defect for which the common law did not provide, what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth and the true reason of the remedy.[158]Thus, the function of the judiciary is to make such construction as to supress the mischief and advance the remedy for private and public benefit. As the mischief rule gives effect to the historical context in which the statute was passed, it does not undermine the doctrine of separation of powers. Because, judges do not step out of the four corners of the statute when arriving at decisions. A purposive approach means at least: judges ought not to go by the letter of the statute, they ought to go by the spirit of it.[159]A purposive construction of an enactment is one which gives effect to the legislative purpose by following the literal meaning of the enactment. When the legislative purpose cannot be understood by the letter of the statute the purposive rule comes into effect. Appealing to 'the intention of Parliament restricts the large creative role of the judiciary in the interpretation of statutes.[160]Nevertheless Denning LJ presented his sentiments in favour of the purposive rule in the case of *Magor and St.Mellons RDC v Newport Corpn.*[161] He stated,' We do not sit here to pull the language of Parliament and of Ministers and make nonsense of it. This is an easy thing to do. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment'. However, his approach of judicial law making was criticised by the House of Lords at the time on the view that filling in the gaps would violate separation of powers. Approving the said impression, Lord Simonds said that for the judges to fill in a gap was 'a naked usurpation of the legislative function under the thin disguise of interpretation. Thus it clearly provides that making laws is not the function of the judiciary under the principle of separation powers. As per Lord Simon of Glaisdale 'a more restrictive approach to analogy and to interpretation reflects the concern for the rule of law and the separation of powers'. In this view, the rule of law requires Parliament to state clearly what it intends, and the separation of powers requires the judge not to presume that he knows how best to complete the legislative scheme.[162] The question whether judges can fill the gaps in a statute lies at the heart of statutory interpretation today. The answer to it has been provided by some recent cases. In some of them the Hose of Lords filled the gaps and did justice. In the others the gap was not filled and injustice resulted.[163]In *Fothergill v Monarch* Airlines, the House of Lords reversed the decisions of the trial judge and the Court of Appeal and filled in a gap. They justified their attitude by reliance on a purposive interpretation. In latter cases however, the House of Lords have refused to fill in a gap. In *R v Barnet London Borough Council, ex parte Nilish Shah*[164]the literal approach of interpretation allowed a student from oversees to be entitled to a mandatory grant to have his university fees paid by the local authorities. The current tendencies among English judges would appear to incline away from the role proposed by Denning LJ and more towards the rule of law approach. In Sri Lanka too the purposive approach has gained recognition excessively through interpretation given to the constitutional provisions. This was identified mainly in the land mark case *of Sriyani Silva v Iddamalgoda*[165] where the decision of Bandaranayake.J. involved a broad interpretation to Article 126 read with Article 17 of the

[156]Jones, O. (2013) *Bennion on Stutory Interpretation*, 6th edn. p.817.

[157] [1584] 3 Co Rep 7a.

[158] Jones, O. (2013) *Bennion on Stutory Interpretation*, 6th edn. p.820.

[159] Per Lord Renton's committee report in May 1975

[160] Bell, J. & Engle, G. (2005) *Cross Statutory interpretation*, 3rd edn., New York: Oxford University Press.p.29.

[161] [1952] AC 189

[162] ibid.p.47.

[163] Denning LJ, *Statutory interpretation again to the fore,* p.102.

[164] 1983 2 WLR 16

[165] [2003] 1 SLR 14

Constitution. In this case, the question before the court was whether the wife or a third party of a deceased person has a right to institute proceedings in the court in terms of the provisions of the Constitution, seeking relief for the alleged infringement of a deceased person's fundamental rights. The majority held that Article 126(2) of the Constitution, when construed according to the ordinary, grammatical, natural and plain meaning of its language, gives a right of complaint to the person affected or to his attorney-at-law and to no other person. Nonetheless the view of Bandaranayake J. was 'a strict literal construction should not be resorted to where it produces an absurd result.'[166]Her interpretation allowed the petitioner to institute proceedings on behalf of the victim as it was appeared that the literal meaning provides no justice to the aggrieved party. According to the context of this case, justice could be achieved only through a flexible approach to the said constitutional provisions as the person whose rights have been infringed was no more alive. This case therefore sets an example that the context is an essential component which is to be considered by the judiciary in interpretation. Thus the context of a dispute before the court paves way to identify the specific rule to be applied in order to serve the needs of the affected party. This methodology was similarly adopted in the cases of public interest litigation as developed by the Indian Supreme Court. Thereby recent developments under judicial activism have permitted third parties to bring cases before the court even in Sri Lanka although they are not the persons affected.[167] This is in contrast to the general practise of making pleadings only by the person aggrieved. Since most of the public interest litigation cases involve fundamental rights violations, this benefits the public widening the scope of Article 126 and Article 17 through interpretation. At first sight, modifying the words of a statute or a constitution by the judiciary amounts to violation of separation of powers. However, if such adaption is necessary in a context to achieve justice, the doctrine of separation of powers must step down from its original position. This indicates that when statutory interpretation reaches one step up, the doctrine of separation of powers drops two steps.

C. Constitutional Supremacy v Parliamentary Sovereignty

The courts' legal obligation is to interpret and apply every statute in a way that is consistent with Parliament's legal authority to enact it.[168]An exception to this rule exists in most democratic countries which have a written Constitution, where it is provided that the Supreme Court can strike down legislation which it determines to be inconsistent with the constitution. In contrast, Sri Lankan Supreme Court has no such power. It only has sole and exclusive authority to determine whether any Bill or any provision is inconsistent with the Constitution.[169]This embodies the principle that the Constitution is supreme and even the legislature is subject to it. This is identified under the concept of 'constitutionalism' where the constitution is supreme over all other branches of governance. The nature and authority of all legislation is rooted in constitutional law. Even in Britain where the constitution is not formally embodied in a written instrument it must follow that, unless the contrary intention appears. Hence, Parliament is presumed to conform the established constitutional patterns. Since constitutional law is the framework of the state, Acts are taken to operate within its confines. The constitution of a state, even when unwritten, is not to be altered by a side wind.[170] In Sri Lanka, the constitutional sovereignty requires the consistency of all legislation passed by Parliament with the constitution. Therefore, it is assumed that ultimately statutory interpretation gives effect to the supreme law of the land, the constitution. Furthermore, the constitution provides the manner in which separation of powers is exercised by the three main institutions of government[171] thus, the constitution itself recognizes the value of upholding the doctrine of separation of powers. Thereby, the judiciary is inevitably bound to follow the said doctrine in performing their function of statutory interpretation. The maintenance of parliamentary sovereignty is that every statute passed by the legislature are legally valid and each individual including the courts are obliged to obey it. The courts' responsibility is therefore to interpret every statute that is enacted by

[166] Per Bandaranayake J. p.15.

[167] *Bulankulama & six others v Ministry of Industrial Development and seven others* [2000] 3 SLR 243

[168]Goldsworthy, J. (2010) Parliamentary sovereignty and statutory interpretation. In: Goldsworthy, J.(ed.) *Parliamentary Sovereignty*. England: Cambridge University Press.

[169] The Constitution of Sri Lanka 1978, Art.120

[170] Jones, O. (2013) *Bennion on Stutory Interpretation*, 6th edn. p.937.

[171] The Constitution of Sri Lanka 1978, Art.4

Parliament without any inconsistency with Parliament's legal authority. Occasionally Judges also engage in law making by interpreting Acts of parliament, thus their role complements that of parliament. In that, parliament can override judicial law making, while judges cannot override what Parliament does.[172] Therefore, is it inequitable to cast the blame for violating the doctrine of separation of powers by the judiciary in interpreting statutes since in every respect Parliament's law making powers are foremost.

V. CONCLUSION

It is submitted that each rule of interpretation is unique in its application and observed in distinct perspectives by judges in different jurisdictions. While some judges are sticked to the law applying the literal rule, some emphasise more on achieving justice adopting a purposive approach. Hence, the former tends to uphold the doctrine of separation of powers whereas the latter is criticized for violating the said doctrine. Although the rule of law and separation of powers are upheld in the application of the literal rule, being more technical would amount to critique as it may produce absurd results. Therefore, it's up to the judge to decide whether they follow only the law and avoid justice or meet the needs of the public as opposed to a literal approach. 'Justice' is distinct from one person to another. What may be seen as justice to one person would not be justice to another. One could argue that the literal rule is best able to reach justice since it does not go beyond the expressed words of the statute. However, it must be understood that whatever the rule applied the expectation of the courts must be to provide justice for those who seek redress. In line with that the context of the presented matter is an important element to be considered when interpreting a statute. Doctrines or principles must be concerned by the judiciary so long as to safeguard the rights of the people aggrieved. Because, the judiciary as the guardian of protecting the rights of each individual has a duty to provide relief to those who seek justice. However, it does not mean that the judges could be subjective in their determinations. Therefore, being biased or having personal interests are not expected from any judge within their scope of jurisdiction even when applying the purposive rule. Thereby, the judges are permitted to be flexible only up to the extent of achieving justice although it makes the doctrine of separation of powers step down. Because, the value of statutory interpretation is not protected only by ensuring the said political, constitutional doctrine, nevertheless providing justice to those whose ultimate resort is the court.

ACKNOWLEDGEMENT

This research would not have been a success without the support of many individuals. Therefore, we would like to extend our sincere gratitude to Ms.Bhagya Wickramasinghe and Ms.Thilini Meegaswatta for their commendable assistance provided in preparing the abstract and the full paper. Moreover, we are grateful to our parents for their encouragement and support in completion of this task. Finding sources for the research was a challenge since the subject matter was uncommon. Therefore, we would like to thank the library of General Sir John Kotelawala Defence University for helping us to find out the relevant books. Furthermore, we appreciate the support given by Ms.Siumi Fernando in accomplishing this task.

REFERENCES

Atiyah, P.S. (1995) Law and Modern Society, 2nd edn, p.194.

Bell, J. & Engle, G. (2005) Cross Statutory interpretation, 3rd edn.,

New York: Oxford University Press, p.1, 22, 26, 29, 34, 47
Denning LJ. (1979) The Discipline of Law.

Denning LJ, Statutory interpretation again to the fore, p.98.

Devenish, G.E. (1992) Interpretation of Statutes, p.36.
Driedger, The Construction of statues

Goldsworthy, J. (2010) Parliamentary sovereignty and statutory interpretation. in:Goldsworthy,J.(ed.) Parliamentary Sovereignty. England: Cambridge University Press.

Jones, O. (2013) Bennion on Stutory Interpretation, 6th edn. p.540, 601, 817, 820, 937.

Renton LJ's committee report in May 1975

Steyn, J.Pepper v Hart; A Re-examination, Oxford Journal of Legal Studies, VOL 21, No.1 (2001) p.62.

The constitution of Sri Lanka 1978, Art.4, 120

[172] Atiyah, P.S. (1995) *Law and Modern Society*, 2nd edn, p.194.

The Interpretation of Statutes (Law Com no 21; Scottish Law Com no 11) para 80 (c)

Montesquieu, B. (1948) Sprit of Laws, Newvell edn., France, Chatellain.

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 at 613

Bulankulama & six others v Ministry of Industrial Development and seven others [2000] 3 SLR 243

Carter v Bradbeer[1975] 1 WLR 1204 at 1206-1207

Duport Steel v Sirs [1980] 1 All ER 529

Grey v Pearson [1857] 6 HL CAS 61, 106

Heydon's case [1584] 3 Co Rep 7a.

Magor and St.Mellons RDC v Newport Corpn[1952] AC 189

Pepper v Hart [1993] 1 All ER 42

R v Barnet London Borough Council, ex parte Nilish Shah1983 2 WLR 16

R v Secretary of state for the Home Department (2001) 2 AC 532,548

R v West Riding of Yorkshire Country Council [1906] 2 KB 676

River wear Commissioner v Adamson [1877] HL

Shenker v The Master & another 1936 AD 136 at 143

Sriyani Silva v Iddamalgoda[2003] 1 SLR 14

Sussex Peerage case [1844] 11 Cl & Fin 85 at 143

Whitely v Chappel [1868] LR 4 QB 147

A Proposal of Law Reform for the Prevention of Children Being Used for Begging by Adults in Streets of Sri Lanka

R Ahangangoda
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
ruvi217@gmail.com

Abstract *- The rate of children being used for unlawful activities by adults has increased rapidly in many fields. Using children for begging on streets by an adult or a guardian to earn money has now become a common practice. On the other hand there is no law specifically to prevent the children from being used for begging in the streets by adults. Hence the research is to demonstrate the current impact of such activities on children in the urban areas of Colombo and to identify the protection plans taken by government towards the safety of these children. The primary objective will be to determine the reasons behind introducing a new legal reform. The research will follow a qualitative method; a semi structured interview with the victims from selected areas of Colombo city and a cross sectional study of a structured interview with the state departments and relevant authorities in relation to protection of street children. The research will put forward recommendations to protect these children and stop them from being used for begging. The reform will be affected with the idea of preventing children from facing violence, abuse, and stopping their valuable lives from being wasted on the streets. Sri Lanka as a developing nation is in need of closing such loopholes through the implementation of reforms. A proper plan of implementation and operative methods of data analysis can generate favourable responses to justify the introduction of the proposed law reforms to Sri Lanka which can ultimately lead to the protection of the rights of children. Therefore the research recommends introducing law reforms in order to take action against women and men who use children involuntarily for the purpose of begging in the streets. Instead they could be directed for institutional care or to remain in the safe hands of a guardian where they will have equal access to rights.*

Keywords— *Law Reform, Children for Begging, Child Rights*

I. INTRODUCTION

The address towards the surviving of children sustaining on streets have become out of the control of the authorities as it is widely spreading all across the nation. This situation is uprising because they try to remain unnoticed and organized. Ultimately this has created children to beg forcefully where the remote is on the hands of racketeers who organize forced child begging.

Identifying a proper definition on the age of a child is challenging due to the different definitions adopted by different statutes for various objectives. Therefore, the proposed research will follow to articulate the definition of the child as per the UNCCR (United Nations Convention on Child Rights) Article 1 “every human being below the age of 18 years”. Together complies with National child protection authority Act No 50 of 1998, which defines child to be under 18 years of age.

Even though the existing legal framework of the government is upon the control of the authorities to enforce law through the Children and Young Persons Ordinance, it has forgotten to make a clear cut prohibition on the use of children for begging by adults and to implement severe punishments to those who force child begging, Therefore identifying the current protection plan towards preventing the violence is important with an introduction to a new reform to the existing law which would ultimately give a deterrent effect on the society.

II. RESEARCH PROBLEM

The existing legal framework is confined to the provisions of Children and Young Persons Ordinance No 12 of 1945 while the practical difficulties are faced by the police and the child Protection authority in implementing the law. Therefore it is indeed necessary for a powerful prevention from a law reform that understands the impact on such children and the need for an effective mechanism to punish the wrongdoers with the coordination of all these forces.

III. LITERATURE REVIEW

The required background for the protection of street children is found already in published material.
The clear observation through law enforcement should be drafted in accordance with composite and learned variety of factors that lead to success in reforming the current statutory regulations for the rights and welfare of

members of vulnerable groups which includes the category of children. (Krishna Iyer, 1992)

This raised some important venues to open up to seek for similar legislations from countries with similar legal systems to Sri Lanka. There were number of laws including prohibitions in India but they were silent about the process in which children begging taken as a child labour should be banned. Therefore to mitigate this situation the parliament enacted the child labour (prohibition and Regulation) Act, 1986 in order to bring uniformity in matters of child employment. These show the needed efficiency in the law enforcement mechanism.

"State together with citizens should protect children from exploitation and from adults using children for financial gain by begging at street corners". (Richardson, 2010)

Findings of these prevailing views around the world reveal that availability of a specific law is a necessary condition. Street children are easy targets because they are young, often small, poor, ignorant of their rights, and frequently do not have responsible adults to look out for them. Police also have financial incentives to resort to violence against children.

This is similar in South Asian region where often children has no choice with regard to the work she/he is engaged in. they are exposed to physical or psychological abuse, and put to work by parents and employers where children are seen as a cheap and accessible source of silent within and outside the family. This perception of the link between development and protection and participation is especially important as a basis for legislative and administrative reform, because countries in the region have not used these processes sufficiently to cope with the phenomenon of exploitative use of young children (Gunasekara, 1998)

All of the analysed literature follows a premise that children are a vulnerable group anyhow children on streets accompanied by adults for begging is more vulnerable, furthermore despite of degrading this unfortunate system, a lack of a specific law to address this loophole has increased the situation, because the attempt to cover the situation through non specified laws cannot solve the issues. The rising need is there for the law to speak on behalf of the child.

IV. OBJECTIVES

A. Current situation of street children

The initial target on this research is to identify the violence over street children accompanied by an adult. Secondly to describe the current legal framework adopted to protect the children finally the need of a new law reform to make the prohibition to be effective in the future.

These children have been forced on to the streets mainly due to their parents' inability to address their needs which the root cause is poverty. The absence of proper guidance from parents leads to these conditions. Most groups of children under five years of age or infants are kept silent by drugging them while the adult who's carrying the child may find it easier to carry out his/ her job without the constant cries of the child.

Children on streets, (accompanied by an adult) face different uncomfortable situations specifically the violations or imminent violations of child rights such as right of being free from violence and right to education. Violence occurs due to the force on children to beg where they may undergo sexual harassments further the protection is undermined in the hands of a stranger if the adult accompanied is not the parent. Even with the parents it becomes unrespectable.

B. Address of Current laws pertaining to the protection of children at risk

The laws prevailing to stop children used for begging is identified by Children and Young Persons Ordinance No 12 of 1945 under Part v, section 77 (1) which prevents vagrants who habitually wanders from place to place takes with him a child who has attained the age of five and shall be guilty unless proved that the child is completely exempted from school or such taking did not interrupt the child's elementary education. Further addressing the issue by section 77 (2) it allows any police officer to apprehend such vagrants without a warrant and to take the child to a place of safety in accordance with the ordinance.

With regard to international bindings, Sri Lanka ratified the UNCRC in 1991 since then it was successful to become an active member. Yet the dualistic nature of the international law adoptions in the island has set the bar to be concerned on indirect application of its provisions. One of the main concerns of UNCRC is to protect children from abuse and exploitation.

Article 19 adopts the protection from all forms of violence, neglect, abuse and maltreatment and not to be exploited by their parents or other guardians. Therefore the prohibition is set, but the enforcement is on the

hands of government. The results were shown form concluding observations of the Committee on the Rights of the Child, Sri Lanka, 2010 where the committee appreciated the positive developments related to the implementation of the Convention specially the adoption of The Penal Code (Amendment) Act No. 16 of 2006 which, inter alia, makes it a penal offence to engage and recruit a child for use in armed conflict and in child labor, child trafficking and child pornography.

Further The Committee welcomes the ratification by the State Party of the Optional Protocol to the Convention on the Rights of the Child on the sale of children. These have been the positive outcomes of legal implementations yet the committee urged Sri Lanka in its concluding observations that the principle of the best interests of the child as defined in art.3 of the Convention and recalled in other provisions of the Convention has not been consistently applied in legislative, administrative and judicial proceedings, as well as in policies and programs relating to children. This situation is to be addressed by the government. These set up of laws lacks the practical effectiveness where it is questioned further by continuously increasing complains on children being used for begging on streets.

However a complete prohibition over using the children for begging has been unsuccessful with the current laws. Therefore recognition of a law reform is a growing need.

C. Rationale behind proposing a law reform.

The final and the primary goal of this research is to build the reasons and its introduction to the new law reform. The establishment carried out by the prevailing law seems to be with loop holes. The prohibition is adopted under several Acts yet not with a strong prohibition. Therefore the new law reform should specifically prohibit and should add a more practical plan to capture the organized racketeers with the effective cooperation of the police and the public. The Department of probation and child care which addresses specifically on street children as a whole cannot carry out the mission alone.

IV. METHODOLOGY

This study has followed a qualitative method of data collecting; an informal interview was carried out in selected places of Colombo, face to face interview with the victims, between the ages of 5 to 14,

Secondly the structured interview which was constructed with Child Protection Authority and commissioner of Provincial Commissioners of probation and Child Care Services (Western Province) revealed information on how the authorities addresses the prevailing situation.

V. FACT FINDINGS AND DISCUSSIONS

As followed by the methodology, the general question posed to the vulnerable group of children was to find out what make them sustain on streets? Surprisingly none of the children were able to answer the question instead all the answers were given by the adult whom they were accompanied by. The common answer for the question is that they are being either there father or mother or the guardian taking the child with them to the streets because they are unable to have any alternative if not. This was observed mainly because either of the spouses are unable to work an earn money. The truth behind whether they are the child's real parents was never revealed. This shows the amount of risk increased to stop further expansion of this business.

The executive authorities the police handle the practical situation as of arresting over such child exploitation for this begging business while the administrative work is handled through legal intervention with a special unit in police, yet this service is mostly available for children who are already abused. Nevertheless a practical barrier to this situation arises as the time to reach the child at risk will be time enough for the vagrant to move to another place without getting caught. Such loopholes may put the child into a more vulnerable stage. This is mainly due to the secret organization of these racketeers.

Child development and women's affairs ministry declared that the authorities had been advised to enforce the law with stringent punishment for those who lure or force children into begging. The ministry emphasized that back there were around 20,000 child beggars in the country, and that they have also got in hold of the information notice that certain organized racketeers were behind forced child begging who take advantage of localized festivities such as the Kandy Perahera and the Poson season in Anuradhapura and transport child beggars. Due to the careful organization of these illegal acts still the offenders have been successful to carry this out as a shadow business. Consequently it is a need to create a fluent legal reform if prevailing authoritative implementations are not in action.

At face of this Situation it is questionable whether the section has only been restricted to simply a provision, because section 77 (1) as aforesaid punish the vagrant from preventing the child receiving education and lacks to address otherwise therefore this cannot be called a complete prohibition.

Thus the prevention mechanism must not completely confine to the ordinance instead a combination of the assistance of all government authorities, police and most

importantly with the attention of the public to work efficiently to bring down the core founders of this begging business.

The reform may maintain strict rules on enforcement which will be the main responsibility of a special unit of police to look into the practical measures in recognizing the groups of racketeers to investigate unnoticed in the areas of Colombo especially where people gather.

Poverty or lack of proper employment for the parent cannot be the result of choosing the streets as for the shelter of the child. Best alternative cannot be the streets in cases over children who said to have no protection in their houses.

Therefore at such time proposed reform may come alive by recommending institutional care. This should be handled with the assistance of department of probation and Child Care, National Child Protection Authority, and the ministry of child development and Women's Affairs together with local authorities such as municipal council. It is provided that the needed assistance over child is achievable by attending them for institutional care. For example the non-governmental organizations such as Child Action Lanka which is situated in Kelaniya, Nuwara Eliya and Kandy rendering proper care for street children and under privileged children to learn, grow and educate. Further Article 3 (3) of UNCRC must be used to strengthen the standards of these institutions which provides facilities for these children.

VI. CONCLUSION

The enforcement mechanism should be more effective over capturing and identifying these organized groups, who use children, and on the other hand against parents that uses the children for begging should also not be justified under any circumstance and severe punishment must be afforded. A child may not know how to define abuse, unawareness of their rights hence inability to talk for their rights have created the need for opening up a specific legal reform which could out stand among the prevailing laws.

In the face of a remarkable Law reform Sri Lanka will easily eradicate violence over street children who've been used by adults. Even though this would become the long term goal, the short term goals will be to protect children from violence from their parents and the organized groups who pushes them to the streets. Furthermore enhance these children with right to education. Therefore the proposed reform is to be enforced as a complete prohibition from using children for begging at any costs.

ACKNOWLEDGMENT

I would like to acknowledge the contributions made by the officials of Planning and Monitory division of Child Protection Authority and commissioner of Provincial Commissioners of probation and Child Care Services (Western Province) for the immense support extended.

REFERENCES

Browllie, I., 1992. Basic Documents on Human Rights. 3rd ed. New York: Oxford University Press.

Children and Young Persons Ordinance No 12 of 1945

Gajendrakar, J., 1972. Children's Rights and Responsibilities. 1st ed. UNICEF Press

Goldstein, M., 2013. Handbook of Resilience in Children. 2nd ed. New York: Business Media Press

Goonesekere, S., 1998. Children, Law and Justice; South Asian Perspective. 1st ed. New Delhi: Sage Publications.

Jayawardane, I., 2013. Building Up Unscarred Lives. Daily News, 01 October. 4.

Iyer, V.R.K., 1992. Fundamental Rights and Directive Principles. 1st ed. New Delhi: Deep and Deep Publications.

NCPA. 2015. National Child Protection Authority. [ONLINE] Available at:http://www.childprotection.gov.lk/.[Accessed 07 June 15].

Richardson, N., 2010. Delhi as the Street Kids See it. The Telegraph, 19 March. 2.

Robert, C.S., 2002. Child Rights and Remedies. 1st ed. Atlanta: Clarity Press.

Sharma, R.N., 1992. Fundamental Rights, Liberty and Social Order. 1st ed. New Delhi: Deep and Deep Publications.

Sri Lanka. National Child Protection Authority Act, No. 50 of 1998. (1998) Colombo: Department of Government Printing.

Sri Lanka. Prevention of Domestic Violence Act, No. 34 0f 2005. (2005) Colombo: Department of Government Printing.

UNHRC. 1989. Convention on the Rights of the Child. [ONLINE]Available

at:http://www.ohchr.org/en/professionalinterest/pages/crc.aspx. [Accessed 07 June 15]

BIOGRAPHY OF AUTHOR

Author is a 3rd year undergraduate of the Faculty of Law, of General Sir John Kotelawala Defence University. Currently serving as the Secretary of the KDU Moot Court and Debating Society. Have successfully completed Diploma in International Relations (BCIS). The areas of interest are Human rights Law, Child rights and women's rights and Humanitarian Law.

Tale of RED and ARRI : the Unseen Role of Run Out Legislation and White-Collar Seats

SE Jayasekera
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
shenalerajay@gmail.com

Abstract— *Cinema is a reputed, glorious mode of expression in pictures in the whole world. Day by day it becomes a widespread entertainment mode with the help of capital and technology. The observable situation in Sri Lanka reflects the calamity of cinema, which could be lead to a catastrophic end to the film art and to the film industry. Sri Lanka has a unique experience of having authority to control the four corners of the film industry unlike other popular markets. The National Film Corporation of Sri Lanka, established by an act, committed wholly to the film industry of Sri Lanka intended to treat everyone engaged in the industry justifiably. It is noteworthy to examine if this legal body has catered or has stood to receive challenges of modern cinema. The purpose of this finding would lead to examine how swift the global cinema changed in recent times and how Sri Lankan authorities unhurried to accept the changes in the world. The changes are mostly parallel to technology existing in the world. It is a must to emphasize the global industry of cinema is a market based on liberalized entrepreneurship. For this market capital flows easily and technology on film making and screening getting higher. To address this crisis, it is essential to revolutionize the current legislation and introduce a pragmatic framework to secure the industry through necessary state intervention, liberalize the industry, introduce and standardize the digital cinema, establish a business model and finally, maintain digital archives through an inquire on professional levels that maintained by relevant authorities. To this, necessary legislations, exclusive interviews, consultation reports and biographies would be used. The result would be a new framework to a legislation which influence for a revival of the Sri Lankan film industry, which would entrust the standards and minimum qualities need to the industry*.

Keywords *- Digital Cinema, Liberalized Entrepreneurship, Necessary State Intervention*

I. INTRODUCTION

The base of the terms, the 'RED' and the 'ARRI' simply reflected the periodical change of the cinema. RED is a representation of the digital era. ARRI is the 35mm analog era. It is unjustified the classification of cinema according to the geographical borders which concern the cinema as a global language of motion pictures with no borders. Then it's a common context to Sri Lanka too. The global cinema stepping forward rapidly with changes in technology, screen plays, distribution and investments. When the world moving towards the high – tech multimedia, it is paralleled the cinema also paving it's path towards themselves. Simply, today's cinema no more in a theatre. The context of Sri Lankan cinema, veterans emphasized the cinema is in a calamity. The media reporting it. The audience recorded a huge downfall in past years. Especially Sri Lanka has a legal authority to regulate the whole cinema. It has necessary provisions and unprecedented when comparing other cinemas. Then the problem arising is how come the Sri Lankan cinema marching towards a calamity under such authoritarian protective context. A complication arising how an old legislation and an authority address such rapid moving context. Therefore this attempt wholly committed to find the reasons of the statement 'calamity of cinema' in a legal background.

The design of the experiment addressed the common issues of the Sri Lankan cinema which strongly believe that the timely failure of the national film legislation and the authority formed by itself. The structure suggested, inquired the operation of National Film Cooperation of Sri Lanka and the act it generated the National Film Cooperation of Sri Lanka Act No. 45 of 1980. The experiment of inquiring the act is to find out the modern applicability of the laws and authorities by concerning the modern trends, issues arose, future trends and the entrepreneurship. The analysis directed to whether the act capable enough to uplift industry from so called calamity.

For a better qualitative analysis some commission reports and committee reports used as consultation reports for the purpose of find the root cause of issue and the need of such authority. Exclusive interviews done a comprehensive detailing and fact finding role regarding contemporary issues of cinema and the purpose of finding root causes. Many literature used in defining the problems in culture of cinema and newspaper articles on

affirmations of veterans reflected comprehensively regarding contemporary problem. Same category of veterans affirmed their view in television programs and considered them as reliable professional statements in analyze.

II. THE HISTORY OF LANKAN MOTION PICTURE BUSINESS

The most common feature of cinema is 'it's a business' based on wide range of entrepreneurship. Therefore it is common to the Sri Lankan context also. The base of the present legislation is the history of film business carried out by passionate wealthy investors in Sri Lanka. The history of the industry witnessed that whole film distribution and exhibition was under the business of above mentioned few investors. Namely Cinemas Ltd., Ceylon Theatres and Ceylon Entertainments are the companies had the regulation of the industry at the early stage of Sri Lankan film business. This time can be identified as the duration between 1948 and 1976. From the economic perspective this situation known as an 'oligopoly'. This oligopoly was much criticized condition in the local film industry. And this was the root cause of the contemporary crisis and the subject of the present legislation.

It has been proved through the business actions carried out by three main companies. Early days of Sri Lankan cinema not based on the Sinhala language cinema. Its all about Tamil and Hindi movies came from India which imported by Cinemas, Ceylon Theatres and Ceylon Entertainments. Sri Lankan film producers also frequently visited India to produce films because lack of infrastructure Sri Lanka had. The statistics reflected, Sinhala movies only got 24.3% proportion of total screen time in 1950's. Most of the film prints were dubbed and companies spent millions of rupees to import films. This situation gradually turned into an opposing demonstration against the oligopoly discussions held with the then government to overcome this minor treatments. The time that the discussions held, the Sinhala cinema have stepped a progressive step with producing 'Rekhawa' in 1956 by Lester James Pieris with William Blake and Titus Thotawatte which the first ever outdoor production done by a Sri Lankan artists. After many communications claims from the local producers then Prime Minister S.W.R.D Bandaranaike stopped Sinhala movies producing in India and banned Sinhala dubbed foreign (Indian) films yet to be distributed.

III. THE 'REPORT OF THE ROYAL COMMISSION ON THE CEYLON FILM INDUSTRY'

The discussions were not paused for many reasons. Main reason was the steps taken so far had no enough gravity to neutralize the oligopoly existing. The result was the whole Sinhala movie industry organized and built up a capability to force government to do so. They discussed this matter in the year 1961 the then minister of Industries and Culture Maithripala Senanayaka. According to the reports the objectives of this discussion were deficiencies of the cinema, anticipated sponsorships from the government and what the government could offer. It is notable, the socio economic background of that time was nationalization in a closed economy. This context force the government to nationalize the cinema industry. The significant year of this context was the year 1962.

In 1962 'Report of the Royal Commission on the Ceylon Film Industry' was appointed by the government to inquire comprehensively regarding proposals and the situation of contemporary industry. The members to the commission were Jothiyasena Wickramasinghe, Reggie Siriwardane and Palitha Weeraman. The commission got specified objectives to inquire as follows.

- The mechanism of direct state sponsorship to the film industry.
- The sufficiency of studio facilities, mechanism of proper film production and the future of government film institute.
- The anticipated harmony between producer and the distributor to avoid irregularities.
- The steps to be taken to raise the quality of films.
- The encouragement to be given to the producers and the skill development of technicians and artists.
- Establish a cooperation for the purpose of acquisition of film importation.

After a long process in 1965 the conclusive report was published. The commission inquired its objectives comprehensively and prescribed important recommendations to revive the industry.

- Reduce Indian movies to 1⁄3 proportion.
- Derive importation and distribution from businessmen to neutralize the oligopoly.
- Sponsor all equipment by prescribing tax incentives.
- Establish a complete studio complex by the means of producing feature films by the proposed cooperation with the intention of giving facilities and credit schemes.

After gaining such considerable victory by the industry they couldn't lead it to their benefit because then government did not interested in the implementation of recommendations given by 'The royal Commission' due to external reasons.

IV. THE STRUGGLE CONTINUED

The veterans of the cinema emphasized the struggles after publishing the report of enquiring continued because of the unnecessary held up implementation by the political authorities. Their discussions were already fruitless because of screen time issues, Indian dependency and industrial oligopoly were existing.

This resulted amalgamation of all professional and cultural organizations in the film industry and made a common platform against the oligopoly except Gamini Fonseka and his wing. By organizations and associations they kept proposing steps avoid disadvantages to the cinema. In 1969, veteran camera director, later administrator Sumiththa Amarasinghe proposed few proposals to reduce influence of oligopoly to then Mass Media minister. Some important proposals were:-

- It is mandatory to screen local films in each and every theatre.
- Screening must be limited one print at a time.
- Reduce entertainment levy up to 10% from local films and increase it up to 50% for foreign films.

Out of many proposals Mr. Amarasinghe's proposals contained a capacity of implementation regardless the sustainability but as a short term answer.

Later, the organizations and associations took their demands and entered into politics and expressed their support to the Sri Lanka Freedom Party and the coalition with the intention of neutralize the oligopoly and establish a cooperation. In 1970 the four main professional organizations of the collective made a declaration and presented to the government. That declaration was the first step to establish a state a film cooperation. Basically this declaration demanded the status of an industry to the cinema with purpose of getting state subsidies. This was a result of comprehensive study of 1965 royal commission report and post situations thereafter. Thus there were some progressive suggestions that force to make a legal body. Basically the suggestions focused on subsidizing local films, protect the choice of importing countries that in a scenario of India was the popular choice, to encourage produce Tamil films in Sri Lanka and government mediation of buying quality short films later these were some of many proceedings of established cooperation.

V. THE LEGAL BODY ESTABLISHED

The attempts of struggle and steps that government agreed made a resolution that industry hoped for a long. The result was 'State Film Cooperation' established through the act no. 47 of 1971. The present law, No. 45 of 1980 is the amended version of the act of 1971. All proposals and contemporary needs that industry demanded included in the list objects of the cooperation. The section 4 of the act, the objects and powers of the cooperation covered a wide range of contemporary needs. Especially the extract of demands, declarations were included in the law and granted them to the cooperation for the execution. But until 1976 cooperation could not able to break up the oligopoly of distribution and exhibition held by Cinemas, Ceylon Entertainments and Ceylon Theatres.

VI. THE LAW ON TODAY'S PERSPECTIVE

When the time introduced the act and the cooperation and later the struggles and declarations are not rare in the industry. When comparing with the today's context the struggles are also in need. But today's issues cannot be consider as can solve through discussions and declarations. Firstly cinema cannot separate from technology. On that base, it produce an image on polarization between the modern cinema and over 4 decade old regulations. This should be reviewed on a justifiable platform that the objects, powers and implementation of the law and cooperation and modern needs.

It's important to note what background that everyone forced to make a law and a cooperation. When crisis begins in the 60th decade, the economic policy was the closed economy concept. Everyone did not get the right to make films to them resources are not available vastly. The importation of film reels could afford by few producers in the country. In 1970's after establish the cooperation, the consent is needed to produce films and reels produced by cooperation done under conditions. Most important thing is cooperation registered film directors under few criterions and they are the only authorized persons to direct films.

The situation is totally changed under the new government formed in 1977 and the closed economy turned open market liberal economy completely. Effect of that the benefit was taken by the film industry thereafter everyone got the liberty to make films because equipment facilities film reels were not rare like earlier. The managerial structure also changed in cooperation and privatized the importation of films that power acquired in 1972.

These scenarios produce a platform to review the objectives of the cooperation once again. Section 4 subsection (a) of the act said the importation but cooperation privatized its objective. But cooperation register the importers of foreign films. Importation of equipment, materials, accessories currently done by the open market and exhibiting when need in their circuit not keeping it as a responsibility. Section 4(b) cooperation to

be exported films produced in Sri Lanka but no proper framework.

In the Section 4(d), according to that it is a responsibility to establish and maintain cinemas. It is too problematic of existing this duty because during past decades total number of 350 – 400 cinemas brought down to 150- 120 by various reasons. The section 4(f) is about maintain high standards. According to the review made, this is the most controversial section of the act, objective of the cooperation. It is important to note every approach to be taken regarding modern cinema covered by this section. Sections 4(g) and 4(h) reflected the idea of film trade and the marketing research.

Simply the powers are stated as a framework to carryout objectives of the act. It is important to identify what is the trend of modern cinema. The world developed the technology analog to digital. Now world following the digital cinema. Digital cinema transformed every function of film making. Shooting, processing, exhibiting and keeping archives. In 2011 ARRI wound up the 35mm camera productions. Now digital cinema at it's peak, companies like RED developing it's technology for highest levels in digital cinema. Digital processing and editing not just so complicated few software done everything in the picture. Exhibiting films no more consisting lengthy reels it's about high capacity projection through a server. Theatres are no more seating. It is now a multiple dimension experience. Most important thing is most of above novelties can be experienced in front the television through the home theatre. Sri Lankan audience widely experience this and now it is a growing market. Sri Lanka's most focused question is regarding screening movies.

Question is the film cooperation had any sense of this rising trend. Then it's crystal clear the act, cooperation and the action of the cooperation did not reached to this technological destination. In the perspective trade and business the percentage of Smart televisions, Smart phones, Tabs, Blu-ray players and Home theatres extended its capabilities and digital cinema entered into it. The resolution levels are existing in 2K and 4K levels in Ultra high definition while Apple Inc. developed it's resolution up to 5K while IMAX theatres producing wide screen up to 18K. Then it is huge challenge to the cooperation how to run out- dated analog cinema within such development.

Above mentioned scenario is the modern trade and business. Every advancement of technology have the business. Still cooperation did not identify the business of DVD cinema which a big market available outside the theatre. It is so challengeable if cooperation fails to upgrade exhibition into highest levels in digitalization Sri Lankan films would be isolated in unfortunate manner. Because no audience like to experience low grade technology after paying. Audience can experience more entertainment from their advanced devices. Today, web cinema has a novel identity in cinema. As mentioned in the act technology and equipment regulated from the cooperation but not today's. This reflected the polarization of law and the action. Hereby one reason revealed for the downfall of audience remarkably.

VII. THE PROFESSIONALISM

It is clear that some provisions of the act reflected it's capability to adapt to the situation. Sometimes it is polarized with the present context. Beyond that, cooperation lost it's professionalism through past years. Most importantly the behavior of administration and the film professionals is a distant one. This fact came up with various occasions and various discussions held. Present the ministry of mass media is the controller of film industry or the national film cooperation. The other hand film industry and professionals are independent characters. Therefore visibly those are two rails supporting to run a train. The relationship is traditional state involvement and independent actions. This state involvement has a political nature. The formal practice or the experience in Sri Lankan bureaucracy has no perfect satisfactions in general minds due to white collar actions carried out by them. Therefore this distance mainly due to traditional white collar regime as part of politics and it is made a distant relationship with state and the industry. This effects for the whole professionalism and the film art and this caused a miscommunication to the relationship that two industrial related parties should have. This situation engage with some other issues in the industry.

Specially, the cooperation's knowledge on cinema is some kind of debatable fact. After establishing the cooperation had a considerable path towards a quality cinema while managing quantitative aspects during the tenure of Dr. D.B Nihalsinghe. But the important thing is, later professional film characters held head post of cooperation but the actions of them failed to get back the cooperation from traditional white collar sense. That leads to a calamity in industry it made a state body that cannot take challenges in cinema, maintain a quality of art as a minimum requirement. Ultimately that reflected the cooperation's lack of knowledge in maintain film industry. Specially, the technology has reached its highest standards. The modern day professional responsibility is bridging the laws with the modern technologies upon the novel structures of film art. That has two aspects in the sense of promoting technology and protecting

art/professionals. In other overseas laws, in Indian context the law done a very liberal duty regarding film industry by Cinematograph Act introduced in 1952, a bit old legislation, but has a capacity to fulfill modern needs. The Indian act established the Central Board of Film Certification for the purpose of examining films in grading purposes, certification and defining essential terms mainly and the other duties are administrational and jurisdictional matters of states. Unfortunately Sri Lanka running a massive cooperation instead of compact body with a big quantity of staff unnecessarily and even no examination on modern film simultaneously act also not flexible enough to support that.

VIII. RECOMMENDATIONS

The loosing professionalism in the film industry leads to polarization of some laws. The possibilities of changes of laws is an outcome from the professionalism. It is proved that cooperation has a duty advice the minister or the government regarding cinema matters connected with the industry. In the Indian context, the entertainment world earned billons per annum as mentioned no cooperation to regulate the business. Clearly its not a body to regularize the business and technology.

To build a better entertainment surrounding, liberalize the film industry is a need. If Sri Lankan cinema cannot gain professionalism through the legal bodies its better to liberalize with the knowledge of entrepreneurship. But its need a collaboration of wealth and the knowledge of cinema. The wealth and knowledge can build a foundation for better business through ventures. Specially in Sri Lanka the young community with greater talent engaging with short film arts but no capital to engage in main stream cinema. This community should be the target artists of modern Sri Lankan cinema. It is noteworthy this is not a generation dealing with analog generation.

If the government can take measures to invest in cinema instead of regularizing cinema it would reflect a progressive step than this situation. That does not mean laws are unnecessary. Necessary state interventions are needed. The existing challenge in Sri Lankan cinema rotates around the technological advancements matching to the modernity. The situation of most of the theatres are worst in condition. Instead of traditional theatres, mini theatres can change the culture of cinema. The technical specifications must be a one standard prescribed by the higher authorities. As a proposal above industrial responsibilities can be taken by ministry of industries and other professional responsibilities can be held by ministry of mass media and a special committee should monitor all technical standards and advancements in contemporary cinema.

For the initiation government has to make a policy regarding revival of the cinema. As the early stages of forming the cooperation and sponsorship given to the industry, government need to give wide range of incentives to uplift cinema. In example, government can remove entertainment tax simultaneously taxes of provincial councils and local authorities. The tax on theatre equipment can be removed totally. The income tax of theatres and companies should under a long period tax holiday. The correct usage of liberalized entrepreneurship in India, leading to best ventures in the London Stock Exchange. As a supporting step government can be involved to the market to acquire stake to support for a monopolistic competition market. Apart from policy making in the industry government is capable enough to maintain film archives. Every country that has a film culture do so. Like national film archive in Pune India, consider films as a national heritage. In this subject Sri Lanka have a complex situation in laws and regulations with lack of knowledge and lack of organization. Finally for the support of film rating and grading it will be important to establish a film rating board by abolishing NFC simultaneously repealing the act. But it is must to acquire a wide state sponsorship with an action plan to make a wide discussion.

IX. CONCLUSION

The situation of Sri Lankan cinema defined as a calamity because of the structure acting upon a white- collar authority. The laws are existing while an authority regulate most of the things. The responsibility of a film authority defined as an innovative approach with the understanding of global trend of cinema. This trend paralleled to the technology. The technology is not static. The film related laws in Sri Lanka introduced in a different era than this and the purpose was totally different. Therefore a new path to the new era must be generated and it's based on the liberalization of the industry with necessary state intervention. The attention on professionalism is a highest destination that the Sri Lankan cinema must pave the way through.

ACKNOWLEDGEMENT

- Mrs. Y.R Nanayakkara
- Mr. Aruna Gunaratne
- Dr. T.B Abeysekera
- Dr. Nuwan Nayanajith Kumara
- Ms. M.A Gunaratne

REFERENCES

Dharmadasa, C. (2012) CULT. 1st Ed. Nugegoda.

Gunaratne, A. Interviewed by: Jayasekera S. (5th June 2015)

Kumara, Nuwan Nayanajith. Journalist. (Personal Communication 3rd June 2015)

Mihindukula, S. (2008) Sinhala Cinemawe Arbudaya. 1st Ed. Sarasavi Publishers.

Perera, P (2015) Digital nowunoth api iwarai. Sarasaviya. [Online] 2nd April. Available from: < http://sarasaviya.lk/2015/04/02/?fn=sa15040226>[Accessed: 22nd May 2015].

Vithanage, P. (2015) Seba kalaakaruwa hemadaama vipakshaye. Sarasaviya. [Online] 15th March. Available from: <http://www.sarasaviya.lk/2015/03/05/?fn=sa15030539> [Accessed: 22nd May 2015].

BIOGRAPHY OF AUTHORS

Shenal Eran Jayasekera is a third year undergraduate of Kotelawala Defence University.

Sri Lankan Children in Immigration Detention in Australia: Human Rights and State Responsibility

A Leelarathna
Legal Unit, Central Environmental Authority, Battaramulla, Sri Lanka
shanikaanjani@gmail.com

Abstract— *There are many families in immigration detention in Australia. People who are fleeing Sri Lanka devastated by the ethnic conflict between Tamil Tigers & Sri Lankan government have the same basic needs as decent living standards, social equality, health care and medicine. The Australian government maintains a policy of indefinite mandatory detention of asylum seekers. According to the current legislation in Australia, asylum seekers who arrive by boat, must be taken "as soon as reasonably practicable" to a Regional Processing Country unless the Minister determines otherwise. Sri Lanka has been co-operating with Australia to return these migrants. Children who are in this situation are very vulnerable and need special protection. There are existing international Human Rights and Child Rights standards and mechanisms, but their implementation is unsatisfactory. It is clear that Australia's system of mandatory immigration detention of children is fundamentally inconsistent with Australia's human rights obligations such as ICCPR, ICESCR, CRC, Torture Convention and Customary International Law. The children in detention on Christmas Island live in converted shipping containers the majority of which are 3 x 2.5 meters. Children are effectively confined to these rooms for many hours of the day as they are the only private spaces that provide respite from the heat. The lack of school education on Christmas Island for teenagers has had negative impacts on their learning and may have long term impacts on the cognitive development of these children. And also the level of mental distress of children in detention is evident by very high rates of self-harm. The main intention of this paper is to find out the duty owed by Australia and Sri Lanka to these children under International Law. This paper also discusses whether the current standards and mechanisms are sufficient to deal with the current problems and suggest how it could be further developed.*

Keywords— *Children's Rights, Asylum seekers, State Responsibility*

I. INTRODUCTION

For more than Three decades, there was an ethnic conflict between Tamil Tigers and Sri Lankan Government. According to the United Nations, more than 100,000 Tamil civilians fled to India and other countries in Indian Ocean to escape during the war period and as well as in the post war situation to Australia. Today, however Sri Lanka embarks on a voyage of Economic and Social development after the end of the civil war in 2009. Therefore, Sri Lanka should consider legal protection for the children in immigration detention in Australia.

There are approximately 100 children in closed immigration detention, according to the inquiries carried out by Australian government. This is a higher number and it is time to look at this issue again with this increase in child detainees. Here, in this paper the author intends to discuss further the ways in which life in immigration detention affects the health, well-being and development of children in immigration detention in Australia.

The author thoroughly believes that immigration detention is an unsuitable setting for children. The main objective of this paper is to point out that current treatment, support and management of children in detention centres contravene Australia's commitments under the United Nations convention on the Rights of the child (CRC) and also the other legal conventions such as ICCPR, ICESCR, Torture Convention and Customary International Law. The author believes that the current legal situation in relation to children in immigration detention reflects poorly on Australia's image and the author intends to suggest how the current legal standards could be further developed.

II. METHODOLOGY

This research will be conducted as a literature review based on the secondary sources including text books, International Conventions, electronic data bases, journals etc. Analysing of data for the purpose of giving recommendations had been done by the author.

III. DISCUSSION

In some instances Australia may have been in breach of international human rights in relation to children in immigration detention in Australia. According to the author, the Department of Immigration and Border Protection in Australia, has a duty to all people in immigration detention facilities. The said Department has

undertaken the care, supervision or control of people in detention in circumstances where those people might reasonably expect that due care will be exercised.

Due to the particular vulnerability of the children in detain, as well as the high degree of control exercised by the Department over detainees, the scope of this duty of care should be set at a high level and extends to a positive duty to take action to prevent harm from occurring.

According to the current legislation in Australia asylum seekers who arrive by boat must be taken "as soon as reasonably practicable", to a Regional Processing Country unless the minister determines otherwise. The recent practise is to send all the asylum-seekers who arrive Australia by boat, without getting a valid visa to Cristmas Island, Nauru, or Papua New Guinea.

These asylum seekers are kept in jail or custody until the inquiry being finished. Recently the number of asylum seekers who arrive Australia by boat, has decreased due to the awareness conducted through local media. However, there are still families who are fleeing Australia looking for better and secured future there.

When we focused on the most vulnerable group, the children in immigration detention, we realize that Australia's system of mandatory detention requires that children without a valid visa remain in closed immigration detention until they are granted a visa or removed from Australia, unless the Minister for immigration and Border Protection decides to make a "residence determination" allowing them to live in community detention.

As at 31 January 2015, there were 211 children (aged under 18 years) in Immigration Residential Housing, Immigration Transit Accommodation and Alternative Places of Detention. The number of children in immigration facilities decreased in January due to children completing mandatory processing and being transferred into the community.

Sri Lanka has been co-operating with Australia to return these migrants. Children who are in this situation are very vulnerable and need special protection. Though there are existing International Human Rights and Child Rights standards and mechanisms, their implementation is unsatisfactory. It is clear that Australia's system of mandatory immigration detention of children is fundamentally inconsistent with Australia's Human Rights obligations such as ICCPR, ICESCR, CRC, and Torture Convention.

Immigration detainees are protected not only under International human rights treaties and norms, but also under the domestic legal system. Despite that, the Australian Government maintains a policy of indefinite mandatory detention of asylum-seekers since 1992. Any non-citizen who is in Australia without a valid visa must be detained according to the **Migration Act 1958(Cth).** The Act provides that a stateless person who has committed no crime, and who has requested removal from Australia and is cooperating with the authorities, may be kept in immigration detention for the rest of their life if unable to be deported or removed. This regulation has confirmed in ***Al-Kateb*** ***vs.*** ***Godwin*** [2004] HCA 37 While amendments to the Migration Act (Detention Arrangements) in 2005 require that the detention of children be a "measure of last resort", unaccompanied minors continue to be detained. However, these people may only be released from immigration detention if they are granted a visa, or removed from Australia.

Immigration detainees are protected under international Human Rights treaties and norms not because of their status as immigrants, but because of the inherent dignity and rights they posses simply by virtue of being human. The Universal Declaration of Human Rights (UDHR), the first global expression of rights to which all human beings are inherently entitled, declared that "[t]he peoples of the United Nations have in the charter reaffirmed their faith in fundamental human rights in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

Human rights treaties and norms provide protection for citizens of all countries regardless of whether they are living in or outside of the country of birth. Furthermore, for the purposes of human rights standards that govern detention which is the subject matter of this paper, the type of facility where an immigrant is detained is immaterial. All facilities must be held to the same standards.

A.Sources of International Human Rights standards

The sheer volume of human rights treaties and international instruments is indicative of the importance that the international community places on maintaining the inherent dignity accorded to all humans. Australia has remained a supporter of human rights throughout international treaty negotiations. Australia has ratified almost all of the major international human rights instruments. Australia was a founding member of the UN and played a prominent role in the negotiation of the UN charter in 1945. Australia was also one of Eight Nations involved in drafting the Universal declaration.

Australia and Sri Lanka must also comply with *jus cogens* (often called peremptory norms). *Jus cogens* are defined as those norms that are "accepted and recognized by the international community of states as a while... from which no derogation is permitted.

Furthermore, Australia is obligated to comply with Customary International Law that emerges "from a general and consistent practice of states followed by them from a sense of legal obligation". Australian Government may argue that because it has not signed a particular treaty, it is not bound by its terms. But the fact that most other states have signed and ratified these human rights treaties, suggests that there is a general and consistent practice of valuing the human rights contained within them.

The Human Rights of children who are in immigration detention are of special concern of this paper. Liberty is fundamental human rights recognised in major human rights instruments to which Australia is a party, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). I must mention here that children who are held in detention are particularly vulnerable to violations of their human rights.

In response to increased detention this paper aims to provide the knowledge and tools to hold government authorities accountable for violations of immigrant detainee rights. The first step in this process is to develop a framework for understanding the patchwork of legal regimes under which immigrant detainees derive rights.

There is no set time limit to how long a person may be held in immigration detention in Australia. The period of time a person spends in detention may vary from a few weeks up to a few years, or even longer. Australia continues to have one of the strictest immigration detention regimes in the world. Not only is it mandatory, it is not time limited, and people are not able to challenge the need for their detention in a court. Through this paper, the author wishes to point out the necessity of making an end to this system of mandatory immigration detention because it leads to breaches of Australia's human rights obligations including its obligations under the ICCPR and CRC not to subject anyone to arbitrary detention. The Convention on the Rights of the Child states clearly that;

- The detention of a child must only be a measure of last resort
- Detention must not be arbitrary.[xlix]

To avoid being arbitrary, detention must be necessary and reasonable in all the circumstances of the case, and a proportionate means of achieving a legitimate aim. If that aim could be achieved through less invasive means than detaining a person, then that person's detention will be arbitrary.

In order to avoid detention being arbitrary, however there must be an individual assessment of the necessity of detention for each person taking into consideration their individual circumstances. A person should only be held in an immigration detention facility if they are individually asseed as posing an unacceptable risk to the Australian community, and if that risk cannot be mitigated in a lesser stricti ve way. Otherwise, they should be permitted to reside in the community while their immigration status is resolves if necessary, with appropriate conditions imposed to mitigate any identified risks. According to the convention on the Rights of the child;

- Any child deprived of their liberty should be able to challenge the lawfulness of their detention.

For detention to be "lawful", it must not only comply with domestic law but also international law. This requires that a court must have the authority to order the person's release if the detention is found to be arbitrary.

Currently, Australia does not provide access to such review, while people in immigration detention may be able to seek judicial review of the domestic legality of their detention; Australian courts have no authority to order that a person be released from detention on the grounds that the person's continued detention is arbitrary. This is in breach of the Convention on the Rights of the Child.

The Convention also states;

- If detention of children is necessary in order to achieve a particular aim, then the length of detention should be the shortest appropriate period for the achievement of that aim.

In instances where children are detained, a review process is required to monitor detention effectively and assess whether it is justified. The author would recommend that this review process should occur within 72 hours of being detained and should conducted by an independent body, consistent with the Convention in the Rights of the Child.

- In all actions concerning children, the best interests of the child shall be a primary consideration.

The best interests of the child should be a primary consideration in individual decision making about a child and when developing legal frameworks and policies affecting children. If laws or policies lead to results that are not in the child's best interests, review is necessary.

Aspects of Australia's migration policy therefore sit at odds with the Convention on the Rights of the child. Examples include the requirement to detain child asylum seekers on arrival in Australia, and the requirement to transfer children who are unauthorised maritime arrivals to a Regional Processing Country. Officers are required by the Migration Act to carry out these tasks, regardless of whether it would be in the child's best interests.

The Convention on the Rights of the child provides;

- Refugee children and unaccompanied children are likely to be vulnerable and require particular assistance.

Article 22 of the Convention on the Rights of the child requires that governments ensure that children seeking refugee status are provided with appropriate protection and humanitarian assistance. Article 20 of the Convention on the Rights of the child provides that special protection and assistance is available for unaccompanied children.

Current detention law, policy and practise does not address the particular vulnerabilities of asylum seeker children nor does it afford them special assistance and protection mandatory detention does not consider the individual circumstances of children nor does it address the best interests of the child as a primary consideration [article 3(1)]

Detention for a period that is longer than is strictly necessary to conduct health, identity and security checks breaches Australia's obligations to;

-detain children as a measure of last resort and for the shortest appropriate period of time [Article 37 (b) of CRC]

- ensure that children are not arbitrarily detained [Article 379b)]

- ensure prompt and effective review of the legality of their detention [Article 37(b)]

Given the profound negative impacts on the mental and emotional health of children which result from prolonged detention the mandatory and prolonged detention , the mandatory and prolonged detention of children breaches Australia's obligation under article 24 (1) of the CRC.

At various times children in immigration detention were not in a position to fully enjoy their rights under articles 6(2), 19(1), 24(1), 27, and 37(c) of the Convention on the Rights of the child. Therefore, it is obvious that prolonged detention is having profoundly negative impacts on the mental and emotional health and development of children.

The mental health care provided to children in immigration detention is severely inadequate. The effects of arbitrary, indefinite and prolonged immigration detention raise serious concerns in relation to the ***Convention Against Torture,*** with the Australian Human Rights Commissioner reporting a very high prevalence of "mental distress" among detainees, especially long-term detainees. The UN Human Rights Committee has expressed concern about the detention of the mentally ill; in ***C vs. Australia*** (2002) UN Doc CCPR/C/76/D/900/1999 finding that it amount to cruel, inhuman or degrading treatment and in ***Madafferi v Australia*** (2004) UN Doc CCPR/C/81/D/1011/2001 finding it was inhumane.

V. RECOMMENDATIONS

1. The Australian government should end the current system of mandatory and indefinite immigration detention. The need to detain should be assessed on a case-by-case basis taking into consideration individual circumstances. That assessment should be conducted when a person is taken into immigration detention or as soon as possible thereafter.
2. The Australian Government should comply with its international human rights obligations by providing for a decision to detain a person or a decision to continue a person's detention, to be subject to prompt review by a court. To comply with article 9 (4) of the ICCPR, the court must have the power to order a person's release if their detention is not lawful.
3. The Australian Government should stop using Christmas Island as a place in which to hold people in immigration detention other than for the shortest possible periods of time.
4. Immediate measures should be taken to reduce overcrowding in immigration detention facilities on Christmas Island.

VI. CONCLUSION

As discussed the above, the duty owed by Australia and Sri Lanka to these children who are in detention in Australia must be clearly identified by the law making bodies of both of the countries. Therefore, It would be important to amend the domestic legal instruments in order to meet the International Human Right s standards.

ABBREVIATIONS

CRC- Convention on the Rights of the Child
ICCPR- International Covenant on civil and Political Rights
ICESCR- International Convention on Economic, Social and Cultural Rights

REFERENCES

United Nations High Commissioner for Refugees, *Guidelines on applicable criteria and standards relating to the detention of asylum seekers* (1999), p1

Convention on the Rights of the child, 1989, At, http://austlii.edu.au/au/other/dfat/treaties/1991/4.html (Viewed 11th June 2015)

BIOGRAPHY OF AUTHOR

Anjani Leelarathna obtained LL.B (Second Class Upper Division), from Faculty of Law, University of Colombo and Presently an apprentice at Sri Lanka Law College. The author is also an intern at Central Environmental Authority, Sri Lanka. In 2015; she was awarded the Dean of the Faculty of Law Award for Jurisprudence

Horizon Line of National Development in Light of Issues and Challenges in Sri Lanka: with Special Reference to Uma Oya Multi-Purpose Project

BM Weerasinghe, HH Basnayake, JNM Fernando, and G Rajapakshe
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
rajapakshagaya@yahoo.com

Abstract— *The notion of development is an essential element for a developing country. It provides a qualitative lifestyle for their citizens. Sri Lanka in the last 30 years has been battling with the problems of development in spite of war and still struggling with monetary funds, technology and skill labour together with environmental issues. The main piece of legislation that relates to this issue in all ways is the National Environmental Act No.47 of 1980 and the subsequent Amendments done to; mainly regarding the EIA process, improper use of land planning and other significant environmental aspects. National as well as International legal instruments are desirable to be addressed in our study, such as the 1992 Convention on Biological Diversity, to which Sri Lanka is a party. The objective of this paper is to pay serious consideration in regard to environmental issues and challenges as horizon line of Uma Oya Multi-Purpose Development Project in Sri Lanka. And also to aware the public with regard to issues and challenges of this national development and to acknowledge responsible authorities to maintain a strike a balance between national development and its confronts. The paper adapted secondary data as sources of information. The paper will conclude that faithful national development implementations in terms of intra-generational equity as challenges for the future and inter-generational equity as issues of present on our way to national development.*

Keywords— *National Development, Environmental Issues, Challenges*

I. INTRODUCTION

The pride of any government is the attainment of higher value level of development in such a way that its citizens would derive natural attachment to governance. National development can be described as the overall development or a collective socio-economic, political as well as religious advancement of a country or nation (Lawal and Oluwatoyin, 2011). It happens through major development projects construct in a country. But there are issues and challenges arise when operating these projects in the process of its national development. As we know, the horizon is a place where no one can achieve. Similarly, national development of a country cannot achieve through such projects easily because issues and challenges become a bar to it.

Since 2009, after eradicating civil war in Sri Lanka, most of major development projects which contribute to the increase of national development have operated successfully. Amongst, mostly discussed recent development project is Uma Oya Multi-Purpose Project. Uma River is a major offshoot of Mahaweli Ganga which has its headwaters in the Pidurutalagala Range. It flows through welimada and Kandeketiya in the Badulla District. It flows together with the Mahaweli River.

Uma River is one of the main water sources of the irrigation system supplying water to the areas developed under the Mahaweli Project. Uma Oya Project is a river diversion which will have the capacity to generate 90 MV of electricity and irrigate 5,000 hectares of agricultural land.

The General Principles of International Environmental Law such as intra-generational equity, inter-generational equity and public awareness are mainly significant principles in regard to this project. Intra-generational equity means equity between people of the same generation whereas inter-generational equity means equity between present and future generations. Public plays a vital role in granting approval to the operation of major development projects. Therefore, public awareness, which means the environmental protection awareness through governmental and non-governmental agencies to take part in protecting the environment, is significant in this regard.

The paper consists of five main parts to evaluate the contribution of Uma Oya Multi-Purpose Project towards the national development in Sri Lanka along with issues and challenges. The first part deals with the legal standards relating to this project. Then the paper focuses on issues and challenges of UMA OYA Project. The third

part is an analysis of how General Principles of International Environmental Law applicable to this. In the fourth part, the study focuses on opinions of environmental experts. The final part concludes the paper with suggesting recommendations to solve problems.

II. LEGAL STANDARDS RELATING TO THE UMA OYA MULTI PURPOSE PROJECT

Environment Impact Assessment (EIA) is the internationally accepted legal tool to assess the impact to environment caused by the implementation of major development projects and propose preventive measures to minimize the predicted impacts. The three-volumes of EIA Report of the Uma Oya Multi-Purpose Development Project were prepared by the University of Jayawardhanapura. The project proponent was the Ministry of Irrigation and Water Management whereas the Central Environmental Authority (CEA) acted as the Project Approving Agency (PAA).

According to Section 23AA of the National Environmental (Amendment) Act No. 56 of 1988, before starting the development project the EIA has to be done and approval must be required from the specific PAA. The EIA Report was opened to the public for review and comments for a period of 30 working days under the provisions of Section 23BB of this Act. During this time, letters were received by the CEA from many Environmental Organizations, Farming Organizations, Community Organizations and groups adversely affected by the project objecting its inception. Section 23P of this Amendment Act mentions about the restriction on noise pollution, but without taking into consideration this provision, this project emits an excessive noise to the environment which is harmful. This does not comply with the standards and limitations prescribed under the National Environmental Act in regard to the volume, intensity and quality of noise.

The proposed project would cause extensive damage to aquatic life, especially through destruction of habitat. This may also affect to the indigenous species of that area. It is inconsistence with the provisions of Section 18 of the National Environmental Act No. 47 of 1980 which states the management policy for fisheries and aquatic resources. The EIA acknowledged the risk of the survival of migratory species. According to Section 20 of this Act, the CEA shall recommend the management policy for wildlife. But there is no such policy recommended by the CEA in regard to the wildlife conservation. Improper land use planning was occurred from this project which is inconsistence with the provisions under Section 15 of this Act which says about the land use management. Section 17 of this Act says about the conservation and management of natural resources in order to preserve for future generation. But natural resources of this area are destroyed due to this project, so how we keep natural resources for the future generation as mentioned in this above section? Also when preparing the EIA Report, the management policy on soil conservation under Section 22 of this Act is not taken into consideration and as consequence a vast damage is caused to the soil in this area.

The EIA further stated the serious impacts to the biodiversity, especially to the fauna. Section 42(1)(a) of the Fauna and Flora Protection Ordinance No. 02 of 1937 states that, “No person shall in any area remove, uproot or destroy, or cause any damage or injury to, any plant……..” Especially, the EIA recognized that the lives of Sri Lankan Sloth Bear who is considered as critically endangered species have become a threat due to this project. The EIA also recognized a strong impact on elephants. Section 12(1)(a) of this Act states that, “No person shall, in any area outside a National Reserve or a Sanctuary hunt, shoot, kill, injury or take any tusker or elephant…….” Therefore, it is clear that this proposed project has become a threat to Sloth Bears and elephants lived in that area but unfortunately it is not taken into consideration.

With the proliferation of international environmental instruments, there is an inevitable overlap in goals and subject area, some relatively comprehensive conventions, like the 1992 Convention on Biological Diversity, address the entire range of human activities in an effort to protect natural systems (Kiss and Shelton, 2004). Sri Lanka ratified this convention in 1994. Article 3 of this Convention says about the extension of the concept of state sovereignty. But this proposed project is inconsistence with this provision. Article 14 states that, “Each Contracting Party…… shall introduce appropriate procedure requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects……. .” But the problem is whether the EIA Report was prepared in accordance with this provision, since we are already a party to it.

The EIA stated about the necessity of permanently relocating residents. Moreover, the agricultural lands of 197 families will be acquired for the project and the livelihood of those families will be interrupted. Accordingly, fundamental rights of those people under Article 14(1)(h) of the 1978 Constitution of Sri Lanka are infringed from this project because they lost their freedom of choosing their residence. Also, it stated that around 38% of affected people are farmers who grow

vegetables and potatoes. They cannot do planting in the soil of this proposed resettle area and they have to shift to a totally different employment of tea. Although 1 acre of land is provided for this purpose, but it is doubtful whether they would be able to adapt to the new life. Therefore, fundamental rights of people under Article 14(1)(g) which states about the freedom to engage in a lawful occupation is infringed from this proposed project and the solution provided from EIA Report is not satisfied. According to Article 28(f) of the constitution, it is a fundamental duty of every person in Sri Lanka to protect nature and conserve its riches. But it shows that this project is inconsistence with this provision and the CEA should have considered about this fact thoroughly before granting approval.

III. ISSUES AND CHALLENGES REGARDING THE PROJECT

The main issue that has had occurred since the inception of this project is, violation of the Fundamental Rights of the people living in those areas. Puhulpola reservoir, which is one of the two main reservoirs aiding the diversion of the Uma River, is being built in the downstream of the town of Welimada. Due to the construction of this, 98 houses and farmlands of 128 families around those areas and 3km of the Welimada-Badulla road will be soon submerged. Likewise, the other main reservoir, Dayaraba reservoir which will be built in Atampitiya and the underground power station which will be located in Galbokka village in Wellawaya Divisional Secretariat Division also carries the same consequences. The authorities have craftily concealed this information from the people, not mentioning it in their EIA Report.

On the other hand the monetary value of the resources lost due to this project is considerable. The main harvests cultivated in the areas above mentioned subject to submersion are paddy, vegetables and potato. Even though it has been proposed to resettle the people displaced due to Puhulpola reservoir and those displaced due to Dayaraba, these resettlement areas are not suitable for cultivation. Therefore loss of Rs. 4.6 million in terms of revenue is caused by the paddy yield, and Rs. 6 million from vegetables and potatoes. Such a massive loss will occur upon the implementation of this project. People in those areas are also involved in animal husbandry including cattle and buffalo farming. But the EIA report indicates that provision of alternative meadows for grazing the cattle to restore the disruption to animal husbandry cannot be functioned meaning that fundamental rights of these farmers will be breached according to the plan of the project.

To compensate for agricultural land lost due to the Uma Oya Project, forests around Alikota-araandkuda oya reservoirs and Handapanagala tank in the Kirindi oya Basin will be cleared. This leads to various negative outcomes. Such as loss of forest cover in the Kirindi oya basin will increase siltation of the Lunugamwehera reservoir due to soil erosion. Further, areas to be taken as agricultural land are situated in association with the Wetahira Mount Nature Reserve and in forests occupied by elephants. Loss of habitat of elephants is going to be a threat to human life.

Loss of soil stability due to vibration generated in underground mining activities, changes in the course of water springs and many effects to the water streams are some of the major adverse effects likely to be caused by this project. This is particularly disadvantageous to central highlands where most of the developmental processes of the project will be carried out since it is already highly vulnerable to landslides. Mining activities will magnify the potential of landslides, soil erosion, siltation of water bodies, and drop of water table in the areas involving the underground canals. To install transmission line to transmit power generated at the underground hydro power station a massive area of forest of the Ravana Falls Sanctuary must be cleared. As a result, biodiversity degradation is caused from the dissection of the Ravana Falls Sanctuary.

Because of the river pollution during the construction stage, the damage and its long term cumulative impacts on aquatic flora and fauna also is very high. Apart from that, the noise pollution in those areas can affect the hearing ability of people and the disturbance to the education of children.

Even though 84% of the benefits are from energy generation, increased yield of water is only 2% and cultivation of other crops in new areas is 11% of the total benefits of the project. More than benefits, the loss seems to be greater which will affect the livelihood and lives of people, freedom of animals, the fauna and flora, geology, the national wealth of a country. By proceeding with a project which isn't cost effective, it's the public who will have to bear the price of it by paying huge tax amounts to the government for generations. That way, it would be impossible to attain sustainable development.

IV. APPLICATION OF GENERAL PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW TO THE PROJECT

Beyond the fundamental protections of human rights, States and the international community must fairly allocate and regulate scarce resources to ensure that the benefits of environmental resources, the costs associated with protecting them, and any degradation that occurs (i.e. all the benefits and burdens) are equitably shared by all members of society. In this regard, environmental

justice is an application of the principles of distributive justice as it seeks to reconcile competing social and economic policies in order to obtain equitable sharing of resources (Kiss and Shelton, 2004).

The principle of inter-generational equity emerged from the recognition that while the present generation is entitled to exploit the limited natural resources of the earth for its sustenance and survival, if it continues to do so at the present levels with the resulting environmental damage, the next and future generations would be born into a devastated planet which would be unable to adequately sustain human or animal life (Guneratne, 2004). It explains that the present generation has a duty towards yet unborn to use natural resources in a sustainable manner and bequeath it to the next generation. This principle recognizes that there should be equity between the present generation and future generation in using natural resources in a sustainable manner. This concept was first articulated in the Stockholm Declaration and thereafter several other Conventions such as the Rio Declaration, Climate Change Convention and Bio Diversity Convention have also expressed the right of future generations. It is closely linked with sustainable development and the precautionary principle. In Sri Lankan context, this principle is discussed under the provisions of Section 17 of the National Environmental Act.

Judicial decisions of both national and international domain have expressed and upheld this principle. The sustainable use of natural resources is discussed in the case of *Bulankulama and Others* v. *Secretary, Ministry of Industrial Development and Others* [2000]. In this case, Amarasinghe J observed that "The inter-generational principle in my view, should be regarded as axiomatic in the decision making process in relation to matters concerning the natural resources and the environment of Sri Lanka in general, and particularly in the case before us."

Under the international context, the judgment delivered by Weeramanthry J in the case of *New Zealand* v. *France* [1996] is significant. He observed that "……., the principle of inter-generational equity – an important and rapidly developing principle of contemporary environmental law." The Philippine case of *Juan Antonio Oposa and Others* v. *The Honourable Fulgencio S. Factoran and another* [1994] has a recent importance in this regard. In this case the petitioners further claimed that in bringing this petition they wish to represent their generation as well as generations yet unborn.

Receiving public comments in finalizing EIA report is major requirement of EIA process. There are a number of advantages of receiving the public comments on in the EIA process since they are the people who finally become the victims of the disaster occur by the project.

The UMA OYA Multi-Purpose Project is not accordance with the principle of Intra-Generational Equity because the entire environment including animals, fauna and flora, soil and so on is destroyed from this proposed project. The operation of UMA OYA Project can be considered as using natural resources by the present generation. But natural resources are not kept to the future generation that they also can use them because entire environment is badly affected by this project. This project is also inconsistence with the principle of Inter-Generational Equity which is of equity between various generations in a one society. As natural resources are destroyed from this proposed project, present generation is unable to use those natural resources. Public awareness plays an important role in the process of granting approval to major development projects. The EIA report of uma oya project is published in Ceylon Daily News in 2011, seeking public comments. There were over 110 public comments to CEA about Uma oya project. The CEA studied all those public comments and approved the EIA. Furthermore, again EIA was opened to public comments in 2013. Since the project has already started, they charge that the current EIA was just a showpiece but call for the public to register their objections so that authorities will be forced to find alternatives.

V. EXPERT OPINIONS ON THE PROJECT

Dr. G.T. Dharmasena, former Director General of Irrigation and a consultant to U.N Project Services in Sri Lanka stated, "It is illogical to assume that all available water at the dam sites can be diverted due to downstream water requirements and also to the rapid fluctuations of water levels in the river caused by flash floods....."Some of these matters are environmental and social impacts due to diminished flow in Uma Oya.

He also came up with an alternative seeing the enormous harm that is going to be caused to the National Development of Sri Lanka, which is still in the process of developing. He said that by damming Kumbukkan Oya at an appropriate location to Veheragala reservoir in the Menik Ganga basin via trans-basin reservoir, water for the Moneragala, Hambantota and Ampara Districts can be provided.

Emeritus Professor C.M. Madduma Bandara of the University of Peradeniya said that the tunnel trace could have been changed before construction started because

there are sink holes especially in Welimada, Bandarawela and the famous Dowa Cave temple above the tunnel. Can national development be done by ruining significant places like this? … Dulip Jayawardena, a retired Economic Affairs Officer U.N ESCAP and a former Director of Geological Survey Department said that a ''more detailed study should be carried out to come to a definitive conclusion on the economic and environmental feasibility of this mega project without rushing to conclusions with inconclusive technical evidence''.

By 2015, Rs. 76.3 Billion has been spent over to complete *one-third including the tunnel.* And now a large amount of money should be allocated from national income for building new houses for the development. Refugees *has to provide reasonable solutions to number of social, economical, ecological, geographical, geological issues in areas coming under this project.* Those who pollute must bear the cost of doing so. Remediation of the damaged environment is part of the process of development, but directly or indirectly the cost of pollution are finally born by the public rather than the pollutants.

The traditional concept that the development and ecology are opposed to each other is no longer available. And the human development paradigm needs to be placed within the context of our finite environment. Other than *damages caused to the houses of villages in those areas, there is a shortage of water with wells running dry. Since people lack drinking water and are compelled to depend on water distribution by the AG's office, its women and children who suffer a lot. Even though economic and social development is essential for ensuring a favorable living for man, is it right of a government to deprive a certain group of people of their rights and ensure the rights of another group of people living under the same roof ?*

Prof. Jinadasa Katupotha, Department of Geography of the University of Sri Jayewardenepura, strongly opposing the Uma Oya project admonished the existing Government to permanently shut down the project due to the above mentioned implications. He considered this as one of the most unsuccessful projects in the Sri Lankan history. He proposed that the Government should save the unused allocation of Rs. 55 billion of the project fund and invest that money to build some viable surface water storage projects in the Southern Province similar to the ancient reservoirs. Further, he stated that Sri Lanka will have to face a high magnitude disaster in future if they proceed with the project because more damages will be caused after completing the project rather than gaining benefits. He also says with utmost confidence that there is no experts in the field of engineering in our country who can do tunnel repairing as a solution to the tunnel leakage problem.

Mr. Athula Priyantha, an agriculture and environment specialist says that people in Moneragala and Hambantota will suffer from chronic kidney disease if they drink water supplies from chemical contaminated water in Uma oya. So, it's clear that this project leads directly to the destruction of the Human Affluence. And Mr. Sajeewa Chamikara of the Environment Conservation Trust warned that after the 26 km long tunnel is completed, the hilly areas of the Uva Province will be prone to severe landslide threats as the constructors carry out constructions in unstable rocky lands.

VI. CONCLUSION

Concluding the paper, the researchers would like to undertake a study to bench mark as Singapore; a country which had developed rapidly for recent past. It is important to stated that some of the great environmental achievements in Singapore on their way to development: Opening our reservoirs for recreational use and bringing nature back to our rivers, streams and canals; fostering the growth of a water industry and being a global thought leader of water policy and governance; championing the movement of live able cities and being a global thought leader on good urban planning, policies and solutions; launching multi-disciplinary environmental education, both at the undergraduate and post-graduate levels and at the Asia Pacific Centre for Environmental Law of the National University of Singapore; fostering a cooperative partnership between government, business and civil society.

So it is very clear that mere development won't achieve proper development in any country, development and sustainable development should be parallel railway line which won't over ride each other. They are very proud to say about the water management and good urban planning along with other environmental enhancement within the frame work of development.

But when analyzing Sri Lankan development process in terms of multipurpose developing projects its reflecting Sri Lankan incapacity for sustainable development. It was revealed that Asian Development Bank rejected to grant loan in the first instances of this project stating the destruction which can be caused to future generations. Move over it had revealed that Iran also did not conduct any feasibility study prior to the project. In the EIA report also the responsible authorities concealed some information which leads to not approve the project. As discuss in the issues and challengers in the paper,

researchers had able to prove the breach of most of environmental principles by the decision makers, not only principles but also it over ruled the prescribed law of the country. It is surprise to analysis the breach of power vested to the government by the supreme law of the country as a fundamental duty.

At the end of this study it's observed that some of main lag behinds of the project as undisclosed of important information from the project approving stage, no consideration of environmental principal, high political influences, planning inappropriate irrigation polices, overruling define law in the country.

We suggest recommendations regarding the proposed project as follows: decision makers should adhere to the well defined laws and regulations in the country and who used the power in *ultra virus* severely punish by the law; public Participation in terms of professional opining for the major projects make compulsory; preparation of EIA reports should not be limited to local specialist and foreign firm should be invited for this purpose. It may be argued that the amount which has to afford for foreign EIA Report is high but it should noted that the sum which have to spend to repair the economical and social damager is far more higher than this. This step will encourage the principle of precautionary approach as well; for major developments projects especially multi-purpose projects in Sri Lanka; PAAs should be the Parliament; term of references should totally based on principle of sustainable development; Strict conditions should be gazette for an instances cut down of tree to implement the project should be maximum 2%, non of the streams make nude.

REFERENCES

Guneratne, C., (2004), Environmental Law, The Open University Press.

Kiss, A. and Shelton, D., (2004), "International Environmental Law", 3rd Edition, UNEP, P. 11.

Koh, T., "Eco Singapore Delegation to UNCSD – Green Thoughts Inspired Stockholm and Rio".

Lawal, T. and Oluwatoyin, A., (2011), "National Development in Nigeria: Issues, Challenges and Prospects", Vol.3(9), Journal of Public Administration and Policy Research, PP. 237-241.

The National Environmental (Amendment) Act No. 56 of 1988.

The National Environmental Act No. 47 of 1980.

The Fauna and Flora Ordinance No. 02 of 1937.

The 1992 Convention on Biological Diversity.

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

Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others (2000) 3 SriLR 243.

New Zealand v. France (1996) Vol. 3 (1 and 2) SAELR 7.

Juan Antonio Oposa and Others v. The Honourable Fulgencio S. Factoran and Another (1994) Vol. 1(3) SAELR 113.

Uma Oya Trans-Basin Multipurpose Project – A Critical reviewhttp://www.dailymirror.lk/68975.011, Accessed 10 June 2015.

Uma Oya Multi Purpose Developmental Project<file///C:/Users/user/Downloads/Uma-Oya-Multi-Purpose-Developmental-Project.html>, Accessed 10 June 2015.

Uma Oya Project: More Damage Than Benefit!http://www.ft.lk/article/399708/Uma-Oya-Project:-More-damages-than-benefits, Accessed 10 June 2015.

UMA OYA MULTI PURPOSE DEVELOPMENT PROJECThttp://parlsrilanka.org/issues.multi-purpose-project/item/181-uma-oya-multi-purpose-developmental-project, Accessed 13 June 2015.

Uma Oya EIA decision – A lost opportunityhttp://hemanthawithanage.blogspot.com/2011/05/uma-oya-eia-decision-lost-opportunity.html, Accessed 13 June 2015.

Medical Negligence and Doctor's Liability; A Critical Review in Present Legal Regime in Sri Lanka

P Rupasinghe
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
poornirupasinghe@ymail.com

***Abstract*—** Medical negligence is the breach of a duty of care towards a patient which results in harm to a patient. Medical negligence is a global occurrence but some countries with developed health care systems where redress scheme for negligence. Medical negligence now a days have become one of the serious issues in Sri Lanka. Unfortunately, there are no proper criteria or law to identify or investigate errors in health care either in the public or private sector. In a case of negligence it is necessary to determine when and how a breach of duty has occurred and whether there was a failure to exercise a reasonable degree of care and skill. However, weakness of the presence legal regime is delay in calling an inquiry allows time to manufacture evidence, with prolonged civil litigation. This research is based on qualititative and quantitative data and embraces both desk research with occasionally field investigations and collection of secondary data in the form of law reports, books, journals, dissertations and as well as judgements of alleged land mark negligence cases Sri Lanka. The objectives of this paper is critically analyze the concept of negligence and how is the breach of doctor's liability in each cases. Also it examines the principles followed by the courts in assessing the quantum of damages and practical difficulties within existence Sri Lankan legal regime. In my study, I found in Sri Lankan health care set up, to reduce the events of malpractices contributing factors must be minimized. Shortage of professionals with expertise in the public as well as private sector are contributing factors for negligence and less skilled substitutes to undertake such tasks. In assessing damages in such a case, the court must weigh policy factors with a sense of flexibility depending on the circumstances.*

***Keywords*—** *Legal regime, Medical malpractice, Liability*

I. INTRODUCTION

Negligence may be defined as doing something which a prudent and reasonable man would not do or omission to do something which a prudent and reasonable man would do, in a given situation. Although medical accidents and misadventures are an expected social phenomenon, medical negligence is not. Medical negligence is the breach of a duty of care towards a patient which results in, harm to a patient. This could be by an act of commission or omission by the medical staff. This duty is owed by all those professionals who hold themselves out as skilled in medical, nursing and paramedical fields. It arises independently of any contractual relationship.

Medical negligence or medical malpractice is often considered as one and the same. It actually means medical care that is hampered due to negligence by the health care provider. It may include doctors and all other related staff who are responsible for providing healthcare.

Those patients or their family members have all the right to initiate legal actions against such practices, and the people involved can be sued in court. It is, however, very difficult to prove that the injury occurred as a result of medical negligence.

In most of the jurisdictions, people are qualified to get a certain standard and level of medical care. When such standards are brought down due to any reasons, the entire staff responsible for providing medical care is subjected to the lawsuit. The reasons of low standards are when the staff do not adhere to the guidelines and are either too busy or tend to get distracted. Sometimes, erroneous actions or faulty machines can also result in unwanted negligence.

Insufficient skill, care, pace or attention can lead to negligence. Professionals providing psychological care to patients are equally responsible for providing due care to their patients. In case of any negligence on their part, they may be charged for medical malpractice. Patients are authorized to receive good medical facilities during their course of treatment. Hence, any negligence in that can also be charged.

The medical professionals who have been charged under medical negligence are often compared to other medical professionals of their group for professionalism and competency before trying them in the court.

A.Elements of a Medical Negligence

Medical negligence is established when 04 main criteria are satisfied. They are:

- The doctor owes a duty of care to the patient
- There is a breach of this duty by an act of commission or omission,
- A causal relationship exists between the breach of the duty and the damage caused to the patient
- Damage or harm is caused to the patient

The burden of proving these elements is on the plaintiff in a malpractice law suit. More important is that the plaintiff must show some actual compensated injury that is a result of the alleged negligent care. Caution may also be vigorously litigated issue because the physician may allege that the injuries were caused by physical factors and related to the alleged negligent treatment. There is a limited time during which a medical lawsuit can be filed which varies per jurisdiction & type of malpractice.

B. Liability of Medical Professionals

Roman-Dutch law recognizes that individual public officers could be held liable for their negligent acts and/or omissions. Further, it recognizes that a negligent breach of a duty, whether imposed by statute or by common law, could give rise to delictual liability. In English law too, the traditional approach has been that public authorities or officers are in the same position with regard to negligent acts and/or omissions, as private persons. Hence, it would be possible in Sri Lanka to bring action against individual Medical officers under law of delict, in respect of negligent omissions which constitute breach of duties imposed by law.

C. Defence of a doctor against charges of Negligence

A doctor will be considered negligent in the following circumstances

- Duty of care
- Breach of standard of care or failure to exercise such duty of care (dereliction)
- Injury or damage and reasonable forseeability of damage

D. Doctor's Duty of care

When a medical practitioner attends to his patient, he owes him the following duties of care:

(1) A duty of care in deciding whether to undertake the case;

(2) A duty of care in deciding what treatment to give; and

(3) A duty of care in the administration of the treatment.

A breach of any of the above mentioned duties gives a right of action for negligence to the patient.

II.LAWS RELATING TO MEDICAL NEGLIGENCE IN SRI LANKA

A. Civil Law

In Sri Lanka, civil wrongs should be adjudicated under the Roman-Dutch law, which is the general law of the country. Roman-Dutch law is one of the received legal systems in Sri Lanka. It provides relief for civil wrongs under law of delict. A delict is the breach of a general duty imposed by law, which will ground an action for damages at the suit of any person to whom the duty was owed, and who has suffered harm in consequence of such breach. The law of delict comprises those legal rules which indicate when, and to what extent, a person will be held liable for having committed a delict.

1) Liability under Law of Delict

Law of delict is derived from two basic actions, the Aqulian Action and the Actio Injuriarum. The Supreme Court decision in **Prof. Priyani Soysa v. Rienzi Arsecularatne** has established that, Sri Lankan Courts must develop the law of delict within the framework of the core norms of the Aqulian Action and the Actio Injuriarum, until legislative changes are introduced. Therefore, the liability of the medical professionals under law of delict should be determined within this basic frame work. The Aquilian Action has three core elements:

(i) proof of wrongful acts or omissions;

(ii) Negligence (culpa) or intentional wrongdoing (dolus)

(iii) Resulting patrimonial loss.

The Actio Injuriarum requires proof of an infringement of interest connected with person, dignity or reputation, committed intentionally or with animus injuriandi. It becomes clear that any delictual action based on negligence could only be brought under Aquilian Action. Hence, liability of the police for negligent omissions should be determined under the Aquilian Action

B. Certain Public Law Remedies

There is a main public law remedies available to persons aggrieved by negligent omissions of the Medical professionals and, the remedy provided in Article 126 of the Constitution, in respect of fundamental rights infringement Fundamental rights jurisdiction of the Supreme Court has become a popular method of holding Medical professionals accountable for their conduct. Certain fundamental rights guaranteed by the Constitution are directed at prevention of physical injury on human beings. For instance, Article 11 of the Constitution of Sri Lanka declares that,

"No person shall be subject to torture or to cruel, inhuman and degrading treatment or punishment".

C.Action against the Medical Negligence

In Sri Lanka, a victim seeking redress of a medical negligence can make a complaint to the health authorities, forward an affidavit to the Sri Lanka Medical Council (SLMC), complain to the Human Rights Commission, lodge a complaint to the police station or file a civil court case in the District Court. In high profile cases all the above events can take place concurrently, but in most instances a departmental enquiry and police investigations followed by a court case will be the outcome. The SLMC Registrar says many victims are not aware of the role that SLMC plays and laments that complaints are not brought to them. He explained the protocol to be followed by the victim of the family or his estate and the lengthy procedure involved thereafter. The Ministry of Health inquirers initiate action against the accused probably by appointing a committee or a medical administrator, all disciplinary in nature and if the element of negligence is proved in the case of a state employee, the Public Service Commission (PSC) has the power to take disciplinary action against the accused but the victim will not be compensated by way of pecuniary measures. If the Police files a court case it may take a long time, perhaps 10 years. Unless a gross negligence is proved, criminals liability does not exist. If serious nature of injury or death occurs, the case may be heard in the lower or superior courts and in the event of appeal, it may end up in the court of appeal or even supreme court. Commissioner of Human Rights, Sri Lanka emphasizes the need of firm legislation to prevent doctors walk away easy after treating haphazardly and insists that every victim to send petitions to SLMC to take action. Apart from that he insists the need of more stringent legislation to stem the carelessness of doctors. As a whole all the above avenues are time consuming, some are costly and some lack transparency. Moreover, the victim or the aggrieved party and the Health Care Provider (HCP) both undergo a gruelling period leaving only frustration, financial loss, mental agony, and retribution. Those procedures will add more misery to the victim and the relatives already subject to purported medical negligence even to the extent of losing a loved one, loss of a limb, or damage of irreparable nature. The only option for the victim in the present context is to file a compensation case usually labelled as case (Wrongful act or infringement of rights leading to legal liability), a journey down a long pathway, an adversarial and hangs on balance of probabilities. Even if the victim is compensated, it is usually years after the adverse event and the award is reduced by a large percentage that covers legal fees and expenses associated with the trial. According to a consultant JMO the present compensation system is financially oriented and far away from the scientific fundamentals of the medical practice as well as from our long standing culture religious and humanitarian values. (GMJ Sept.2009) According to him tort-based medical litigation make the health care professional and the patient both become victims but benefits the legal profession.

III.DAMAGES

In the civil law if someone does any harm he has to pay for it irrespective of he did it wilfully or negligently or by inevitable accident. In such cases he has actually done harm and therefore is bound to undo by paying compensation. The principle in the civil case is the transfer of loss from the plaintiff to the defendant by enforcing compensation.

A. Types and landmarks of Medical Negligence

Arseculeratne v. Priyani Soysa is a landmark and controversial case of alleged medical malpractice in Sri Lanka. The plaintiff's case was that the defendant was negligent in not diagnosing Brain Stem Glioma and in the misdiagnosis of Rheumatic Chorea. Had a timely diagnosis been made, it was argued by the plaintiff, survival or prolongation of life would have been possible. Since Brain Stem Glioma was a terminal condition with no prospect of effective treatment, it was also argued for the defendant that even if her negligence was established, causation had not been proved and as such the plaintiff's action should fail. It was on this ground that the Supreme Court allowed her appeal. Prof. Soysa's appeal to the Court of Appeal was dismissed, however the quantum of damages was reduced as under the Common Law of Sri Lanka which is Roman Dutch law, and damages could only be awarded for patrimonial loss. The Supreme Court allowed Prof. Soysa's appeal setting aside judgments of both lower courts. In a landmark judgment heavily critical of the decisions of the lower courts, the Supreme Court held that causation was not established on a balance of probabilities by the plaintiff. The defendant was also allowed costs of action, which she declined to accept. The case lasted almost a decade traversing the full extent of litigation in the country - from the District Court of Colombo to the Court of Appeal to finally the Supreme Court. The District Court upheld the Plaintiff's case and awarded him Rs. 5,000,000 (around US$ 125,000 at the time) and costs.

Medical negligence can occur in an infinite number of ways, but many instances of medical negligence can be grouped into one of the following categories:

1) Misdiagnosis

One of the most difficult aspects of a doctor’s job is taking a set of symptoms and diagnosing the illness or injury causing them. Often times, several different

illnesses may result in similar symptoms, but will require very different treatment. For this reason, it is important that, if a doctor has doubt regarding a diagnosis, further testing should be done. Often times, an illness or injury becomes more and more difficult to treat as time goes on. It is often critical that a doctor diagnose an illness or injury in an appropriate amount of time, so that treatment can be administered, and the patient made well.

Jude Stanly (15) in Negombo died in 2011 at the Lady Ridgeway Children's hospital after being prescribed filaria tablets without identifying the real illness Failure to Timely Diagnose.

Chandrika Wickramasinghe (30) in 2012 died at a private hospital in Matara just two days after the delivery of her baby. Cause of death: The administration of a wrong injection.

A 45-year-old mother reportedly died after receiving a transfusion of the wrong blood type at the Negombo Base hospital.

2)Surgical Error

Surgical errors are a common form of medical negligence, and usually involve a doctor accidentally cutting or cauterizing an internal organ or tube, which can be defined as a negligent act if careful performance could have prevented it. Common injuries resulting from surgical errors have to do with foreign fluids, such as urine, bile or feces, entering the abdominal cavity through a cut unintentionally made during a surgical procedure. This often leads to severe infections and sepsis, or septic shock which can lead to a patients' death.

Another form of surgical error is called a wrong site surgery, and is exactly what it sounds like. There have been cases reported of patients needing an arm, leg, hand, finger or other appendage amputated, and a mistake prior to surgery results in the wrong appendage being amputated. Imagine a patient who would have otherwise lived a normal life with one prosthetic leg, is now permanently bound to a wheelchair.

A 48-year-old mother, **Sithy Nazeera** alleged that her healthy leg was accidentally amputated at the Negombo Base Hospital.

Upali Gunatilake (47 years old husband) and a **Sanduni Rashmika Gunatilake**(15-year-old daughter)of a **Dayani Hemamala** (38-year-old wife) who died due to alleged medical negligence at the Durdans Hospital in Colombo filed a lawsuit against the hospital and the gynaecologist and obstetrician who performed a surgery into an ovarian cyst of the deceased woman, claiming Rs.14.6 million as loss and damages.

Professor in the Peradeniya University **Rajiva Jayasinghe** died in 2013 an operation named SLEEVE GRESTECTOMY under a Laparoscopy method at the Kaalubowila Teaching Hospital.

3) Failure to Follow Up with Treatment

This is a broad form of medical negligence that involves a doctor prescribing treatment, then failing to monitor the progress and adjust or cease treatment accordingly.

The plaintiff Achala Priyadarshani had been admitted to the Matara Hospital with fracture injuries in her left hand after falling down a flight of stairs at her home in Urubokka. The plaintiff stated she received treatment at the Matara Hospital and was subsequently transferred to the Colombo National Hospital for further treatment. The plaintiff stated that upon being admitted to the Colombo National Hospital, the doctors had diagnosed to amputate her left hand. The plaintiff further stated that her left hand was amputated due to negligence on the part of the staff attached to the Matara General Hospital and the Colombo National Hospital. She further stated that the doctors diagnosing to amputate her hand could have averted it, if the defendants and the hospital staff had acted in a responsible, effective and vigilant manner and claimed a sum of Rs.100 million as damages from the defendants and the state.

Nimeshka Kavindi Abeysekara whose finger was amputated immediately after her birth at the De Soyza Hospital in 2005 sued the nurse and the Attorney General stating that it was the negligence of a Government servant and claimed Rs 10 million as compensation.

Dedunu Kanchana de Silva (23) died in 2008 at the Ragama hospital, due to lack of proper medical care.

4)Failure to Treat in a Timely Manner

Once a doctor makes a diagnosis regarding a patients' illness or injury, treatment should be administered is such a time frame that gives the patient the best possible chance at recovery. If a doctor fails to act quickly enough to treat the patient, then possible negligence has occurred. Often times, this form of medical negligence takes place in an emergency room or urgent care situation, where timeliness of treatment can mean the difference between life and death.

Birth injury cases also often result from a failure to treat in a timely manner. In cases of fetal distress, hospital staffs have precious few moments to act, and perform a c-section to remove a baby, before permanent damage or injury occurs to the fetal brain. There have been

numerous cases of a failure to perform a c-section in time, resulting in permanent brain injury, or cerebral palsy in a new born baby.

Baby died after delivery at the Nagoda hospital. Mother - Rukmani Dias (28) was in severe labour pains but the doctor did not transfer her immediately to the Castle Street maternity hospital.

Sarath Paladeniya (39) in 2001 a Sergeant of the Special Task Force, admitted to the NHC for high blood pressure, died due to negligence in giving him timely treatment.

Ashoka Dayananda's daughter aged one year and two months baby Sewmini whose finger and left hand was amputated due to human error and not willful negligence at the Kandy General Hospital in 2006.

Five pregnant women died at the Nagoda hospital after caesarean operation in 2011.

5)Anesthesia Error

In any surgical procedure, anesthesia poses a high risk in and of itself, which is why anesthesiologists practice such a narrowly focused medicine. Anesthesia errors can lead to severe brain injury, organ failures, and even death. In many cases, medication administered to a patient in the days and weeks prior to a surgical procedure can affect the drugs used for anesthesia. It is critical that an anesthesiologist examine the patient's medical records prior to deciding on the type, mixture or "cocktail" to use to anesthetize the patient for surgery. Any failure to do so can result in serious injury to the patient.

V. V. Chandra Malkanthi (37) died after delivering her baby at the Homagama hospital in 2007.

6)Medication or Prescription Error

Medication and prescription negligence can generally occur in one of two ways:

1. A doctor prescribes a patient a drug or medication that causes injury due to a dosage error, misdiagnosis of symptoms or failure to check for allergic reaction, or;
2. A prescription is filled incorrectly by a pharmacist, which can lead to injury to the patient. One case places liability for medical negligence on the prescribing doctor, and the other on the pharmacist.

Sumudhu Jayanath (14) from Hanwelle admitted for appendicitis died in 2003 at the Avissawella base hospital for bowl infection caused by wrong medication.

Obviously, this is not a comprehensive list of types of medical negligence, but does encompass most of the types that usually result in injury and a case of medical malpractice.

IV. TRIAL

Medical negligence cases can drag on as long as ten years to come to court, at great expense, and are notoriously difficult to win. The courts seem keen to protect the integrity of the health profession while being very considerate to medical practice regarding medical negligence. In civil suits the victim or the legally designated party on behalf, has to prove all the elements by preponderance of evidences but if both parties agree, the case may be settled pre-trial, on negotiated term. Failing to do so, the case will proceed to trial. Expert witnesses invariably emerge from both parties , usually a qualified medical personnel with expertise and experience in the particular issue accepted to the court.

A.Burden of proof and chances of error

The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant. The law requires a higher standard of evidence than otherwise, to support an allegation of negligence against a doctor. In cases of medical negligence the patient must establish her/ his claim against the doctor.

B.The Patient Contribute to Medical Negligence

In most cases of medical treatment, a doctor or medical professional will order their patient to participate in the treatment by taking certain medications, eating, or not eating certain foods, avoiding strenuous work or exercise, or taking care of treated areas during recovery from an injury. What happens if a patient doesn't do as ordered? Is he or she also liable for any injury suffered as a result?

V. CONCLUSIONS

Thus, after critically analyzing the present paper I came up to following conclusion.

There are two possibilities in cases of negligence – either it is negligence of the doctor or it is negligence of the staff. There may be a possibility of negligence, both of the doctor and the staff. In most of the cases, it will be a case of joint and several liabilities, and both the doctor and the hospital will be liable. On the scrutiny of leading medical negligence cases of in Sri Lanka, certain principles should be taken into consideration while pronouncing the judgment in medical negligence cases.

1. Negligence should be guided upon the principle of reasonableness of common man prudence and negligence must be established in order to give the compensation in certain cases.
2. Medical profession requires certain degree of skill and knowledge, so the standard of care in cases of

medical professional is generally high and should also be taken into account while giving the judgment.

3. A medical professional can be only held liable, when the standard of care is reasonably is less than the reasonable care that should be taken from a competent practitioner in that field.

4. When a choice has to be made between certain circumstance when there is higher risk involved and greater success is involved and lesser risk with higher chances of failure, the facts and circumstances of the individual case should be taken into the consideration.

5. No negligence will apply on medical professional, when he performs his duty with the utmost care that should be taken, and he had taken all the precaution.

6. Medical professional should not be harassed unreasonably and unwanted apprehension and fear should not be created on the medical fraternity that they can give their best in certain cases where it is required; they should be given some liberty in certain peculiar situation where they need to make their judgment without any apprehension freely. So that it can be beneficial for the society.

7. In assessing damages in such a case, the court must weigh policy factors with a sense of flexibility depending on the circumstances such as the work load, facilities available, time constraints, competence of the patient to understand the risk factors etc .It can be argued therefore that in finding the legal causation (remoteness of damage) between the negligently caused act and the damage, policy considerations that govern the rights of self-determination coupled with patient autonomy must be considered in Sri Lanka.

VI. RECOMMENDATIONS

- Medical Ethics teaching and training on soft Skills, especially of communication skills will go a long way in not only improving the quality of health care and satisfaction of patients but also in preventing medical negligence cases.
- Need for Classification of Medical Negligence Cases
- Need for further Research
- Establish a Redress Scheme for Medical Negligence

REFERENCES

"Landmark Case of Medical Negligence in Sri Lanka", Ceylon Medical Journal, 2002. 58 p

Medico-legal Framework DR Kithsiri Edirisinghe PPt

Medical Negligence in India: A Critical Study By Daya Shankar Tiwari College of Legal Studies, University of Petroleum & Energy Studies, Dehradun

Indian Academy Forensic Med. Journal Jan-March 2015, Vol. 37, No. 1

A Space Policy for Sri Lanka: A Need of the Hour

D Yapa
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
dilshaniyapa@yahoo.com

Abstract— *Space Law which is a new branch of International Law is a body of law applicable to governing space related activities in outer space. It involves a responsible approach to the exploration and use of outer space for the benefit and in the interests of all humankind. Space Law consists of two layers of Laws and Regulations. The first layer is INTERNATIONAL SPACE LAW which regulates rights and obligations of States and intergovernmental organizations in outer space. And the second layer NATIONAL SPACE LAW which is for the implementation of State's international obligations under treaties, and to regulate the activities in outer space which are not covered by international treaties. Thus National Laws complements the deficiency of International Legislation to some extent. Today that a trend could be observed among the states that not only the major space faring nations such as Russia and USA but also non-space faring nations such as Australia and Argentina also have taken steps to implement national policies on activities in outer space and corresponding legislation. Some factors that laid to this are private actors within the states engaging in space activities, power play and pressure, making use of satellites and issues regarding sovereignty. The objective of this paper is to examine the steps that Sri Lanka should take in order to design and implement an outer space policy based on the above discussed developments and approaches of the other states. This study is largely based on qualitative approach which is a contemporary study on legislations of the countries which engage and not engage in the space activities with UN conventions on outer space and relevant scholarly works. Thus the conclusion emphasis that nation should establish a space policy to address its needs with implementation guidelines.*

Keywords— *Space Law, Air Law, Outer Space*

I. INTRODUCTION

The entire space over a country, divided in to two parts as air space and the outer space. Airspace and Outer space together may call as flight space where flight crafts are capable of flying. Airspace is where air is normally to be found and is therefore identical with atmospheric space. Each planet or star that possesses an atmosphere thus has its own airspace, each air space being co extensive with the corresponding atmosphere. Outer space which includes interplanetary and installer space, means space between the innumerable planets and stars, beyond their respective atmosphere where these exist. There is no legally accepted rather, universally recognized demarcation or line of demarcation between air space and outer space. Generally speaking there is a general agreement among nations that air space is limited at the maximum height that an airplane can fly. So it's generally accepted as 1000km from earth surface. This is considered as Air Space. So beyond this is known as the outer space.

Opening up of air space courtesy goes to Wright brothers' who invented the engine powered flights and meanwhile due to World wars existed airspace have been used by balloon flights for certain military perspectives. Ever since the Soviet Union launched the first artificial satellite in 1957, space has constituted a new frontier to be discovered before the human eye.

II. AIR SPACE AND OUTER SPACE LAW

Air Space is considered as an extension of state's territorial sovereignty. The territory of the state and the fact that whoever governs the state has control over the land territory of the state is considered as the territorial sovereignty. The territory of a State, consist with the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State. Sovereignty of a State was understood to extend for unlimited distance into the airspace above its territory. However this view has been modified by the law of outer space.

Air Law is the set of national and international rules concerning aircraft, air navigation, aero-commercial transport and all relations public or private arising from domestic and international air navigation. This present law of air space, which is centred on the regime concerning air navigation, has developed from the Chicago Conference of 1944 and the conventions adopted there (such as, the 1944 Chicago Convention on International Civil Aviation, the 1944 Chicago International Air Services Transit Agreement, and the 1944 Chicago International Air Transport Agreement).

The Chicago Conventions reaffirms the basic principles of customary international air law. The Chicago Conventions applies only to civil aircraft, not to State aircraft which are used in military, customs and police services. It provides that every State has complete and exclusive sovereignty over the airspace above its territory. Thus, the rule that the sovereignty of a State extends over its airspace to an unlimited height has been one of the fundamental principles of the law of airspace. However, this rule has been substantially modified as the result of the creation and development of the new law of outer space.

Space law is a new branch of international law initially elaborated under the auspices of the United Nations since 1960s. It is the law meant to regulate relations between states determine their rights and duties resulting from all activities directed towards outer space and within it and to do so in the interest of mankind as a whole, to offer protection to life , terrestrial and non-terrestrial wherever it may exist. Since it's a branch of Public International Law it consists of common sources. In sources of International law, the term "source" refers to methods or procedure by which international law is created. There are five sources of international law. According to section 38(1) of the statute of the "International Court of Justice" (ICJ), the most uniformly accepted source of international law is the convention or treaty. A treaty is an agreement between two or more countries. Treaties come in numerous forms, from bilateral understandings between two friendly states, to those that end world wars or create international arrangements like the United Nations Organization. They cover the entire scope of human activities from politics, economics and the arts to the sciences, agriculture, youth exchanges and family relations

A second uniformly-accepted source of international law is customary international law. There are three conditions under which the general behaviour of states becomes a rule of customary international law: a) if the behaviour is widespread, b) practices are followed over a not insignificant period of time, and c) it's viewed by it is practitioners as mandated by law.

The third broadly accepted source of international law is the so-called general principles of law which is, in the phrasing of the Statute of the International Court of Justice, "recognized by civilized nations".

The decisions of judicial and Arbitral Tribunal and finally juristic works are the other sources mention in ICJ.
This adopts customary International Law like, Non-national appropriation, the common heritage of mankind, no claim of sovereignty, free access to space and resources etc. so customary International Law is being effect by space law.

III. DEVELOPMENT OF SPACE LAW

Development of space law during the 20th century evolved in two interrelated phases: the development of space law before Sputnik: from 1910 to 1957 which is known as pre sputnik development and development of space law after 1957 which is post-sputnik development. During the first half of the 20th century there were only a handful of papers and one significant monograph proposing concepts of space law. The first paper in 19102 was by a Belgian lawyer, Emile Laude. The second paper5appeared in the USSR in 1926.V. A. Zarzar, a senior official of the Soviet Aviation Ministry, presented a paper at an air law conference held in Moscow. Laude (1910) and Zarzar (1926) recognized the basic altitude and operational differences between air and space flights and declared the need for separate legal regimes to regulate use of air space and outer space. So likewise till the end of 1956 many written papers, dissertations and other forms of writings appeared regarding space law and air law.

When talking about the post sputnik development the decade of the 1960s involved the initiation and substantial successes of the United Nations' Committee on the Peaceful Uses of Outer Space (COPUOS) in drafting applicable space law. The secretariat support for UN space related activities was provided through a staff, which came to be known in 1992 as the Office of Outer Space Affairs (OOSA) in the UN Secretariat. During the 1960s the two main space fairing nations were USSR and the US. Both were dominant in spaceflight activities and meanwhile they had a cold war in order to achieve the best. For subjects on whom these two powers could agree, it was possible for the United Nations to formulate and obtain general assent to international agreements relating to spaceflight activities. COPUOS was a unique organ of UN in which there was no voting. Decisions were taken by consensus. The first, most significant of the relevant UN-produced instruments, a Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of OuterSpace, was adopted unanimously by UNGA in 1963. COPUOS then proceeded to elaborate five treaties implementing the declaration. Following are those fie treaties ;

- Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies

- Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space
- Convention on International Liability for Damage Caused by Space Objects
- Convention on Registration of Objects Launched into Outer Space
- Agreement Governing the Activities of States on the Moon and Other Celestial Bodies

The COPUOS continues meeting annually. Its function is monitoring progress of States and international organizations in the use and exploration of outer space, and reporting to the General Assembly. As time passed, more countries became interested in space activities, and the size of COPUOS increased. As the size increased, obtaining consensus on the content of formal treaties became substantially more difficult. After 1980 the COPUOS oversaw the drafting, formulation and adoption of four additional General Assembly resolutions containing declarations of principles: Those are

- Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, adopted on 10 December 1982 (UNGA Resolution 37/92)
- Principles Relating to Remote Sensing of the Earth from Outer Space, adopted on 3 December 1986 (UNGA Resolution 41/65);
- Principles Relevant to the Use of Nuclear Power Sources in Outer Space, adopted on 14 December 1992 (UNGA Resolution 47/68)
- Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking Particular Account of the Needs of Developing Countries, adopted on 13 December 1996 (UNGA Resolution 51/122).

In parallel with UN development of space law, starting in the 1950s, and significant international organizations appeared to facilitate international cooperation and the exploitation of space technology. Selected organizations generated by space related activities include IAF 1952 , ESRO & ELDO 1962 ,INTELSAT (Interim) 1964 ,INTELSAT (Permanent) 1971 ,INTERSPUTNIK 1971 ,ESA 1975 , EUMETSAT 1986 ,UN/OOSA (Secretariat) 1992 etc.

IV. DOMESTIC SPACE LEGISLATION

The current space law consists of the five international treaties at the core. It is also complemented by relevant UN GA resolutions, regional or bilateral treaties and customary international law, as well as legislations and practices of States and intergovernmental organizations as subsidiary means for the determination of rules of space law. Generally speaking, space law consists of two layers of laws and regulations. The first layer is international law that regulates rights and obligations of States and intergovernmental organizations in outer space. The second layer of space law is the national law. As technology developed and national programs matured, national governments established laws and national organizations devoted to the management and or regulation of national activities in space. Among the countries establishing national entities manly the spacefaring nations hold a significant position. The term Spacefaring carries out many definitions. Simply it is the action or activity of travelling in space. In other words it is a nation with the ability to access space capabilities using their indigenous space systems. To be spacefaring that nation should be capable of and active in the art of space travel or space transport, the operation of spacecraft or space planes. This involves a knowledge of a variety of topics and development of specialized skills such as aeronautics; astronautics; programs to train astronauts; space weather and forecasting; ship-handling and small craft handling; operation of various equipment; spacecraft design and construction; atmospheric take-off and re-entry; orbital mechanics (aka astrodynamics); communications; engines and rockets; execution of evolutions etc. The degree of knowledge needed within these areas is dependent upon the nature of the work and the type of vessel employee. As per the literal meaning of the term spacefaring this can be divided in to two parts. They are major spacefaring nations and emerging spacefaring nations.

The Soviet Union started sending space missions, which inspired other countries to explore the space as well. And in line with that, here are the top ten countries with the most space presence what we known as major space faring nations ; Russia (inherited from USSR) ,United States, France ,Japan ,China ,United Kingdom ,India ,Israel and Iran

V. SPECIAL FEATURES RECOGNIZED

There are several reasons behind them but the main thing is that there is a space race among these superpowers as it is a useful weapon for them stands superior to others. When moving in to major spacefaring nations;

Russia - They have adopted a respective number of norms to regulate outer space activities and to secure compliance with its obligations arising from the international space law instruments. The most important norm is the Law of the Russian Federation on Space Activities; this was adopted on August 20, 1993 and

enacted on November 29, 1996. The Principal norm in the Russian Federation is the Law on Space Activity. It lays down the main legal scenario for the development of space activities; it establishes the organization of space activities in Russia.

China- As a developing country, fundamental task is to develop its economy and continuously push forward its modernization drive. The reason for the space activities of China is the space industry as an integral part of the state's comprehensive development strategy, and they believed that the exploitation and utilization of outer space for peaceful purposes. china participated in space corporation in mid-1970.

Japan- Talking about Japan, Japan Aerospace Exploration Agency, which is the major institution governing the space activities has established on 1st October 2003. The purposes of this are; to facilitate development of academic research at university or other institution, Enhancement of the level of space related science and technology, Enactment of the level of aeronautics science and technology and Promotion of space development and utilization

India- There is a respective weight on space activities from India also as a space faring nation in developing world. India is the powerful emerging state among the other South Asian countries; they push their space activities just like a competitive in nature joining the other superpowers. Indian Space Research Organization is the primary body for space research was established on August 15, 1969. ISRO travelled along with a vast space mission. ISRO has established two major space systems. Indian National Satellite system series of communication, television, broadcast and material services. Then Indian remote sensing satellite system for resources monitoring and management.

Therefore these countries for the management and regulation of national activities in space establishing national entities were quite normal. But today a trend could be observed among the states that not only the major space faring nations but also non-space faring nations also have taken steps to implement national policies on activities in outer space and corresponding legislation. Australia, Argentina can be taken as examples. Basically they designed and implemented National Space Industry Policy in order to focus on space applications of national significance such as earth Observation, Satellite Communications, Position Navigation, timing etc. to assure access to space capability, to strengthen and increase international cooperation (to prioritize partnerships with the US, UK, Canada, New Zealand, Japan and the EU. Countries who do not have a space launch carriers just like USA, France etc. therefore, their domestic regulatory framework has been conceived to encourage foreign companies to establish space launch facilities in their countries) , to contribute to a stable space environment in order to Support SSA initiatives, EU's proposal for an international Code of Conduct and regulatory frameworks, to improve domestic coordination, to support innovation, science and skills development and as well as for the national security and economic well-being

VI. DOMESTIC SPACE LEGISLATION FOR SRI LANKA

So even if countries who have not even thought of engage in space race or countries which are not major space fairing nations either, if have domestic space legislations then having a such legislation is Sri Lanka will be useful for the time being and will be a good investment for the future as well in order to formulate and implement policies pertaining to the popularization and advancement of science and technology, including scientific research and development and transfer of technologies, to ensure improved quality and productivity so as to upgrade economic activities, which are essential for the economic and social development of Sri Lank and ultimately to become a scientifically and technologically advanced country of the region . At this moment Sri Lanka , like many others countries, has not enacted any space legislation. Therefore, the absence of domestic space legislation as a major lacuna in the Si Lankan Legal System when compared to other developed and developing countries and suggest the drafting of a comprehensive and futuristic domestic enactment on outer space activities.

VII. RELEVANT PRINCIPLES OF INTERNATIONAL SPACE LAW TO CONSIDER IN NATIONAL LEGISLATION

As the law standards today following seven international space law principles should be considered in national space legislation. This is internationally accepted.

- No national appropriation of outer space; Only peaceful use of outer space permitted,
- All space activities must be conducted in accordance with International law, including UN Charter;
- Nations must avoid harmful contamination of Earth's environment;
- Nations must promote international cooperation in space activities;
- Conduct space activities with due regard for the space activities of others
- Duty to render assistance to astronauts

- Duty to notify of any anomalies during conduct of activities in outer space;

VIII. REASONS WHY SRI LANKA NEED ONE

Sri Lanka is a dualist country which means that its domestic law does not automatically incorporate public international law. Thus unless it is cooperated by treaty law it is not particularly part of law. Notwithstanding Sri Lanka becoming a party to an international legal instrument such as a Convention, it was always necessary for the national legislature which is this Parliament to enact enabling or implementing legislation to give legal and domestic effect to our obligations and rights under international law. Thus by now Sri Lanka is a party to three of the international space treaties; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies , The Convention on International Liability for Damage Caused by Space Objects and The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space which form the main body of international space law. Yet it is not a party to The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies and the Convention on Registration of Launched Objects into Outer Space.

Sri Lanka has also played a significant role to adopt 5 sets of legal principles by the U.N General Assembly Resolutions, which provide for the application of international law and promotion of international cooperation and understanding in space activities. It is also under an obligation to give effects to the various rules contained in these norms through the medium of appropriate legislation in the domestic field. All the areas which directly or indirectly related with space activities under the Sri Lankan Constitution fall within the domain of the Chapter VI – Directive Principles of the State Policy and Fundamental duties. It is for the Parliament of Sri Lanka to take the starting step in the direction of enacting a law for Sri Lanka for the purpose of the effective regulation of various aspects of Sri Lanka's space policy. Because of recent national and global developments, active involvement of the private sector and commercialisation of space activities and the agreements made nationally and globally with various agencies, governments, international and intergovernmental organisations, there is a huge need of space law in Sri Lanka.

The second most important reason for a space law in Sri Lanka is that now the Sri Lankan space activities have become vastly diversified and have come to stay, having successfully demonstrated their implicational capabilities, there is a need to redefine and formalize the existing set up of institutional mechanism, and to facilitate inter-departmental coordination, making it a legal norm.

Thirdly, there is a need to clarify applicable legal norms and rules relating to both public laws and private law aspects of space activities, as demonstrated by the experience of developed countries like USA. The public laws deals with competence of authorities in the space field, legal status of space objects, control of space activities, control over space industries, dispute settlement and jurisdiction of courts and security aspects of space activities and installation. On the other hand, Private Laws include fair trade practices, company law, insurance and indemnity, securities, contracts and specific performances, torts, personal property, patents, copyrights and other intellectual property rights etc.

Fourthly commercialisation of the space activities is in the process of establishing a vast space activities and vast space market where India plans to and has already begun to sell, its space products. Thus the question of private participation in space activities both in Sri Lanka and in international ventures, transfer of technology and products marketing may need to clarify. So, it is the need of the hour that Sri Lanka should enact domestic space legislation keeping in view of the dramatic changes that are taking place in the domestic as well as international spheres. Therefore, there is need for Sri Lanka to enact a National Space Legislation as soon as possible.

IX. KEY AREAS TO ADRESS

There are two principal considerations of space law that any country would have to think before implementing their space policy. One is the protection of common interests and the other one is respect for the interests of individual States. So the first principal consideration of space law, namely the protection of common interest, the primary objective of space law consists of the following five aspects of interests: Ownership by all and equitable sharing of benefit, The maintenance of peace and common security, The promotion of international cooperation, The promotion of the rule of law in outer space and Sustainable development.

The second principal underlying consideration of space law is the respect for the interests of individual States. This is the secondary objective of space law. Space law recognizes the right of free exploration and use of outer space in accordance with international law. However this freedom is not absolute and it is subject to some limitations too. Apart from these major facts Sri Lanka needs to critically and objectively address all legal and commercial issues related to domestic and international

space activities before enactment of space laws. The associated regulatory risks in grant of authorizations, licenses, permits and approvals for communication satellite operations are required to be minimized by properly defining the guidelines and procedures. A well-defined space law shall enable better capitalization and optimization of existing infrastructure and resources by:

(i) Promoting orderly and organized growth of space business by providing recognition and legitimacy to on-going space programs;
(ii) Providing opportunity to potential space operators, domestic and international;
(iii) Promoting development of indigenous technology matching international standards;
(iv) Providing mechanism for enforcement and prevention of misuse of space activities; and
(v) Providing stringent punishment for violators of space law.

Sri Lanka also needs to critically and objectively study the provisions contained in the space laws of other countries like USSR, China and also US Space Laws, Commercial Space Act, 1998; Land Remote Sensing Policy Act, of 1992, Inventions in outer space etc. to frame and adopt its own space laws.

X. ESSENTIAL ELEMENTS OF NATIONAL SPACE LEGISLATION

The future Sri Lankan domestic space law must include following provisions for peaceful use of outer space for the benefit of all mankind worldwide and aimed at welfare and security of Sri Lanka. This can be drafted under following themes.

Scope of Application - Scope should consist of launching of objects and their return from outer space, site operation and as well as operation and Control of space objects in Orbit. Further application of space science and technology (earth observation, space communication, etc.) and as well as jurisdiction over national activities in the territory or elsewhere should be included in the scope.

Authorization and licensing – Basically this should be competent with national authority and include categories of Licenses and procedures. Setting out conditions for granting, modifying, revocation and licensing norms for space entrepreneurs associated with various commercial activities and applications are also important under this.

Continuing supervision – under this, procedure for in-situ inspection and enforcement mechanisms should have implemented. Further aeronautical and space activities would have been controlled by a civilian agency except those associated for development of weapons systems, military operations, or the defence of Sri Lanka

Safety – This should address condition to verify that activities are carried out in a safe manner, ways and means to minimize risks to persons, environment and property, provide international co-operation in promoting public safety and space business and defence machinery

Liability and Insurance – under this legislation should address liability provisions, should include insurance and should cover damage claims of indemnification matters.

Registration- Under this theme provisions should address National registry of Space Objects and that Information should be submitted to UN Secretary-General. Also Operators should provide information on changes.

Environmental considerations. Under this the legislation should protect property rights in inventions and stipulate provisions on environment safety like Space debris mitigation/ Apart from above areas in general provisions should further consist ways to promote commercial use of space , development and operation of vehicles capable of carrying instruments, equipment, supplies, and living organisms through space and as well as promotion and management of autonomous educational institutions of international standards for nurturing space professionals

XI. CONCLUSION

The proposed legislation should provide for Creation of National Space Agency, Licensing and Certification of space activities, Economic conditions of space activities, a provision on space infrastructure, space safety and space liability, space insurance, international cooperation and protection of intellectual property rights in outer space. This draft should be a
Convergence of divergent regulations in order to bring comprehensive and harmonious space legislation that would be beneficial for our Nation.

ACKNOWLEDGMENT

I would like to acknowledge the advice and guidance of the all the lecturers of the Faculty of Law, Kotelawala Defence University and my parents, family members and my friends for the support and the encouragement.

REFERENCES

Air Space and Outer Space Law <https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/13-air-space-and-outer-space-law>

Cheng B. (1997) *Studies in International Space Law*: Oxford University Press

Frans G. Von der Dunk & Sergei A. Negoda, *Ukrainian National Space law from an International Perspective* (2002). Space and Telecommunication program faculty publications. Paper 55. [online] <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1054&context=spacelaw> accessed 12 June2105

Graham Gibbs*, An analysis of the space policies of the major space faring nations and selected emerging space faring nations.* [Online] Available from <http://www.spacepolicyonline.com/pages/images/stories/Graham%20Gibbs%20Analysis%20of%20National%20Space%20Policies.pdf >accessed 9 June 2015

Hermida J.(2003) *legal basis for a national space legislation*[online] Available from < http://www.julianhermida.com/algoma/intlawreadingsspacelaw.pdf> accessed 12 June2015

Kopal V. and Verschoor D. (2008) *An Introduction to Space Law.* 3rd Ed. Kluwer Law International

Maxwell C. (2012) *Sources of International Law*. [Online] Available from <www.thinkafricapress.com/international-law-africa/sources >accessed 10 June 2015.

South African Council for Space Affairs, *Requirements for national space legislation responsive to domestic needs*. [Online] < http://www.sacsa.gov.za/conferences/3rd_Act_Rev_WS_CT_Dec2014/Requirements_national_legislation-Sekhula.pdf > accessed 1 June 2015

Sundahl M.(2011) New Perspective on Space Law.[online] <http://engagedscholarship.csuohio.edu/scholbks/131/> accessed 10 June 2015

Top 10 Countries with Space Presence [online] Available from < http://www.therichest.com/expensive-lifestyle/location/top-10-countries-with-space-presence/ > accessed 9 June 2015

United Nations Treaties and Principles on Space Law [Online] <http://www.unoosa.org/oosa/en/SpaceLaw/treaties.html> accessed 10 June 2015

United Nations/Republic of Korea Workshop on Space Law United Nations Treaties on Outer Space, *Actions At the National Levels*[online] <http://www.unoosa.org/pdf/publications/st_space_22E.pdf> accessed 06 June 2015

BIOGRAPHY OF AUTHOR

Author is a 3nd year student at Faculty of Law, KDU. She has an interest in research under this new theme" A space policy for Sri Lanka: a need of the hour" This KDU International Research Conference was her second attempt. Her Interest areas are Space Law ,Computer Law, Human Rights Law.

Right to Access to Information, is an Avenue for Strengthening the Sovereignty of People in Sri Lanka?

CS Kodikara
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
chamara.kodikara@yahoo.com

Abstract— *As per the constitution of Sri Lanka, sovereignty which includes powers of government, franchise and fundamental rights, is in the people and is inalienable. Further it elaborates the way in which the sovereignty exercised. People's powers of government are handed over to the elected representatives, to exercise in a certain manner in limited period of time. Further the preamble of the constitution embodies this idea of Social Contract between the people and their representatives. So people should have the knowledge over the implementation of their sovereign rights. In that context, "access to public information" is an essential fact for the empowerment of people. On the other hand transparent government is a long standing demand of general public and several attempts were made to enact a separate law for certifying the access of some governmental information (eg-assets and liabilities of elected and appointed dignitaries). Present government gives its priority not only for such act but also to make "right to access to information" as a new fundamental right. This paper particularly focus on the issue of "right to access information as fundamental right" and generally on the proposed information bill with its historical evolution. Comparative study with South African, Indian and USA jurisdictions would results better evaluation over the domestic attempt. In the special determination of the Supreme Court and in the Parliamentary debate, pertaining to the 19th amendment bill to the Constitution, this issue was heavily contested since its ambiguity and broadness. The constitutional guarantee on the right to information may adversely affect to the national security, peace and order. Though the limitations over such right are vague (eg- privacy) and sometimes unnecessarily diminishing its scope (eg-contempt to court). All such issues ultimately affect to the people's sovereignty. The objective of this research is to critically analyse whether the current approach of the government is sufficient to certifying the right to access public information to the people and determine how it affects to the people's sovereignty. Interviews with the legal experts may contribute as primary sources while acts, judgements and prior research works would be contribute as secondary sources. It is concluded with the recommendations for the better implementation of right to access of information*

Keywords— *Right to access, Information, Sovereignty*

I. INTRODUCTION

Access to information has been recognized as a human right since as far back as 1946. In that year, in the inaugural sessions of the United Nations, the General

Assembly adopted Resolution No. 59(1) which recognized freedom of information as a fundamental human right and as "the touchstone of all the freedoms to which the United Nations is consecrated". Article 19 of the International Covenant of Civil and Political Rights, as well as the Article 19 of the Universal Declaration of Human Rights recognize the right to seek, impart and receive information as a part of the fundamental right to freedom of speech and expression.

A number of countries have introduced such legislation in recent years and this has helped to bring about a change in political culture, the mindset and attitudes of politicians and bureaucrats and also has empowered the people in their quest for more participation, accountability and responsiveness. After several unsuccessful attempts in recent history, present government with the leadership of President Maitripala Sirisena, amended the constitution *inter alia* to give effect "Right to access to information" as a fundamental right. Actually they promised to enact specific law (via normal act) for certifying such right in their election manifesto.

The view of the author pertaining to the constitutional guarantee for "right to information" without proper procedure and substantive legal instruments, is derogate the merit of historical attempt in Sri Lankan political arena and will create many ambiguities and conflict of laws.

The 2nd part of this paper in this regard and provide justifications of "right to information" as an avenue for strengthen the people's sovereignty in general. 3rd Part of this paper deals with the legislative and judicial efforts made by the people to establish the legal recognition over their inherent right as the true owners of sovereignty. Part 4 brings a critical analysis of the "right to information" under 19th amendment to the constitution and with prevailing limitations. This paper concludes with the recommendations derived with the

comparative analysis in 5th part for the better implementation of "Right to access to information" as an avenue for strengthen the people's sovereignty in Sri Lanka.

> *"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." - James Madison [1822]*

II. GOVERNMENT: OF THE PEOPLE; BY THE PEOPLE; FOR THE PEOPLE

The right to information (RTI) is a multidimensional right which serves a range of individual and group interests and rests on various theoretical justifications. The democratic system of government is nourished by and is dependent on the public and free flow of information which focuses on the core issues that influence community and individual life. Therefore, many view the free flow of information as a 'key' to the operation of the entire democratic system. The ability of individuals, interest groups, and organizations to actively participate in political debates deciding issues on the public agenda, as well as the very possibility of placing issues on that agenda, is tightly linked to their ability to obtain relevant information.

The information holdings of the government are a national resource. Neither the particular Government of the day nor public officials collect or create information for their own benefit. They do so purely for public purposes. Government and officials are, in a sense, 'trustees' of that information for the Sri Lankan people. The information which public officials, both elected and appointed, acquire or generate in office is not acquired or generated for their own benefit, but for purposes related to the legitimate discharge of their duties of office, and ultimately for the service of the public for whose benefit the institutions of Government exist, and who ultimately (through one kind of impost or another) fund the institutions of Government and the salaries of officials. Similar to the prohibition against a public agency's arbitrary and inequitable distribution of financial and other material resources considered to be public property, which includes allocation of these resources for the agency's exclusive benefit, public agencies are prohibited from preventing access to the information that they produced as public trustees.

Further RTI is worked as an instrument for certifying other constitutional guarantees. For instance in *Environmental Foundation Limited* v *Urban Development Authority of Sri Lanka and others(Galle Face Green Case)* (S.C.F.R 47/2014), Sarath N. Silva, C.J. held that RTI would enable a person to effectively exercise the right to freedom of speech and expression contained in Article 14(1)(a) of the constitution. Conditions supporting the exercise of basic rights are therefore no less crucial than the rights themselves. When a public agency stores information touching upon an individual's rights or duties, that person's only weapon in the protection of his or her other basic rights, constitutional and non-constitutional alike, is the RTI: "Indeed the whole system for protection of human rights, cannot function properly without freedom of information. In that sense, it is a foundational human right, upon which other rights depend." - Toby Mendel (*Freedom of Information: An Internationally Protected Human Right)*

A commonly held view is that constitutions should include mechanisms to enable the regulation and oversight of government agencies. This idea rationalizes the introduction of principles and institutions into a constitution such as protection of the rule of law, aimed at guaranteeing the continuation of the democratic rules of the game. Accepting the proposition that transparency is vital to administrative oversight, which likewise has constitutional dimensions, this value represents an additional justification of the RTI. It has long been accepted that freedom of information encourages the transparency that alleviates corruption. In a broader sense, transparency ensures proper practice on a daily basis. As per Justice Brandeis, freedom of information can be understood as the "best disinfectant" for public ills. The constitutionality of access to information in this sense does not relate to its nature as a right, but to its nature as an important component of governance in any democratic regime. As is well known, constitutions not only protect rights, but also determine the structure of government. They do so in a manner that aims to promote proper functioning of government and to limit the threats that stem from the power vested in government. Access to information is an important tool in such structures. The public administration is meant to serve the public, its citizens, and residents. The public's right to oversee those who serve it resembles the right of beneficiaries to monitor their trustees. Beneficiaries have no need to uncover or even suspect corruption to justify their oversight. In the public sphere, such a review may indicate that officials have invested innocently, but unwisely, even while bearing the public good in their sights; they may nevertheless be required to pay the consequences. At other times, the same type of review may indicate that officials have not met expectations of efficiency and good judgment. In any case, as long as these trustees' decisions were reached free of any conflicts of interest, or on the basis of extraneous

considerations—they were within the "range of reasonableness"—the judiciary will avoid intervening. The same does not apply with regard to the public trial conducted in their wake. The public is entitled to demand an account of its trustees' actions and the execution of their judgment. It is also entitled to demand that its trustees act not only reasonably, but optimally. Maintaining such oversight requires that the public have access to information. Sweden was the first country in the world which legislate a freedom of information act and to provide constitutional protection for this right. Then Finland inherited the right from Sweden. Today, Sweden and Finland are considered the least-corrupt countries in the world. The corruption-free character of these countries has arguably fostered a culture of transparency. It is important to mention the considerable weight that these states attach to administrative transparency as well. Conversely, totalitarian and corrupt regimes exert immense efforts designed to conceal information.

The justifications described above lead to the conclusion that constitutions adopted by democratic states should include targeted protections to guard the right to information. This conclusion flows from the fact that the right to information represents an essential ingredient in the proper functioning of substantive as well as procedural democracy, and that access to information is a necessary condition for the exercise of other human and civil rights. Taken alone or together, these justifications underscore the importance of the constitutional recognition of the right to information.

III. IVOLUTION OF DOMESTIC LEGAL REGIME OVER "RIGHT TO INFORMATION"

There has long been recognition of the need for legislation on the freedom of information in Sri Lanka. The Committee to advice on the Reform of Laws affecting Media Freedom and the Freedom of Expression in 1995, chaired by R.K.W. Goonesekere, recommended the enactment of a freedom of information of act and the inclusion of the right to information in the draft Constitutions which were being considered at the time. It recommended the following formulation "This includes the freedom to seek, receive and impart information and ideas, either orally, in writing, in print, in the form of art or through any other medium of one's choice. With regard to a Freedom of Information Act, the Committee noted that such legislation should display clear commitment to the general principle of open government and adheres to the following; disclosure to be the rule rather than the exception, all individuals have an equal right of access to information, the burden of justification for withholding information rests with the government, not the burden of justification for disclosure with the person requesting information, individuals improperly denied access to documents or other information have a right to seek relief in courts. The committee also recommended that the law should specifically list the types of information that may be withheld, indicating the duration of secrecy. Furthermore, legal provision must be made for enforcement of access, with provision for an appeal to an independent authority, including the courts, whose decision shall be binding. The law should make provisions for exempt categories, such as those required to protect individual privacy including medical records, trade secrets and confidential commercial information; law enforcement investigations, information obtained on the basis of confidentiality, and national security. It was also recommended that the legislation include a punitive provision whereby arbitrary or capricious denial of information could result in administrative penalties, including loss of salary, for government employees found in default.

Notwithstanding these recommendations, the Law Commission of Sri Lanka produced a conservative Access to Information Draft Bill in 1996. The Law Commission in its report which accompanied the draft Bill recognised the unsatisfactory status of the current legal regime. It stated that the current administrative policy appears to be that all information in the possession of the government is secret unless there is good reason to allow public access. This policy is no longer acceptable in view of the reasons adduced above. On the other hand, law reform which allowed for the principle that all information in hands of the government should be accessible to the public unless there is good reason to make it secret would also be inappropriate. The introduction of the Bill was not pursued.

In the years that followed various civil society groups engaged in serious discussions on alternative freedom of information legislation. During the period of co-habitation between then President Chandrika Kumaratunga and UNP government, a space emerged which civil society groups decided to exploit. The government indicated willingness to revive the initiative to introduce a Freedom of Information Act. Its initial draft was conservative. The Editors Guild, Free Media Movement and the Centre for Policy Alternatives presented an alternative draft which was more in keeping with international best practice. Thereafter a series of meetings were held under the chairmanship of the Prime Minister at after which a compromise third draft was agreed to. This draft was presented to and approved by the Cabinet of Ministers in February 2004. Unfortunately, Parliament was dissolved soon afterwards as the

cohabitation arrangement collapsed. Further progress on the enactment of this important piece of legislation was stalled.

The Bill was further revised in 2010 by then Justice and Legal Reforms Minister of the Peoples' Alliance government, Milinda Moragoda who attempted unsuccessfully to enact an RTI law. Later, then United National Party opposition parliamentarian Karu Jayasuriya also attempted to bring in an RTI law as a private member's Bill. This attempt was disallowed by the UPFA government in power in a move widely condemned at that time.

In despite of the fact that RTI was not specifically certified via the Constitution of the country or other law, judiciary played an active role by deriving such legal norm with existed provisions in per 19th amendment era for the sake of people's sovereign rights. While the right to information is not specifically referred to in the constitution, some judgments of the Supreme Court, which functions as a constitutional court, have held that the right to information is implicit in the freedom of speech and expression.

In the *Galle Face Green Case,* the Court held that denial of access to official information is a violation of *Article* 14(1)(a*)* of the Constitution, therefore suggesting that this article indirectly includes one's freedom of information. There is also strong judicial thinking that freedom of information is not a right *simpliciter* but an integral part of *Article 10* relating to thought & conscience on the basis that information is the 'staple food for thought'. "The observations in *Stanley v. Georgia* suggest a better rationale that information is the staple food of thought, and that the right to information, *simpliciter*, is a corollary of the freedom of thought guaranteed by Article 10. Article 10 denies government the power to control men's minds, while Article 14(1) (a) excludes the power to curb their tongues. And that may explain and justify differences in regard to restrictions: e.g. that less restrictions are permissible in regard to possession of obs cene material for private use than for distribution."

IV. AMBIT OF "RIGHT TO INFORMATION" IN 19TH AMENDMENT

Now, the art 14A (1) states that every citizen shall have the right of access to any information as provided for by law, being information that is required for the exercise or protection of a citizen's right held by:-

> (*a*) the State, a Ministry or any Government Department or any statutory body established or created by or under any law;
>
> (*b*) any Ministry of a Minster of the Board of Ministers of a Province or any Department or any statutory body established or created by a statute of a Provincial Council;
>
> (*c*) any local authority; and
>
> (*d*) any other person, who is in possession of such information relating to any institution referred to in sub-paragraphs (*a*) (*b*) or (*c*) of this paragraph."

With the amendments made to the original bill at the committee stage as per the directions of the Supreme Court made this provision more specific and meaning full. Honorable attorney general made those submissions to his Lordships concern. But the access to information in the possession of a private person is heavily argued even at the committee stage of the parliament since it relates to private persons. The category of the personality is not clear whether it is natural or legal. As per the views of the Hon. (Prof.) G.L. Peiris, though the restriction is with regard to the nature of the material, still gives the right of access to material in the possession of a private citizen. Even if it (information) comes within the ambit of central government, provincial councils or Urban council, is it the policy of Parliament to allow information in the hands of a private person to be divulged? That is a policy issue.

The Hon. M.A. Sumanthiran replied as if one goes through subparagraphs (a), (b) and (c) , it is not the information relating to "any other person"; not his private information, it is only in situations where "any other person" is in possession of information that is required from the State, a Ministry or a Government Department, a body established by law, a Ministry of a Province or a Department or statutory body or any local authority. This is only to make sure that those bodies do not say, "We do not have that information, so and-so has that information. It is only for that reason. This was gone into in full and that is why a particular formulation was agreed in the Supreme Court which is incorporated in the Determination. The whole desirability of bringing a private person into this was discussed. I do concede that there are concerns. But, as the Hon. Minister of Justice said, the whole thing was discussed and it was found that this information is restricted to an information that is in the possession of a Board or a Government Department or a local authority, not some of his private information. So, that is why the Court has permitted.

Art 14A (2) placed the restrictions on the right as declared and recognized by earlier. Restrictions 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 and for maintaining the authority and impartiality of the judiciary are the general restrictions.

In Joseph Perera alias Bruten Perera v. The Attorney General & others *(1992) 1 SLR 199 at 230,* it was held that the exercise of the basic freedom of expression cannot be made dependent upon the subjective whim of the Police, without offering any standard of guidance. Where power is entrusted to a State official to grant or withhold permit or licence in his uncontrolled discretion, the law ex facie impinges the fundamental rights under Article 12. The permission of the Police mandated by Regulation 28 is a form of prior restraint. It abridges the freedom of expression guaranteed by the Constitution. It gives the Police absolute discretionary power to control the right of citizens to exercise their right of expression. There is no rational or proximate nexus between the restriction imposed by Regulation 28 and national security/public order. It is unconstitutionally overbroad. It strikes at the foundation of the fundamental right of speech and expression by subjecting it to prior permission. Hence that Regulation is invalid and can not form the basis of an offence in law. Also in Victor Ivan & Others v. Hon. Sarath N. Silva & Others *(2001) 1 SLR 309 at 325* and Sunila Abeysekera v. Ariya Rubasinghe, Competent Authority & Others (*2000) 1 SLR 314 at 375* , pounced that a restriction, even if justified by compelling governmental interests, such as the interests of national security, must be so framed as not to limit the right protected by Article 14(1)(a) more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.

In 14A(3) states, “citizen” includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.”.The thrust of the submission of petitioners in special determination was that Paragraph 14A(1) enables even foreigners to receive benefits as they become the beneficiaries of the rights by virtue of the synthetic definition of a citizen given in the Bill as per the proposed paragraph 14A(3).It was also stressed on the fact that the proposed amendment enables a foreigner with the help of four other citizens of Sri Lanka living abroad or living in Sri Lanka to access this information via setting up a hoaxed unincorporated body. Further it was the contention of the Counsel that when a fundamental right of this nature is conferred it amounts to a right as provided for by law and therefore it amounts to granting of a right conferred by paragraph 14A(1) against an individual and secondly, the said paragraph 14A(1) becomes a source of law by which that 'right of access' is granted to the accessory.

Counsel heavily laid stress on the following aspect also with regard to the paragraph 14A(2), that is, the defenses under 14A(2)are restricted by the inclusion of the phrase "prescribed by law", as there are no specific laws which have been enacted in relation to the right of privacy of an individual or reputation of others which are vague principles for which no defenses would be available for a Court to consider. The Court notes that the definition given to a "citizen" is identical to the definition given in the Constitution.

It has to be noted that restrictions that could be placed on the enjoyment of the fundamental right of access to information are not mandated to be reasonable ones. This gives the executive a large measure of discretion to determine the scope of the restrictions to be imposed on such right. Another serious drawback to the protection of fundamental rights is Article 16 of the Constitution. This Article makes all existing written law and unwritten law to be valid and operative notwithstanding any inconsistency with the provisions of the Chapter on Fundamental Rights. Hence all the fundamental rights, even those couched in absolute terms become illusory to any person vis-a-vis an existing law - whether written or unwritten - if that law was in existence at the time of the commencement of the Constitution.

Many of these existing laws and statutes contain provisions that are inconsistent with the chapter on fundamental rights including the right to information. Many of these statutes are designed to restrict access to information rather than to enable or facilitate it. Chief amongst these laws is the Official Secrets Act No 32 of 1955, which in its title states that it is “an Act to restrict access to official secrets and secret documents and to prevent unauthorized disclosure thereof”. The Act, *inter alia*, prohibits entry into ‘prohibited places’ or places used for military purposes, and makes it an offence for any person entrusted with or in possession of such documents to seek, obtain, deliver or communicate any official secret or secret document. Under the Sri Lanka Press Council Law No 5 of 1973, it is an offence publish, or cause the publication, of official secrets and information which may ‘adversely affect the economy’ in any newspaper without prior Ministerial approval. Furthermore, under the same Act, it is an offence to publish, or cause the publication, in any newspapers of any matter which purports to be a) proceedings of a meeting of the Cabinet of Ministers, b) internal

ministerial documents and c) decisions of the Cabinet, unless approved by the Secretary to the Cabinet.

Other legislation which has a similar effect include the Profane Publication Act No 41 of 1958, the Public Performance Ordinance No 7 of 1912, the Obscene Publications Ordinance No 4 of 1927 and the Prevention of Terrorism Act No 48 of 1979. Furthermore, in recent years, because of 30 year war, the country has often been governed under a state of emergency. When a state of emergency is in force, the President is empowered to promulgate emergency regulations. Many of these regulations provide for censorship and restrictions on movement and information which have a serious bearing on the public's access to information. A trend in Sri Lanka is for such regulations often to be "overbroad" thereby preventing access to a wider range of information than may actually be warranted in the interests of national security.

Unlike the majority of countries which have a written constitution, Sri Lanka has no judicial review, but has in its place a limited system of pre-enactment review. Under this system, once a Bill is enacted by Parliament, the constitution expressly disallows any challenge to it on questions of constitutionality. Once a Bill is published in the Government Gazette, a citizen has a two week period during which s/he has to obtain a copy of the Bill, scrutinise it, obtain legal advice and if so desired prepare a comprehensive legal challenge before the Supreme Court. This has fostered a culture of secrecy in which draft legislation is kept secret and inaccessible until late in the process of law-making. Furthermore, it has also given rise to the practice in which controversial pieces of legislation are introduced to coincide with public holidays and court vacations in order to make the process of challenge more difficult. An example of such a practice is the introduction of the Media Authority Bill in April of 1997 close upon the traditional New Year holidays. Apart from undermining the supremacy of the Constitution and providing an incentive for governments to enact unconstitutional legislation, it also shuts people out of the process and promotes a culture of authority and secrecy rather than a culture of justification and transparency. Draft legislation is secret and inaccessible until it has been approved by the Cabinet of Ministers.
In Sri Lanka a Members of Parliament does not have the freedom to vote according to his/her conscience. Members of Parliament are considered to be ambassadors of their parties in Parliament, rather than representatives of the people. The authority of a political party which opposed to representative democracy may dilute the importance of the individual responsibility of a Member of Parliament as a legislator and advocate for the people. There is very little scope therefore for dissent in Parliament, for individual responsibility and accountability. The outcome of a vote on a piece of legislation is so predictable that the debate ceases to be a serious deliberation where an attempt is made to persuade members of the legislature on the merits and demerits of the draft legislation. The undermining of Parliament which consists of the elected representatives of the people acting on behalf of the people, as a deliberative assembly, has seriously hampered the people's right to know about important issues of public policy.

According to the proviso of newly replaced art 35 of the constitution, the immunity of the president shall not extend to the jurisdiction under art 126. So in the event of infringement or imminent infringement of right to access to information within the scope of art 14A, any citizen can institute fundamental rights petition against Attorney General in respect of anything done or omitted to be done by the President, in his official capacity. As per art 33A which newly included to the constitution, The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security.". Further as per art 43(1) cabinet of ministers are collectively responsible and answerable to the parliament. Such constitutional provisions may increase the accessibility to public information.

One of the main causes for the culture of authority and secrecy that exists in the public service is the Establishments Code. Paragraph 6 of Chapter XLV11 deals with The Release of Official Information to the Press or the Public demonstrates the conservative approach of the Code to access to information. It states that a Secretary to a Ministry or Head of department may exercise discretion with respect to the release to the public of information that ' may be of interest and value to the public.' Paragraph 6 : 1 : 3 provides that,
No information even when confined to statements of facts should be given where its publication may embarrass the Government as a whole or any Government Department or officer. In cases of doubt, the Minister concerned should be consulted. These provisions such as these help create a mindset or attitude among public servants which is not compatible with values of transparency and public accountability. A comprehensive revision of the Establishments Code is, therefore, urgently required.

Introducing reforms to strengthen parliamentary control over public finances is a key area of governance and accountability that requires capacity building. The constitutionally questionable practice in recent years of

the Executive President holding the finance portfolio considerably undermined parliamentary control over public finances. Furthermore, the constitutional position of Members of Parliament vis-à-vis their parties and the electors described above, the absence of intra-party democracy and the erosion of traditions of deliberative democracy in the past two decades have contributed to the decline of Parliament as a watchdog mechanism in all areas including public finance. At a more specific level reforms to strengthen parliamentary control over public finance by making this aspect of the legislative function more visible, will be useful. The proceedings of various parliamentary oversight committees such as the Committee on Public Accounts (COPA) and the Committee on Public Enterprises (COPE) are held *in camera*, and are not open to the media or the public. There is, therefore, little public pressure on the committees to perform effectively.

V. FOR CERTIFY THE RIGHT TO ACCESS INFORMATION: THE WAY FORWARD

Neither USA nor India provide direct constitutional guarantee over the RIT. Though, both countries have very strong culture of public information delivery and access. Both countries have very strong "Promotion of access to information acts while having separate laws for certifying the Right to privacy. South Africa initially provide the constitutional guarantee over RIT while placing mandatory provision as part and parcel of such right to enact separate law for the promotion of RIT. Right to privacy is a separate constitutional guarantee in there. Even though the establishment of constitutional certification over RIT is welcomed by the public, the supportive act is essential to reach a meaningful end.

Information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society. But information is not just a necessity for people – it is an essential part of a good government.

REFERANCES

2nd Republic constitution (1978) of Sri Lanka with the 19th amendment

Judgment, proceedings and journal entries of special determination over 19th amendment

Hansard of The Sri Lankan Parliament in 28th Apr 2015 (Volume 234 - No. 8 (Part II))

Mediwake v Dissanayake (2001) 1 SLR 177; was a case that held that the right to vote had both an individual and a collective aspect.

Environmental Foundation v UDA, (The 'Galle Face' Case), Supreme Court Minutes of 28 November 2005.

Mario Gomez, 'The Right to Information in Emerging and Existing Democracies', (Draft Article).

'Freedom of Information Bill' (Private Member's Bill), Supplement to the Government Gazette, Part II of 5th May 2011 (issued on 16th May 2011), Government Publications Bureau.

Abduction of Infants and Illegal Adoption of Abducted Infants and Its Legal Situation on Adoption Laws in Sri Lanka

DT Samayawardena
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
dilinismiles@gmail.com

Abstract— *Rights of the child has become more irrefutable moral phenomenon of out of the human rights system. Orphans or children, whose parents cannot support them, can be adopted under procedure laid down by the Adoption Ordinance in Sri Lanka No 24 of 1941 and Convention on Rights of Child, 1989. Adoption law always expects the best interest of the child and protect the child's welfare and security. However, in the Sri Lankan society abduction of infants and illegal adoption exists as a hidden crime which does not report mostly. It has been reported several cases on infant abduction, which shows that has become a burning issue. This research is basically discussed under two aspects, which is infant abduction and illegal adoption of the abducted infants. The issue is discussed along with the adoption laws in Sri Lanka. This study intends to critically evaluate the contemporary national laws in Sri Lanka regarding child adoption. The main objectives of this research is to identify the loopholes of the existing laws relating to the issue of infant abduction and illegal adoption. It is also intended to propose suggestions to the prevailing law to reduce infant abduction and illegal adoption. Further it was identified that it is necessary to have more legal provisions to curb this crime. Furthermore this study also suggests that there should be adequate regulations at the hospitals to prevent such threats of abducting infants. Research methodology is largely based on qualitative approach which analyses the contemporary national legislations and relevant documentary sources from books, journals, and websites relating to this area. Further, this research extensively examines the decided case laws of national and international arena and they have been analysed, compared and criticized.*

Keywords— *Abduction of infants, illegal adoption, adoption laws*

I. INTRODUCTION

"The abduction of a child is a tragedy. No one can fully understand or appreciate what a parent goes through at such a time, unless they have faced a similar tragedy. Every parent responds differently. Each parent copes with this nightmare in the best way he or she knows how" stated by John Walsh who hosts the TV series America's Most Wanted when his son was abducted.

The abduction of the infants has become a burning issue within the recent past. It has been reported in several cases that the infants are abducted from the hospitals or heath care centres or homes or other places and those infants are given in illegal adoption. Nevertheless thankfully in most of the cases where infants were abducted for illegal adoption, the abductors were caught and the cases have been resolved within few days and the babies were return to their rightful parents.

The abduction of infants for illegal adoption is a global problem. It also has become a challenge for the law making bodies to curb this threat because there must be a separate law regarding this offence and must give sever punishments to the offenders who are liable for the illegal adoption of the abducted infants. Recently even in Sri Lanka, there has been few incidents where new born babies have been abducted or tried to replace the infants at the hospitals with or without the help of the hospital staff.

This research will discuss under two topics which are infant abduction and illegal adoption of the abducted infants. The main objectives of this research is to identify the loopholes of the existing laws relating to the issue of infant abduction and illegal adoption and give some suggestions to strengthen the prevailing law to reduce the infant abductions.

II. METHODOLOGY

This study is conducted as a qualitative research. The key sources of the research are the Penal Code (Amendment), No. 16 of 2006, The Child Adoption Ordinance No. 24 of 1941 and Convention on Rights of Child, 1989. This research intends to analyses the contemporary national laws and relevant documentary sources from books and websites relating to this area. Further, the study has extensively examined the decided case laws of national and international arena and have been analysed, compared and criticized.

III. LITERETURE REVIEW

As per the research findings, there have only been few researches on the topic of abduction infants for the illegal adoption in Sri Lanka. But, there are more researches that are conducted in the international level in coordination with the National Centre for Missing & Exploited Children (NCMEC) and they have tied up how an infant abduction can be happened and what are would be good preventing methods to reduce this offence.

The research "An Analysis of Infant Abductions", which was conducted by NCMEC and university of Pennsylvania School of Nursing, is focused on the abduction of infants (through 6months age) by non-family members. According to findings of that research, most of the infant abduction cases happened in the hospitals or health care facility centres in urban areas and those infants were taken from the mother's room with or without help of the hospital staff. In some cases the abductors have acted as university medical students or hospital staff and above all some abductions are directly done by the hospital staff. Home was the other location where the infant abductions could take place. According to their findings, often the abductors would respond to an advertisement placed in the newspaper by the family for a baby sitter or act as an extension of servicers offered by the health care facility. Small number of infant abduction involved from other locations such as day-care centre, shopping mall, bus station etc. This study have marked two methods as ways of which an abductor would abduct the infant. They are; where the abductor simply walk out of the health care facility or home with the infant(no attempt was made to conceal the infant) and infant was concealed under a coat or blanket or in hand-carried container such as a gym bag. Furthermore, the study shows that the gender of the infant is not usually a significant factor, but the race of the child usually match with the offender or offender's partner. Nevertheless, risk of the physical injury for the victim infant is low and most abducted infants are healthy.

"For the health care professionals"- also conducted by the NCMEC, it has suggested guidelines for the health care professionals such as comprehensive program of health care policy and procedures thorough education of teamwork by nursing personnel, parent, physicians, security and risk management personnel, complete coordination of various elements of electronic security. Furthermore it suggested that the proactive prevention guidelines for the infant abduction such as immediately after the birth of the infant (before the mother and the infant are separated) attach identically numbered ID bands to both infant and mother prior to the removal of the newborn from the birthing room, get the footprint, take colour photograph, record the assessment along with description of the infant and those are must recorded in the infant's medical record. Further require all heath care facility to wear unique uniform and must have the colour photo ID badges (name and title easily should identifiable) and that ID badged easily should be returned to the HR or issuing department immediately upon the termination and missing must be immediately reported to the security facility/ prohibiting carrying infant in the arms (transport to be via a bassinet) and prohibiting leaving an infant without direct line of sight supervision.

The book, which is "Security in the health care environment" (David H. Sells) also discussed 'Maternity Centre Security' in the chapter 11. It has mentioned that the scope of problem of infant abduction by people outside the family and use the recommended guidelines to help prevent and responds to an infant abduction (mentioned as above) etc.

Book, "Hospitals and Healthcare security" (Russell L. Colling, Tony W. York, 2010 (5^{th} edition)) is mentioned that 'security sensitive areas' under the Chapter 20, also discusses how to develop the healthcare facilities/security to prevent the infant abduction from the hospitals.

'A study relating to the inter-country adoption in Sri Lanka', which is conducted by the Humanitarian Organization affiliated with the department of child care and probation, mentioned that the most of the illegal adoptions take place through the inter-country adoption. Foreigners pay large amount of money directly to the biological parents or through a third party. As it has mentioned, there were many suggestions introduced by the ministers to minimize this problem, but unfortunately after the government change it was not established. The findings show that the responsible government officers or biological parents directly associated to this illegal adoption as they could find a large amount of money. Finally they have proposed some suggestions to prevent illegal inter-country adoption.

Rather than the research studies on this particular subject, the newspapers and websites report mostly the unreported cases on the abduction of infants for illegal adoption. In the newspaper articles of 'The Island' and 'Sunday observer' reported incidents where the infants have been abducted from the lawful custody of their parents and such acts most probably happens in hospitals or health care centres. There are lot of international cases regarding this issue, which were referred in the

websites, especially in 'http://www.amfor.net/StolenBabies.html' where it has mentioned about this serious problem. In most cases, the "baby mafia" is done by women by buying the infants from the poor parents who are, in most of the times in need of money, and then sells the infant to a couple who does not have babies for a large amount of money.

In Summary, NCMEC has conducted many researches regarding the infant abduction and identify the ways that the infant abduction can be happened (basically focusing on the case laws) and they have introduced some preventing measures for this issue. However, it does not discuss on the illegal adoption on the abducted infants.

IV. ABDUCTION OF INFANTS

The illegal carrying of the new born babies from the custody of the biological parents or legal appointed guardians can be known as the "abduction of infants". S.353 of the Penal Code of Sri Lanka give the definition for the word of "abduction" as, 'whoever by force compels, or by any deceitful means, or by abuse of authority or any other means of compulsion, induces any person to go from any place, is defined to abduct that person'.

There are three types of abduction that can take place. One of them is abduction for illegal adoption. Abduction can be done by a member of the infant's family or by strangers. If the abduction is done by the infant's family member, most probably it is not with an intention for an illegal adoption of the child as their own. But where the abduction is done by strangers it could be with the intention to rear the infant as their own or to sell to a forthcoming adoptive parent for illegal adoption.

As reported in the newspaper article in 'Sunday Observer' (by Sampath Jayasingneh, 20.01.2008), there was a case, where the new born infant was abducted in broad daytime from the Kalubowila hospital. A mother who gave birth to a child at the hospital was sharply removed by another woman with the help of a hospital employee and a janitor at the hospital. In that incident, the suspected woman has posted as a visitor and pretended to be the mother of the newborn infant boy and then stated that her child was being kept in the baby room and have tried to be friendly with the victim's mother. Miserably, the victim's mother had handed her infant boy over to her in order to go to the bathroom at around 2.30 p.m., when she returned, child was reported missing.

The other famous incident was the 'Baby 81' incident which was reported as the dispute with regard to the identity of the parent about the baby who survived 2004 Tsunami disaster. In this incident, no one abducted the infant, but there were nine couples who were reported to have said that the four months old child was theirs. Then the court ordered to do a DNA tests of the couples' and the infant's in order to resolve the problem. Luckily they had found the real parents.

Likewise, there are number of cases that have been reported in Sri Lanka and most of the infants are abducted from the hospitals or health care centres. But in the rural area it can happen at home due to parent's incapacity to provide a good security for their infants.

However, Penal Code is the only source to punish the offenders of the abductors. As it is finally amended by the Act No. 16 of 2006, it is specify the offences committed on the children and the abduction is also discussed under the Section 353- 360A. But there is no any specific provision to punish offenders who are liable for the infant abduction. But court has punished the infant abductors under the Section 354 of the Penal Code, Sri Lanka, which is the punishment of kidnapping, because abduction of infant can be also considered as a kidnapping. According to the Section 350(Penal code, Sri Lanka), there are two kinds of kidnapping which are,

1. Kidnapping from Ceylon
2. Kidnapping from lawful guardianship

Infant abduction can be categorized under the second part which is the kidnapping from the lawful guardianship which means "whoever takes or entices any minor under fourteen years of age if male, or under sixteen years of age if a female, or any person of unsound mind, out of keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian" (S. 352 Penal Code, SL).

As in the explanation of the same section, the word "lawful guardianship" can be included any person lawfully entrusted with the care or custody of such minor or other person.

Furthermore, in the book of "Offences under the Penal Code of Sri Lanka" (Prof. G.L.Peiris, 2009) has compared the differences between kidnapping from lawful guardianship and abduction as;

i. Only three specified categories of persons (mentioned above) may be victimized of the former offence, while any person at all may be abducted
ii. The former is essentially an offence against guardianship while, no need to be guardian for the abduction

iii. The relevant consent from the lawful guardian in the former case and that of the victim in the latter
iv. Abduction (unlike kidnapping) involves as a constituent the use of compulsion, deception or force.

Therefore, the offender of the infant abduction can be liable under this kidnapping section, because the nature of the infant abduction would be kidnapping as mentioned in the above section and that person, who is liable for this offence, will be punished under the Section 354 of the Penal code Sri Lanka, which shall be punished with the imprisonment of either with description for a term which may extend to seven years, and shall also be liable for a fine.

V. ILLEGAL ADOPTION

Illegal adoption is an adoption, whereby a person assumes the parenting of another child/infant from that child/infant's biological parents permanently, which is done in violation of the adoption laws. Illegal adoption may result for abuses such as: abduction or the sale of children, traffic of children, and other illegal or illicit activities against children (US Legal Definition, USLEGAL.COM).

In the illegal adoption requires the exorbitant amount of money be paid directly to the birth mother or to a third party. In this study, it is basically focused on illegal adoption that happens through abduction of infants. Where stranger abducts the infant and made false birth certificate by his/her own or third party who is going to adopt the infant illegally who is not the legal guardian of the infant at all.

In Sri Lankan, where the adoption is done according to the Adoption Ordinance of Sri Lanka, is known as "legal adoption". There must have a court Order to adopt the child or infant. But, where there is an adoption which infringes the Adoption Ordinance procedures, it can be considered as an illegal adoption and the offender will be liable under the S.354 of the Penal code Sri Lanka.

In some instances, in Sri Lanka, some court proceedings or department of child care and probation take a long time to give child in adoption and thus parents try to do the illegal adoption with paying large amount of money to the biological parent directly or through a third party, since it saves time. Sometimes, where a newborn baby born to a woman sex worker (prostitutes) or unmarried couple, it is sold to another person to adopt the infant which is also illegal.

VI. LEGAL SITUATION ON ADOPPTION LAWS IN SRI LANKA.

Orphans or children, whose parents are poor to support or feed their children, can be assigned to be adopted by the department of child care and probation under the Adoption Ordinance No 24 of 1941 in Sri Lanka with the Court Order for the best interest and the welfare of the child and protect the child's welfare and security as well. Mc Call v. Mc Call (1994 (3) SA 201 (c)) laid that the Best Interest of the Child is better able to promote and ensure child's physical, moral, emotional and spiritual welfare, because the children's beings are not considered as the parent's private matters alone. Therefore, where the parental care is in doubt, the state will intervene as the upper guardian of all minors.

As mentioned in the Adoption Ordinance No.24 of 1941 in Sri Lanka, any person who assumes the parenting of another child/infant must have the adoption order which is issued by the District Court and that order should be registered at the Registrar General's Department. No adoption order shall be made authorizing two or more persons to adopt a child (section 2)

Any married couple can adopt a child as they wish and that adopting parents should be on or below 60 years, because this adopting parents must be able to bring up a child. The young married couple should declare a medical report from a doctor that they cannot conceive a baby. The adopted parents should also declare their monthly income, which should be sufficient to provide the child education and other needs, because they must have a position to bring up a child.

S.3 of the Adoption Ordinance gives the restriction on making of adoption orders, as; the applicant is under the age 25 years and the age gap between the applicant and the adoptee child is less than 21 years. No applicant will apply if the child concerned is a descendant of the applicant or his/her brother/sister or any of their married parents. No adoption order shall be made where the sole applicant is a male and the adoptee child is a female, unless if the court satisfied under special circumstances which justify the making of an adoption order. Adoptee child should be below 14 years of age and if the adoptee child is over 10 years old, that child's consent is required. No applicant is made in favour of any foreign applicant, because they must give priority to the applicant who is a citizen of Sri Lanka and resident or domicile in Sri Lanka.

Under the Adoption Ordinance, the birth of the adoptee child can be re-registered. According to my view, in some circumstances, it is no need to have consent of the biological parents to adopt the child or infant; where the

person or legally married couple provide education, security, maintenance for that adoptee child at least within 2years period of time/ where the natural parents or legal guardian is missing or mentally incapacity/ biological parents hard to give support or protection to that child (if the court satisfy). It is difficult to mention the specific time period that is to fulfil the adoption procedure, because it can differ under the circumstances (amount of the applicants/ children).

Convention on the Rights of the Child (CRC), which was adopted and opened for signature, ratification and accession by the General assembly resolution 44/25 on 1989 and entered in to force on 1990, recognizes the child rights such as; inherent right to life, survival and development of the child, right to name and nationality at birth, right to know about parents and their care, right to education etc.

Article 21 of CRC mentioned that the adoption system shall ensure the best interests of the child. Basically it is discuss about the inter-country adoption which is authorized only by competent authorities who determine in accordance with the applicable laws and procedures, and that adoption is permissible in view of child's status concerning the parents/relatives or legal guardians, if required, the person have their informed consent to adoption on the basis such counselling as may be necessary; inter-country adoption may be considered as an alternative means of child care, if the child cannot be placed an adoptive family in the child's country of origin; ensure that the adoptee child enjoys safeguards and standards equivalent to those existing in the case of national adoption; inter-country adoption does not result in improper financial gain for those involved in it; ensure that the placement of the child in another country is carried out by competent authorities or organs.

VI. LOOPHOLES IN THE LAW

Sri Lanka is facing this problem of abduction of infants for the illegal adoption for the last couple of decades. Usually the punishment is not enough to the offence done. As well as under the slow process of law, the punishment of such individuals are delayed.

Even though there are laws which is mentioned in the Penal code, to curb kidnapping of infants, unfortunately, certain hospitals do not have adequate regulations to prevent such issues which is taking place within their premises.

Moreover, no specific provisions being granted to punish the government officers or staff who breaches their responsibility crookedly or negligently regarding the infant abduction from the hospitals or help to create a fake identity card of the parents and re-registered baby falsely.

In my point of view, there is no any legal provisions to protect the victims, though the adoption law gives priority to the best interest of child. It is not clear about the legal situation to protect the parents who will be going in search of legal remedies whose children have been abducted.

The legal fees are so high that people suffering from poverty would not be able to seek legal assistance.

There was no legal aid given to such individuals, because most of the parents, whose child has been abducted, does not seek any legal assistance as the fees of the lawyers are exorbitant.

The legal provision is not fair as teenagers between the ages of 16 to 18 years are allowed to have a sexual intercourse, but they cannot marry till they are 18 years of age.

Government officers in Probation department or police or hospital staff have lack of knowledge regarding the legal background of the adoption law and the crime of kidnapping as well as the modern technology.

According to my findings, there are around more individuals (than 1200) in the probation list waiting to adopt children legally. But probation receives few children per year. As a result of the individuals try to adopt the infant or child illegally and women, who conceive baby before marriage or who act as a sex worker, always try to expose their identity and they secretly give that baby for illegal adoption.

VII.RECOMMENDATIONS

The current legal provisions safeguarding children from abduction and kidnapping, should be implemented fully and must give sever punishments or capital punishment to the offenders.

Give punishments to the offenders without taking much times.

Implement specific punishments and remove them from the government services to the government officers or staff who breached their responsibilities.

The officers who involve in investigation into kidnapping and illegally adopting children, should study the legal provisions on adoption.

Authorities should consider introducing the DNA test to identify the biological parents of the abducted or kidnapped infants.

Government should introduce free legal aid centres for poor victims to seek the legal aid for the criminal matters.

As referred in the above research which was conducted by NCMEC, I would also recommend the following suggestions to be adopted to prevent abduction of infants from the hospitals. Therefore, introduce adequate regulations to prevent such crimes and immediate reporting and investigation by law enforcement is necessary for the safe return of the infant because hospital staff and the management of the facility must response for the infant abduction. Every hospital or health care centre must develop their technologies.

ACKNOWLEDGEMENT

I gratefully acknowledge the advice and guidance of all the lecturers of the faculty of Law, General Sir John Kotelawala Defence University and pay my gratitude for my parents, family members and my friends who provided encouragement and support in every means.

REFERENCES

Aisha Edris,"Laws to curb kidnapping, abduction of children need more teeth" <http://www.nation.lk/2008/03/16/newsfe6.htm> Accessed on 16 March 2008

Ann wolbert Burgess and Kenneth V. Lanning,"An Analysis of Infant Abductions" <http://takeroot.org/ee/pdf_files/library/Burgess.pdf> Accessed on July 2003

"Baby 81 appears on US talk show", BBC NEWS <http://news.bbc.co.uk/2/hi/south_asia/4311325.stm> Accessed on 2 March 2005

Convention on the Rights of the Child, 1989

David H. Sells,"Security in the Health Care Environment" < https://books.google.lk/books?id=FzKwK8ocnrwC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false> Accessed on 1 January 2000

Government of Sri Lanka, Penal Code, 1970

Government of Sri Lanka, Penal code (Amendment) No 16, 2006

Government of Sri Lanka, Adoption Ordinance No 24 of 1941

Jayampathy Jayasinghe,"The case of the adopted baby", Sunday Crime, Sunday Observer <http://www.sundayobserver.lk/2008/01/20/imp07.asp> Accessed on 20 January 2008

Jayashika Padmasiri,"Infant's abduction rocks the nation" < http://www.nation.lk/2007/12/23/newsfe1.htm> Accessed on 23 on December 2007

John B. Rabun, "For health care professionals: Guidelines on prevention of and response to infant abductions" < http://www.missingkids.com/en_US/publications/NC05.pdf> Accessed on August 2014

Russell Colling, Tony W. York, "Hospital and Healthcare Security", 5th edition < http://www.amazon.com/Hospital-Healthcare-Security-Fifth-Edition/dp/1856176134>

BIOGRAPHY OF AUTHOR

The author D.T.Samayawardena is a final year undergraduate of Faculty of Law, General Sri John Kotelawa Defence University. Her research interests include Human Rights, Humanitarian Law and company Law.

Pungency in the Amusement

Radha Kuruwitabandara
Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
radhiguit@gmail.com

Abstract— *This research paper intends to discuss the negative impact of cellular phones in the perception of cellular phone crimes. Today the increasing rate of so said crimes is seen to be considerably high parallel to the development of technology in cellular phones. The technology of cellular phones has been developed from the simplest feature phones to smartphones by which that fact itself has contributed to increase of usage of cellular phones. Similarly, the rate of cellular phone crimes too have increased. But it is seen that the contemporary problems are not well addressed by the contemporary laws. It has been the main objective of conducting this research to provide few recommendations on amending the existing law on cellular phone crimes.*

Keywords— *Cellular phone crimes, Sri Lankan law, Lacunas*

I. INTRODUCTION

A cellular phone, also called a mobile phone sometimes, is a type of short wave analogue or digital telecommunication in which a subscriber has a wireless connection from a mobile phone to a relatively nearby transmitter. The transmitter's span of coverage is called a cell.

A cellular phone crime as regarded in this research is a wrongful act committed with a wrongful intention in a situation where a cellular phone is either a tool or the target or both. Further, a cellular phone criminal is a person who commits a cellular phone crime.

This research paper will proceed to analyse the effect of cellular phones on the creation of the idea of cellular phone crimes, the social factors of Sri Lanka which has provided a helping-hand to such crime rate, the role of Sri Lankan law in its operation and the emerging trends in the global arena.

II. CELLULAR PHONES AND CRIMES

The use of cellular phones in human lives has become so vital that even the morning alarm is being replaced by a cellular phone. The definition of cellular phones itself contains a wide scope because the concept of cellular phone has been gradually developed into many deviations. For an example, the development of feature phone to the smartphone has further expanded its scope to tablets, electronic notebooks and such similar versions. This makes it more complicated in the matter of narrowing down the research area. But in comparing the nature of those with cellular phones, it is clear that each one of them should be incorporated into the definition.

Moving further to the rate of usage of cellular phones in Sri Lanka in contrast with the rate in the world as a whole, it is essential to look into few statistics. By 2014, more than one quarter of the global population are cellular phone users. It is 6.8 Billion in a number. By 2018, it is expected to be increased to 69.4%, which will exceed the half-line[173]. By the end of 2012, Sri Lanka had an estimated 20.3 million of mobile phone users out of 20.8 citizens[174].

There are many reasons for this gradual increase of usage. The inexpensive prices of some models of cellular phones have transformed it to an ordinary item rather than an exciting one. Cellular phone companies in the other hand are observed to be very frequent in releasing new updates of their productions which has then resulted in creating a bigger second-hand market which fits low budgets.

Moving into the core aspect of this essay, aforesaid usage rate has a direct connection with the increasing crime rate related to cellular phones. Despite of all the development experienced, one most important factor is being ignored, the security. It is rather a social factor, that as it has been available for people in low economic standards and with less education, the possibility of them getting involved in misuse of cellular phones is higher.

Even the definition of cellular phone crimes stands as provided previously, one would yet have a confusion between computer crimes and cellular phone crimes. That is because, today it is a common fact that smartphones with a network connection can perfectly act as a computer, or even more sophisticated than that. And all the portable internet provider gadgets are working on

[173] eMarketer report on Worldwide Mobile Phone Users.
[174] Mobile mania in Sri Lanka by Charitha Ratwatte

a cellular phone network. Moreover, several parts of cellular phones are considered in cyberbullying, which is mainly a computer crime.

Cellular phones today are equipped with Bluetooth, wireless fidelity (WiFi), Third generation technology (3G), global system for mobile communication (GSM), General Packet Radio Service (GPRS), virtual private networks, dial-up-service and many other advanced services. These make it possible to network mobile devices at home, a workplace or even on the go.

What is to be understood is that the decisive factor is the technology used to transmit the call, irrespective of the phone's capabilities and inabilities. Standing on this factor helps to draw a line between cellular phone crimes and cybercrimes.

III. CELLULAR PHONES OPENING DOORS FOR CRIMES

A.Cellular phone crimes as cyber crimes

It was previously discussed that cellular phones have now evolved to act more as portable computers than just a phone which makes calls. This has created a link between cellular phones and cybercrimes. What this has further resulted in is the absence of knowledge of being a victim and sometimes even being the wrongdoer. They tend to hold the idea that the fact of not using a computer in that particular act provides them an exception for not being a criminal or a victim, in which they actually are. Every person who uses internet, Bluetooth, or even infra-red enabled cell phones can be easily put into the sphere of cybercrimes. Thus it is clear most of all the phone users has the possibility of becoming a subject of a cybercrime.

B.Few common cellular phone crimes

Bluebugging is an attack done on a cellular phone through a Bluetooth connection[175], which is a very common offline mode of connecting two or more devices. Despite the benefit of quick transformation of data, a stranger might have the opportunity of getting into ones' private cellular phone. This access allows the stranger to take over the total control of the victim's phone. The danger is even crucial because unless the original user is known enough about his device, he cannot even recognise that the phone is being hacked. The hacker can access to almost all the information in the victim's phone. He can reach the extent of making calls and listen to other conversations that occur through the infected phone.

Phishing is getting revealing and access to personal information such as passwords and credit card numbers and use of such information for fraudulent practices[176].

Vishing is a way of committing financial crime by a phone. In other words this is voice phishing[177]. This has come into play through the practice of using cellular phones for online shopping and bank transactions. These are similar to phishing attacks which includes identity theft such as credit card information. A misleading phone call can fulfil all the necessities of the hacker.

Smishing usually happens through the Short Message Service or more commonly known SMS. User is sent with a lucrative message requiring them to disclose his personal information which the hacker misuses later. This can end up in information theft.

Malware is another vital threat to cellular phones. Once infected, the device perform malicious activities. This can happen through a simple short message (SMS), a file transfer or downloading programmes from internet[178].

C.Cellular Phone Crimes in Sri Lanka

Some upholds the idea that, as for the fact that Sri Lanka is still a developing country, most of those very advance, mastermind cellular phone crimes do not occur in Sri Lanka. But one may not conclude that for the fact of not having reported incidents. It is disappointing to note that even the Yearly all island crime evaluation done by the Police Department of Sri Lanka denotes no sign of cybercrimes or cellular crimes. The department only recognizes a very few types of cellular phone crimes mostly for the fact that they are not reported in the frequency the occur. They are, Phishing and pharming for identity theft, Lottery scams and phone number scams.

Identity theft is one of the most frequent ones out of all in Sri Lanka. An identity theft is when someone's professional information is stolen to commit a fraud[179]. In theses, most of the times, the victim receives a message appears to be from a credible, real bank or credit card company, with links to a website and a request to provide account information. But the website is fake, made to look real.

[175] Oriyano, S P. (2013) *Hacker Techniques, Tools and incident handling*, p.199, 2nd ed, Jones & Bartlett Publishers

[176] Phishing *https://www.microsoft.com/security/online-privacy/phishing-symptoms.aspx*

[177] Vishing *http://www.lifelock.com/education/smartphones/vishing/*

[178] Malware *http://blog.avast.com*

[179] Police Department Records, Sri Lanka

Lottery scams are another popular type seen in Sri Lanka. In these, it includes scams which can go under the name of a genuine lottery. Unsolicited messages or telephone calls tell people they are being entered into a prize draw. Later, they receive a call congratulating on winning a substantial prize. But before claiming the prize they are said to pay an amount of money to pay for administration fees and taxes. The prize of course does not exist. It is quite clear that no genuine lottery would ask for a money back from a winner. But some people fail to track such factors[180].

Phone number scams are a type that has been there for a long time, and still in use. These are at first send as postal notifications of a win in sweepstake or a holiday offer. These include an instruction to ring a premium rate number. This is generally a 900 toll number. So said prizes do not exist[181].

Above mentioned are a very few offences committed with the use of cellular phones in Sri Lanaka, which are stated according to the records as reported to the Police department. There should be no doubt that there are failed and unreported complaints. And it is very clear that the advancement of new ways of committing crimes will never look back for the law to follow it. In fact the development of technology has been a helping hand for offenders.

D.Latest legal trends regarding cellular phone crimes

The world as a whole has now come to the conclusion that an advance legal system should be implemented in eliminating the crimes committed via cellular phones.

Offences relating to cellular phones can be addressed in two major ways. It can either be addressed as a claim of civil damages or in the point of a crime. The matter in question is the criminal aspect. In regarding it as a crime, imposing a punishment can be the ultimate result of the proceeding which would mostly be a fine or an imprisonment.

Many of the countries have taken necessary steps to introduce new laws to their legal systems through their legislative bodies considering the crime rate that is spiralling out of control.

E.Indian legislation on Cellular phone crimes

Republic of India, the closest neighbour to Sri Lanka enacted the Cell phones and the Information Technology Act in the year 2000.

Section 2 (i) has defined the devices covered by the Act as "any electronic, magnetic, optical or other high speed data processing device or system which performs logical, arithmetic and memory functions by manipulation of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network". It is therefore clear that a mobile cell phones are just been made a part of it.

Section 2 (r) refers to the term 'electronic form', which means any information sent, generated, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device. In fact, the transformation transactions done through a cellular phone are encompassed into this Act.
Section 43 deals with destruction and unauthorized access to information technology devices.

Section 66 provides protection against hacking. Hacking is defied in regard to this section as any act with an intention to cause wrongful loss or damage to any person or with the knowledge that a wrongful loss or damage will be caused to any person. An offender could be given with an imprisonment of three years or a fine.

Section 67 (A) sets out the punishment for transmitting of material containing sexually explicit act or conduct in electronic form. According to this, an imprisonment up to five years or a fine.

A protection against confidentiality and privacy of data is provided under the section 72.

Along with the IT Act, section 378 of the Indian Penal code is incorporated. This particular section relates to Theft.

F. Is the Indian Law sufficient to address the cellular phone crimes in India?

It is clearly seen that many of the crimes committed by use of a cellular phone eventually leads to the information theft. Even if India has the Cell phones and the information technology act enacted, there is no specific Act for Data protection as seen in United Kingdoms. Supporters defend the arguments of reality stating that the Information Technology Act has enough provisions for data protection in which the reality is far beyond. The said Information Technology Act provides aids to a certain extent but not as it is required by the necessities.

[180] Police Department Records, Sri Lanka

[181] Police Department Records, Sri Lanka

The legislation in existence is seen to be defending very few and common crimes which does not accommodate the whole sphere of cellular phone crimes. For instance, it was earlier discussed that a cellular phone crime can be committed either by a phone with a network connection or without such. It is only the equipped phone that has been taken to consideration in this enactment. For example, bluebugging can result in a crucial damage to ones' information. But there are no provisions provided to cover such matters. The concern has solely been aimed on cellular phones with connection networks which has neglected all the other possibilities. Therefore it is clear, even if there is an Act on cellular phone crimes in India, it is even not sufficient enough to address the varied possibilities.

G. Data protection Act 1998 – United Kingdom

The data protection Act of United Kingdom is an Act to make new provisions of the regulation for the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information as per to its preamble. Simply, this Act governs how the personal data of an individual is used by organizations, businesses and the government. This Act basically gives a right of access to personal data to the individuals. Personal data is collected when an individual takes part in a purchase of a good or service from a company or any other service provider. It is regarded as a breach of a civil right to use someone's confidential information for fraudulent purposes. The Data Protection Act was enacted as a guideline to be followed by the companies in the scope of gathering personal data in extending possibilities.

Section 1(1) defines the scope of data controller as to who needs to comply with the Act. Such data controllers should be responsible for the availability, integrity and security of the data that fall under the Act.

In discussing about the Data Protection Act, there are eight main requirements which the Act is expected to consist. In other words they are the core expectations of the Act. They are, information must be processed fairly and lawfully, information must be processed for limited purposes, information must be adequate, relevant and not excessive, information must be accurate and up to date, information must not be held for longer than is necessary, information must be processed in accordance with the individual's rights, information must be kept secure and information should not be transferred outside the European Economic Areas unless adequate levels of protection exists.

Out of these requirements, the one that says that the information must be kept secure is indicating a relevance to that of loss of data and data theft through mobile phones. This section extends to impose duty on a company who is holding or using data of an individual to keep such data in a secured manner. In a situation where a company loses a Computer with such data, the Act provides provisions to impose a liability on that company. Furthermore, the Act also takes steps to fine organizations who act in such negligence. This Act indirectly insists the Companies to not to be careless. The company must ensure that the personal information are in safe hands and will not be passed to wrong hands.

The matter in question is whether the losses occurred by a cellular phone is acceptable in relation to the Data protection Act. The Data Protection Act covers 'personal data' and 'sensitive personal data'. Personal data is any information about an individual irrespective of the format of the information[182]. This means information that affects the person's privacy. 'Sensitive personal data' are the information that includes the individual's race, religion, political beliefs, mental health and other similar information[183]. The Act does not cover confidential data of every nature but only the ones that contain personal data. This seems to be a gap in the law.

It is clear that this Act does not cover every aspect of loss of data. In fact, it only covers the loss of data occurred in the possession of a company or such other organization. But it is satisfactory to a certain extent that it covers at least a part of it. Sri Lanka in the process of achieving legislative goals, it would be useful to have enacted a Data protection Act including the aspects of cellular phones as well.

D. Sri Lankan legislations on cellular phone crimes

It is disappointing to state that Sri Lanka has not yet taken steps on addressing cellular phone crimes as a separate area of law.

Sri Lanka has only a Computer Crime Act No 24 of 2007 which is precisely addressing the Computer crimes but not the cellular phone crimes. The definition of the term computer is given in the interpretation section of the Computer crimes Act as "an electronic or similar device having information possessing capabilities"[184]. One may argue that this definition has the possibility of considering cellular phones. But in moving into the other

[182] Section 1(1), Data Protection Act of 1998, UK

[183] Section 2, Data protection Act of 1998, UK

[184] Section 38,Computer Crimes Act no 24 of 2007, Sri Lanka

sections of the said Act it is seen that the legislature had not possessed the intention of recognizing and incorporating cellular phones or crimes related to such devices in enacting Computer crime Act, No 24 of 2007.

In relation to computer crimes, this act has discussed unauthorized access to computers (S. 03), intentional use of a computer in a manner of affecting the national security, national economy or public order (S. 06), buying, possessing or selling unlawful data (S. 07), and unlawful accessing to a password or access code of a computer (S.09). It is beyond certainty that all the foresaid crimes could also be committed in relation to a cellular phone. It is therefore a major loophole to not to have a body of law to govern the said area.

Apart from that, there are also some crimes that can only be committed by cellular phones as discussed earlier in this text, which are unable to be committed by use of a computer. It is in question how such issues are to be regulated.

In regard to the context of India, these crimes can be addressed by the Penal Code of Sri Lanka under the offence of theft to a certain extent.

Section 366 of the Penal Code of Sri Lanka is as follows;

"Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking is said to commit 'Theft'."

The term 'movable property' should be precisely taken into account. Section 20 in the General explanations of Chapter II of the Penal code refers to movable property.

"…includes corporeal property of every description, except land and things attached to earth…"

This definition only covers theft of property of corporeal nature. Corporeal nature needs the subject matter to be physical and tangible. It is obvious that a collection of data in the software mode is not tangible. But a collection of data stored in a compact disk or a floppy disk or a pen drive can be considered as included into this definition since it becomes a movable property once the data is stored in a movable device. In that matter, it is applicable to an extent, the Penal section of 366 for the instances where a cellular phone with a data collection is the subject of theft.

In considering the different types of cellular phone crimes, it is clear that a mere theft of the cellular phone is not the only mode of such crimes. There are far more advance modes of accessing only to the data storage even without the victim's knowledge. This results in a stranger accessing to the intangible data of another person without reaching the tangible device. The existing law in Sri Lanka does not seem to cover or recognise such gains or losses of data in particular. This is a major lacuna identified in this particular area. The failure of penal law of Sri Lanka on cellular phone crimes could be well elaborated on this fact. For instance, the other Penal code section that shows an applicability to an extent is the section 21.

S. 21 (1) Wrongful gain – "gain by unlawful means of property to which the person gaining is not legally entitled."

S. 21 (2) Wrongful loss – "loss by unlawful means of property to which the person losing it is legally entitled."

A person who makes access to another's data on a cellular phone gets a wrongful gain which is not lawfully entitled to him. The Victim, in the other hand, suffers a wrongful loss of data which ought to be possessed by him in legal means.

Even though the sections stands so, it is in question whether they can make an influence towards the rapid growth of cellular crime rate in Sri Lanka.

E. Analysis

As long as there is no existing legislation found in the area of cellular phone crimes in Sri Lanka, the need of an implementation of such a law is in greater necessity. In such an implementation, having regard to the laws of aforementioned countries would support such implementation to reach an advanced level of defending such crimes.

The particular commissions should be made recognized by setting out their constituent elements as it would contribute in imputing liability. Identification and providing a procedure to investigate and prevent cellular phone crimes should be the main purpose to be served. Punishment for commission of such crimes should be introduced further.

In regards to setting out a definition for these crimes, it needs a more comprehensive approach in comparison to that of the Indian Act on Information Technology. In the Indian Information Technology Act it seems to be an indirect reference to cellular phones rather than a direct definition. This has the possibility of creating loopholes in the practical use of the law.

Furthermore, the need of having defined the different forms of committing these crimes should also be laid

down. As for an example, the acts of bluebugging and phishing are two particular acts that need unique recognition and also result in different degrees of damage. In that matter, it is essential to recognize the different types of cellular phone crimes under an umbrella definition.

The victims should also be empowered with a mechanism to claim damages for the data loss occurred due to the wrongful acts done through cellular phones.

These are the main aspects that need to be addressed in an implementation of a legislation regarding wrongful acts committed with the use of cellular phones.

XI. CONCLUSION

It was discussed previously that the law relating to cellular phone crimes in India is not competent enough to address the threats that are being created so far along with the vast development of technology. Comparatively, in Sri Lanka, where the law on cellular phone crimes is still in its infancy requires a greater attention and consideration than that of India.

The necessity should firstly be identified and then the findings should be addressed accordingly. An amendment to the Computer crimes Act No. 24 of 2007 can be raised by suggesting to incorporate cellular phones into it would be a practical recommendation at least as a primary step to be taken.

The time that has been passed without an enactment should not be considered as a failure but as an extra extension of time in which the neighboring countries have kept their first step so that we are able to follow them along with upgrades to the lacks they possess. In fact, this is the best stretch of time for Sri Lanka to lead its legal system to the digital world with a comprehensive enactment.

It is reasonable not to have the best solution at the first attempt itself. But taking the first step today would eventually lead to its own improvements parallel to the technological evolution.

ACKNOWLEDGMENT

The author is grateful to Mr. Buvaneka Aluwihare PC. Justice of the Supreme Court for the valuable suggestions and the guidance provided, and Mr. Prasantha De. Silva Justice of the Civil Appeal court, Gampaha. for the massive academic support rendered. Further, the assistance given by Ms. Bhagya Wickramasinghe is also gratefully remembered.

REFERENCES

Cell Phone Crimes – India, <*http://www.legalindia.com/* >

Computer Crime Act, No. 24 of 2007

Data protection Act 1998 of United Kingdom, *www.legislation.gov.uk*

Data protection; *www.gov.uk; www.clouddirect.net*

Gupta N A. Mobile cell phones and cybercrimes in India. <*http://www.legalindia.com/* >, Accessed 06.16.2015

Oriyano, S P. (2013) *Hacker Techniques, Tools and incident handling*, 2nd ed, Jones & Bartlett Publishers

Jayasinghe K G (2012). *Computer and Internet law*

Malware., <*http://blog.avast.com*>

Mobile technology crime. Accessed 06.16.2015, < *http://police.mizoram.gov.in/* >

Penal Code of India 1860

Penal code of Sri Lanka, No. 02 of 1883

Phishing.,
<*https://www.microsoft.com/security/online-privacy/phishing-symptoms.aspx*>
www.google.lk/search?hl=en&redir_esc=&client=ms-android-sonymobile&source=android-launcher-widget&v=141400000&qsubts=1435156652850&action=devloc&q=what+is+phishing+attack#hl=en&q=define+phishing

Reed C. and Angel, J. (2000). *Computer Law*, 4th ed, Universal Law Publishing Co. Pvt. Ltd.

Sri Lanka Centre for cyber security
http://www.slcert.gov.lk

Smith R G. Preventing mobile telephone crimes., *http://www.aic.gov.au/media_library/conferences/other/smith_russell/1996-10-crf.pdf* >Accessed 06.16.2015

Vishing.,
<*http://www.lifelock.com/education/smartphones/vishing/* >

BIOGRAPHY OF THE AUTHOR

[1]Author is a law undergraduate of the General Sir John Kotelawala Defence University, Sri Lanka. She is currently studying in the second year.

LIST OF REVIEWERS

Dr. P. Mahanamahewa – *Dean, Faculty of Law, General Sir John Kotelawala Defence University*
Mr. M. Wijesinghe - *Faculty of Law, General Sir John Kotelawala Defence University*
Dr. Thusitha Abeysekara - *Faculty of Law, General Sir John Kotelawala Defence University*
Ms. K.Jayasekara - *Faculty of Law, General Sir John Kotelawala Defence University*
Ms. H. Rathnamalala - *Faculty of Law, General Sir John Kotelawala Defence University*
Ms. P. Wijesooriya - *Faculty of Law, General Sir John Kotelawala Defence University*
Ms. S. Elkaduwa - *Faculty of Law, General Sir John Kotelawala Defence University*
Ms. B. Wickramasinghe - *Faculty of Law, General Sir John Kotelawala Defence University*