MEEZAN

ANNUAL LAW JOURNAL

53RD EDITION

LAW STUDENTS' MUSLIM MAJLIS 2018/2019
SRI LANKA LAW COLLEGE

MEEZAN

AN ACADEMIC AND PROFESSIONAL JOURNAL COMPRISING
SCHOLARLY AND STUDENT ARTICLES

53RD EDITION

EDITED BY:

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The Law Students' Muslim Majlis
Sri Lanka Law College

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Review, Responses and Criticisms
The Law Students' Muslim Majlis welcome any reviews, responses and criticisms of the content published in this issue.

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EVENT DETAILS

The Launch of the 53rd Edition of the Annual Law Journal

-MEEZAN-

Chief Guest

Hon. Justice Ameer Ismail
(Former Judge of Supreme Court)

Guest of Honour

Hon. Palitha Fernando PC
(Former Attorney General)

Date

3rd September 2019

Venue

Sri Lanka Law College, Colombo 12

Law Students' Muslim Majlis
Of
Sri Lanka Law College
The Executive Committee 2018/19

Patron	Mrs. Indira Samarasinghe PC
	Principal, Sri Lanka Law College
Vice Patron	Justice A. H. M. D. Nawaz
	Judge of the Court of Appeal
Senior Treasurer	Mr. M. U. M. Ali Sabry PC
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Committee Members	Inshaff Sajeer
	Mohamed Liyaudeen
	Mohamed Rakshan
	Mahees Majeed
	Rashad Ahamed
	Ilham Hasanali
	Shermila Muthaliff

Dedicated to
Late Mr. Shibly Aziz PC

Shibly Aziz was a senior President's Counsel in Sri Lanka who contributed to the development of the legal system in the country. He was a former Attorney General and a Solicitor General of Sri Lanka and had served on a number of national commissions and statutory bodies and represented Sri Lanka in several international fora. He continued his legal career in private practice, specialising in Constitutional law, Commercial law, and Shipping and Aviation law. He was a senior Counsel in several landmark cases in the country. He held an LLB from the University of Ceylon and an LLM from the University of London including Diplomas in Shipping & Maritime Law and in Air and Space Law.

Law Students' Muslim Majlis

2018 / 2019

SRI LANKA LAW COLLEGE

Seated (left to right)

Maahira Fouzul Hameed (Treasurer), Ijaz Azmy (Vice President), Mr. M.U.M.Ali Sabry PC (Snr. Treasurer), Haajer Azhar (General Secretary),His Lordship Chief Justice Jayantha Jayasuriya PC, Mubarak Muazzam (President), His Lordship Justice A.H.M.D. Nawaz (Vice Patron & Judge of the Court of Appeal),Mrs. Indira Samarasinghe PC (Patron & Principal of Srilanka Law College), Shabna Rafeek (Editor), Mohamed Fuzly (Vice President), Mohamed Infas (Coordinator)

Standing Left to Right

Ilham Hasanali (Committee Member),Mohamed Rakshan (Committee Member),Shermila Muthaliff (Committee Member), Ina Sajeer (Committee Member),Shimlah Usuph (Asst. Editor), Shafna Abul Hudha (Asst. Editor), Mohamed Arshad (Asst. Treasurer),Rashad Ahamed (Committee Member)

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Mahees Majeed (Committee Member),Mohamed Liyaudeen (Committee Member)

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4th July 2019

Message by His Lordship the Chief Justice

It gives me great pleasure to forward this message of felicitation to the Law Students' Muslim Majlis, on the occasion of the release of the 53rd edition of their annual publication "Meezan".

The Law Students' Muslim Majlis through the publication of "Meezan" journal continues to provide a forum for the exchange of ideas, views and opinions on Islamic Jurisprudence and other related subjects, to create awareness amongst the students of diverse ethnic groups regarding various matters connected with religion and the law.

The "Meezan" contains articles of value and the magazine is well received by those in the legal fraternity and also by those who are just entering the profession. It is indeed laudable that the members of the Law Students' Muslim Majlis are able to bring out a journal of this standing.

Whilst commending the editorial board of the "Meezan" journal, I wish the members of the Law Students' Muslim Majlis every success in their future endeavours.

Jayantha Jayasuriya, P.C.
Chief Justice

Message from the Patron

It gives me much pleasure to send a message to 'Meezan' 2019, the annual publication of the Law Students' Muslim Majlis of Sri Lanka Law College.

The publication of Meezan for 52 years demonstrates these broader interests and it is my earnest hope that such interest will continue over the years to enrich the minds of lawyers of the future.

In my mind, the Law Students' Muslim Majlis over the years has done yoeman services for the Muslim Students in particular and all the other Law Students in general.

Members of the Muslim Majlis, whilst pursuing their academic goals, must make a concerted effort to reach out to the common membership of Sri Lanka Law College students population with a view to promote the true ideals of Islam, which promote co-existence and brotherhood among all human beings irrespective of their race, religion, cast or linguistic barriers.

The President and the other members of the executive committee of the Majlis must be congratulated for all their efforts throughout their term of office to keep the Majlis flag flying high despite the small numbers of students. I wish the Sri Lanka Law College Law Students' Muslim Majlis all success.

P. Indira S. Samarasinghe, PC.
Principal
Sri Lanka Law College

Message from the Vice Patron

In the long years of its existence, the Law Students' Muslim Majlis of Sri Lanka Law College has played a truly significant role in bridge building among the communities and, as this year's programme of activities draws to a close, culminating in the grand event on a successful publication of yet another "Meezan"- the signature journal of the Majlis, I hasten to compliment the committee members and the editors on its successful publication.

I extend my heartiest greetings and wishes to all members of the Majlis who have guided the destinies of a society of such pristine memory and I exhort all future office bearers to expend their efforts to promote and sustain its noble objectives of propagating harmony and peace among all students of Sri Lanka Law College. My prayers go out for the continued sustenance of the Majlis through the customary dedication, diligence and devotion of its future office bearers.

I wish the Majlis and its members great strides in its future endeavors.

Justice A.H.M.D.Nawaz
Judge of the Court of Appeal
Vice Patron,
Law Students' Muslim Majlis

Message from the Senior Treasurer

It is with great sense of satisfaction that I pen this message to felicitate the launch of the "MEEZAN", the voice of the Law Students' Muslim Majlis of Sri Lanka Law College.

These are challenging times to the Muslims in the world in general and the Sri Lankan Muslims in particular post "Easter Sunday Terrorist Attacks".

Islam and the Muslims, their beliefs and culture have all come under a microscopic scrutiny from the rest of the world, some genuinely attempting to learn and understand, others making use of the opportunity to drive their hidden agendas against the Muslims and Islam which has become an industry called "Islamaphobia".

In the light of such challengers, each and every one of the Muslims who profess the Islamic faith has a bounden duty to advance the real virtues of Islam, i.e. love, mercy, brotherhood, justice to all and fair play.

One need to understand that the misunderstandings and misinformations about the Islam and the Muslims could only be clarified by engagement, discussion and education. An average Non-Muslim will not read the Quran nor the Hadith, they will observe the Muslims as to how they act and deal in their day to day activities, so it is our bounden duty to act as true ambassador of our faith without blindly following the ideologies promoted by foreign elements to suit their culture and context.

Contextualizing the religion, the practice and the performance of Islamic way of life is important in which the future of the Muslims and the brand of Islam which we need to practice in a country like Sri Lanka cannot be solely decided by religious scholars due to their limited knowledge and engagement with the outer world and particularly with our brothers and sisters from different faiths.

In the context the intellectuals, the academics, the professionals and the business leaders together with the community leaders representing our faith has a role to play in contextualizing the brand of Islam which we ought to practice in this country which will promote brotherhood understanding, national unity and thereby peace and prosperity of the nation.

Hence it is my fervent hope that the Muslim intellectuals and professionals including the students and members of the Muslim Majlis will play an active and positive role in shaping the future of the Sri Lankan Muslim community without leaving it to the sole prerogative of the Ulema / religious scholars before it is too late.

May Allah bless all of us with the wisdom and guidance to promote the real ideals of our great faith and spread love, mercy, tolerance and understanding to all.

I take this opportunity to wish the Law Students' Muslim Majlis a successful launch of this "MEEZAN" and all its future endeavours.

M.U.M. Ali Sabry
President's Counsel

Message from the President

Bismillahir Rahmanir Raheem

It is with great pleasure and privilege that I pen the words of my final message as the President of the Law Students' Muslim Majlis for the year 2018/2019.

Today, we are here to witness the launching of the 53rd edition of the Meezan annual law journal which is dedicated to the publication of high quality articles from the legal fraternity and is considered to be one of the best law journals ever to be published by a student body of the Sri Lanka Law College.

The journey throughout in elevating this limelight event to success was never easy, it came with sacrifices beyond words and with the cost of trial and error. Yet, as a cohesive team that stood for justice and equality, supporting and defending one another we emerged successful in attaining our target.

I would deem it absolutely impossible to have achieved this much unless for the mercy and love of my creator. Alhamdulillah. It is mention worthy that nothing would have been possible without the great support of our Patron Ms. Indira Samarasinghe PC. Further, I must express my heartfelt gratitude towards our guide, mentor and Vice Patron of the Law Students' Muslim Majlis, His Lordship Justice A.H.M.D.Nawaz-Judge of the Court of Appeal for his untiring efforts to keep us motivated and to achieve higher whenever we lost courage and confidence. I also thankfully acknowledge the commitment of our Senior Treasurer Mr. M.U.M. Ali Sabry PC in encouraging us to keep striving in the midst of challenges on our own so as to make us better and committed leaders of the future.

I would also make this an opportunity to thank all the office bearers of my committee for their support and contribution. Further, I also extend my sincere thanks to staff, lecturers, student unions of Sri Lanka Law College, senior lawyers, article writers, donors,advertisers and volunteers for their utmost support. Thank you very much!

May the blessings of Allah be with you all!

Muazzam Mubarak
President,
Law Students' Muslim Majlis.

General Secretary's Report for 2018/2019

In the name of Allah, the Most Gracious, the Most Merciful

The Holy Qur'an repeatedly warns and reminds us that one day we shall be standing in front of Allah and be held accountable for our responsibilities. Allah says:

"يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ ٱتَّقُواْ ٱللَّهَ وَلۡتَنظُرۡ نَفۡسٞ مَّا قَدَّمَتۡ لِغَدٖۖ وَٱتَّقُواْ ٱللَّهَۚ إِنَّ ٱللَّهَ خَبِيرُۢ بِمَا تَعۡمَلُونَ"

O you who believe! Fear Allah, and let every soul consider what it has forwarded for the morrow (The Day of Judgement), and fear Allah. Allah is acquainted with what you do [Surah: 59, Verse: 18].

It is with immense pleasure, I submit the General Secretary's report of the Law Student's Muslim Majlis for the year 2018/2019.The present executive committee was appointed on the 30th of August 2018 at the Annual General Meeting presided by His Lordship Justice A.H.M.D.Nawaz.

As law students who successfully made it to Sri Lanka Law College by the grace of Allah, the Executive Committee of the Law Students' Muslim Majlis organized a special seminar for students facing the Law College Entrance Examination in collaboration with the All Ceylon YMMA Conference as our first order of business with the intention of giving back to society. The said event, which saw the participation of around 80 participants from various parts of the island, was conducted at the YMMA Auditorium in Mardana on the 24th of September 2018. We are indebted to our resource personnel Mr. S. Kamalayogeswaran (AAL) and Mr. M. Affan Kariyyappar (SLAS, M.Sc in Agri Economics & B.Sc in Agri Technology & Mgt.) without whose help this event would not have been a success.

As our next project, the Law Students' Muslim Majlis partnered with a local community based organization in Kal-Eliya to carry out a legal awareness programme with the objective of taking knowledge of everyday legal matters to the door steps of the public on 9th of December 2018 to mark the International Human Rights Day.

Apart from the introduction given about the Law Students' Muslim Majlis at the General Orientation programme, a Fresher's Welcome programme was arranged for preliminary year Muslim Students in order to familiarize them with the workings of the Majlis.

A discussion on the Counter Terrorism Bill was initiated in Collaboration National Front For Good Governance on 14th of March 2019 at the ICES Auditorium in order to provide an open platform to voice opinions regarding the CTA with the aim of reaching a common stand. Representatives of political parties and civil rights activists took part in this event. We sincerely thank Hon Mr. Bimal Rathnayake (M.P) and Ms.Swasthika (AAL) for sharing their insights on this subject.

We would like to extend our deepest apprecition to the family of late Mr.Shibly Azeez, former Attorney General for their generous donation of 250 books related to various disciplines to the library of the Law Students' Muslim Majlis and we pray that this kind gesture will be accepted as Sadaqatul Jariya as it will no doubt benefit generations to come.

It is with great honour that we dedicate the 53rd edition of the Meezan Law Journal in memory of the esteemed former Attorney General Mr. Shibly Azeez and it is with much gratefulness and humility that we end our term with launch of the Annual Meezan Law Journal for the 53rd time. I deliver my sincere regards to Shabna Rafeek, the Editor of the Law Students' Muslim Majlis and the backbone of the 53rd Meezan Law Journal for her tireless efforts and hard work. I also extend my sincere gratitude to the donors of articles for sharing their knowledge and sacrificing their valuable time.

I would like to extend my heartiest gratitude to our patron, vice patron, senior treasurer, lecturers, members of the legal profession, staff and administration of Law College, fellow students and student unions, office bearers of the Law Student's Muslim Majlis who extended their support to carry out the activities of the Majlis.

I wish the future executive committee of the Law Student's Muslim Majlis all the very best in executing their aspirations for the Law Students' Muslim Majlis. May Almighty Allah shower his choicest blessings on our College and the Majlis for us to march forward from strength to strength to achieve our goals.

Haajer Azhar
General Secretary,
Law Student's Muslim Majlis 2018/2019

Message from the Editor

In the name of Allah, the Most Gracious, the Most Merciful.

It is with extreme pleasure and pride that I commit to paper my message as the Editor of the 53rd edition of the "Meezan" Law Journal, an annual publication of the Law Students' Muslim Majlis of Sri Lanka Law College.

The Meezan is one of the best law journals published by a student body at Law College annually. It is widely looked forward to by senior judges of the superior courts, judges of various other courts and legal luminaries for the outstanding articles contributed by the very best and most sought after academics, professionals, the highest members of the judiciary and law students.

Firstly, I thank Almighty Allah for giving us the strength and showering his countless blessings in making this year's publication a success.

I would like to take this opportunity to extend my heartfelt gratitude to the Patron of the Law Students' Muslim Majlis and the Principal of Sri Lanka Law College, Mrs. Indira Samarasinghe, Our Vice Patron His Lordship Justice A.H.M.D. Nawaz and our Senior Treasurer Mr. M.U.M. Ali Sabry for their continuous guidance and support at all times.

My sincere appreciation goes to the President and to all the members of the Executive Committee of the 2018/2019 Majlis for whose unrelenting support the Meezan would have been impossible. I also wish to extend my special thanks to Haajer Azhar, the General Secretary of the Law Students' Muslim Majlis for the immense support and succour rendered throughout this roller coaster journey in launching the 53rd Meezan successfully.

I also acknowledge and express my sincere appreciation to Mrs. Shibly Aziz, wife of late Mr. Shibly Aziz PC, distinguished luminaries, academics and students who have contributed us with articles, reviews and our financial donors and sponsors who assisted us providing the means and resources in publishing this journal.

I must reteirate that it was indeed a great honour and privilege to serve as the Editor of the Law Students' Muslim Majlis for the year 2018/2019.

I wish the future members of the Law Students' Muslim Majlis the very best in their future endevours.

Shabna Rafeek
Editor,
Law Students' Muslim Majlis

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Share our true Islam with the Muslims and the Non-Muslims

Article published by the Late Mr. Shibly Aziz PC

In an article which I wrote recently (and which sentiments still hold true and, in my view, still worthy of repetition) I said:

"The average Muslim is confused by the violence which is going on in the name of Islam. Islam which is projected as a religion of Peace is now, in the eyes of many who have seen the turbulence and anarchy which prevails in many Muslim States and the acts of terrorism which are perpetrated in its name in other parts of the world, seen as a religion of aggression. This perception of people or nationalities as aggressors is cyclical and it is unfortunate that it has now fallen on the shoulders of the Muslims to play this role in the eyes of the world."

One has only to look at the relatively recent history of the world. The white settlers when they butchered the natives of North America or in Australia and the far East, the Aborigines, to take control of the land, the Germans and the Japanese when they perpetrated large scale acts of cruelty and violence on a hapless world, the British when they brought immense suffering to Eastern Europe by endless bombing, the Americans when they dropped the Atomic Bomb over Hiroshima and Nagasaki, the unspeakable atrocities of the Vietnamese and the Koreans and that directed against them, the endless bombing missions presently carried out in the Middle East. The list can go on and on. At every turn, the aggressors seek to explain away their conduct with the main reason trotted out is that these measures are necessary to right a wrong or are in self defence and to avert further harm to the world. The victims of the aggression have a different story to tell. So the confrontation continues in the present world and is no different. We pray this will end some day.

We only wish to raise matters pertinent to the issue whether the religion of Islam inspired and justified such violence as is commonly sought to be done by protagonists. The West sees the religious exhortations as the root of the problem and those opposed to them rely on the same religions exhortations as justifying the violence. Fortunately not all in the West think on those lines. Those who can rise above narrow parochial confines do truly appreciate the greatness and usefulness of the true religion of Islam in the modern context and are prepared to treat it separate from some of its wayward followers.

The vast majority of Muslims, though personally pious, are moderate in their politics. Theirs is the 'religion of the middle way'. The Prophet himself always disliked and feared extremism. The critics of Islam must learn to distinguish clearly between what the vast majority of Muslims believe, and the causes for the terrible violence of a small minority among them, which civilized people everywhere must condemn.

Islam has always been a religion which advocated peace and peaceful co-existence. The Meccan period of the Prophet's life (610-622 C.E.), when the Prophet showed no inclination toward the use of force in any form, even for self defense is often cited in proof of this . He lived a life of nonviolent resistance, which was reflected in all his instructions and teachings during that period, when Muslims were a minority. The Prophet's teachings were focused on values of patience and steadfastness in facing oppression. The Prophet of Islam strictly limited his sphere to peaceful propagation of the word of God.

The lessons from the Quran and the Hadith support a nonviolent response, even in a confrontational context. It is reflected in the story of Abel (Habil) and Cain (Qabil), personalities representing the two opposing ways of approaching life. Abel is representative of justice and righteousness, refusing to soil his hands with blood. Cain represents aggression and readiness to use violence or even kill on any pretext.

> God accepts the sacrifice only of those who are righteous. If He has not accepted your sacrifice, how is it my fault? If you will lift your hand to slay me, I shall not lift mine to slay you. I am afraid of God's displeasure, who is the Creator of the worlds. (Quran 5:27-28)

Peacemaking and negotiation are recommended as the first strategy to resolve conflicts, as clearly expressed in the Quranic verse: 'if they incline to peace, you should also incline to it, and trust in God." (Quran 8:39)

"And make not Allah's name an excuse in your oaths against your doing good and acting piously, and making peace among mankind. (Quran 2:224) Sura Al Bakqara

"Invite mankind to the way of your Lord with wisdom and fair preaching and argue with them in a way that is better" (Quran 16:125) Sura an -Nahl

"Hadeeth- Sahih Al Bukhari Vol 8 No 470 "Even I will not be saved unless and until Allah bestows His Mercy on me. Therefore do good deeds properly, sincerely and moderately, and worship Allah in the forenoon and in the afternoon and during part of the night, and always adopt a middle, moderate, regular course whereby you will reach your target (Paradise)

(Quran 17:37) Sura Al Isra "And walk not on the earth with conceit and arrogance"

Abu Huraira related (Shaih Al Buhari V 1 Hadith 38 "Religion is very easy and whoever overburdens himself in his religion will not be able to continue in that way. So you should not be extremists, but try to be near to perfection and receive the good tiding that you will be rewarded; and gain strength by worshipping in the mornings and during the mornings afternoons and during the last hours of the night"

(Quran 25:63)Surah-Al Furqan "And the slaves of the Most Beneficent are those who walk on thee earth in humility and sedateness and when the foolish address them (with bad words) they reply back with mild words of gentleness."

(Quran 42:40) Surah –Ash-shura "The recompense for an evil is an evil thereof, but who ever forgives and makes reconciliation, his reward is due fro Allah. Verily, He likes not the

Zalimun (oppressors, polytheists and wrong doers).

Islam postulates that human life is valuable and must be saved and protected, and that resources should be utilized to preserve life and prevent violence. A central teaching of Islam is that there is a purpose and meaning in the creation of the universe, including humans: "Not for (idle) sport did We create the heavens and the earth and all that is between!" (Quran 44:38) Surah- Ad-Dukhan.The Qur'an clearly suggests the sacredness of human life, "And if any one saved a life, it would be as if he saved the life of the whole people." (Quran 5:32) Surah –Al Maidah. "And do not take a life which Allah has forbidden save in the course of justice. This he enjoins on you so that you may understand." (Quran 17:33) Surah – Al-Isra

Thus destruction and waste of resources that serve human life are prohibited. Even when Muslims in the early period launched an armed conflict, their rulers instructed them to avoid destruction and restrict their wars. According to a well known speech made by the first Khalifah Abu Bakr, when he dispatched his army on an expedition to the Syrian borders:

"Stop, O people, that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Neither kill a child, nor a woman or an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services, leave them alone."

Many Quranic verses stress this principle, among them:" Whenever they kindle the fire of war, God extinguishes it. They strive to create disorder on earth and God loves not those who create disorder." (Quran 5:64) Surah- Al Maidah. Tolerance, kindness to other people, and dealing with all people in such a manner with no exception is also emphasized in these verses: "God commands you to treat (everyone) justly, generously and with kindness." (Quran 16:90) Surah- Al Nahl "Repel evil (not with evil) with that which is best: We are well-acquainted with the things they say." (Quran 23:96) Surah- Al Muminoon

This is encouraged regardless of race, ethnicity or religious affiliation of the people.

The Prophet's tradition also supports the shunning of violence and calls for restraint. Such teaching is clear in the Hadith: "The Jews came to the Prophet and said, 'Death overtake you!' Aisha said 'And you, may Allah curse you and may Allah's wrath descend on you'. He (the Prophet) said: 'Gently, O Aisha! Be courteous, and keep yourself away from roughness.' Forgiveness and a preference for peace over war or violent confrontation, is the best reaction to anger and conflict. As the Quran says in the well known verse. "But if the enemy inclines towards peace, do you (also) incline towards peace, and trust in Allah: for He is the one that hears and knows (all things). (Quran 8:61) Surah – Al –Anfal. "Nor can goodness and evil be equal. Repel with what is better: then will he between whom and you was hatred become as it were your friend and intimate!" (Quran 41:34) Surah - Fusilath.

The Holy Prophet's life has been cited as a source of nonviolent inspiration and teachings of peaceful preaching. Particularly during the early years though he was tortured, accused of

blasphemy, and humiliated, and his family and supporters were ostracized, he did not curse his enemies or encourage violence. On the contrary, his teachings were centered on prayer and hope for enlightenment and peace. Ibn Umar relates that someone asked the Prophet, “Who is the best Muslim?” He replied, “That one whose hand and tongue leave other Muslims in peace.” We should follow this exhortation.

One Country - One Law in the Context of Sri Lankan Matrimonial Law

Justice Saleem Marsoof PC

Introduction

While the MMDA Reform process[1] has been for some time the talk of the town,[2] this debate has now been eclipsed by another equally vociferous one, namely the campaign to eliminate personal laws in Sri Lanka under the slogan 'One Country, One Law', which if implemented, will make MMDA, and a few other personal laws, irrelevant.[3] I will not be surprised if the latter slogan, attractive as it seems, soon finds its way into some election manifesto, since already it is in the agenda of some civil society organizations. The concept of 'One Country, One Law' is so fascinating that it attracts committed supporters, including some well-known lawyers, who are also very vocal on social media. This fascination by itself warrants serious consideration of the pluses and minuses of the concept with sincere desire to move forward. In this article, I shall focus on the concept in the context of Sri Lankan Matrimonial Law.

Sri Lankan Legal Landscape

Fitting the concept of 'One Country, One Law' (or 'One Nation, One Law') into the Sri Lankan legal landscape is not without its difficulties. For one, the concept seeks to deviate from the rich cultural and legal heritage that all Sri Lankans should be proud of. In a sense, Sri Lanka is a "legal museum" exhibiting side by side, laws from diverse legal traditions.[4] Sri Lanka's Sinhalese laws and customs had been in force throughout our Island nation during

1 "MMDA Reform" has become a popular expression in Sri Lanka used to refer to the movement to amend the Muslim Marriage and Divorce Act No. 13 of 1951, as subsequently amended. After several unsuccessful efforts which date back to 1956, the final leg of the reform process commenced in 2009 with the appointment by the then Minister of Justice of a Committee to consider and recommend amendments to the said Act, which Committee submitted its Report to Hon. Thalatha Athkorale, Minister of Justice on 22nd January 2018. The Re

2 Aamina Nizar, "Addressing the Misconceptions on Reform to the MMDA", Daily Mirror (28th March 2017) at: http://www.dailymirror.lk/article/Addressing-the-misconceptions-on-reform-to-MMDA-126321.html; See also for the latest position, Dr. Amir Ali, "Reconstitute ACJU and Reform MMDA", Daily FT e-Paper (1st August 2019) at: http://www.ft.lk/columns/Reconstitute-ACJU-and-reform-MMDA/4-683045

3 Hard Talk, "Have a Single Law for all Sri Lankans", Daily Mirror (13th June 2019) is accessible at: http://www.dailymirror.lk/hard-talk/'Have-a-single-law-for-all-Sri-Lankans'/334-169201; See also, Zulkifli Nazim, "One Country – One Law", Daily FT e-Paper (20th July 2019) at: http://www.ft.lk/opinion/-One-Country-%E2%80%93-One-Law-/14-682303

4 For an analysis of the Sri Lankan legal heritage, see Saleem Marsoof, "Insights into Sri Lankan Family Law", accessible at: https://www.academia.edu/9940386/Insights_into_Sri_Lankan_Family_Law

ancient times, but came to be known as Kandyan law only because its operation was confined to the Kandyan region after the capture of the coastal zones of Sri Lanka (formerly, Ceylon) successively by the Portuguese, the Dutch and the British. The Dutch and British rulers left behind their own legal imprints in the form of the Roman-Dutch law, which is now deemed to be the foundation of Sri Lanka's common law (residual law) and the English law which has been introduced into Sri Lanka by specific legislation and some judicial decisions.

Even prior to the introduction to Sri Lanka of those European laws, Sri Lanka had the opportunity of getting to know two other legal traditions, namely the Thesawalamai law, which was the customary law of the Malabar Dravidian settlers of Sri Lanka's Northern and Eastern Provinces and Muslim law that was brought to our blessed Island by the Moor trading community. Our legal heritage is so rich that in *Kamalawathie v. De Silva*, Tambiah J was able to decide a custody dispute applying the principle of English law that the interests of the child was paramount instead of the Roman Dutch law rule that the father had a preferential right to custody, asserting in the course of his judgment that "law, like race, is not a pure-blooded creature."[5] Those who advocate the adoption of the concept of 'One Country, One Law' are oblivious of, or indifferent to, our own legal traditions and values which are very hard to replace.

The Constitutional Framework

The concept of 'One Country, One Law" does not find a place in the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the "Constitution"), which is all for diversity. Not only does the said Constitution guarantee every citizen the freedom, "to manifest his religion or belief in worship, observance, practice and teaching"[6] and "to enjoy and promote his own culture"[7], it also provides that all "existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency" with the fundamental rights guaranteed by the Constitution.[8] Art 16(1) of the Constitution was clearly intended to prevent laws such as the Muslim Marriage and Divorce Act (MMDA)[9] being challenged for inconsistency with the fundamental rights recognized and guaranteed by the Constitution. This explains why some Muslim women activists who have been fighting for the amendment of certain discriminatory provisions of the MMDA against the stiff resistance of the ACJU[10], out of sheer frustration, made representations to the government to amend Art 16(1) of the Constitution in order to challenge the said provisions of the MMDA in the Supreme Court, or in the alternative to introduce legislative provisions that would permit any Muslim the option of not being governed by the provisions of the MMDA which they claim

5 *Kamalawathie v. De Silva* 64 NLR 252 at 259.

6 See, Art. 14(1)(e) of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 as amended.

7 *Ibid*., Art 14(1)(f).

8 *Ibid.,* Art 16(1).

9 The Muslim Marriage and Divorce Act (MMDA) No. 13 of 1951, as subsequently amended.

10 ACJU stands for the All Ceylon Jamiyyathul Ulama. See in this connection: Colombo Telegraph (23rd March 2017) "Religious Leaders Cannot Be Trusted To Reform MMDA: Women's Action Network" accessible at link: https://www.colombotelegraph.com/index.php/religious-leaders-cannot-be-trusted-to-reform-mmda-womens-action-network/

are not fully Islamic.[11]

There is nothing in the Constitution including the Directive Principles of State Policy enshrined in Art. 27 that provides a basis for the acceptance of the concept of 'One Country, One Law'. In contrast, in India, which has recently been compelled to take the concept of 'One Country, One Law' seriously, it is more than a neat hashtag and goes back to the drafting of the Constitution. When the Indian Constitution was being drafted, the issue was hotly debated: some members of the Constituent Assembly argued for a common personal law for marriage, divorce, inheritance and adoption, while others believed that this was a goal to be achieved in stages. The Directive Principle embodied in Art 44 of the Indian Constitution, which requires the State to "endeavor to secure for citizens a uniform civil code", was a compromise since the time was considered not right.[12] Ever since, the time has never seemed right![13]

What is the problem sought to be resolved?

When one talks about the 'One Country, One Law' solution, it is useful to look at the problem that the concept is called upon to solve. In most plural societies, one sees clashes of cultures and personal laws, which often give rise to fears on the part of the majority that some practices such as child marriage and polygamy might radically distort existing demographic patterns.[14] At the same time, in these societies women demand changes to laws that seem to discriminate against them, and when they fail to move forward with law reforms, they embrace the 'One Country, One Law' solution. It is interesting to see that majority communities in plural societies and women activists both demanding one uniform law for all citizen in place of existing personal laws which are part of the diversity of these societies. The dilemma faced by women here is that for the purpose of achieving gender justice, they may have to lose their diversity and at least part of their cherished cultural and legal heritage.

Gender-just laws and codes are, as they should be, the critical test against which contemporary democracies are assessed. Western democracies in continental Europe have inched closer to ensuring equality for women through a series of legislation, and in the UK, US, Australia and Canada, where the English Common Law prevails, women's position has improved gradually through historic judgments and legislation. In each of these countries, gender equality was not realized through a single legislation, and the process was gradual propelled by feminist

11 Muslim Personal Law Reforms Action Group, "Muslim Women's Demands on Reforms of the Sri Lankan Muslim Marriage and Divorce Act", at: https://www.colombotelegraph.com/wp-content/uploads/2017/03/Womens-Demands-on-MMDA-Reforms.pdf

12 *See*, Namita Bhandare, "Uniform Civil Code: One nation, one law", Live Mint (11th July 2016) accessible at: https://www.livemint.com/Opinion/5pwNnS5hmjm4iOtnsvWo0M/Uniform-civil-code-One-nation-one-law.html

13 Shambhavi, "Uniform Civil Code: The Necessity and the Absurdity" (2017) ILI Law Review, Summer Issue Vol. I, at: http://www.ili.ac.in/pdf/paper217.pdf

14 For Sri Lanka, see article by Bisthan Batcha, "The Muslim Sri Lankan Population : Debunking Myths & Phobias" Word Press (12th January 2017) at: https://bisthanbatcha.wordpress.com/2017/01/12/the-muslim-sri-lankan-population-debunking-myths-phobias/

struggles.[15] As a matter of fact, the US only has a Universal Commercial Code (UCC) and has great diversity in its personal laws among its various states, particularly in regard to the question of child marriage.[16] That said, it is now necessary to move on to consider in brief detail the concept of 'One Country, One Law' in the context of the matrimonial law applicable to the Sri Lankan Muslims (that is, the MMDA) and the Marriage Registration (General) Ordinance ("the MRO")[17] that applies to those who are not governed by any special law.

MMDA, MRO and One Country – One Law

What most of those who embrace the concept of 'One Country, One Law' do not realize is that, for the purpose of achieving one law for one nation, it is not only essential to have a supportive constitutional framework, but also necessary to have laws that are generally acceptable or to make fresh codifications of law that are generally acceptable. For instance, if we are to repeal MMDA and let the Muslims be governed by the provisions of the Marriage Registration (General) Ordinance (MRO)[18], we may ask, what does the latter say about child marriage?

We all know that section 15 of the Marriage Registration Ordinance (MRO), at the time of its initial enactment in 1907, provided that "no marriage shall be valid, the male party to which has not completed sixteen years of age, or the female twelve…..years of age." Section 22 of the Ordinance initially provided in essence that "the father of any person under twenty-one years of age", or if the father be unavailable or incapacitated, the mother or if both are unavailable or incapacitated, a guardian duly appointed, "shall have authority to give consent to the marriage of such party, and such consent is hereby required for the said marriage." In fact, section 22(2) provided that where there was no parent or guardian, or such parent or guardian unreasonably withholds consent, the marriage of a person below twenty-one may only be contracted with the consent of the District Court. It is worth remembering that in 1907, when the MRO was enacted, the age of majority stood at twenty-one years[19], which was reduced to eighteen years very much later, in 1989.[20]

So, the position was that prior to 1995, the minimum age of marriage for those governed

15 Gurpreet Mahajan, "Why the West offers no models for a Uniform Civil Code", Times of India (15th September 2017) accessible at: https://timesofindia.indiatimes.com/india/why-the-west-offers-no-models-for-a-uniform-civil-code/articleshow/60522634.cms

16 Bethany Blankley, "Analysis: Child Marriage is legal in 49 US States" The Centre Square (25th May 2018) accessible at link: https://www.thecentersquare.com/national/analysis-child-marriage-is-legal-in-u-s-states/article_fbefbf04-5d0e-11e8-b6e6-cb9d5643bc13.html Cf, Saleem Marsoof, "Child Marriage and other Abuses under the Muslim Marriage and Divorce Act of Sri Lanka", (2018) JSA Law Journal Vol. VI, page 1 which is accessible at: https://www.academia.edu/38018255/CHILD_MARRIAGES_AND_OTHER_ABUSES_UNDER_THE_MUSLIM_MARRIAGE_AND_DIVORCE_ACT_OF_SRI_LANKA

17 Marriage Registration Ordinance No. 19 of 1907, as subsequently amended. This Ordinance is also popularly known as the General Marriages Ordinance (hereinafter "MRO").

18 *Supra* note 17.

19 *See*, the Age of Majority Ordinance No. 7 of 1865, as subsequently amended.

20 *See*, the Age of Majority (Amendment) Act No. 17 of 1989.

by the MRO was 16 for a male and 12 for a female and while marriages of persons below that minimum age were not valid, a person above the said minimum age but below the age of majority (which was reduced from 21 to 18 in 1989 as noted above) may only contract a valid marriage with the consent of a parent, guardian or the District Court. It is noteworthy that despite the age of majority being reduced to eighteen years in 1989, the MRO was not amended till 1995, when by an amending Act, section 15 of the said Ordinance was replaced with the following provision:

> "No marriage contracted after the coming into force of this section shall be valid unless both parties to the marriage have completed eighteen years of age."

However, section 22 of the Ordinance requiring the consent of a parent, guardian or the District Court for a valid marriage was retained without change leaving the law in a state of confusion. The confusion arises because the amendment to section 15 which prohibited any persons below 18 years of age from contracting a valid marriage also implicitly allowed a person who has completed the age of 18 years from validly entering into a matrimonial bond, there being in section 15 no words to indicate that it was enacted subject to section 22. The confusion is compounded by the fact that as already noted, the age of eighteen specified in section 15 is synonymous with the age of majority, the attainment of which usually confers full capacity including the capacity to marry without assistance of a parent or court. In this context, it is interesting to note that a leading member of the Committee of Muslim Ministers and Members of Parliament considering amendments to MMDA in the light of the recommendations made by the MMDA Committee is reported to have intimated to Roar Media that:-

> "One of the main concerns raised by the ACJU, is that according to Section 22 of the General Marriage Ordinance, there is a provision stating that marriages under 18 *can be permitted* with the consent of the District Court."[21]

This was in fact after section 15 of the MRO had been amended in 1995 making 18 the minimum age at which a marriage may be contracted by all persons coming under its purview, and after a further possibly ill-conceived amendment to the Ordinance had been made in 1997 to replace the word "twenty-one" in section 22 with the word "eighteen." That amendment, which seems to manifest an intention of Parliament to retain the system or parental or court consent to validate the marriage of a child who is otherwise incompetent to marry on its own, certainly gives credence to the claim of ACJU that the MRO allows a child to be given in marriage without a lower age limit with the consent of a parent, guardian or the District Court.

It is significant to note that the 1995 and 1997 amendments to the MRO were considered by the Court of Appeal in *Gunaratnam v the Registrar-General*[22] in the context of an application for *certiorari* filed by the father of a girl who was only 14 years of age seeking to challenge the refusal of the Registrar-General to register her marriage to a young man who had not completed 18 years of age, which marriage was contracted with the consent of the parents of

21 See, Zahara Dawoodbhoy,"The Rough Road To Reform: Why Is It Impossible To Amend The MMDA In Sri Lanka?" Roar Media (1st August 2018) at: https://roar.media/english/life/in-the-know/the-rough-road-to-reform-why-is-it-impossible-to-amend-the-mmda-in-sri-lanka/

22 *Gunaratnam v the Registrar-General* (2002) 2 SLR 302

both parties to the purported marriage. The Court of Appeal had no difficulty in upholding the decision of the Registrar-General on the basis that both parties to the purported marriage had not completed eighteen years of age, and could not have validly entered into a matrimonial bond. In handing down the judgment of the Court of Appeal, it is noteworthy that Her Ladyship Justice Shiranee Tilakawardane J (with Amratunga J concurring) stated *obiter* in the course of her judgment that-

> "In terms of section 22 consent to marriage of parties was required where the party was under 18 years of age. It appears that the framers of the law did not consider the implication of the Marriage Registration (Amendment) Act No. 18 of 1995 when they enacted the amendment to section 22 of the Marriage Registration Ordinance."[23]

Advocates of the 'One Country, One Law' concept seem to be oblivious of the general lethargy and indifference of those charged with initiation of policy for law reform and the apparent incompetence of our law makers which come into focus when one examines the state of the law arising from the 1995 and 1997 amendments to MRO. The fact that our legislators do not seem to understand what they are doing, is illustrated by the continued and probably unintended existence of section 22 of the MRO, which as it stands now, clearly contradicts the objective of the 1995 amendment to section 15 of MRO, which was to fix a uniform minimum age of marriage to be attained by the completion of 18 years of age, and to dispense with the system of parental consent or the consent of a guardian or a court of law.

Another factor that a Muslim who is asked to consider embracing the concept of 'One Country, One Law' through a change of matrimonial law regime is the state of the provisions for divorce in the MRO. Marriage is based on consent and in theory should last only so long as the parties are willing to continue as husband and wife, so long as the children are provided for. However, the grounds set out in section 19 of the MRO do not include divorce by mutual consent, nor does the Ordinance recognize the irretrievable breakdown of the marriage as a ground for the grant of divorce, whereas under the MMDA a divorce is available on the basis of mutual consent *(mubarat)* as well as breakdown of marriage *(khula*) under section 28(2) of the Act. Indeed, the attempt to recognize similar grounds for the benefit of those governed by the MRO failed in 1956 – 1959 when the Commission on Marriage and Divorce chaired by Mr. A.R.H.Canekeratne Q.C[24] could not reach consensus in regard to these matters.

Advocates of the 'One Country, One Law' concept should first address these types of issues (there are so many, but I have selected only two) before they ask those who have been governed by their personal laws from the time of their birth to opt for One Law. If existing general laws are not satisfactory, first they must be reviewed and updated so that even those governed

23 *Ibid.,* at 304.

24 The Commission on Marriage and Divorce consisted of Mr. A.R.H.Canekeratne Q.C (Chairman), Rev. Father Peter Pillai, Ven. Mottunne Sri Indasara Nayaka Thero, Dr. J.H.F Jayasooriya, O.B.E, Dr. (Mrs.) Mary Hellen Rutnam, Mrs. E.I.A Deraniyagala, Mr. P.B Ranaraja, Mr. D.B Ellepola, C.B.E, Al Haj M.I.M Haniffa M.B.E, Mr. M. Vairamuttu J.P, Mr. Ivor Misso, Mr. S.A.D.M. Don James Senartne and Mr. M.M.P de Zoysa, Mr. T.E Gooneratne, Advocate and Registrar General (Secretary) and of the Mr. T.P Unamboowe, Advocate (Assistant Secretary). The Report of the Commission has been published as Sessional Paper XVI – 1959 in the Ceylon Sessional Papers Volume II.

by other laws may be attracted by the One Law. That is the way forward, as I see it. In my opinion, concept of 'One Country, One Law' provides a basis of achieving stability and social harmony which is so essential for national unity and economic progress. The concept may be taken forward through social and law reform, and the best way to evolve into One Law for any nation is to consider the codification option. When making a common code of law, one can pick the best in every law and put them together.

The Codification Option

The first ever codification of law known to humanity was the Code of Ur-Nammu[25] from Mesopotamia, a nation situated in the fertile land between two rivers, the Tigris and the Euphrates, written on tablets in the Sumerian language in approximately 2100 to 2050 BC. The first few tablets of the Code were translated into English by Samuel Kramer in 1952, but after further tablets were found, they were also translated in 1965, allowing some 40 of the 57 laws to be reconstructed. I found some of its provisions of the Code of Ur-Nammu interesting, and wish to refer to some of them:-

(a) If a prospective son-in-law enters the house of his prospective father-in-law, but his father-in-law later gives his daughter to another man, the father-in-law shall return to the rejected son-in-law twofold the amount of bridal presents he had brought;

(b) If a man divorces his first-time wife, he shall pay (her) one mina of silver;

(c) If it is a (former) widow whom he divorces, he shall pay (her) half a mina of silver; and

(d) If the man had slept with the widow without there having been any marriage contract, he need not pay any silver.[26]

Of course, there have been so many codifications of law that have come into being after the Code of Ur-Nammu, such as the Code of Lipit-Ishtar,[27] King of Isin, in ancient Sumer, that was proclaimed in 2210 BC and the Codification of Hammurabi,[28] a monarch of Babylonia, made in the 18th Century BC. Ancient Greek and Roman civilizations continued the practice of codification, though with less success, until in the 6th Century AD the Roman emperor Justinian accomplished a complete codification of its laws. The Code of Justinian, known as the Corpus Juris Civilis[29] (Body of Civil Laws), became the legal authority of Rome in 533–34 AD. Johannes Voet's later work, the Voet's Pandects (*Commentarius ad Pandectas*) is

25 See, "Code of Ur-Nammu", https://www.polk.k12.ga.us/userfiles/644/Classes/177912/Code%20of%20Ur-Nammu.pdf See also, Joshua J. Mark, "Ur-Nammu" (16th June 2014) Ancient History Encyclopedia, accessible at: https://www.ancient.eu/Ur-Nammu/

26 See, "Code of Ur-Nammu", supra note 23.

27 http://professordeannaheikkinen.weebly.com/uploads/1/6/8/5/16856420/mesopotamian_law_codes.pdf

28 See, Owen Jarus, "Code of Hammurabi: Ancient Babylonian Laws"(3rd September 2013) accessible at: https://www.livescience.com/39393-code-of-hammurabi.html

29 Mark Cartright, "Corpus Juris Civilis" (24th April 2018) Ancient History Encyclopedia, at: https://www.ancient.eu/Corpus_Juris_Civilis/

an important source of Roman-Dutch law in Sri Lanka and South Africa.

The democratic revolutions in France and the US inspired codifiers, who emphasized that codification by legislators would reflect the will of the people more than would law as determined by judges. In 1804, France enacted the Code Civil, a set of rules that were designed to regulate the organization of courts, civil court procedures, remedies, and the execution of judgments, which was renamed the Code Napoleon during reign of Napoleon as Emperor, and improved tremendously. Greatly influenced by the Code Napoleon, in 1848, the legislature in New York enacted the Code of Civil Procedure, which replaced a complicated common law system of pleadings and installed a simpler, more rational system of court procedure. The US Congress passed the US Code in 1926.[30]Much later, the diversity of commercial law across the various States of US gave way to the Uniform Commercial Code (UCC)[31] in 1952.

Codification Experience in Sri Lanka and Indonesia

As far as the Muslims in Sri Lanka are concerned, their first introduction to a codification of law came from Batavia, which was the ancient name for present Jakarta, and was the headquarters of the Dutch East India Company, which administered both Indonesia and Ceylon and other Dutch territories. Most of the Arab traders in Colombo had been driven away by the Portuguese, and the Dutch rulers found that the local Muslims in Colombo who remained there at that time were not all that familiar with their religious laws and customs.

Fortunately, the Dutch Governor was aware that Indonesian Muslims had put together a codification of law known in Dutch language *as Byzondere Wetten aangaande Mooren of Mohammedanen en andere inlandsche natien,*[32] for the benefit of the Muslims of Indonesia. It was also fortunate that both Sri Lanka and Indonesia happened to be ardent followers of the teachings of Imam Abu Abdillah Muhammad ibn Idris al-Shafii (Imam Shaffie), who was one of the great Imams of the Sunni Sect. Hence, it was considered convenient for the Dutch to introduce to Colombo the same Code, which was done in consultation with the Muslim leaders in Colombo, who adopted it for use in Sri Lanka. As His Lordship Basnayake CJ explained in the course of his judgment in *Mohideen v Sulaiman*,[33] when the British took over from the Dutch, they translated the said Code into English and called it the "Special Laws Concerning Maurs or Mahomedans", which became law as the Mahomedan Code of 1806. The Code was arranged under two titles, the first entitled "Relating to Matters of Succession, Right of Inheritances, and other Incidents occasioned by Death" and the second "Concerning Matrimonial Affairs." The Code at first applied to the "Province of Colombo" only, but was later extended to the rest of the Island in 1852.[34]

It is relevant to note that the provisions of the first title of the Mahomedan Code dealing with "Succession, Right of Inheritances, and other Incidents occasioned by Death" were replaced

30 Legal Information Institute, "Federal Rules of Civil Procedure" at: https://www.law.cornell.edu/rules/frcp

31 Legal Information Institute, "Uniform Commercial Code" at: https://www.law.cornell.edu/ucc/index.html

32 Which in English meant the Special Laws relating to Moors or Mohammedans and other native races.

33 *Mohideen v Sulaiman* 59 NLR 227 at pages 229 - 230

34 *See*, Section 10 of Ordinance No. 5 of 1852.

by the Wills Ordinance No. 21 of 1844[35] and the Muslim Intestate Succession Ordinance of 1931.[36] So much of the Code of 1806 relating to matrimonial law "as is inconsistent with the Ordinance" was repealed by the Mohammedan Marriage Registration Ordinance of 1886,[37] which was enacted to provide for registration of marriages of persons professing the Mohammedan faith. The said Ordinance of 1886 was replaced by the Muslim Marriage and Divorce Registration Ordinance of 1929.[38] Section 48 of the Ordinance of 1929 expressly repealed the second title of the Mahomedan Code from section 64 to section 102 (first paragraph). The Ordinance of 1929 was repealed by the MMDA,[39]which is still in force in Sri Lanka subject to certain amendments of not much practical significance.

Despite several Commissions and Committees recommending amendments to MMDA in the face of serious abuses and injustices that has been taking place in its implementation,[40] adequate remedial action was not taken by successive governments until a committee of experts was appointed in 2009 to consider the upgrading of the Quazi Court System and recommending amendments to the MMDA. The Report of the said Committee shows that substantial consensus was achieved by the Committee despite the extremely sensitive nature of the mattes deliberated upon by the Committee.[41] There was difference of opinion among the members of the Committee in regard to a few issues resulting in a separate set of recommendations being made by some members of the Committee in regard to those issues.[42]

What is significant to note however, is that the primary reason for most of the differences of opinion among the members of the Committee was the methodology adopted by the members of the Committee. Members of the Committee who declined to adopt a progressive approach to law reform were unwilling to step outside the parameters of the school of thought (*mazhab*)

35 Wills Ordinance No. 21 of 1844

36 Muslim Intestate Succession Ordinance No. 10 of 1931.

37 Mohammedan Marriage Registration Ordinance No. 8 of 1886, as amended.

38 Muslim Marriage and Divorce Registration Ordinance No. 27 of 1929.

39 *Supra* note 9.

40 For details of the circumstances that led to agitations for reform and the recommendations made by the various Commissions and Committees, see Saleem Marsoof, "The Quazi Court System in Sri Lanka and its Impact on Muslim Women" (2001 edition), (MWRAF, 2001), Chapter VIII (Conclusions) pages 3 to 7, accessible at: https://www.academia.edu/30277198/The_Quazi_Court_System_in_Sri_Lanka_and_its_Impact_on_Muslim_Women See also, paragraphs 2.1.01 to 2.1.12 (pages 3 to 11 of the Report of the Committee Appointed to Consider Amendments to the Muslim Marriage and Divorce Act, Vol I (Ministry of Justice 2018) which is accessible at: https://www.academia.edu/38033559/REPORT_OF_THE_COMMITTEE_APPOINTED_TO_CONSIDER_AMENDMENTS_TO_THE_MUSLIM_MARRIAGE_AND_DIVORCE_ACT_-_VOLUME_I

41 See, the Foreword of the Chairman of the Committee at page I of the Report of the Committee Appointed to Consider Amendments to the Muslim Marriage and Divorce Act, Vol I, *supra* note 39/

42 For details of the matters in regard to which the MMDA Committee had consensus and issues in regard to which the members were at variance, see Colombo Telegraph (2nd July 2018) "MMDA: Colombo Telegraph Leaks Complete Saleem Marsoof Committee Report, 'Leaked Report' Redacted, Incomplete And Distorted", which report is accessible at: https://www.colombotelegraph.com/index.php/mmda-colombo-telegraph-leaks-complete-saleem-marsoof-committee-report-leaked-report-redacted-incomplete-and-distorted/

to which they considered themselves bound, which happened to be the Shaffie opinion on controversial matters such as the removal of the existing bar to appointment of women as Quazis.

However, the members of the Committee who arrived at what is considered more progressive recommendations including the deletion of the word "male" from sections 12(1) and 14(1) of MMDA, did so by a process of deductive reasoning known as *ijtihad*[43] which is part of juridical methodology (*usul -al-fiqh*) available for not only purposes of law reform but even for judicial decision making. It is unfortunate that the former group of members were unwilling to perform *ijthihad* and apply principles of public interest (*malahah mursalah*) in arriving at their conclusions. The differences in the approaches adopted by the members of the Committee may also be analyzed as a difference in attitude towards tolerance and acceptance of diversity, which attitude also plays a major role in the deciding whether a nation should adopt a 'One Country, One Law' policy. Indeed, such an inflexible attitude is not conducive to law reform or codification. What bearing these differences of attitude may have in the adoption of the concept of 'One Country, One Law' has to be seen in the future.

In this context it is noteworthy that Indonesia, from where we received the Dutch original of the Mahomedan Code of 1806, again took a step towards codification of law in 1974 by enacting a Code of Marriage Law[44] which effectively avoided issues of conflict of *mazhab* through an eclectic and pragmatic process, while the neighboring Shaffie jurisdiction of Singapore[45] attempted to provide flexibility and virility to the law through legislation by giving impetus to the Shaffie *mazhab* while expressly providing for consulting the views of the Hanafi, Hanbali or Maliki schools of thought where the application of the Shaffie law is found to conflict with the public interest (*maslahah mursalah*). A similar approach was also followed by the other Shaffie jurisdiction of Malaysia, which enacted substantively similar legislative provisions.[46] These different approaches to resolving inter-*mazhab* issues were also considered by the MMDA Committee in formulating recommendations for the amendment of the problematic section 16 of MMDA which currently makes the "Muslim law of the sect (*mazhab*) to which the parties belong" applicable in determining the validity of a marriage or divorce coming within the purview of MMDA.

Conclusions

There is no doubt that the concept of 'One Country, One Law' may be an ideal way in which a nation acutely divided by racial and religious differences and not favorably disposed towards

43 *Ijtihad* literally means "exertion", and technically the efforts a jurist makes in order to deduce the law, which is not self-evident, from its sources.

44 See, Law of the Republic of Indonesia No 1 of the year 1974 on Marriage. See also, Nani Soewondo, "The Indonesian Marriage Law and its Implementing Regulation", Archipel, Année 1977 Vol 13 page 283.

45 See, section 33(2) of the Administration of Muslim Law Act of 1966 (edited in 2009) provides that though the Majlis and the Legal Committee shall ordinarily follow the tenets of the Shafie school of law, "If the Majlis or the Legal Committee considers that the following of the tenets of the Shaffie school of law will be opposed to the public interest (*maslahah mursalah*), the Majlis may follow the tenets of any of the other accepted schools of Muslim law as may be considered appropriate, but in any such ruling the provisions and principles to be followed shall be set out in full detail and with all necessary explanations."

46 *See*, section 39 of the Administration of Islamic Law (Federal Territories) Act of 1993.

diversity can avoid serious conflicts among its people. Such conflicts may end up in bloodshed, destruction of properties, economic loss and permanent tearing of the social fabric. However, for the purpose of giving effect to the 'One Country, One Law' policy, it is necessary to take the preparatory steps of enacting facilitative constitutional provisions and also enhancing legal research, drafting and implementing competencies.

As already suggested in this article, for achieving success, the 'One Country, One Law' policy should not be adopted as a means of oppression of the minority communities, and ideally, those who are asked to agree to One Law should be given the choice of freely doing so without any form of compulsion. The ultimate objective should be the wellbeing of the people whose amity and unity can propel the nation towards social, cultural and economic progress. Sri Lanka has great diversity in its laws, and indeed, most Sri Lankans are proud of their rich legal heritage. Hence, every effort should be made to protect that diversity and enhance levels of tolerance to diverse laws and practices. As Maya Angelou put it, "it is time for parents to teach young people early on that in diversity there is beauty and there is strength."[47] It is necessary to stress that though building diversity might take a generation or more of hard work, it takes only a moment of folly to destroy the peace and amity that prevails in the nation. The human family has begun to feel that it is living on top of an active volcano that might erupt any moment, and this tension is also felt in Sri Lanka, particularly after the Easter Sunday bombings.

It is time to realize that social media constitutes a strong and somewhat dangerous platform for the dissipation of hate speech and developing extremist mind sets.[48] It is therefore important to set up effective legal mechanisms that can handle disruption of society through hate speech and terror mongering.[49] With Sri Lanka being ranked as the foremost human right violator in South Asia, having earned 52 points to its credit, ahead of Bangladesh (45 points), Bhutan (43 points), Pakistan (41 points), Maldives (23 points), Nepal (24 points) and India (24 points),[50] it is essential for the Sri Lankan law enforcement agencies to be committed to national security concerns while maintaining law and order without discrimination. It is only through good administration, efficient policing practices and independent judicial attitudes that Sri Lanka can prosper as a peaceful, vibrant and democratic nation in which people of diverse cultures and faiths could live in harmony enjoying diverse personal laws, or alternately, as One Country with just One Law for all its people!

47 Karen Fenaroli, F&A (5th July 2016) "Making the Move: Are you Future-Proofing your Board through Diversity?", accessible at: https://fenaroliassociates.com/making-the-move-are-you-future-proofing-your-board-through-diversity/

48 Mend: "Momentum grows globally around outlawing online hate" (2nd May 2019) accessible at: https://www.mend.org.uk/news/momentum-grows-globally-around-outlawing-online-hate/

49 European Commission, "Countering illegal hate speech online – EU Code of Conduct ensures swift response" (2019) accessible at: https://europa.eu/rapid/press-release_IP-19-805_en.htm See also, Article 19, "Self-Regulation and Hate Speech on Social Media Platforms (2018) accessible at: https://www.article19.org/wp-content/uploads/2018/03/Self-regulation-and-%E2%80%98hate-speech%E2%80%99-on-social-media-platforms_March2018.pdf

50 See, South Asian Human Rights Index 2018 at: https://reliefweb.int/report/nepal/south-asia-human-rights-index-2008 See also, Reilef Web "Sri Lanka No. 1 Human Rights Violator in South Asia" (1st August 2018) (1st August 2018) accessible at: https://reliefweb.int/report/sri-lanka/sri-lanka-no-1-human-rights-violator-south-asia

Revocability of Kandyan Deed of Gift

By. Mrs. Indira S. Samarasinghe PC

The Privy Council in Dullewa v. Dullewa (1968) 71 N.L.R. 289 had to decide whether a Kandyan deed of gift executed after the Kandyan Law Declaration and Amendment Ordinance of 1939 can be revoked if the donor had merely described the gift "as a gift irrevocable." The Ordinance of 1939 deprived a donor of the right to cancel or revoke a gift provided he had expressly renounced the right "by a declaration containing the words 'I renounce the right to revoke' or words of substantially the same meaning." (section 5(1) (d)).

In interpreting this provision it is only natural to seek assistance from the Kandyan Law Commission Report (Sessional Paper 24 of 1935) to which the Ordinance could be traced. But the extent to which Judges could rely on the Report has been differently understood.

The Supreme Court in Punchi Banda v. Nagamma (1963) 64 N.L.R. 548 did not think the Report was of help in interpreting the words of section 5 (1) (d). It was true that the Report contained a recommendation that the renunciation should be made in explicit terms and according to a prescribed form, but Sansoni J. said, " Parliament has not accepted the recommendation so far as it relates to a clause or to a prescribed form, and we thus come back to the actual words of the Ordinance, " It was held in this case that the word "irrevocable" was an abbreviated form used by the Notary expressly to renounce the donor's right to revoke. (It is clear, however, from Ukku Amma v. Dingiri Menika (1965) 69 N.L.R. 212, Tammita v. Palipane (1965) 70 N.L.R. 520 and other cases that Notaries also use an express clause of renunciation).

On the other hand, in the Privy Council Lord Hodson delivering the majority judgment relied on the Report to ascertain the evil or defect which the Ordinance was intended to remedy and from this arrived at the conclusion that the Ordinance required a special clause of renunciation. "The renunciation is to be expressed and not to be implied and a description of a gift as being irrevocable does no more that imply the renouncing of an existing right to renounce," (p.28). This was also the view of H.N.G. Fernando S. P. J. (as he then was) in Ukku Amma v. Dingiri Menika where he said, "The ordinary meaning of the words 'expressly renounced' is exactly or definitely renounced as opposed to impliedly renounced." Lord Hodson drew attention to the possibility of a conflict between the intention of the donor and the expression of that intention. "In construing the Ordinance it is necessary to consider whether its requirements have been complied with irrespective of the intention which can be found on a reading of the original document. The intention may have been to give up the right to revoke but this is not the same as express revocation of an existing right." (p.296). The result was that the deed of gift was held to be revocable and Punchi Banda v. Nagamma was over-ruled.

Lord Donovan in a dissenting judgment did not agree that the statute requires that there should be a formal declaration to take away the right of revocation. According to his Lordship the purpose of section 5(1) (d) was to insist on the use of the word "irrevocable" as the minimum to convey the donor's renunciation of his right. There was no difference between the use of the word 'irrevocable' and the formula prescribed by the Ordinance. Another reason for Lord Donovan preferring this construction was that it was in keeping with previous decisions of the

Supreme Court and therefore ensured stability of title to land transferred after the Ordinance.

On the last point the majority judgment did not disagree in principle. Lord Hodson conceded that there was a long line of decisions before the Ordinance taking the view that if a gift is stated to be irrevocable *simpliciter* then it cannot be revoked and did not doubt that in the case of pre-1939 deeds this construction would still be proper. Dullewa v. Dullewa therefore does not take away the authority of Tikiri Bandara v. Gunawardane (1967)70 N.L.R. 203. (For a recent decision holding that the words 'the donee shall possess forever' in a pre-1939 deed, was not an effective renunciation of the right, *see* Kekulandara v. Molagoda (1968) 71 N.L.R. 433). But his lordship held that as a matter of fact, there was no consistent current of authority in relation to deeds after the passing of the Ordinance, so that in their case a different construction based on the language of the Ordinance was permissible. A renunciation can now be effected only by a declaration containing a transitive verb '*renounce*' or an equivalent as opposed to "an adjectival description of the gift as irrevocable." In the absence of a declaration by the donor to this effect, the gift is revocable.

Law Relating to Rei Vindicatio Actions and Possessory Actions

Mr. M.U.M. Ali Sabry PC

INTRODUCTION

Types of Action related to land are categorized as movable and immovable. Immovable property denotes lands and whatever thing permanently attached to a land.

According to the Roman Dutch law interpretations there are 5 different kind of rights attached to immovable properties, namely;

i. right of property,
ii. right of possession,
iii. right of inheritance,
iv. right of servitude and
v. right of pledge or mortgage.

All the causes of actions in respect of a land are imperatively relate to the aforesaid rights.

There are different types of actions that can be instituted relating to lands. Those are,

i. Partition actions
ii. Actions for declaration of title/*Rei Vindicatio* action
iii. Possessory action
iv. Testamentary action
v. Rent and Ejectment action/Leave and license
vi. Servitudes
vii. Mortgage Bond
viii. Constructive trusts

There are common elements of all the cases relating to a land which the parties should prove to succeed their claims. Those are;

i. Identification of the corpus.
ii. The paper title or prescriptive title to the said corpus.
iii. A right other than the title such as right of way, servitudes, possession, tenancy and in respect of a land lord etc.

REI VINDICATIO ACTION

Introduction

1. An action for Vindication arises out of the Right to possession, this right is defined by Wille[1] as follows;

   "The absolute owner of a thing is entitled to claim the possession of it; or if he has the possession he may retain it, if he is illegally deprived of the possession, he may by means of vindication recover the possession from any person in whose possession the thing is found. In a vindicatory action the claimant need merely to prove two facts, namely; that he is the owner of the thing and that the thing is in the possession of the Defendant'….

2. It is defined as an action which arises from the right of dominium[2]. Accordingly, Rei Vindicatio action lies for an owner of a property to recover a property belonging to him when the property is possessed by someone else.

3. It is important to note that the intention or animus of the possessor has no effect when it comes to a Rei Vindicatio action. Thus, the action lies against both bona fide and mala fide possessors of the property.

THE MAIN REQUISITES FOR *REI VINDICATIO* ACTION IS THAT;

To bring an action for Rei Vindicatio the Plaintiff is required to establish the following;

i. Identification of Corpus

ii. The Paper Title to the said Corpus

a. IDENTIFICATION OF CORPUS

In the case of ***Pathirana vs. Jayasundara*** [3]Gratien J. stated in *Re Vindicatio* action proper the owner of immovable property is entitled, on proof of his title to decree in his favor for the recovery of property and for the ejectment of the person in wrongful occupation. "The plaintiff's ownership of the thing is of the very essence of the action. Accordingly it must be established that **the Plaintiff is the owner of the property.**

In **Latheef and another Vs Mansoor And another** [4] set out that in a Vindicatory Action the plaintiff must prove the identity of the corpus while proving his title in a case where the identity is also at issue.

"The identity of the Subject matter is of paramount importance in a rei vindicatio action because the object of such an action is to determine ownership of the property, which

1 Wille's Principles of South African Law, 8th Edition page 270

2 (The Law of Property Volume III; Actions; Wijedasa Rajapakse PC)

3 58 NLR 169(at Page 172)

4 2011 BLR 189

objective cannot be achieved without the property being clearly identified. Where the property sought to be vindicated consists of land the land sought to be indicated must be identified by reference to a survey plan or other equally expeditious method. It is obvious that ownership cannot be ascribed without clear identification of the property that is subjected to such ownership, and furthermore, the ultimate objective of a person seeking to vindicate immovable property by obtaining a writ of execution in terms of Section 323 of the Civil Procedure code will be frustrated if the fiscal to whom the writ is addressed cannot clearly identify the property by reference to the decree for the purpose of giving effect to it. It is therefore essential in a vindicatory action, as much as in a partition action, for the corpus to be identified with precision.

In **Fernando vs. Somasiri** it was held that,

(a) In Vindicatory action the burden of proof rest upon the plaintiff to prove his title including the identification of the boundaries.

(b) In a vindicatory action it is necessary to establish a corpus in a clear unambiguous manner.

Identification of the subject matter and the application for commissions

In a *rei vindicatio* action it is a fundamental requirement to identify the subject matter. In the plaint the subject matter should be described by reference to physical metes and bounds or by reference to a sketch, map or plan. When there is encroachment if the Plaintiff is unable to describe the encroached portion at the outset the Plaintiff could reserve the right to take a commission and amend the plaint accordingly. If the plaintiff is unable to identify the subject matter even in the event the judgment is delivered in his favour execution of the writ will be a difficult task. After the introduction of pre trial procedure application for commissions must be made at the pre trial stage.

b. ESTABLISHING THE PAPER TITLE

i. **The burden to establish the Title is vested on the Plaintiff**

The burden of proof in a Rei Vindicatio action is vested on the Plaintiff. Section 110 of the Evidence Ordinance denotes that;

'When the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving he is not the owner is on the person who affirms that he is not the owner'

The stance was depicted in the case of **Wanigaratna Vs Juwanis Appuhamy**[5] the Apex court held that in a Rei Vindicatio action the Plaintiff must establish title (see also **Karunadasa Vs Abdul Hameed**[6]

In the recent case of **Fernando Vs Somasiri**[7] it was held that 'in a Vindicatory action

5 65 NLR 167

6 60 NLR 352

7 SC APPEAL NO 105/10 decided on 28.3.2012

the burden of proof rests upon the Plaintiff to prove his title including identification of the boundaries. Hence it is on the Plaintiff to establish the corpus and paper title to the subject matter.

In **Pieris Vs. Savunahamy** [8] it was contended that The burden of proof is on the Plaintiff to establish title which is pleaded and relied on by him, The Defendant need not prove anything.

If the Plaintiff fails to prove title in himself in a Rei Vindicatio action, a judgment will be entered in favour of the Defendant.

ii. **The standard of proving title**

In a *Re Vindicatio* action the standard of proof required was discussed in the case of ***R. W. Pathirana vs. Jayasundara***[9] wherein it was held that "Strict proof" of the plaintiff's title would be required. However, the fact that the defendant has a poor title is not relevant. (**Wanigaratne vs. Juanis Appuhamy**[10])

iii. **When does the burden shift to the Defendant ?**

Upon the plaintiff establishing title the burden of proof shifts to the defendant to prove that he has a right to possession or occupation of the property. this stance was clearly depicted in the case of **Sumanawathi Vs Jayakaduwa**[11] where it was held that in an action for Rei Vindicatio the Plaintiff must prove and establish title. Only when the legal title to the premises is admitted the burden of proof shifts to the Defendant to prove his occupation is lawful.

Also in **Deeman Silva Vs Silva**[12] set out that only when the legal title to the premises is admitted that the burden of proof shifts to the Defendant to show his lawful occupation.

However, in the case of **Wijetunge vs. Thangarajah** Justice Ismail held that when the legal title to the premises is admitted the burden of proof is on the defendant to show that he is in lawful occupation.

Furthermore, where a Plaintiff has enjoyed prior peaceful possession and alleges that the defendant ousted the plaintiff there is rebuttable presumption of title in favor of the plaintiff. In that case, the burden of proving the title shifts to the defendant from the commencement of the action. (See. *the case of* **Mudalihamy vs. Appuhamy** *[13])*

8 56 NLR 407)

9 58 NLR 169

10 65 NLR 167

11 CA 247/1997 decided on 31.10.2011

12 1997 (2) SLR 382

13 1 CLR 67)

In the case of **Siyaneris Vs Udenis de Silva** held that the burden of proof with regards to the right of possession rests on the defendant when the defendant can prove that he was given the possession by either the plaintiff or some other person who isn't entitle to grant such right.

iv. Absence of title at the commencement of an action

It is an established principle that an action for Rei vindicatio cannot be instituted or maintained by a person who has no title to the subject.

In **Ponnamma vs. Weerasooriya** [14]Courts was of the view that, where a person who sought to vindicate title to a property conveyed to her by a person who had purchased the property at Fiscal's sale but who at the date of bringing the action had not obtained a fiscal's transfer did not have the necessary title to institute an action. Wood Renton J held that the plaintiff's title must fail as her vendor had no title at the date of action in the absence of a fiscal transfer. (See also case of **Silva vs Hendric Appu**[15])

In the case of **Aeliashamy vs. Punchi Banda** [16] where during the pendency of an action the Plaintiff sold the land in dispute to a third party, court held that the Plaintiff was not precluded from maintaining his claim for damages, though he could not get a decree for declaration of title. (See also **Fernando vs. Appuhamy**[17])

Hence, the said case established that a Plaintiff must not only have title at the time of institution of action but also retain title through the course of action.

v. Subsequent acquisition of title

Under the Roman Dutch Law a purchaser could defend his possession in a suit where he acquired title subsequently.[18] In the case of **Rajapakse vs. Fernando** [19]that where A without a title sell to B and A subsequently acquire title, the title ensures to the benefit of B without further deed from the vendor.

I. WHO CAN BRING A REI- VINDICATIO ACTION?

1. Purchaser's right to bring *Re Vindicatio* action

A purchaser of a property is in law entitled to have possession of the property he purchased. Hence, upon the execution of a transfer the full title of a property is vested with the purchaser, this stance was depicted in **Appuhamy Vs Appuhamy** (1880 (3) SCC 61)

Where a one had purchased property the constructive possession is sufficient. in such an event should first sue the party in possession and will have a course of action against vendor only in the event the action against the party in possession fails.

14 11 NLR 217

15 1 NLR 13

16 1 NLR 13

17 23 NLR 476

18 (The Law of Property Volume III; Actions; Wijedasa Rajapakse PC)

19 20 NLR 301

In the case of ***Ratwatte vs. Dullewe*** [20] *a* full bench of the Supreme Court held that a vendor of immovable property is bound to deliver vacant possession of the property sold to the vendee, in the event of failure to do so the vendee is entitle to a rescission of the sale and refund of money. The vendee can sue the vendor in such an event. A vendee of immovable property is entitled to ask his vendor to place him in possession of the property upon execution of the transfer.

Furthermore Courts have held that where the question arises between a purchaser and a third party, the delivery of the deed of transfer is sufficient to entitle the purchaser to maintain an action as owner against such third party.

2. **Co-owner's right to bring *Re Vindicatio* action**

ndivided share of land is entitled to sue a trespasser, to have the title to the undivided share declared and for the ejectment of the trespasser from the whole land. (Law of Property, Wijedasa Rajapakse PC [21])

In **Unus Lebbe vs. Zayee**[22] exemplified that the concept behind it is that every co-owner of an undivided share has an interest in every part and portion of the entire land. The said stance was also established ***Hewavitharana vs. Dangan rubber Co. Ltd.*** [23] it was held that the co-owner of undivided share of land is entitled to sue a trespasser with a view to have his title for the undivided share declared and for ejectment of the trespasser from the whole land.

3. **The right of a permit holder under the Land Development Ordinance to bring an action in Rei Vindicatio**

The Supreme Court in a recent case, **Fernando vs. Somasiri** [24]looking into the applicable law held that the title holder of a permit under the Land Development Ordinance is significant to maintain a vindicatory action against a trespasser.

This stance already established in the case of **Palisena v Perera** [25]and **Banadaranayake vs. Karunwathie**[26] where it had been held that the title of the permit holder is sufficient to maintain a vindicatory action against a trespasser.

4. **Rei vendicatio action against the State**

It is established that *Rei Vindicatio* action may be brought against the Crown.

In the case of **Le Messurier vs Attorney General** [27]a Plaintiff brought an action against the Crown claiming to recover the land. In this case court allowed the action

20 10 NLR 304

21 volume III; page 171

22 (1893 SCR 56)

23 (17 NLR 49)

24 SC Appeal No. 105/2010 decided on 28-3-2012

25 56 NLR 407

26 (2003 3SLR 295)

27 5 NLR 65

to proceed for the recovery of land, however, held that action could not proceed for recovery of damages on the alleged wrongful possession.

In terms of section 456 (1) of the Civil Procedure Code all actions by or against the State can be instituted by or against Attorney-General. In the event an action to be instituted against Attorney-General section 461 requires to give him one month notice before the institution of the action. Accordingly in bringing a Rei Vindicatio action the said provisions must be followed.

IV. SOME OTHER IMPORTANT ASPECTS PERTAINING TO THE ACTIONS RELATING TO LAND.

1. **Joinder of Parties**

According to section 14 of the Civil Procedure Code the Plaintiff is entitled to join defendants against whom the right to any relief is alleged to exists. In a Rei Vindicatio action several defendants who occupy distinct portions of the land could be joined together and seek declaration of title and ejectment. However, in a recent case of **S.C. Appeal 105/2013** Court decided that only when the said defendants entered in to the land by way of a consort act only they could be joined together otherwise separate cases should be filed against each and every party.

2. **Prayer for ejectment of the Plaintiff**

One of the common mistakes in *rei vindicatio* drafts is not praying for ejectment of the Plaintiff. If there is an encroachment or trespassing it is required to pray for ejectment in addition to declaration of title. However in the case of Viraj Anthony **Jayakody Vs. Beminihennadige Meulet** [28]the court decided that if the declaration of title is granted the Defendant could be ejected even without a prayer in that effect *vise versa* in the case of **Dharmasiri Vs Wickramatunga** [29]court held that even though Plaintiff has not asked for declaration of title It does not prevent him for seeking relief for ejectment. However the rather than filing defective plaint we must always bare the mind to pray both declaration of title and ejectment.

II. HOW A REI VINDICATION ACTION DIFFER FROM AN ACTION DECLA RATION OF TITLE.

Both *Re vindicatio* action and action for declaration for title are remedies under Roman Dutch Law for recovery of immovable property. However, both forms separate remedies.

28 SC appeal 87/16

29 2002(2) SLR 218

Rei Vindicatio Action	Declaration of Title
In General In order for an action brought for *Rei Vindicatio* strict proof of action is required.	Where an action lies for recovery of a property from a person who has merely the detention of the property under the authority and the name of the owner such as lessee or tenant under true owner, in such an event the owner of the property is not required to prove is title because the detention by the subordinate is on his behalf with his leave and license. There's nothing to prevent an owner in such an action for the recovery of his property for lessee, tenant or licensee asking for a declaration of title. Here strict proof of title is not necessary.[29.1]
Pleadings in the land mark case of **Pathirana vs. Jayasundara** [29.2] wherein; The pleadings (particularly the plaint) in a Rei Vindicatio Action should set out the title clearly that is, that the plaintiff should narrate and plead his title fully, and prove his title in strict sense against the defendant and should also state how defendant denies or disturbs his title to enable the court to vindicate his title. (see. **Kanapadian v Petersz**[29.3])	The pleadings in a Declaration of Title case the plaint should set out the facts that are necessary to prove the contractual relationship between the parties and how the defendant acted in breach thereof.
Prayer in the two actions As stated in the case of Pathirana (Supra) in a *Rei Vindicatio* action the main prayer should be for the declaration of title. An incidental prayer can contain a prayer for mesne profit or damages consequential to the trespass.	However, on the other hand an action for declaration of title it is not necessary to have prayer for the declaration of title but a mere prayer for ejectment is sufficient.[29.4] Furthermore, an ancillary prayer for declaration of title can contain a prayer for arrears of rent, damages for breach of contract.
As discussed above the burden of proof in *Rei Vindicatio* action lies on the Plaintiff to prove paper title **Peiris vs. Sabenhamy** [29.5]	in an action of declaration of title the Plaintiff is required to prove that the defendant came in to occupation of the property under him on a contract (Tenancy, lease Agreement or permit) and after the termination thereof the defendant did not hand over the vacant possession. If the defendant came in to distinct possession of the land on contract Plaintiff need not identify the land like in a *Rei Vindicatio* action.

29.1 The Rei Vindicatio Action and the Action for Declaration of title ; Frank Gunawardhana J.in 2015 BLR XXI At page 50
29.2 58 NLR 169
29.3 1 S.C.R.75
29.4 The Rei Vindicatio Action and the Action for Declaration of title ; Frank Gunawardhana J.in 2015 BLR XX I At 53
29.5 54 NLR 207

III. SPECIFIC DEFENCES

The specific defences for Rei Vindicatio was expressed in old case of **Allis Appu v**. **Endris Hamy** (1894) 3 SCR 87 at page 93.

i. Denial of the plaintiff's title.

ii. Setting up the defendant of his own title, in the sense of establishing a title superior to that of the plaintiff.

iii. Prescription of action.

iv. The plea of res judicata.

v. Right of tenure under the plaintiff E.g. usufruct, lease, loan.

vi. The right of retain possession subject to an indemnity from the plaintiff under peculiar conditions.

vii. The plea of exception rei venditae et traditae.

viii. The ius tertii (whether the defendant is entitled to resist the plaintiff's vindicatory action by showing that title to the disputed property is neither in the plaintiff nor in the defendant but in the third party).

POSSESSORY ACTION

I. INTRODUCTION

1. The law governing possessory remedies in Sri Lanka is contained in the section 4 of the Prescription Ordinance No. 22 of 1871.
2. **Section 4** of the Prescription Ordinance provides that any person who has been dispossessed of any immovable property otherwise than process of law it shall be lawful for him to institute proceedings against the person dispossessing him at any time within one year of such dispossession.
3. Therefore a *bona fide* possessor of a property could maintain a possessory action seeking to reinstate of the possession.

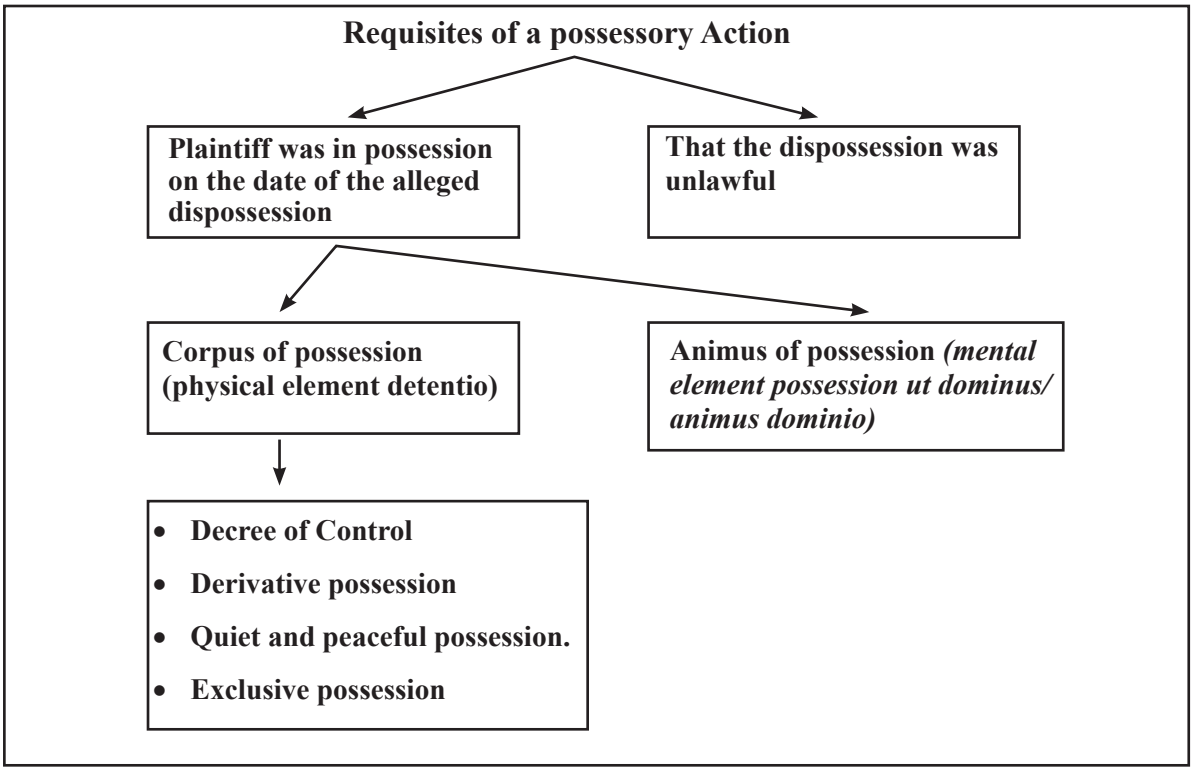
II. REQUISITES OF A POSSESSORY ACTION

In **Silva v Dingiri Menika** it was held that in order to successfully claim under possessory action, the Plaintiff must prove:

a. That he was in possession on the date of the alleged disposition, and

b. The disposition was unlawful.

The above position was reiterated in **Scholtz v Faifer**



Possession

As Walter Pereira states " possession or interdicts is the actual retention or physical occupation of a thing with the intention of keeping it for oneself and not for another, Both these parts of the definition are necessary to constitute possession'

Hence to bring a possessory action the following is necessary ;

a. The power to deal with the property as Plaintiff pleases, to the exclusion of every other person [Physical element of possession *(detentio*)] and

b. The intention of holding it as his own [Mental element of possession (*animus possidendi*)]

Simple possession without the intention is insufficient.

Therefore, in order to establish possession one must establish both the mental element and the physical element.

A. <u>The Corpus Of Possession (physical element)</u>

The Plaintiff must prove that he was **in fact** in possession.

a) <u>Degree of Control</u>

Generally the Plaintiff should have exercised control over the entire property. However it must be decided on a case-by-case basis.

In the case of **Scholtz v Faifer** [30] where a partially erected structures had been left abandoned for eight months, so the contractor was held to not be in possession. It was held further that a mere temporary absence of the contractor for a short time would not destroy the physical element (ex: where the builder goes home every night). However where work is suspended for a considerable time, the builder must take special steps to preserve possession (ex: putting a representative in charge) If he elects to leave the work, then no matter what his intention is, the physical element is absent, therefore he loses possession. In this case it was held that the builder lacked detention of the partially erected structure.

b) Derivative Possession

In the aforesaid case (Scholtz) it was also established that the possessor could be in possession personally or through an agent.

c) Quiet and Peaceful Possession

In **Abdul Aziz v Abdul Rahiman** [31] a full bench of the Supreme Court held that a person appointed by the congregation of the mosque as 'trustee' for a term of years, is not entitled to maintain a possessory action, hence the Roman Dutch Law requires that the Plaintiff in a possessory action to have quiet undisturbed possession for an year and a day

d) Exclusive Possession

In the said case **Abdul Aziz v Abdul Rahiman** – the Plaintiffs duties and powers as a trustee was defined by the rules framed by the congregation, and his powers are controlled by an 'assembly' elect by the congregation. Courts commenting on the same state that the possessor should have had the power to deal with the property as he pleases to the exclusion of other persons.

B. The Animus of Possession (Mental Element)

The mental element required in a possessory remedy is '*possession ut dominus'/'animus domini*'.

various interpretations have been given in respect of the meaning of this term.

In the case of **Bandara v Hendrick**[32] Court observed that a Plaintiff who was a tenant held the necessary mental element required.

Furthermore **Edirisooriya v Edirisooriya** set out that Legal rights are immaterial, provided he had the intention of remaining in effective control will have possession ut dominus. In the case of **Perera Vs Wijesuriya**[33] Courts held that trespass without ouster may, in appropriate circumstances amount to dispossession within section 4 of the prescription Ordinance.

30 (1910) TPD 243

31 (1909) 12 NLR 330

32 (1907) 1 ACR 81

33 59 NLR 529

Some important cases;

1. **Mascoreen v Genys** [34] A priest allowed a man to be in possession of a particular premises belonging to a church. The man later excluded the premises from the priest. Held, although the priest was not in possession, he had derivative possession from the Catholic Church, and the priest could file a possessory action against the wrongdoer.

2. **Changarapillai v Chelliah** [35] Plaintiff was manager of a Hindu temple and a possessory action was allowed. This case was distinguished from Tissera on the basis that the manager in Chelliah had "control of the fabric of the temple and property belonging to it", whilst the muppu in Tissera did not.

3. **Tissera v Costa** A priest allowed a man to clean the church premises, collect offerings and maintain the church. When the priest tried to disallow him from using the church premises, the man tried to file a possessory action. Held, he was a mere servant ('muppu') of the premises and did not therefore have possession ut dominus.

4. In the case of **Changara Pillai vs. Chelliah** [36]Bonzer J set out that the plaintiff did not claim to be the owner of the property whatever his duties, rights, and powers were. Accordingly, he didn't claim to be the owner (ut dominus) and therefore he couldn't maintain the action.

C. Illegal Dispossession

The Plaintiff must prove that he was unlawfully disposed by the Defendant; Section 4 of the Prescription Ordinance No. 22 of 1871.
Accordingly there are 4 requirements:

i. Disturbance of possession is sufficient for a possessory action **Perera v Wijesooriya (supra)** - Trespass without ouster is sufficient for a possessory action under Section 4. **Rowel Appuhamy v Moises Appu**[37]- The Defendant illegally carrying away the harvest of the land was sufficient to prove dispossession.

ii. It is not necessary to prove fraud or force (merely needs to be without consent of the person dispossessed); **Nino Bonino v de Lange**[38]

iii. Should be an unlawful dispossession - One cannot file possessory action if the person dispossessing did so lawfully (ex : evicting a tenant under the Rent Act)

34 (1862) Ramanathan's Rep. 195

35 (1902) 5 NLR 270

36 5 NLR 270

37 (1899) 4 NLR 225

38 1906 TS at p. 120

iv. In addition to dispossession, possession at the time of the Plaint must be with the Defendant. There will be no remedy where the Defendant *bona fide* alienated the property prior to proceedings.

III. **The Period of Possession**

The period of possession had been determined in several cases as follows;

In Gunawardene v Pereira and Silva v Dingiri Manika it was held that a minimum period of one year and one day is not necessary from the date of dispossession. However, in the case of Abdul Aziz it was held to be necessary.

IV. **Other Important aspects**

1. Possessory action against co-owners

The question has been dealt in the following cases whether a possessory action can be brought against a co –owner. In **Perera vs. Fernando** [39] it was held that the possession of a co-owner is not such an exclusive possession as to entitle him to a possessory action in the event of him being dispossessed. However, in the case **Cassi Lebbe vs. Baba** [40]it was held that one of the co-owners of immovable property was entitled to institute possessory suit against a trespasser who was not entitle to any share of the land.

The ambit and operation of the law pertaining to possessory action against co-owner was dealt with in Rowell **Appuhamy vs. Moises Appu** [41]which held that a possessory action was inappropriate where the defendant was admittedly a co-owner and if co-owners could not agree as to the exercise of their common rights the only appropriate remedy was an action was Partition.

However, **Heen Hami vs. Mohotti Hami** [42]the full bench decided there is no rule that a co-owner cannot maintain and action against another co-owner without joining all the other co-owners of the land.

However, where a co-owner who has been in possession of the entire common property for year and a day can maintaining a possessory action against other co-owner who has ousted him. This was so held in the case of **Cooray vs. Samaranayake** [43]

2. Possessory action on lessors

The Roman Dutch law recognizes a lessee's right to brig possessory suit against the lessor

39 1 SCR 329

40 (7 SCC 97)

41 (4 NLR 225)

42 19 NLR 235

43 47 NLR 322.

upon being forcibly disposed by the lessor during the lease period. (Case of **Perea vs. Sobana**[44])

In **Fernando vs. Fernando** [45] a lessee who entered into possession of a property bona fide under a lease was held to be entitled to possessory remedy he had to prove the ingredient that is he should had possession and has the intention of holding and dealing with the as his own for the full term of the lease.

3. **Possessory Action on State Land**

As long as the main ingredients/elements of a Partition Action are established, the party seeking the remedy need not prove title.
Attanayake v Aladan[46]**-** Weerasekera J. held that where there is no averment of dispossession as required by Section 4 of the Prescription Ordinance No. 22 of 1871, it cannot be a PA. Further, as no declaratory relief to be entitled to the land was asked for by the Plaintiff (he only prayed to be declared a yearly permit holder of the land granted under the Land Development Ordinance), the consequential relief of ejectment of the alleged trespasser cannot therefore arise.

44 6 SCC 69

45 13 NLR 164

46 *(1997) 3 SLR 386*

5:32 Could Change the Globe

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" … that whosoever kills a human being for other than manslaughter or corruption in the earth(according to the law), it shall be as if he had killed all mankind, and who so saves the life of one, it shall be as if he had saved the life of all mankind …" (Al-Quran: Sura Maida Chapter 5:32)

The above verse unreservedly and unambiguously declares that killing a human being is equal to killing of all of mankind and saving a life amounts to saving all of mankind. It specifically, explicitly and unequivocally indicates that by killing a life, one is committing a crime against humanity and by saving a life one is saving the lives of the entire mankind. This provides supreme and highest value for human life which was the creation of Allah Almighty and hence it is strictly prohibited to eliminate it by any individual or authority unless one is found guilty, for murdering another individual/s or where he spreads corruption in the earth meaning acting against the interest of mankind by threatening their rights or existence.

Killings, massacres, genocides and mass executions which mankind have been witnessing across the globe indicate that the sanctity of human lives is not respected and their forceful eliminations are being executed while the world conveniently or helplessly witnesses them. Although mankind knows the sacredness and inviolability of human life to be the highest treasure which has to be preserved and protected under all circumstances, killings have been common incidences in all corners of the world.

Historically, men, under various banners engaged in bloody battles and wars for dominance or survival which ended in massacres and killings. However, the rulers in various eras had introduced sets of laws to punish people who have committed killings or other crimes, with the view of punishing the wrongdoers and preventing further crimes. Nevertheless, historical evidence indicates that in the past criminal laws were not equally enforced among the people in several jurisdictions. For instance, under the Roman law during the greater part of the Roman Empire, a noble could not be punished for killing a slave.

Human conscience compelled men and women to understand that killing a human being is a wrongful and heinous criminal act and it should be prevented at least by introducing

punishment for the convicted criminals. In our times there is no single state which does not have a criminal law that makes killing a human being a criminal act punishable under the law.

Crimes against Humanity

Killing a human being or one person is not regarded as a crime against humanity under any modern law which is currently in operation in any jurisdiction. The subject of crime against humanity, at the beginning developed as a concept, and later as a law, is a very recent phenomenon and development which has a short history.

Crimes against humanity, according to scholars, have existed in customary international law for over a half century. However, crime against humanity as part of the international convention first originated at The Hague Conventions of 1907 on Respecting the Laws and Customs of War on Land, where a reference was made in its preamble, though the wording 'crime against humanity' was not directly referred.

The next development of this law was articulated in the Nuremberg Trial where committing genocide was considered a crime against humanity.
The uniqueness of 5:32(the Quranic injunction) lies in its unconditional position which seeks to protect human lives by not only outlawing murder or killing in a highly prohibited manner but also by seriously emphasizing, encouraging and urging people to save lives as it (life) is sacred and inviolable. The word saving a life, has a broad and extensive meaning. In this verse does Allah Almighty directly remind us of our duty to save lives with clear justification and rationalization that a single life should not be eliminated unjustly, and killing a single life amounts to killing all of mankind. A human being, especially a weak person, has several threats to his life. He/ She could have threats in the following circumstances:

(1) From those who harbour criminal intentions against him/her.
(2) When there is a miscarriage of justice, especially if he/she is unjustly or wrongly charged and convicted for an offence punishable with death, which he/she did not commit.
(3) When he/she cannot economically survive because of severe economic problems in his/her life, and as a result, he/she becomes vulnerable to chronic diseases or hunger related diseases or he/she was caught by social degeneration or chaos created by the economic/political crisis.

Elimination of all Forms of Threat to Human Lives

The Quranic injunction to save a life includes preventing or eliminating all forms of threats to human lives. The preachings of the Quran and Prophet Muhammed (Peace Be Upon Him) demand people to establish justice in all aspects, especially in political, civil, social and economic spheres.

The Islamic criminal law regards an intentional or premeditated killing which has been proved beyond all shadow of doubt, as an offence punishable by death. The Quran states "… **Take**

not life, which Allah hath made sacred, except by way of Justice and law ..."

This Quran verse very clearly explains to us four essential things:

1. Life is sacred and no one has the right to take it.
2. In the case of the death sentence for murder/s or massacres, justice should be applied equally to the both victim/s and accused (both substantial and procedural justice should be respected).
3. There should be no unjust law targeting a life, and
4. Any law which sanctions a death penalty should be a just law as the merit of the law will be measured in terms of justice.

The punishment of death for murder is accepted punishment today by many states though some states have taken out death penalty from penal law. Criminal procedural justice in Islam has very clear guidance and directions to those who enforce criminal justice to ensure that no innocent is punished. Furthermore, Islamic criminal procedure provides necessary guarantees to the accused that he or she will not be subjected to torture, inhuman or degrading treatment to obtain their confession and any confession taken under oppression will not be admitted.

All aggressions and injustices are prohibited

"Allah enjoins justice, generosity and kind treatment with relatives, and forbids indecency, wickedness and oppression. He admonishes you so that you may learn a lesson."
Aggression in any form, whether it is against life or property or honour is strictly prohibited, and this prohibition applies to everyone regardless of one's position, status, and reputation. The ruler and ruled cannot violate the rights of the people. It applies to both national and international laws (**siyar**)

The curse of Terrorism

Terrorism could be defined as the use of violence or threat of using violence to achieve objectives and thereby terrorizing unarmed or innocent people. Terrorism as a method to achieve a target is barbaric and inhuman as it creates a cycle of violence. It is a criminal act irrespective of who adopts it and who the victims are. Any person who adopts this method could be referred to as a terrorist.
The act of terrorism is also an aggression against people's rights to life and properties. As Islam strictly prohibits aggression, terrorism for any cause, whether for right or wrong, is not permissible.
Under Islam fighting is permitted only to deter aggression (war situation), where war becomes inevitable and unavoidable since one party is determined to engage in aggression. Even in a war type situation, the Quran gives clear instructions to the warring parties not to commit transgressions or excesses.

"Fight in the cause of Allah <u>against those who fight against you</u>, and <u>do not transgress</u>; for Allah loveth not transgressors" (underlined –emphasis added)

"But if they cease (fighting you), Allah is Oft Forgiving, Most Merciful"

The above Quranic verse (**chapter 2:190**) orders not to adopt transgression even at the time of war. Accordingly, when war is declared by one party against another party it should be fought according to the laws of war and no party should transgress or commit excesses against the other.

The second Quranic verse (**chapter 2:192**) proclaims that if one party ceases fighting, the other party should follow the same. Furthermore, this verse raises a persuading question: If Allah is forgiving then why cannot human beings who are engaged in fighting not forgive their adversaries when they (the adversaries) want peace?

"But if the enemy inclines towards peace, do you (also) incline towards peace, and trust in Allah: for He is the One that Hears and Knows (all things)

The above verse further affirms the position specified in verse **2:192**, if the enemies are inclined to peace**, <u>you should not incline to war but stretch the hands for peace</u>**.

Forgiveness and Generosity

When the Quran refers to war, it emphasizes the importance of peace and forgiveness and also provides guidance to achieve them. With the view of maligning Islam through false propaganda, several writings/programmes appear in both print and social media which mislead readers/viewers, especially non-Muslims, by misquoting Quran verses or quoting them out of context. These anti-Islam propagandists make miserable attempts to portray a gloomy picture of Islam by misquoting or quoting out of context the Quranic verses which refer to fighting and war.

During the time of Prophet Muhammed (Peace Be upon Him) order for fighting was given by the Quran against groups of people from Mecca and some from Medina who declared war against Muslims with the intention of eliminating Prophet Muhammad (Peace Be upon Him) and His followers physically. These groups persecuted and harmed Muslims for more than thirteen years. They tortured, maimed and killed many Muslims during that period. Eventually when the prosecution became unbearable Muslims migrated to Medina, which made these groups relentless and they marched to Medina with a large army to eliminate the Prophet (Peace Be Upon Him) and Muslims. For the first time Muslims were given permission to fight against those who declared war against them and this permission was attached with the condition and limitation. When the Quran gave permission to fight against those who fought against them, the enabling Quran verse **did not contain either word 'Kafir' or enemy**. The verse contains a sanction for self defence for Muslims against the people who were aggressively and violently planning to eliminate them or denying their very existence.

"Fight in the cause of Allah against those who fight against you, but <u>do not transgress limits, Allah does not love transgressors"</u> (Underlined Emphasis Added)

As we noted above, even this permission is a qualified one as the Quran verse explicitly and clearly commands '***do not transgress***, which means, do not extend the fighting beyond the parameters of necessity and also not to commit any excesses.

"O ye who believe! Make not unlawful the good things which Allah hath made lawful for you, but commit no excess: <u>for Allah loveth not those given to excess</u>." (Underlined Emphasis Added)

The above verse read with chapter 2:190 clearly states that although permission to fight was given because they fought against Muslims (unarmed innocent men, women, and children), no permission was given to transgress or commit excesses. The message of the Quran clearly reveals that war should be fought only to defend against aggression and if there is peace or enemies stop the aggression, the purpose of the war will not exist.

Another reason for permitting fighting is to prevent or eliminate oppression or depriving/ denying their rights in an oppressive and suppressive manner. Even this permission is strictly subject to the restriction which prohibits aggression. When the oppressors cease to oppress, there will be no permission for fighting.

The Quran also commands the warring parties to provide asylum when the other parties seek asylum and take them to a place of security. **Clause 3 of the Medina Charter (**Ṣaḥīfat al-Madīna **-** according to some writers it is that first ever written constitution to which different groups of people have subscribed) declares "**In a case of war with anybody they will redeem their prisoners with kindness and justice common among Believers**." This commands Muslims to act in terms of kindness and justice, but not according to the pre-Islamic notion where the rich/strong and the poor/weak were treated differently.

This clause imposes the following duties:

1. All warring parties should redeem their prisoners (who are under them).
2. Redemption should be done in terms of kindness and justice.
3. It should be done according to the practice of believers which was based on the command of Allah and the preaching of His Messenger (Prophet Muhammed (Peace Be Upon Him).
4. According to the command of Allah and the preaching of His Messenger, kindness and justice cannot be diluted at any stage of human affairs.

Fourteen centuries before the modern world conceived certain humane rules for conducting war which are known as humanitarian laws, the first Caliph of Islam Abu Bakr (May Allah Pleased With Him) laid down humanitarian laws as the guidance for Muslim army officers. He followed Quranic injunctions and the preaching of Prophet Muhammed (Peace Be Upon Him). Some of these regulations are:

1. No old man, no child, no woman shall be slain (during war).

2. No hermit shall be molested, nor his place of worship damaged.

3. Corpses of the fallen shall not be mutilated or disfigured.

4. No fruit bearing trees shall be cut down, no crops burned, no habitation devastated.

5. Treaty obligations with other faiths shall under all circumstances be honoured and fulfilled, and

Those who surrendered shall be entitled to all the rights and privileges of a Muslim subject.

Professor Thomas Arnold comments on Caliph Abu Bakr's humanitarian rules "The self-restraint of the conquerors and the humanity which they displayed and secured a welcome for an invading army that was guided by such principles of justice and moderations as were laid down by the Caliph Abu Bakr."

Clause 6 of the Medina Charter and the humanitarian rules for conducting war established by Caliph Abu Bakr (May Allah pleased with Him) cover the following areas:

Treatment of injured combatants.

1. Treatment of Prisoners of War.

2. Protection of Civilians or non-combatants.

3. Protection of Civilians' habitations and places of utility, and

4. Protection of Productive and Agricultural lands, and products.

It was only on August 12, 1949, that the four Geneva Conventions on certain important aspects of humanitarian laws were introduced. They are:

(1) The Convention of the Amelioration of the condition of the Wounded and Sick in Armed Forces in the Field;

(11) The Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;

(111) The Convention related to the Treatment of Prisoners of War; and

(1V) The Convention related to the protection of Civilians in Time of War; and on May 3, 1977 the Standard minimum rules for the treatment of Prisoners were introduced.

Professor Weeramantry explains this aspect of Islamic Humanitarian Law with the citations of some leading authors in the same area, in his works ***"Nuclear Weapons and Scientific Responsibility'*** in the following manner : "in the Islamic tradition, the laws of war forbade the use of poisoned arrows or the application of poison on weapons such as swords or spears. Unnecessarily cruel ways of killing and mutilations were expressly forbidden. Non-

combatants, women and children, monks and places of worship were expressly protected. Crops and livestock were not to be destroyed by anyone holding authority over territory. Prisoners were to be treated mercifully in accordance with such Quranic passages as 'Feed for love of Allah, the indigent, the orphan and the captive. So well developed was Islamic law in regard to conduct during hostilities that it ordained not merely that prisoners were to be well treated, but that if they made a last will during captivity, the will was to be transmitted to the enemy through some appropriate channel."

Miserable Attempts to Portray Intolerance Picture

Anti-Islam propagandists miserably attempt to show a vile picture of the Quran verses on war by misquoting them or by quoting them out of context. They add their own baked and faked interpretation to these verses to mislead readers with the deliberate and calculated intention of maligning Islam and its followers and causing mistrust and hatred between Muslims and non- Muslims.

They want to give a wild impression that Muslims are commanded to kill disbelievers and to support this abhorrent propaganda they cite the Quranic verses which give permission to fight against those who were committed to eliminate Muslims at the time of Prophet Muhammad (Peace Be Upon Him). As we noted above, the first verse which permits fighting does not contain even the word 'enemy'. The Meccan adversaries of Islam continuously and vigorously harboured enmity towards the Muslims and unilaterally declared war even after signing a "Truce' with the Muslims. In this context, the Quran verses gave strict commandments to the Muslims to fight against them as their (Muslims) existence was threatened, but they(Muslims) were ordered to exercise restraint and give refuge to the enemies if they sought refuge.

The word "Mushriqeen or kafir' in the subsequent Quran verses which gave permission for fighting, was used to distinguish between the followers of Prophet (Peace Be Upon Him) who were believers and the enemies who had declared war against them (the believers) to eliminate them. In this context, the word "Mushriqeens or 'kafirs' was not referring to the people who follow other faiths but those who declared war against Prophet Muhammad (Peace Be Upon Him) and His followers at that time. Mushriqeens or Kafirs were used several times in the Quran to refer Meccans at the time of Prophet Muhammed (Peace Be upon Him) who were plotting against Him and his followers.

Commanded to Be Kind and Just With the People of Other Faiths

Among many verses in the Quran, one verse which defeats all wild attempts made by anti-Islam/Muslims propagandists to portray 'Islam as the religion of intolerance' is contained in chapter sixty, verse nine.

"**Allah does not forbid you, with regard to those who do not fight you for (your) Faith nor drive you out of your homes, from dealing kindly and justly with them. For Allah loves those who are just**" (Underlined Emphasis Added)

The above verse gives the following instructions to Muslims:

(1) The dispute is only with those who fight against you or/and drive you out of the homes

because of your faith,
(2) With others (non-Muslims) Muslims should deal kindly and justly, and
(3) Allah loves those who are just (to win the pleasure of Allah, one has to act justly).

Justice for Everyone

Islam demands justice for everyone including non-followers of Islam and people belonging to other ideologies. The Quran declares

"O you believe! Stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just that is next to piety: and fear Allah. For Allah is well acquainted with all that you do."

"O you who believe! Stand firmly for justice, as witness to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest you swerve, and if you distort (justice) or decline to do justice, verily Allah is well-acquainted with all that you do"

"And when Judge between men and men judge with Justice."

Next Fundamental Principle "No Compulsion in Islam"

Although Islam is a missionary faith and its followers were commanded to spread the message of peace, it proclaims clearly that there is no compulsion in Islam and it further prohibits converting people of other faiths by force. This prohibition and command was declared in the Quran.

"**Let there be no compulsion in religion**.**The Truth stands out clear from Error; whoever rejects Evil and believes in Allah has grasped the most trustworthy hand-hold that Allah never breaks. And Allah hears and knows all things."** (Underline Emphasis Added).

Islam further asks its followers to convey the message of Islam in a best and beautiful way. The Quran commands **"Invite (all) to the Way of your Lord with wisdom and beautiful preaching…**"

Tolerance and Forgiveness (Historical Evidence)

The best example of the practice of tolerance and forgiveness was evident in Prophet Muhammed's (Peace Be Upon Him) example of forgiving enemies at the time of great victory. At the conquest of Mecca, the Prophet (Peace Be Upon Him) forgave and freed all the people of Mecca who persecuted Him and His followers in a most ruthless and brutal manner. They relentlessly carried out the campaign against the Prophet and his followers to demoralize them mentally and eliminate them physically. The campaign included slandering, defaming, character assassination, torturing followers, imposing economic sanctions, brutally beating

them in public, banning pilgrimage to Kaaba (the holiest Mosque in Mecca), and expelling them from their birth places, conspiring, and cold blooded murders.

Bloodless Conquest

When the people of Mecca retreated when they witnessed the army of Prophet Muhammad (Peace Be Upon Him) in a state of incomprehension and confusion as they knew that they had lost their protracted battle against them (Muslims), the Prophet (Peace Be Upon Him) and his followers entered Mecca in humility. The Prophet (Peace Be Upon Him) asked them what would they expect from him, they said 'you are a noble brother'. The Prophet (Peace Be Upon Him) answered them graciously 'you are freed today,' thus he forgot and forgave the people who harboured enmity for decades within a few seconds.

The benevolence and munificence (which were the hallmark of the conquest of Mecca) were the turning point in the history of Islam as it boosted the spread of Islam among the hearts of many people. Many leaders of Mecca who were avowed enemies of Islam including Ikrama Bin Abu Jail (the son of Abu Jail) returned to Mecca, embraced Islam and became strong followers of Islam.

Whenever Prophet Muhammad (Peace Be upon Him) was severely persecuted by the people of Arabia, he prayed to Allah to seek His help to make the same people understand the Divine message. One remarkable incident among many incidents was the Prophet's (Peace Be Upon Him) visit to Taif. In Taif, the leaders there incited some youths to attack the Prophet (Peace Be Upon Him) and He was stoned and beaten seriously. While he was bleeding helplessly angel Jibreal (Gabrieal-Spirit) visited him and asked whether he (Jibreal) could (with Allah's leave) destroy those who were responsible for the attack. The Prophet (Peace Be Upon Him) said 'No' although these people did not understand the message, their children may (in the future) understand it.

Al-Quran declares "And We have not sent you (O! Muhammed) save as a bringer of good tidings and a Warner to entire mankind"

"We sent you not, (O! Muhammed) but as a Mercy for all creatures"

Extracts from the author's unpublished work "Islam: Ideology of Justice and Peace"

Notes and References

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2. The 1945 London Charter of the International Military Tribunal (Nuremberg Charter), Article 6(c):"murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."
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4. Al-Quran Sura An-Nahl Chapter: 16:90
5. Al-Quran Sura Al-Baqara Chapter 2 : 190
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The Concept of Bid'a (Innovation) – An Overview

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> "An inaccurate use of terminology may sometimes be of but little importance, and discussion of it may be merely quibble. But accuracy of expression becomes important when it appears that inaccuracy is due to a confusion of thought in the application of proper rules or principles of law."[1]

Introduction

Most of the Muslims Scholars today have not properly understood the concepts of *bid'a* and have confused themselves as to its correct application and its proper interpretation. The concepts of *bid'a* (innovation) and *ijtihad* (critical legal thinking in search for answers to new problems) give Islam great historical mobility, enabling it to preserve continuity with the past while renewing its vitality as a dynamic faith. The allegation that something is *bid'a* is often made rashly, marginalizing new ideas and making creativity difficult.

Ijtihad is often highlighted as the main vehicle that drives creativity and innovation in Islam. "Every bid'a (innovation) is misguidance, and every misguidance (ends up) in the Hellfire". Taken in its face value, this prophetic tradition (hadith) seems to condemn any single act of innovation and creative process; Muslims are not encouraged to think and act creatively. In contrast, they should only follow and obey what has been revealed by God and taught by the Prophet. As a matter of fact, this is not the real meaning of the tradition of the Prophet. Yet, due to ignorance and other factors, it has become a popular belief that Islam is rigid, not open to new ideas and Muslims are not encouraged to express creative and novel ideas in fear of being labelled as *mubtadi*' or the person who initiated the *bid'a*.

The opinion of those who condemn any new act without qualification comes from a misunderstanding of the sources of the Qur'an and Hadith, for example by quoting passages out of context or without the true meaning. It is apparent that the classical scholars, who probably had a greater knowledge of Qur'anic or Hadith exegesis than any living person today decreed that newly introduced practices are allowed as long as they do not contradict the Qur'an or Sunnah. This stands in marked contrast to the opinion of many so-called learned people today. They should be careful in condemning an act as Haraam or prohibited if it is not specifically prohibited by the Qur'an or Sunnah, as judging a permissible act as Haraam may lead to Shirk.

1 Commissioner Fred K. Nielsen said in his dissenting opinion in the *International Fisheries Co. Case* (1931) before the Mexican-United States General Claims Commission (1923) - Access on 14.07.2019 https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1213&context=umiclr

In this article an attempt has been taken to focus the importance of innovation to prove that Shariah accept new acts initiated in Islam that were good and did not conflict with the principles of Shariah and reject things that were otherwise and to prove that innovation has played a major role in Islamic Jurisprudence. To achieve the said objectives the writer firstly intends to define *bid'a* and *Sunnah* (prophetic traditions) and analyse both concepts in relation to the most controversial five *Ahadith* (prophetic traditions) of the Prophet which led some of the scholars to declare that bid'a is prohibited in Islam and then to deal with some arguments of Scholars who promulgated that bid'a is prohibited only in religious or spiritual matters and the Prophet has clearly permitted innovations in mundane (worldly) affairs. The writer finally intends to deal with innovation (bid'a) and creativity and how they go hand in hand.

Definition

The word *Bid'a* has two aspects to it, one being the linguistic definition, and the other, it's meaning from a Shariah perspective. Linguistically *Bid'a* means introducing something new, regardless of whether it is connected to religious affairs or other worldly matters, and regardless of whether one practices it considering it to be part of religion (*Deen*) or otherwise. Scholars who give linguistic definition define *Bid`a* as everything that has been introduced following the death of the Prophet and the golden eras of his Companions.

Shari'ah definitions of the word differ from linguistic meanings because the Shari'ah may restrict, qualify, expand, or attach conditions (to the linguistic meaning) to give a new conceptual meaning which is employed by the Shari'ah to address the people. Examples include, prayer, belief, faith charity amongst others, all of which have intended Shariah meanings which are different to the original linguistic meaning afforded by the root words in the language.

Scholars (Imams) have defined *Bid'a* as follows:

"A newly invented way [beliefs or action] in the religion, in imitation of the Shari'ah (prescribed Law), by which nearness to Allaah is sought, [but] not being supported by any authentic proof - neither in its foundations, nor in the manner in which it is performed." [2]

Ibn Hajar al-Asqalani said:

"the newly invented matter…… is what has been newly-introduced and does not have any basis in Shari'ah. It is referred to in the usage of the Shari'ah as innovation. As for what has a basis indicated by the Shari'ah then it is not an innovation. For 'innovation' in the usage of the Shari'ah is blameworthy as opposed to its usage (with its) linguistic (meaning), for everything that has been newly-invented without any prior example is named bid'a irrespective of whether it is praiseworthy, or blameworthy."[3]

Ibn Al-Jawzi, may Allaah said: "A Bid'a is any form of worship that did not exist at the time of the Prophet and his companions then later it was innovated."

2 Ref: Al-I'tisaam of ash-Shaatibee (1/37)

3 Ref: Fath al-Bari (13/253)

Ibn Rajab said: "A Bid'a is any form of worship which has no basis in the Shari'ah which would warrant its legislation."

Anything new that has no basis in the Quran, Sunnah or sayings of the Companions, is bid'a. Most of the scholars, who disapprove bid'a, always stress on the Prophetic Sunnah which states "every innovation is misguidance" and warn the Muslims not to introduce anything new which are not in the Sunnah. They consider bid'a as antithesis of Sunnah

Sunnah

Sunnah and *Hadith* convey the same meaning, namely, the Traditions of the Prophet. But, a critical study of these terms will show that their meaning was not identical. However, for the purpose of this article the writer considers that both are identical.

Sunnah implies the normative practice or the model behaviour whether actually good or bad, of a particular individual, sect or community.[4] The manner in which God dealt with the former generations is termed God's *Sunnah* in the Quran[5]; while the *Sunnah* of the past generations[6] refers to their practices and customs. A number of Quranic verses clearly indicate that the term *Sunnah* denotes practice or behavior.[7] In pre-Islamic Arabia, the Arabs used the word *Sunnah* in reference to the ancient and continuous practice of the community which they inherited from their forefathers. Thus it is said that the pre-Islamic tribes of Arabia had each their own *Sunnah* (i.e. their customary or common law), which they considered as a basis of their identity and pride.[8]

However, in Islamic jurisprudence, *Sunnah* of the Prophet refers to all that is narrated from the Prophet, his acts, his sayings and whatever he tacitly approved plus all the reports which his physical attributes and character.[9] The Quran time and again makes obedience to the Prophet obligatory on the Muslims and speaks of his behaviour as 'ideal'. The Muslims, therefore, from the very beginning accepted his conduct as 'model' for them on the basis of the teaching of the Quran.

Quran enjoins obedience to the Prophet and make it a duty of the believers to submit to his judgment and his authority without question. The following verses of Quran are all explicit on this theme.

"And whatever the Messenger has given you - take; and what he has forbidden you - refrain

4 Ahmed Hasan, The Early Development of Islamic Jurisprudence, 2003,New Delhi, p.85

5 Al-Quran 17:77, 33:62

6 Al-Quran 8:38, 15:8

7 Al-Quran 35:43, 48:23, 33:62

8 Ahmed Hasan, The Early Development of Islamic Jurisprudence, 2003,New Delhi,p.44

9 Kamali,M.Hashim, *Principles of Islamic Jurisprudence*, 1997, Geneva, p.82] – for details see Isnawi, *Nihayah,II*, 170; Shawkani, *Irshad*, p.23

from. And fear Allah ; indeed, Allah is severe in penalty".[10]

"Obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger."[11]

To refer the judgment of a dispute to God means recourse to the Quran and referring it to the Messenger means recourse to the Sunnah. In another verse the Quran emphasises "whoever obeys the Messenger verily obeys God".[12] The Quran is categorical to the effect that the definitive rulings of the Quran and Sunnah are binding on the believers in that they are no longer at liberty to differ with the dictates of the divine. "It is not for a believing man or a believing woman, when Allah and His Messenger have decided a matter, that they should [thereafter] have any choice about their affair. And whoever disobeys Allah and His Messenger has certainly strayed into clear error".[13]

In these circumstances, what would be the position if a new practice (innovation or bida) is introduced into Islamic jurisprudence? Will it be disobedience to God and His messenger? Or will it be considered as deviation from Sunnah of the Prophet?

The answer will be 'no' if the innovation is in respect of the worldly or mundane affair. If the innovation is in respect of the religion or spiritual or ritual matters, it is disobedience or deviation from Sunnah. The objective of this article is to show the difference.

Every *Bid'a* is a Misguidance

The conception of the word *bid'a* as intended by the Shariah and as conveyed by the Prophet in his *Sunan* (plural of *Sunnah*- traditions), and upon which warnings have been made is found completely in the following *ahadeeth* (plural of *hadeeth*) of the Prophet.

The First Hadeeth of Aa'ishah is "Whoever innovates something into this matter of ours which does not belong to it will have it rejected."[14]

The Second Hadeeth of Aa'ishah is "Whoever performs a deed that is not in accordance with our matter will have it rejected."[15]

The Third Hadeeth of Ai'shah (through Ibn Isa) is "Whoever worked an affair in discrepancy with ours will have it rejected."[16]

The Fourth Hadeeth of al-Irbaad bin Saariyah about the Prophet's farewell sermon:"And

10 Al-Quran 59:7

11 Al-Quran 4:59

12 Al-Quran 4:80

13 Al-Quran 33:36

14 Ṣaḥīḥ al-Bukhārī 2550, Ṣaḥīḥ Muslim 1718

15 Ibid

16 Sahih. See Sahih al-Jami al-Saghir (no. 6369)

beware of the newly-introduced affairs, for every newly-introduced affair is an innovation, and every innovation is misguidance."[17]

The Fifth Hadeeth of Jabir bin Abdullaah

"Indeed, the best speech is the Book of Allaah and the best guidance is the guidance of Muhammad and the worst of affairs are the newly-invented matters, every newly-invented matter is an innovation and every innovation is misguidance, and every (instance of) misguidance is in the Hellfire."[18]

Do all these mean that everything new in the world is haram or unlawful? The scholars say that the above ahadith do not refer to all new things without restrictions. The use of the word 'every' does not indicate an absolute generalization. Most of the scholars are of the view that new matters in Islam may not be rejected merely because they did not exist in the first century of Islam but must be evaluated and judged according to the comprehensive methodology of Shariah.

Whether every innovation is a misguidance or not depends on how the five ahadith given above are interpreted. The most crucial hadith is the first one namely: "Whoever introduces into this affair of ours that which does not belong to it, will have it rejected."[19]

This hadith has been the subject matter of almost all the Scholars of which Imam Abu Ishaq al-Shathibi[20] is in the forefront. Imaam al-Shatibi in his excellent work, al-I'tisaam,[21] has provided the most comprehensive, concise and definitive legislative definition of al-bid'a. He has analysed this hadith in particular and other ahadith in general giving a different definition to the word *bid'a*. [This definition has been accepted by almost all the subsequent scholars). Imaam al-Shatibi states that this hadeeth has provided three very important conditions or restrictions which have made the meaning of bid'a intended by the Shariah to be something unique. As such, nothing is considered a bid'a in the Shariah sense except when these conditions are met. The three conditions are:

1. introducing something new (Innovates)

2. Into this affair of ours (ascribing it to the religion)

3. which does not belong to it [Absence of Shariah evidence for this newly-introduced matter) in either a general way or a specific way]

17 Reported by Abu Dawud, Ibn Majah and al-Tirmidhi

18 Sahih. Reported by al-Nasa'i, al-Bayhaqi, al-Aajurree and others

19 The Arabic terms of this hadith reads as 'Man ahdatha fee amrina haada maa laisa minhu fahuwwarad.". The direct translation could be given as 'Whoever innovate into this affair which is not from it, it will be rejected

20 Abu Ishaq al-Shatibi (720-790 A.H./1320/1388 A.D.) was an Andalusian Sunni Islamic legal scholar following the Maliki madhab

21 al-I'tisaam (tahqiq, M. Salman, Maktabah al-Tawhid) 1/41-55

These three qualifications are found in the hadeeth itself:

The first condition refers to bringing anything new without any prior example. At this point, this could refer to all newly-invented things, praiseworthy or blameworthy, religious, or otherwise. With this restriction, many things are excluded from the definition of bid'a, in particular those things that do have a foundation in the Shari'ah and such things include the compilation of the Qur'an, the writing and compiling of hadeeth, the congregational tarawih prayer, the principles of fiqh, knowledge of grammar and morphology and so on. All these are not new (bid'a). Even if they were not formally present, their foundations can be found in the Shari'ah (*Maqasid-us-Shari'ah*-purpose of Shari'ah). So these are not considered innovations in the Shari'ah sense.

In the second condition he qualified and restricted this to the religion. This excludes all other affairs, such as habits, customs and so on, and this is because this path or way is being ascribed to the religion. If it was a worldly matter, it would not be labelled a bid'a (innovation). Thus all innovations in respect of worldly affairs are outside of the definition of bid'a. For an example innovations on personal laws, customs, science, technology are not considered bid'a and thus they are not misguidance.

Third condition is that it has no support from the Shariah, neither in a general sense (a general evidence) or in a specific sense (a specific evidence). Imam Al-Shatibi further explains the third condition and states that if an innovation doesn't contradict the objectives of the Shari'ah(*Maqasid-us-Shari'ah*), it can be considered from the Sunnah of the Prophet. That is to say, "Whoever introduces something into this matter of ours which is not from it, will have it rejected." but if it is from it, it is not rejected and is therefore acceptable.

Enactments dealing with acts of worship is not the same as enactments dealing with mundane and social conducts. The God takes the responsibility of stipulating the realities of worship with regard to form, time, place, quantity, method, what is general and what is specific, etc. This is specified by His wisdom and there is no room for the exertion of our own opinions; we are only required to fulfil these obligations. The acts of worship should remain the same as they have been from the era of the Prophet to the end of time, with no difference between our predecessors and the generations to come. Complete compliance has to be shown in this matter, from beginning to end.

The Prophet has specifically in many an occasion has demonstrated that Sunnah is limited to confirmed religious rulings and exclude personal habits and customs of the Prophet, that is, Sunnah on confirmed religious rulings no one can tamper or change by introducing new things, but the worldly affairs is open for changes. The following *ahadith* could be given as an example where the Prophet allowed new things to be introduced on mundane matters.

Raafi ibn Khadeeja reported that the Prophet came to Madeenah and found the people grafting their date-palm trees. He asked them what they were doing and they informed him that they were artificially pollinating the trees. He then said "*Perhaps it would be better if you did not do that*." When they abandoned the practice, the yield of the date-palms became less. So they informed him and he said, "*I am a human being. So when I tell you to do something pertaining*

to the religion, accept it, but when I tell you something from my personal opinion, keep in mind that I am a human being." Anas reported that he added '*You have better knowledge (of technical skills) in the affairs of the world*."[22]

The Prophet always reminds his followers that he is a human being and that anything in respect of worldly matters the followers could be more knowledgeable and they can introduce new things and apply it to suit the circumstances which would fetch a better result. In worldly matters he further informed his followers that even in the case of legal judgments with regard to disputes before him, the Prophet could unintentionally rule incorrectly, as some of such decisions were based on the evidence before him and he could make mistakes in judgment due to factor beyond his control.[23]

Another example of deviation from the Quran and the Sunnah comes from Umar ibn al-Khattab, the second righteous Caliph. According to Al Quran punishment for theft is cutting off the hand which is called Hadd punishment. it is specifically provided in Quran: "[As for] the thief, the male and the female, amputate their hands in recompense for what they committed as a deterrent [punishment] from Allah"[24]

Once a companion caught a thief and brought him to the Prophet. When the Prophet in keeping with the above verse of the Quran ordered the Hadd punishment to be applied to him, the companion pitied the thief and decided to forgive him, but the Prophet in response said that there is no alternative but the application of the Hadd punishment.

In the year of the famine, once some slaves had stolen a she-camel, slaughtered and eaten it. When this matter was referred to 'Umar ibn al-Khattab, he in the first instance ordered the cutting of the hands of the thieves, but after a moment's reflection he said, addressing the slaves' master: I think you must have starved these slaves out.' He ,therefore ordered the master of the slaves to pay double the price of the she-camel and withdrew his order for the cutting of the thieves' hands.[25]

Umar, suspended the punishment for stealing in the year of famine, since theft became so rampant at that time that Caliph Umar saw it befitting to lift the Hadd punishment on stealing altogether, as opposed to leaving half of the nation amputees. He did this for the sake of Istihsaan[26], a well known issue in Usul al Fiqh which means "equity" in the Shari'ah.

As the writer has stated above under the heading 'Sunnah', has Umr been disobedient to God and the Prophet or has he deviate from the Law of Allah and the Messenger or has he contravened the Quranic verses. In that event can anyone say that Umr has violated the law and introduce an innovative (bid'a) legal principle which was not in practice during the time of the Prophet.

22 Dr.A.A.Bilal Philips -*The Evolution of Fiqh* Reprint Edition 2006, p.34

23 ibid

24 Al Quran-5:38

25 Prof. ahmed Hassan, Early Development of Islamic Jurisprudence, 2003, New Delhi, p.120

26 Istihsaan (juristic preference) The preference of one proof over another proof because one appears to be more suitable to the situation than the other.:Dr. Bilal Philips, *The Evolution of Fiqh*, 2006, New Delhi, p.147

Did he introduce a new rule (a bid'a)? Is that in respect of a religious matter? and thirdly is there a base in Shariah for him to deviate? Umr's has violated or deviated from a specific Quranic verse where even the Prophet specifically said that he too has no authority to deviate. Nevertheless, since it is not a religious matter (this falls into worldly affair) this does not fall within the meaning of bid'a. Secondly it has a base in Shariah, that is he had two legal principles to apply under Istihsan (juristic preference). He acted prudently and chose the best to suit the circumstance.

In another example where the Prophet has said "whoever sells food should not do so until he has it in his possession"[27] According to this Hadith contracts for manufacture are invalid since the item is non-existent at the time of the contract. However, since such contracts have been universally accepted and the need for such contracts is obvious, the contract was allowed based on the principle of *Istihsaan.*

The above instances (*Ahadith*), are sufficient to prove that the introduction of new matters into the worldly affairs are permitted. Therefore, all innovations do not fall within the meaning of bid'a. If in any innovation,

(a) there is a prior example, it is not a bid'a.

(b) If there is no prior example but not a religious (worship) matter, that innovation is not a bid'a.

(c) whether it is religious matter or not, if the innovation has evidence in Sharia'h or does fall within the maqasid-us-Sharia'h it is not bid'a.

Therefore, it is permissible for a Muslim to originate a good practice, even if the Prophet didn't do it (In the above example Umr did what Prophet didn't do, that is the ban of the cutting of the hands of thieves due to the situation faced by the people during the famine), for the sake of doing good and cultivating the reward. The meaning of inaugurate a good practice (*sanna sunnatun hasana*) is to establish a practice through personal reasoning (ijtihad), derivation (istinbat[28]), istihsaan or any other methodology from the rules of religious law or its general texts.

Innovation and Creativity

In Islamic jurisprudence, *ijtihad* is defined as a conscious effort by a jurist to make decisions in relation to Shari'ah and it is contrary to *taqlid*, which refers to the act of imitating and blind following. In doing so, *ibda* is required, which adhere to creative thinking as it involves making new decision in relation to current issues with strictly bound to al-Quran and al-Sunnah.[29] *ijtihad* as a topic has received a great deal of interests from scholars who studied it

27 Reported by Ibn'Umr and collected by Maalik (Muwatta Imam Malik, (English Trans.) p.296, no. 1324

28 An Islamic legal term referring to independent reasoning or the thorough exertion of a jurist's mental faculty in finding a solution to a legal question.

29 Mohamed Azmir bin Mohd Nizah and others, *A Preliminary Study on the Islamic Creativity Practices-*

from various perspectives, especially in its creative role in reform (*Islah*)and renewal (*Tajdid*). Creative thinking involves an act of observing, noticing, scrutinizing, analyzing, adapting, and synthesizing systematically, taking lessons, and then making inferences and conclusions which can be additional input to the available knowledge.[30]

Thus, it is imperative here to ask: What is then the intended meaning of *bid'a* that was condemned by Prophet? How did the Muslims in the past understand it without hampering their creativity? Is there a role for *bid'a* in fostering creativity.

In terms of Imam al-Shatibi's definition on the scope and domain *bid'a* is delimited strictly to the domain of worship and rituals (*'ibadat*). In other words, any novel ways introduced relating to worship in terms of the ritual involved and so on without having its origins in the Islamic Law is deemed as *bid'a.* This is because, the religion of Islam has already been perfected with the demise of the Prophet, and as such, any addition to it is condemned as unnecessary and misguided, hence the term *bid'a.*

Introduction of new things to worldly matters do not fall into the category of reprehensible and sinful innovation, thus they are totally permissible as long as they don't contradict any other ruling of Shariah. Muslims are greatly encouraged to exercise it for their own benefits, like they did in the past, and contribute to humanity in general. In other word, they have to exercise creativity in relation to ijtihad as a positive quality in human being. At the same time, in its religious sense, bid'a can be understood as a mechanism of controlling the limit and boundary of ijtihad or the creative process. In other word, the Muslims have to be careful in exercising their creativity so as not to transgress the limit and boundary set by the Quran and Sunnah, lest they will fall into bid'a, which is condemned and warned by the prophetic tradition.

The transformation of Islamic education from its focus on the religious knowledge to the integration of religion and the sciences could be regarded as an example of applying creativity and innovation in the educational system of the Muslim society. The principal studies of al-Azhar University; one of the greatest symbols of Islamic institutions for the Muslims around the world, until the middle of 19th century are restricted the learning of the religious sciences only. Then, the shift was made to introduce the non-religious and modern sciences in its curriculum.[31]

Conclusion

A feel for the true conceptions of *bid'a*, creativity and ijtihad is necessary for Muslims today. It is necessary to promote the intellectual health of the Muslim community by spreading "Islamic literacy" in order to instill critical consciousness in the Muslim rank and file.

file:///C:/Users/User/Downloads/PreliminaryonIslamicCreativity%20(1).pdf Access on 22.04.2019

30 Ibid

31 Muhammed Mustaqim and others, *Creating Creative and Innovative Muslim Society: Bid'ah as an Approach*
https://www.researchgate.net/publication/257656510_Creating_Creative_and_Innovative_Muslim_Society_Bid'ah_as_an_Approach
access 22.04.2019

Islamic literacy is required by the rules of *ijtihad*, which were never restricted to scholars alone but required the lay community to pass judgment on each scholar's aptitude. A sound understanding of *bid'a,* creativity and *ijtihad* is a fundamental component of the Islamic literacy our community needs.

It is vital for Muslims to have a comprehensive understanding on the sophisticated concept of *bid'a* and the related concept of ijtihad. It should be sufficiently clear that the concept of *bid'a* as a whole should be viewed to constitute a standard of excellence and not just a blanket condemnation of every unfamiliar practice or new solution introduced by the Muslims in their lives. In fact, the implementation of *bid'a* as a creative process started with the advent of Islam and was practised by the Prophet and the succeeding Muslim scholars, scientists and reformers who had a holistic and balanced understanding of the religion. In fact, it is perhaps justified to state here that the intellectual and social malaise that befell the Muslims was mainly due to their abandonment of the creative intellectual activity in favor of imitation and blind following (*taqlid*) of custom and authorities, which lead them to ignorance, backwardness and intolerance of innovations and ideas.[32]

It is imperative that our community free itself from erroneous understandings of *bid'a* and develop full competence to perform ijtihad independently. Most of the universities are currently producing highly qualified graduates in Islamic studies, many of whom become influential intellectuals in the Muslim community and are committed to producing rigorous scholarship as well as fostering Islamic literacy. Perhaps this new generation of intellectuals will carry the banner of *ijtihad* through the twenty-first century, laying the foundations of a genuinely modern Islamic culture that has intellectual and spiritual depth, is actively committed to humanity and the world.[33]

32 M.Mustaqim M. Zarif & another, *Creating Creative and Innovative Muslim Society: Bid'ah as an Approach* - access:15.07.2019 https://www.researchgate.net/publication/257656510_Creating_Creative_and_Innovative_Muslim_Society_Bid'ah_as_an_Approach]

33 DR. Umar Faruq Abd-Allah, Innovation and Creativity In Islam –access on 15.07.2019 https://archive.org/stream/InnovationAndCreativityInIslam/Innovation%20and%20Creativity%20In%20Islam_djvu.txt]

Qatar Crisis: From the Sri Lankans' Point of View

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ABSTRACT

The aim of this article is to examine the Saudi blockade over Qatar and its impact in the past 20 months in the country. A special focus will be given to the Sri Lankan workers who have been living in Qatar for the past two decades. The reason why the author has chosen it is because there are over 140.000/2.639.000 Sri Lankans living in Qatar which is about 5.3% of the total population of the country. Qatar is one of the smallest and high income countries in the world which was challenged by Saudi Arabia and some other Arab neighbors recently. On June 5th 2017 an air, sea and land blockade was imposed on Qatar by four Arab countries: Saudi Arabia, the United Arab Emirates (UAE), Bahrain and Egypt. The immediate reason for this blockade was 13 allegations against it. Qatar has long practised an ambitious foreign policy with different priorities to its neighbours but there are two key issues which have angered them in the recent years. One is Qatar's support for Islamist militant groups. The other key issue is Qatar's relations with Iran, with which it shares the world's largest gas field. The unexpected blockade disturbed Qatar in many ways: food shortage, travel restrictions, high inflations, limitations on import and export, etc. Qatar is in the post blockade era now and it has been trying so hard to overcome the above challenges. It is noted that Qatar is recovering very fast than expected and people who live in Qatar are very optimistic about the country and the service provided by the head of the state.

Keywords: Blockade, Arab neighbors, Muslim Brotherhood and Islamic State-IS)

1. QATAR – SRI LANKA RELATIONS

The two countries' diplomatic relations started in 1998. Since then, Sri Lanka has been maintaining very cordial relations with Qatar in many ways. Qatar is one of the countries which has been receiving many Sri Lankan workers for its domestic work. According to the Sri Lankan embassy in Qatar, currently there are 140,000 Sri Lankans working, around 79% of them are labourers and house maids and 21% are professionals/skill workers. Qatar is very important for Sri Lanka in terms of foreign remittances and humanitarian assistance. Large amount of foreign remittance (US $400-500 million) comes from Qatar every year. Further Qatar provides financial assistance to the poor people in Sri Lanka through its charity organizations. Saudi blockade was a shocking news to Sri Lanka, any negative consequences of blockade can directly impact the Sri Lankan economy. Middle East is a home for over a million Sri Lankan workers. There are around 600.000 workers in Saudi Arabia. The blockade not only impacts Qatar but also disturbs many other countries in the world.

2. INTRODUCTION TO THE QATAR CRISIS

It has been 20 months since Qatar was cut off by its four Arab neighbours: Saudi Arabia, the United Arab Emirates (UAE), Bahrain and Egypt. Qatar is a small peninsula in the Middle East, 2/3rd of its territory covered by the Persian sea and 1/3rd covered by land. Qatar has a direct land border with Saudi Arabia and it shares maritime borders with Bahrain, Iran, and the United Arab Emirates. Qatar; once one of the poorest Gulf States, is one of the richest States in the region today. According to the UNDP report Qatar has the highest per capita income in the world ($128,702) and it is classified as a country of very high human development and it is widely regarded as the most advanced Arab state for Human Development Index (37/189). The main income for Qatar is natural gas and oil. Petroleum and natural gas are the cornerstones of Qatar's economy and account for more than 70% of the total government revenue, more than 60% of gross domestic product, and roughly 85% of export earnings. Qatar has the world's third largest proven natural gas reserve (14% of the total world natural gas) and is the second-largest exporter of natural gas after Russia.

Although Qatar is very rich and is a high income country it has to depend largely on Saudi Arabia and other Arab neighbours for its import and export. It is noted that Qatar is dependent on imports by land and sea for the basic needs of its population of 2.6 million, about 40% of its food came in through the land border with Saudi Arabia. Up until 2017, Qatar was having smooth relations with Saudi Arabia and other Arab neighbors despite some misunderstandings and issues. However, on June 5th 2017 all of a sudden, the long term friend Saudi Arabia and other Arab neighbours imposed a blockade on air, sea and land to Qatar. Many thought it would be temporary but it has been continuing for more than 17 months without an end. It was the first time that Qatar faced such isolations from its long term friends. Although there were some verbal threats to Qatar in 2014, it did not lead to any blockade or isolations. It was the beginning of Ramadan (month of fasting) where naturally there is a huge demand for household items. People panicked and some decided to leave the country while many others were indecisive whether to stay or leave Qatar.

Young Emir Sheikh Tamim bin Hamad Al Thani, began to find some alternative ways both from air and sea to import necessary items from other countries. Turkey and Iran extended their support to Qatar while Kuwait and Oman began some negotiation roles between Qatar and other Arab countries. Both parties did not come to any settlements. Qatar kept denying the severe allegations against it while Saudi Arabia and other Arab neighbours were not in a position to compromise their demands and lift their blockades. It was a win win game for both parties. Being a rich country having a very high per capita, Qatar was able to import all necessary items both from Iran and Turkey. There was a shortage of food items for some time but Qatar was able to fill the gap within a short period of time. However, currently the situation is different. Everything is available in the market but the price is a little higher than before but the people are able to afford without any problem. The Qatar government bears a big portion of the cost for imports and reduced the price for the sake of their people in the country. The way Qatar has been dealing with the blockade is very impressive and the people of Qatar are very positive about their leader and their country. It seems that Qatar has won the blockade and is making tremendous progress without any problems.

Some scholars say that Saudi Arabia and other Arab neighbours are the real losers in this game and they will end this blockade from their ends very soon for the sake of their political, economic and social benefits. One Sri Lankan taxi driver who has been living in Qatar for more than five years pointed out that he likes Qatar, the Emir, people, the culture, and most importantly the rule of law and does not want to leave the country for now. Being a Sri Lankan, the author was able to move freely with the Sri Lankan community in Qatar. Based on interviews, discussions and telephone conversations the author has found out that none of the Sri Lankans have negative feelings about Qatar. It is a home to over 140,000 Sri Lankans and it is a paradise/heaven for some 30,000 professionals and skill workers who live there with their families, friends and relatives.

3. ROOT CAUSES FOR CRISIS

There are many root causes for the Saudi blockade over Qatar. 13 allegations against Qatar can be seen as immediate roots: (1) Downgrading diplomatic relations with Iran, (2) Ceasing of all military cooperation with Turkey, (3) Cutting off all of ties with terrorist groups, (4) Stopping all funding to terrorist groups, (5) Handing over all listed terrorists and criminals wanted by the four countries, (6)Shutting down Aljazeera and all affiliated stations, (7)Ceasing meddling with other nations' affairs and naturalizing citizens of the four blockading countries, (8) Financially compensating the four countries caused by Qatar's policies over the years, (9) Seeking harmony with surrounding countries and following the Riyadh agreement, (10) Handing over all information it holds on opposition elements Qatar supported, (11) Shutting down all news outlets funded directly and indirectly by Qatar, (12) All demands must be agreed to within 10 days or they become null and void, finally (13) An agreement with Qatar on these points were included. The above 13 demands seem that Saudi Arabia and four other neighbouring Arab countries intend to minimize Qatar's activities both within and outside the country. Further, all four Arab countries desired to weaken its economy and reduce its power in terms of political & diplomatic activities with other countries, especially with Iran. Finally, Saudi Arabia and three Arab neighbours want to weaken Al Jazeera and impose some restrictions on a few selected newspapers and local media in Qatar.

4. CONSEQUENCES OF THE CRISIS

The Saudi blockade over Qatar has brought multiple consequences (negative & positive) both within and outside the country. In Qatar there were some domestic changes in terms of economy, politics, social & culture and others. At the global level the crisis brought the following concerns. Firstly, the immigrant workers in Qatar, around 90% of Qatar labor force are foreign workers who come from different parts of the world: India (690,000), Nepalese (350,000), Bangladeshis (280,000), Filipinos (260,000), Egyptians (200,000), Sri Lankans (140,000), Pakistani (125,000), and some Africans (Kenya, Nigeria, Morocco) etc. The above foreign workers had serious fears about their job security while their families, relatives and friends also had fears back in their home country. Secondly, travel restrictions and money transferring. Many foreign workers had to find alternative ways to travel to their countries/ homes safely and cheaply. Earlier there were 19 flights per day between Doha and Dubai, now they need to re-route their travel plan either via Oman or some other destinations. This consumes more time and extra money. Although, things are improving very fast, there are some problems due to the travel restrictions in Qatar.

One Sri Lankan laborer pointed out that earlier there were some affordable flights but after the blockade they are unable to find such flights anymore in Qatar. Thirdly, shortage of some household and food items. The Saudi border closure has prevented between 600-800 trucks per day entering Qatar from Saudi Arabia. Due to this blockade Saudi has stopped sending all items from there. For example, Almarai dairy products, which was well known among the people in Qatar but now there are no more products from it. Finally, lack of job market; due to this blockade some foreign companies stopped recruiting new employees while some companies terminated their current employers. The above consequences are negatives for Qatar nationals and foreigners but there are some positive consequences also that arose due to this blockade. Firstly, Qatar began to invest in many foreign countries in various sectors such as real estate, automobiles, agriculture and animal husbandry, etc. Secondly, Qatar promoted domestic products and initiated some plans to be self-sufficient in the future. Thirdly, Qatar promoted education unlike before. Many Qatari students go abroad and study in various disciplines while Qatar invites foreign Scholars and students to come to Qatar and explore their knowledge. It is noted that Qatari students are very smart and more active in their universities. In fact, it was personally observed by the author while he was doing a presentation to the Qatari students at the Qatar National University and Doha Institute.

5. FROM THE SRI LANKANS' POINT OF VIEW

This section will explain the concerns of Sri Lankan workers who live in Qatar in the following areas: political views, economic views, social & cultural views, religious views and humanitarian views. In fact, the author has conducted a two weeks field survey in Qatar. The author has met many Sri Lankans in the country: taxi drivers, shop keepers, house boys, construction officers, laborers, professionals (Professors, Engineers, Technical advisors, HR managers, Accountants, teachers, etc.) Based on interviews and discussions the author has summarized their views as follows

Political views: It has been 20 years since the diplomatic relations between Sri Lanka and Qatar started. There are many official/state visits and agreements signed between these two countries. Up to now there is no political related problems or issues between the two countries. Qatar is unique in terms of politics, which promotes democracy, multi culture and freedoms within the country and across the region. Qatar has given voting rights to all its citizens above the age of 18. Qatar has recruited some female members into their executive branch and treats women well. Qatari women are allowed to study, work, and drive. One Sri Lankan technician pointed out that Qatar is a good country to live in as there are no worries about politics, government or judicial systems. If anyone does wrong then he or she must be punished according to the sharia laws. There are no excuses for any serious offences such as rape, murder and robbery. As a result, there is less corruption, less crimes and a high level of social security. One Sri Lankan engineer pointed out that he doesn't see any political crisis or deadlock in the country. He stated that he likes the Emir and loves the country very much. He showed me the poster of Sheik Tamim which was pasted on his car.

Economic views: Qatar is very important to Sri Lanka for its foreign remittance. Annually Sri Lanka receives around US$ 500 million from Qatar through its foreign workers. The total foreign remittance in 2017 was US$ 7.16 billion, which means Sri Lanka receives around

6.98% from Qatar. According to the Sri Lankan Ambassador in Qatar, Sri Lanka is hoping double it within the next two years. Sri Lanka should have very good relations with Qatar for the sake of its economy (Sri Lankan Embassy in Qatar 2018). Qatar is a very rich country in the Middle East. It has been supporting the Qatari nationals (313.000/2.639.000) and foreign workers in many ways. Although the Qatari population is very small around 11.8% they know how to keep control of the country and promote its development while giving enough support to foreign workers. Following are some keys for the success of Qatar in terms of economy: (1) All lands belong to the government (crown land). When there is a need for the Qatari or other foreign workers or investors they may do joint ventures. Without Qatar nationals no one can own any business or properties. (2) Qatar provides loans for businesses and industries with zero interest. (3) All executive posts are hold by Qatari nationals (4) Encourage Qataris and assist them to be more active and functional. Qatar provides lots of services to the Qataris. Apart from the above facts there are some other factors too: Zero poverty, less unemployment, less corruptions and high level social security are keys for their success. During the two weeks stay in Qatar the author did not see a single beggar begging for money or food in any place. Foods are cheap and available to anyone in the country.

Social & Cultural views: Although Qatar is an Islamic country, it respects other cultures and their identities very much. Qatar allows foreigners to follow their identity and practise their cultures. However they cannot violate the Islamic values by practicing their culture excessively. It was observed that many foreigners who reside there respect them and the local culture. Even some non-muslims dress in a good manner in public. No disturbance, no harm and no indecent behaviors in public. Qatar is always very concerned about the Islamic culture, and in the meantime it gives enough room to foreigners to practise their cultures without harming Islamic values. One Sri Lankan Muslim worker in Qatar pointed out that what he likes the most in Qatar is every food item being halal. Another Sri Lankan worker pointed out that he feels more safety and protection.

Religious views: Most of the Muslims in Sri Lanka and Qatar follow Sunni principles, which helps them to practise Islam in one place without any differences. Islam is the predominant religion and makes up 77.5% of the population of Qatar and all others make up the remaining 22.5%. There are six churches and 36 Hindu kovils/temples in Qatar. Qatar allows other religions to practise their religion. However they cannot disturb the public or perform religious functions in public places like in Sri Lanka. All have their right to follow their religion and practise it but they cannot harm or disturb Islamic values. One Sri Lankan labourer pointed out that some of his Sri Lankan friends in Qatar are more righteous compared to how they were, when they were in Sri Lanka. He added that the Islamic culture and mosque environment was very inviting and it reduces the level of social crimes. It was observed by the author that the religious tolerance is very high in Qatar.

Humanitarian views: Qatar is well known for charities among many countries. Qatar has been helping many people all over the world under the name of humanitarian support. Qatar has opened Qatar charity in many countries including Sri Lanka and identifies needy people and provides necessary assistance to them. In Sri Lanka, Qatar charity funds for building mosques, cultural centers, houses, drinking water, playground and dry food rations etc. Likewise it provides more humanitarian assistance to the people in Palestine, Syria, Iraq and

Yemen etc. However, in the post blockade period Qatar was forced to close down some of its charity organizations in the Middle East. Saudi Arabia and other neighbours accused Qatar of using charity organizations to finance terrorist groups but it was clearly denied by Qatar. One Sri Lankan worker in Qatar pointed out that he had been in Saudi for many years, however compared to Saudis, Qataris are more generous and kind. He mentioned that he received charities from Qatari people many occasions.

6. CONCLUSION

The overall conclusion of this article is that although the Saudi blockade has brought some immediate impact in the country, by time Qatar is trying its level best to overcome those challenges. Being a powerful country in the region, Saudi has to have a soft corner on Qatar instead of punishing or isolating its long term friend and neighbour. Further, Qatar needs to have more dialogues with Saudi and other Arab neighbours in order to sort out all its allegations in a peaceful manner. Once the Qatar Emir had stated that his country can overcome this blockade sooner or later but he would like to work with Saudi and others for regional peace and stability. Peace in Qatar is not only important to Qataris but also important for many foreign workers and their families and relatives all over the world. Any negative consequences taking place in Qatar surely affects Sri Lanka's political, social, economic, cultural and religious values. The Saudi blockade is not only challenging to Qatar but also it is keeping check on many countries in the region and outside. Sri Lankans are very positive about Qatar and its progress however there is a little worry about this continuous blockade and pray for the normalcy and peace very soon.

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Combating Institutional Culture of Impunity; An Imperative for Sri Lanka!

With Special Focus on Communal Violence and Hate Attacks from 1983-2019

By Lukman Harees (LLB (OUSL), MBA (Sri J.)

'All government is cruel; for nothing is so cruel as impunity'
George Bernard Shaw

Introduction and Background

Democratic societies founded on the rule of law which ensure the availability of accountability mechanisms are more likely to provide effective protection of human rights and appropriate redress to victims of violations when other safeguards have failed. Establishing effective mechanisms to ensure that perpetrators of human rights violations will not go unpunished is therefore an important step in restoring the rule of law. International law does make all individuals responsible for certain gross violations. However, lack of a centralized system of accountability has so far prevented this being realized in practice. Fortunately, the twentieth century saw the role of law and justice in governance extend beyond the realm of individual nations. Its significance, both regionally and globally, is illustrated by the developments made in international law, especially with regard to the recognition of international human rights, universal jurisdiction and additional international crimes.

For the first time in history, international courts were established before the eyes of the world in both Nuremberg and Tokyo to try individual persons accused of crimes to commit conspiracy, crimes against the peace, war crimes and, an important new category, ''crimes against humanity''. The horrifying evidence revealed at these trials simply beggared description and shocked the conscience of humankind. To make it even worse, the defendants claimed that they could not be held responsible. The notion of ''crimes against humanity'' has now been firmly rooted in international law to cover atrocities that until 1945 had no special name. Today, that notion has been extended to include a number of sexual crimes that traditionally involved no criminal responsibility. Bringing Milosevic to The Hague has been celebrated as the most significant event in the international efforts to end the culture of impunity, underway since the establishment of the Yugoslavian and Rwandan war crimes tribunals in 1993 and1994, the adoption of the Statute of the International Criminal Court in 1998 and the commencement of criminal procedures in several countries against former domestic or foreign political leaders.

Impunity simply means "escaping punishment". Impunity is often the primary obstacle to upholding the rule of law, whereby human rights become a mockery. The culture of impunity'' is an appropriate description for most of the entire experience of human history. In the vast and complex history of the world, the overwhelming majority of those who ever lived and died suffered from some form of human rights abuse. Where a culture of impunity is allowed

to take root, violence is rewarded and the institutions and rule of law are undermined at the very moment they are at their most vulnerable. Efforts to end the impunity enjoyed by heads of state and other high officials have been under way in many national societies and through the use of foreign courts such as divesting Augusto Pinochet's immunity relating to his alleged complicity in the torture of thousands of political prisoners in Chile. A climate of impunity arises when it becomes the norm in a country that cases are not efficiently dealt with and perpetrators are not held to account. Past impunity sustains present-day impunity.

The amended Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, submitted to the United Nations Commission on Human Rights on 8 February 2005, defines impunity as:

> "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."

The First Principle of that same document states that: "Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.".The primary goal of the Rome Statute of the International Criminal Court, adopted on 17 July 1998 and entered into force on 1 July 2002, is "to put an end to impunity for the perpetrators" [...] "of the most serious crimes of concern to the international community as a whole".. The Rome Statute system thus stands as the world's best option for ensuring that such crimes do not go unpunished. Transitional justice is recognized as essential for countries recovering from conflict or repressive rule. Rooted in the rights to justice, truth, reparations and guarantees of non-recurrence, transitional justice mechanisms constitute a comprehensive approach to combating impunity, ensuring accountability for past human rights violations, redress for victims of violations of human rights and advancing broader institutional reform necessary to address the root causes of strife and conflict.

However, the significant advances with regard to the international recognition of humanitarian law and the ending of impunity for war criminals stand in real danger of being reversed. If the leading democracies turn their back on an international rule of law and if the world's most powerful democracy does not respect its international treaty obligations, there is little hope for support in that direction from the global community.

Hate Speech and Impunity

Hate crime is the most severe expression of discrimination and a core fundamental rights abuse. It demeans victims and calls into question an open society's commitment to pluralism and human dignity. Hate crime victims are often unable to seek redress against perpetrators for

a variety of reasons, meaning many crimes remain unreported, unprosecuted and, ultimately, invisible. Sustained and concerted action, notably by the police and the courts, is necessary to protect the rule of law and human rights in the country. Democracy is seriously threatened by the upsurge of hate crime and a weak state response. Domestic and international anti-racism law has been used inadequately, or not at all, to this end. This is particularly true with regard to hate-crime related activities of political organisations.

Many western countries already do criminalize hate speech in a more encompassing way, although enforcement is often weak and spotty. The United States, however, stands almost alone in its' veneration of free speech at almost any cost. The U.S. Supreme Court insists that the First Amendment protects hate speech unless it constitutes a " true threat" or will incite imminent lawless action. Hate speech, often dismissed as bigoted ranting or merely painful words, could also serve as an important warning sign for a much more severe consequence: genocide. Increasingly virulent hate speech is often a precursor to mass violence. The world saw how hate speech led to the Holocaust and how high levels of inflammatory speech preceded Rwandan genocide and the Bosnian war of the mid-1990s. Since then, the ICJ Tribunal for Rwanda has recognized the relationship between hate speech and genocide by trying the world's first "incitement to genocide" cases, convicting radio broadcasters, a newspaper editor, and even a pop star for the crime. The world also saw how the virulent anti-Muslim hate speeches and sermons of Wirathu (branded as the 'Face of Buddhist terror' by the Time Magazine) led to the Rohingyan genocide. In 1995 the ICC convicted Jean-Paul Akayesu, a former Rwandan bourgmestre—or mayor—for incitement to genocide after he gave a speech that was immediately followed by massacres.

Hate speech should not be tolerated in the name of free speech. The idea that vulnerable persons and groups should have to tolerate hate speech against them in the name of freedom of expression—often over decades or a lifetime—is offensive. The right to free speech is a fundamental value, but it should not be allowed to outweigh the basic human rights of other people, especially their right to life. Hate speech is evidence of social disease; no more evidence should be required to accept that action needs to be taken to ensure the safety of our fellow persons. The dehumanising language consistently used by many folks of different shades around what has become a deeply polarising issue. A common objection to prosecuting hate speech is that it might endanger speech that *counters* hate speech. Another objection is that prosecuting hate speech removes accountability from those who actually commit the violence, turning violent perpetrators into victims of hate speech. But no-one is suggesting that hate speech causes people to act against their will or takes away their personal responsibility.

Typically, hate speech creates an environment in which a person who is already sympathetic to the views of the speaker feels validated and encouraged to take action, with a reduced fear of punitive consequences and even anticipation of praise and support from the in-group that shares their views. Nothing prevents a hate-inspired murderer from being prosecuted in the same way as any other violent murderer—in fact, many countries mete out harsher penalties for hate-motivated crimes. But those who inspired the murderer should also be prosecuted separately under hate speech laws.

Violent acts of hate are generally preceded by hate speech that is expressed publicly and

repeatedly for years, including by public figures, journalists, leading activists, and even the state. Some examples include Anders Behring Breivik's terrorist acts in Norway (June 2011), the assassination of Kansas abortion provider Dr. George Tiller (May 2009) and other abortion providers in the 1990's, the Rwandan genocide against the Tutsis (1994), the ethnic cleansing of Bosnian Muslims in Bosnia-Herzegovina (1992-1995), and the Nazi Holocaust. Courts of law should be able to look at broader patterns of hate speech in the culture to determine whether a hateful atmosphere inspired or contributed to violence, or would likely lead to future violence. When hate speech is relatively widespread and acceptable (such as against Muslims or abortion providers), it's not difficult to see the main precursor to violence—an escalation of negative behaviour or rhetoric against the person or group.

It is imperative to pinpoint the main purveyors of hate speech that lead to violent crimes. In the Norway shootings, the killer Breivik relied heavily on writings from Peder Jensen ("Fjordman"), Pamela Geller, Robert Spencer, Mark Steyn, Jihad Watch, Islam Watch, Front Page Magazine, and others. Such individuals and groups should also be charged with incitement to hatred and violence. Similar culpability for the assassination of Dr. George Tiller should rest on the shoulders of the extremist anti-abortion group Operation Rescue and Fox News commentator Bill O'Reilly. In general, anyone spewing hate to an audience, especially on a repeated basis, could be held criminally responsible. This would include politicians, journalists, organizational leaders and speakers, celebrities, bloggers and hosts of online forums, and radical groups that target certain categories of people. We also need to hold people in accountable positions to a higher standard, such as political leaders, government employees and contractors, ordained religious leaders, CEOs, and the like.

Criteria by which to assign culpability could include a speaker's past record of prior hate speech against a particular person or group, how widely and frequently the views were disseminated, and the specific content and framing of their views. In cases where violence has already occurred, judges could determine how likely it was that the violent perpetrators had been exposed to someone's specific hate speech, and hand down harsher sentences accordingly.

The State's indifference regarding hate speech by some political parties is obscene. It is extremely important for public figures; the people in power, to clearly, unambiguously and publicly talk about the topic of hate crime and, in those utterances, to unequivocally express disapproval and criticism. This message has to reach the masses. It is simply not allowed to beat anyone because of their skin colour, sexual orientation or disability. It is prohibited to insult anyone because of his/her religion which is different." (Victim support service, Poland).

The spectre of collateral damage and the protection of the powerful are a big part, but only part, of the story behind cultures of impunity. Another reason for failures to prosecute lies in public deference to authority and what might be thought of as motivated blindness. Many people simply do not want to see officials they respect and depend on as being responsible for crimes. They are especially disinclined to accept testimony about such crimes from members of minority groups whom they distrust. If doubt exists or can be plausibly manufactured, those in authority get the benefit of it.

Changing settled expectations about exemptions from legal accountability is no simple

matter. In all these areas, there is a tension between justice for individuals and reform of the institutions. There is a long way to go in ending impunity and assuring that the law applies to everyone. With such formidable barriers to prosecution, it is a formidable challenge to turn a culture of impunity into a culture of accountability. From the public's perspective, this should however not be an either/or choice. The public has a right to both individual and institutional accountability. But how to get that accountability as well as sustained institutional change is extremely difficult.

International Focus on Impunity in Sri Lanka

Sri Lanka offers a potent lesson to other countries in Asia in its cynical adherence in theory to international law norms while blatantly flouting their substance through the treatment of its citizens. Lack of government action to hold perpetrators accountable in the past has led to a culture of impunity in Sri Lanka, These patterns of impunity have persisted for decades on the part of successive governments and have impacted on vulnerable segments of the majority as well as the minority communities with singular force. Ratification of international treaties has failed to ensure basic protections for the minorities or for political dissenters, journalists and activists. In Sri Lanka, multiple governments have contributed to the crisis of impunity.

A 150-page report by the International Commission of Jurists(ICJ), '*Authority without Accountability: The Crisis of Impunity in Sri Lanka* (2012), described how decades of Emergency rule and legal immunities granted to the President and other government officials weakened the checks and balances in the Sri Lankan government, while political interference—particularly in the conduct of the office of the Attorney-General—in practice led to a failure of justice in a number of key cases. This situation constitutes a serious breach of Sri Lanka's international obligation to protect and promote human rights. The failure by public authorities, whether due to legal obstacles or lack of political will, to fulfil that international obligation and bring perpetrators of human rights violations to account, is the definition of impunity.

It further states, 'impunity has over the years become institutionalized and systematized: mechanisms to hold state actors to account for their actions have been eroded; checks on the arbitrary use of power have been diluted, if not dissolved; institutions to protect the independence of the judiciary have been eviscerated; the Attorney-General has become politicized; and political forces have continually sought to influence and interfere with the judiciary. Blatant disregard for the rule of law and the independence of the judiciary has crippled the justice system, leaving victims with little or no prospect of remedies or reparations for serious human rights violations'.

In 2011, the United Nations Report of the Secretary General's Panel of Experts on Accountability concluded that the (then) current approach to accountability in Sri Lanka does not correspond to basic international standards that emphasize truth, justice and reparations for victims. The Report went on to note that the criminal justice system is ineffective in combating a culture of impunity, citing a lack of political-will in the pursuit of accountability.

UN Human Rights Committee, in its' 'General Comment' stated, 'The duty to guarantee human rights is grounded in both international law and customary international law. In

order to give effect to these guarantees, Sri Lanka must implement its international rights obligations in domestic law; refrain from violating human rights in both acts and omissions; and adopt measures to guarantee the enjoyment of human rights and to protect persons from the impairment of the enjoyment of human rights by third parties, including private actors. Sri Lanka must also act to prevent human rights violations and when such violations occur, investigate and hold accountable those persons responsible and provide for access to a remedy and reparation arising from the violations'.

According to the Report tabled at the Human Rights Council in the latest examination of the government's stalled reconciliation promises, Sri Lanka has made "virtually no progress" on probing allegations of war crimes and crimes against humanity. The risk of new violations increases when impunity for serious crimes continues unchecked. The lack of accountability for past actions likely contributed to the return of violence against minorities. Rights groups draw a direct line between post-war impunity to continuing abuses and political crises that hamper the country. (In respect of anti-Muslim violence) , Alan Keenan, a Sri Lanka analyst with the International Crisis Group, calls Buddhist-Muslim tensions "a second fault line" that threatens to explode. (This) report before the Human Rights Council calls last year's violence a "very dangerous pattern" moulded by the failure to prosecute past abuses. The lack of accountability for past actions likely contributed to the return of violence against minorities .

The failure to tackle institutionalized impunity since the end of the armed conflict in 2009 has once more been highlighted, whilst this session has been underway, by a new wave of targeted violent attacks against the Muslim population. Regrettably, the law enforcement authorities failed to uphold and enforce law and order in a timely manner and may even, in some cases, allegedly have been complicit.. Little progress on accountability for crimes under international law and other human rights violations and abuses and this failure to address key emblematic cases have hardened a climate of impunity, allowing ethnic and religious tensions to deepen social divides – such as during the recent attacks on Muslim homes, businesses and places of worship. It is worrying to see the recurrence of hostility and violence against ethnic and religious minorities in Sri Lanka. While the government has committed itself to a process of reconciliation, the wounds of the past will only heal if there is justice, truth and reparation.

Contextualizing Hate Attacks/Communal Violence:

Background Study

A Small Island of many people', wrote S.J. Thambiah, in his lucidly written book, "Sri Lanka–Ethnic Fratricide and the Dismantling of Democracy", ' whose political machinery is running down in an environment of increasing fragmentation and factionalism. The hopes of yesterday…have become fast evaporating fantasies'. In this context, Peter Kloos in 'Democracy, Civil War and the Demise of the Trias Politica in Sri Lanka', too queries 'So how does one explain the transformation from a promising democracy in the 1940s to the state of the present?' and continues, "the introduction of the majoritarian model of democracy rule in Sri Lanka chosen already during the late-colonial period paved the way for political forms that were undemocratic in the moral sense of the term. Far-reaching decisions regarding the political process are based on political expediency rather than on fundamental discussions of

democratic rule".

History is integral to understanding the ethno-politics of any nation The history of nationalism in Sri Lanka can roughly be traced back to the second half of the 19th century. Many have however argued that the rise and institutionalisation of Sinhala-Buddhist nationalism in post-independent Sri Lanka bear much responsibility for today's ethnic conflicts between the majority Sinhalese state and the minorities. Ironically, the competition among the Sinhala ruling classes, for acquiring state resources and political capital, has turned nationalism into the ruling ideology and the state ideology of Sri Lanka. In the overall context, divisive nationalist posturing from the country's main ethnic communities has presented the singular most formidable challenge to reconciliation, social cohesion, and the vision of creating a united Sri Lanka. The two most assertive nationalisms that have emerged in post-independence Sri Lanka, Sinhala and Tamil nationalisms gave rise to a bi-polar debate in the national discourse. In fact, Tamil leaders as well without finding common ground to create national integration too demanded majoritarian status, in response to its marginalization rather than ethically re-configuring the discourse to re-imagine the nation as a more inclusive site based on principles of justice and equality for all communities as another analyst Qadri Ismail(2005) pointed out. Thus, it is said that if the idea of national reconciliation is to be taken seriously, one needs to confront the almost total absence of a space in which 'Sri Lankan-ness' (a common identity) can be evoked and experienced.

Analysts reasoning out these developments, argue on the contrary, that Buddhism had been neglected during colonial rule and that little had been done by post-independence governments to rectify the damage. There was a feeling in the majority community that the minority community had a disproportionate hold on public service positions. Furthermore, during the colonial period, there was growing discontent within the Sinhala-Buddhist community on the secondary position of Buddhism in the country. It was therefore contended that the growing disenchantment in the Sinhala-Buddhist community on many fronts, their burgeoning economic woes in particular, at least in part has made it easier for nationalistic political posturing to re-capture its lost appeal. In these circumstances Sinhala-Buddhist ideology began to serve as a new type of benefit exchanged between the majority Sinhalese voters and their political patrons, without incurring very little or no cost for the patrons. Overall, Sinhala-Buddhist nationalism may thus be seen as a modern political response to newly emerging local and global social challenges, which also benefits from the institution of majoritarian democracy.

The Report on 'Dynamics of Sinhala Buddhist Ethno-Nationalism in Post-War Sri Lanka' published by the Centre for Policy Alternatives (CPA) in 2016 argued that while the vast majority of Sinhala Buddhists embrace rationalistic values and are amenable to sharing power with the minorities, nationalistic forces within the community continue to subsume moderate voices. As a direct result of their dominance and the centre's apprehensions of triggering an extremist backlash, arriving at a sustainable political solution to the country's ethnic question will remain a contentious issue.

It is also pertinent to note that the involvement of Buddhist monks in politics following independence in 1948, in effect, transformed Buddhism into a highly politicised religion. Buddhist monks became frequent visitors in the corridors of power. Since Independence,

Buddhist interest lobbies have been active in politics and politicians seek the support of organised Buddhist groups as well as the clergy at elections and their presence at ceremonies. Similarly, Buddhist institutions too depend on the state, thus making the relationship a deeply symbiotic one'. This explains how majoritarian attitudes and racism became political tools. Analysing these developments, a CPA Report (2016) states, 'Political Buddhism has been linked to ethnic violence in both Sri Lanka's pre and post-independence history' .The end of the war in May 2009 saw the resurgence of Sinhala-Buddhist ethno-nationalism as a prominent force, the most patent instance of its link to violence being manifested in the June 2014 anti-Muslim riots in the country's south-western coastal belt'. Social Analyst Dr. Jayadeva Uyangoda has argued that *"Sinhalese Buddhism has made no significant contribution to the evolution of a non-violent social ideology. On the contrary, the Sinhalese Buddhist historiographical tradition and ideology inherent in it supports ethnic political violence"*. . The emergence of anti-Muslim hate groups in Post –war Sri Lanka bore Sinhala Buddhist extremist leanings, and were spearheaded by some rogue sections of the Maha Sangha.

As a nation 71 years after gaining Independence, Sri Lanka has thus failed in no uncertain terms to build an inclusive, progressive nation in qualitative terms – to build a sense of common identity and a sense of unity. Majoritarian attitudes in statecraft, inability to accept the multi-cultural, multi-lingual reality of our nation and lack of political commitment in creating 'Sri-Lankan-ness' in the people have thus paved the way to the continuance of an environment of increasing fragmentation and factionalism since Independence. It was widely seen that political parties largely exploited ethno-religious affiliations which led to the polarization of ethnic identities. They seldom focussed on the importance of building upon the spurs for national unity which arose at Independence and many other subsequent instances in our post-Independence history. Many broken promises given by political parties of all hues to resolve the national question, and their hypocrisy and corrupt outlook have been part of the process of degeneration of the political culture and today the political leadership of all communities have lost their credibility in the eyes of people. Communalist political parties too have also been a bane in contemporary Sri Lanka, propagating divisions in terms of race and religion.

Communal Violence in Sri Lanka-1983 and Beyond!

Ethnic or religious clashes or conflagrations have not been anything novel or new to the Sri Lanka. In fact, modern Ceylon's first ethno-religious riots targeted not Tamils but Muslims in 1915. Former Prime Minister of Singapore, Lee Kuan Yew said in his book, From Third World to First: '*In 1965, we had 20 years of examples of FAILED states. So, we knew what to avoid – racial conflict, linguistic strife, religious conflict. We saw Ceylon. SWRD Bandaranaike's promise to make Sinhalese the national language and Buddhism the national religion was the start of the UNRAVELLING of Ceylon. I was surprised when, three years later, he was assassinated by a Buddhist monk. I thought it ironic that a Buddhist monk, dissatisfied with the country's slow rate of progress in making Buddhism the national religion, should have done it. Over the years, I watched a promising country go to waste. Sri-Lanka has failed because it had weak or wrong leaders'*.

1983 Anti Tamil Pogrom and Institutional Impunity

The Black July anti- Tamil riots of 1983 were not the first of its kind in independent Sri Lanka. Anti-Tamil riots had previously taken place in 1958, 1977 and 1981. However, the magnitude of violence during these riots was far lesser than the riots of 1983. The 1983 riots themselves had a highly corrosive and destructive impact on the polity in general and on Sinhala-Tamil relations in particular. The government's inability to provide its citizens with basic protection distanced the Tamil population from the country's leaders. Still worse, although not acknowledged, was the widely believed fact that the Jayawardene government had a role to play in the 1983 riots.

The systematic and well-planned nature of the attacks against the Tamils - to which the government itself later alluded - ruled out the spontaneous outburst of anti-Tamil hatred within the Sinhalese masses. Moreover, the possession of electoral lists by the mobs - which enabled them to identify Tamil homes and property - not only implied prior organization, for such electoral lists could not have been obtained overnight, but it also pointed to the cooperation of at least some elements of the government, who had been willing to provide the mobs with such information. Similarly, many government-owned vehicles were used to transport the mobs in and around Colombo. The failure of government authorities to offer an explanation to this phenomenon (and the very low probability that civilian rioters would have had the audacity to carry out such a large-scale take over of government vehicles without assistance from internal sources) further raised questions about the government's role in the riots (Senaratne, 1997:45).

Several eyewitness reports stated that the armed forces and police looked on while arson and looting took place and in some instances even took part in the riots. This served to deteriorate relations between the two communities even further. (Meyer 2001:121-2). In some instances, security forces even took part in the riots. An element of pre-meditation was also noted, as in the case of the prison riots that broke out on July 25 which targeted the Tami inmates, and it was suspected that prison guards may have provided the Sinhalese inmates with tools to break in to the Tamil ward. Amnesty International would later note that prison authorities had assisted the rioters at the Welikade prison (Amnesty International 1984:301).

Immediately after the riots, the government overlooked the crimes that had reportedly been committed by its own forces and the police. However, increasing pressure from international actors forced the government to acknowledge the involvement of some of its forces in the riots. The government also promised to hold enquiries on these allegations but very little concrete action was taken thereafter. The 1985 annual report of Amnesty International states that the Sri Lankan government declared that an inquiry had been held on the July 1983 massacres but the lack of sufficient proof resulted in no civil servant being condemned. The government however stressed that 149 members of its armed forces had been deposed on the grounds of disciplinary action (Amnesty International 1985:296). Arrests, torture and extrajudicial killings carried out by government forces and the police continued throughout 1984, so much so that Amnesty International raised concerns over increasing reports of the deliberate massacres of non-armed Tamil civilians by armed forces, in retaliation to violence perpetrated against these forces by groups of Tamil extremists. Unfortunately, Sri Lanka officials have been unwilling to hold repressors to account.

In its 1985 annual report, Amnesty International warned that extrajudicial killings could turn into a systematic practice of the security forces as reprisals to the killing of their own men. The report stressed that not a single member of the forces was brought before justice for having taken part in a presumed extrajudicial killing. In the rare instances where an inquiry was held, the report continued, the conclusions of the enquiry had not been made public (Amnesty International 1985:295-6). The continuation of violence, together with segregation of the two communities led the Tamils to feel that co-existence between the two communities had been rendered impossible (Balasingham 2003:69). Whatever the explanation, the immediate and long-term consequences of the 1983 riots have had devastating effects on the country, least of which was the civil war which would continue (with periodic cease-fires) for over 30 years and cost the innumerable number of lives. In July 2004, President Kumaratunga issued a national apology for the July '83 riots as an interim reconciliation measure and appointed a special commission to pay compensation to victims who lodged claims with the Commission.

The government thus shielded the perpetrators from any form of accountability. As Sri Lanka stands in its own shadow, it should reflect on the harm that impunity has caused to its' international image and the gradual erosion of confidence of its' people in the process of rule of law .Failing to hold those accountable for their actions, and inactions that lead to harm and loss, and compensate the victims adequately, fails humanity as a whole. Thus ,the irony of this South Asian Island nation falling from grace, after being a promising democracy in the 1940s can best be explained by political expediency and mismanagement of ethnic tensions, and the fanning of ethnic prejudices, which have been the foremost factor in retarding the country's development. The inability to settle communal differences and have firm control of extremist elements as well as failure to combat impunity , have been a severe cost to development.

Post War Period and the Impunity Culture

Sri Lanka's civil war, which spanned more than a quarter of a century, ended in 2009. With more than 100,000 war casualties and one million refugees, it represented one of Asia's most violent, destructive and intractable conflicts. A decade since active military hostilities ended, there has been no progress towards constitutional and political reforms addressing the problems of pluralism and democracy that lay at the heart of the conflict, nor a legitimate process of truth and accountability for war-time abuses. Instead, Sri Lanka is steadily moving in the direction of becoming an authoritarian state, with the rule of law and governance under attack, the ascendance of majoritarian ethno-religious intolerance, and an overall decline in democratic and human rights standards as well as a pervasive culture of impunity both with regard to past abuses as well as post-war governance.

Although the war ended in 2009, lessons were not learnt. Post-war triumphalism, racist politics, and chronic corruption have been continuing regardless, with the country losing yet another historic opportunity to ensure ethnic harmony and mobilise its' entire resources for economic and social development. Demonising the Muslims then became the next strategy of the political schemers. The end result was both the numerically smaller Tamil and Muslim communities feeling disempowered and disillusioned while even the majority Sinhalese feeling aggrieved in many areas.

Despite the nation's resolve not to allow any repeats, the mentality, the politics and rhetoric which enabled and created July'83 sadly did not entirely left the public discourse. Worryingly, the same rhetoric later emanated from the Sinhala Extremist groups particularly in the Post-war period , in relation to the Muslim community, who became their next target, in the Post war period. Rising violence against religious minorities cannot be treated as an isolated issue. Tapping into longstanding insecurities that the majority community of the country is under threat, these groups began to demonise Islam and Muslims, presenting them as a religious, cultural and economic threat to the country. Such militant groups operated openly without fear of sanction, with minimal interference from the law enforcement authorities. These groups also used social media spaces to play on these fears, fuel tensions, and encourage, incite and plan violence to spread fake news, canards and misconceptions about Muslims, borrowing inspiration from global Islamophobia platforms. Mahinda Rajapakse government then looked on regardless. However, the racism and impunity culture continued in various forms even under the Maithri S.- Ranil W. coalition government too.

Anti-Muslim Violence in Post-war Sri Lanka: The Puzzle of Continuing Impunity

In 2011, there was a phenomenon called the "grease devils" that struck fear in communities in different parts of the country, and particularly those living in areas in which the Muslims predominate. On occasion when people from the affected communities gave chase, they found the suspected grease devils running into camps of the security forces in their bid to getaway. As suddenly as it started the grease devil phenomenon ended. There were no arrests by police that led to convictions.

Religious extremism and hate campaigns have targeted minorities and resulted in many incidents of violence in the post -war context, primarily due to the activities of and 'hate speech' disseminated by extremist organisations such as the Bodu Bala Sena (BBS), Sihala Ravaya and Ravana Balaya. No meaningful steps to curb the activities of these organisations and hold them to account were initiated by the Government of Sri Lanka (GoSL), which fed the public perception that it was complicit in their activities. Continuing and egregious lapse in the rule of law and the maintenance of the security of all the peoples who inhabit Sri Lanka and a well-orchestrated hate campaign carried out by these groups culminated in the anti-Muslim violence in Aluthgama, Beruwela and Dharga Town. It was extremely disturbing to note that such violence could take place despite the well-equipped and extensive security apparatus and network at the disposal of the GoSL. The inability and/or unwillingness of the GoSL to take steps in Aluthgama , illustrated the selective application of the law and further fuelled the perception of its complicity in the violence. This was particularly problematic in a context where laws were used most effectively to prosecute and/or detain civil society activists and media personnel and to silence dissent. There was a widespread perception that the purveyors of this spate of religious intolerance and violence enjoyed patronage and support from within the government .

The whole episode of orchestrated hate attacks on Muslims and their properties in Aluthgama reportedly began when a Buddhist priest Ven. Ayagama Samitha Thero, Chief Prelate of the Kurunduwatte Sri Wijerama Viharaya, Dharga Town alleged that he and his driver Vishwa were

attacked in Aluthgama on 12th June 2014 by three Muslim youths, without any provocation. Based upon this story, the fiery monk belonging to the BBS Ven Gnanassara visited the area and made a provocative speech which led to the spate of anti-Muslim violence. However, 4 ½ years later, the judiciary held that there was no case and acquitted all the Muslim youth jailed. Goons who were instigated by the BBS reportedly came from outside areas and operated under the cover of a curfew and waged hate attacks. There were charges of complicity on the part of some sections of the law enforcement authorities as well.

The failure of the security forces to apprehend those who have broken the law was at the root of the puzzle. It has led to calls for action by the government to uphold the Rule of Law. These calls have been made by civil society organizations, political parties, foreign governments and also by the Bar Association. The statement issued by the Bar Association set out the provisions of law under which the police can arrest those who perpetrate violence and hate crimes against the Muslim community and under which the Attorney General's Department can file indictments in the courts of law. The puzzle was that the police have been inactive in taking the first step which was to obstruct the violent actions of those who have been terrorizing the Muslim community and arrest those who have been videoed and documented as having been in the attacking parties.

The evidence of attacks and the identity of the attackers were readily available. A national television station, for instance, showed an incident where the temporary shelters of Muslims in a rural area were being physically pulled down and demolished by a group of people with a prominent Buddhist monk in the picture. Those who have suffered violence and destruction at the hands of violent groups have also provided the police with footage of the attacks. The irony is that the governmental leaders who are in charge of the security forces have been affirming their opinion that the police ought to act, even in Parliament, but there continues to be governmental and police inaction that is difficult to explain.. Thus, the perpetrators of the Aluthgama anti-Muslim tragedy in 2014, were not punished or dealt with under the law. There was also no official condemnation of the violence, no inquiry and/or an apology for the lapses in security and law enforcement from the highest levels of government, augmented by no demonstrable assurance that law and order will be impartially enforced by the Sri Lankan state. A Commission of Inquiry to inquire into this spate of hate attacks was also basically one of the promises which the present government gave during the election campaign, which to-date remains unfulfilled.

Although the anti-Muslim violence has got the centre stage at this time, there was also anti-Christian violence that has been directed for a longer period against evangelical Christian groups that engage in their missionary activities. The National Christian Evangelical Alliance has reported that since the beginning of this year, over 20 incidents of violence and intimidation took place against Christian places of worship across the country.

In 2018..

During February- March 2018 period, Muslims of Sri Lanka specially in the Eastern as well in the Central Province and surrounding areas were subjected to a cycle of mortal fear psychosis as a result of a well-orchestrated hate campaign and hate attacks carried out by thugs and goons

and organised by hate groups and movements with Sinhala Buddhist labels and extremist agendas reportedly with political connections. The anti-Muslim violence spread like wild fire in the context of apathy of the officialdom, to many areas in the Central Province. Despite many arrests at the initial stages, the hate groups behind the well-orchestrated hate campaign in the Post era, were allowed to operate and be active specially through social media spewing anti Muslim hate despite many representations made and video evidence submitted. Although some arrests were then made, the Muslim community virtually lost confidence in the law enforcement machinery and the process of justice based on their earlier experiences. Main culprits were later released in early 2019. This failure of successive governments to bring to justice those orchestrating the attacks on Muslims has been fuelling more and deadlier cycles of violence against them.

Sri Lankan analysts have been warning that the violence being systematically unleashed on Muslims could provoke a strong response from Muslim youth. It could have "the effect of radicalizing Muslim youth and marginalizing Muslim moderates," writes political commentator Dayan Jayatilleka in *The Island newspaper.* Recalling how Sinhala racists repeatedly attacked the island's Tamils "to put them in their place" and the role this played in spawning Tamil militancy and a three-decade long civil war, Jayatilleka points out that this "story is being repeated [now] with the Muslims. We have come one step closer to the emergence of Islamist terrorism in Sri Lanka". Indeed, with every incident of violence being unleashed on Muslims and the state avoiding reining in the Sinhalese extremist outfits, Sri Lanka is giving Muslims reason to pick up arms, if only to defend themselves. The Muslim community in Sri Lanka has kept itself busy with business and trade so far. That is in danger of changing. And for that, Sinhalese extremists and their patrons among politicians and parliamentarians are to blame.

The State is obligated to ensure the safety of its citizens - by all measures. However, it failed to provide the security in March 2018 in spite of warnings. Police and local officials were bystanders at critical phases – the state responses came after preventable tragedies had happened. In recent years, the state has not apprehended the instigators who had a trail of law breaking leading to their sense of impunity. The minimum that the State can do is to compensate those affected fairly and rapidly. It is to be granted that the State has been saying all the right things about recovery. The leadership has attempted to move fast to expedite its usually cumbersome processes. But implementation was at snail's pace. In a study published in the Ground-views (12/06/2018), individuals whose homes and businesses were damaged by Sinhala-Buddhist extremist mobs spoke with increasing frustration of the inadequate State response to the violence. In respect of the Ampara tragedy, it was reported that not only that those responsible were not brought to book, but also the victims and their businesses burnt and the mosque damaged on a false pretext, were not compensated for as well.

Overall, the impunity enjoyed by the perpetrators of these crimes, amongst others, serves as a testament to the lack of willingness by the Sri Lankan authorities to hold those responsible for serious human rights violations accountable for their actions.

Post-Easter Sunday Tragedy

Akin to America's 9/11, Sri Lanka's 21/04 – the black Easter Sunday where a spate of despicable terror attacks targeted some churches and high-end hotels by an 'extremist' group – has become the latest watershed which would hereafter divide this island nation's post-independence period. It was a game changer – the day that has virtually changed every aspect of life in this Paradise Isle, particularly for the Muslims. It has been a national tragedy, where harassment, discrimination and a well-orchestrated hate campaign has been taking shape in the public domain, demonising and alienating Muslims by exploiting the strong emotions behind the flowing tears shed by a grieving nation, forcing the community into a 'deer in the headlights' and besieged mentality. Another disaster indeed in the making – perhaps, much worse!

It is an irony that the Muslims of Sri Lanka, who gave crucial support to gain Independence in 1948 as well as to end the ruthless Tiger terror in 2009, are now being tar-brushed as 'extremist' and asked to assume collective guilt for this Easter tragedy. It is also an irony that the mainstream opinion has been strongly gravitating towards alienating the Muslim community from the public space on this count when there is clear evidence regarding the failure and culpability of the State and its Intelligence arm. According to the evidence, the State and its Intelligence arm ignored many repeated warnings about the impending Easter attacks, both from foreign governments and from within the Muslim community itself.

Thus, in the backdrop of a near 'free-for-all' post-tragedy environment, there has been a rise in unbridled hate speech both in the mainstream as well as social media, the sharing of fake stories, canards often borrowed from the global Islamophobia platforms, and the usual quoting of *Qur'anic* verses out of context. An unofficial boycott of Muslim businesses was also mooted through social media. Muslim women in their Islamic attire are the most affected, being insulted and denied entry to hospitals, government offices, and schools. 'Media terrorism' made the entire Muslim community suspects in the eyes of the wider society, making them feel unsafe and insecure all over the country.

Mainstreaming Anti-Muslim Hate

There were increased spate of communal violence against the Muslim community after two weeks of relative lack of violence (thanks to the sagacious leadership of the Cardinal), since the Easter Sunday attacks. However, In mid-May, there were well- orchestrated hate attacks by goons with political links, in Negombo, Chilaw, Kurunagala, Kuliyapitiya, Hettipola, Dummalasuriya, Rasnayakapura, Kobeigane, Bingiriya among others, which led to Muslim homes, businesses and places of worship being targeted by violent individuals and groups, with incidents reported also during curfew hours. This violence was encouraged by the viral circulation of video clips and provocative posts inciting violence against the Muslim community. Reports indicating inaction and/or delays in response to this violence by the security authorities, yet again reflected an unfortunate trend which were repeatedly witnessed in the past. Inaction and/or unwillingness to prosecute any person for inciting racial and religious hatred have exacerbated a culture of impunity.

On the contrary, Muslims were particularly targeted with arbitrary arrests. Of 2,289 people arrested for the Easter Sunday attacks, 1,820 were Muslims, and most were on trivial charges.

For example, an elderly man was arrested for having a *Qur'anic* verse, and a pregnant lady was arrested for wanting to vomit. Furthermore, a 47-year-old grandmother was arrested and held under the ICCPR Act without bail, on a flimsy charge of wearing a dress with a picture of a ship steering wheel. This steering wheel looked similar to a 'Darmachakra' – a symbol of the Buddhist faith – and thus, insulted Buddhism. This was a blatant abuse of the ICCPR Act and a violation of the same fundamental rights that this Act was intended to protect, as per Human Rights Lawyer J.C. Weliamuna.

What was worrying in this backdrop has been that the State and the law enforcement authorities appear to be complicit in, and fail to prevent, this dangerous process of marginalisation and demonisation of the Muslim community, according to eye witnesses. They appear to turn a blind eye to the wider machinations at play, in order to put their security and safety at risk and, by failing to decisively act upon and prevent the increasing level of harassment, discrimination and gross human rights violations. By default, Muslims were portrayed as part of the problem, rather than taken into confidence to be part of the solution, as rationale dictates. There were open discrimination and harassment of Muslims by government or public authorities. The recent circular issued by the Public administration ministry regarding attire to be worn both by the staff and the public discriminated against primarily Muslim women. There were also instances where lawyers attached to some BASL branches refused to appear for Muslim victims. Recently, Wennappuwa Pradheeshiya Sabah wrote to the Police to take action to bar Muslim traders from the local Dankotuwa weekend Pola(fair). There were also regular incidents of Muslim women being brazenly shut out of public space like hospitals and schools because of arbitrary attire restrictions.

The more worrying aspect has been the involvement of some influential rogue sections of the Buddhist clergy in leading these hate campaigns and the hesitancy of the officialdom to prosecute them. This is in complete contrast to the matured leadership given by both the Catholic Cardinal and the greater sections of the Buddhist clergy to successfully manage the raised emotions of the populace in the aftermath. For example, the lead instigator who orchestrated the hate campaign in the Post-war period and responsible for the anti-Muslim hate attacks in 2014, Ven. Gnanassara and another monk Ven. Ratana, have been openly competing with each other waging a well-orchestrated anti-Muslim hate campaign, in recent times. Latest and the most alarming development was the extremely vitriolic statements made by the Asgiriya Chief Buddhist Prelate, such as the stoning of Muslims (to death) and urging Sinhala Buddhists to refrain from frequenting Muslim-owned shops and consuming food offered by Muslims, in total violation of the principles of the peaceful religion of Buddhism. These type of provocative diatribes shows semblance to hate speeches made by Myanmar's Wirathu (dubbed as the Face of Buddhist Terror by the Time Magazine in 2013), which sadly climaxed into the ongoing genocide of the Rohingyan Muslims. Anti- Hate speech laws or ICCPR Act apparently do not apply to them. Centre for Policy Alternatives (CPA) reportedly lodged a complaint with the Police against the Chief Prelate of the Asgiriya Chapter over the controversial remarks made by him.

The Human Rights Commission of Sri Lanka has, on many occasions, strongly criticised the on-going harassment of and discrimination against Muslims, and has even called for decisive measures to safeguard everyone's rights with cultural and religious sensitivity, which to-

date have by and large fallen on deaf ears. Furthermore, the UN Special Adviser on the Prevention of Genocide, the Delegation of the European Union (EU), and Organisation of Islamic Cooperation (OIC), issued strongly worded statements expressing extreme concern about the hate attacks, harassment, and political and religious pressure being directed at Sri Lanka's Muslim community. They stated that these attacks were in violation of the obligations under the international law and undermined peace and reconciliation in the country, citing that prejudiced and unsubstantiated allegations that are repeatedly published by media serve only to fuel intolerance.

Another relevant question which has arisen in the aftermath of the Easter Sunday disaster, although not related to his anti-Muslim stance, was the Presidential pardon granted to Ven Gnanassara, who was jailed for contempt of Court released from prison on 23rd May 2019 after few months. Presidential pardons exist to correct miscarriages of justice and are to be exercised with extreme caution and gravity and the pardon of Gnanasara Thero cannot be called a fit and proper exercise of that power by any metric. This act therefore raises a number of pressing questions which the President and the government are obliged to answer. CPA stressed; Firstly, it legitimises the view that it is possible to act with contempt for the judiciary, be punished through a legitimate judicial process, and then enjoy impunity through a pardon granted on political considerations. Secondly, the pardon comes amidst the ongoing and extremely tense situation in the country. It has been a mere week since extremist Sinhala Buddhist mobs instigated anti-Muslim riots across North Western Sri Lanka. The pardon, therefore indirectly, represents a worrying endorsement of such anti-minority sentiment, and can only heighten the anxiety and fear being felt by Muslim Sri Lankans today.. Accordingly, the government as a whole must justify, with stated reasons, why the grant of a pardon in this case will not be inconsistent with the Constitution, the rule of law, and the administration of justice in Sri Lanka and will not exacerbate inter-communal tensions. Anything less will directly undermine the legitimacy of Sri Lanka's democracy.

Role of Social Media in spreading Anti-Muslim Hate

Anti-Muslim hate speech was generally, qualitatively more vicious and venomous than anti-LTTE sentiments even at the height of war. Sanjana Hattotuwa, an analyst at the Centre for Policy Alternatives in Colombo in 2018, said 'the government had been late in waking up to a problem many had been warning about for years. Many of these individuals have been operating with complete impunity, spewing hate and inciting violence, so it's quite surprising to me that the government has finally woken up to it only after the riots.. I think in countries like ours, where there is a history of communal fault-lines, political unrest, racial tensions and identity conflict, it serves to seep into those cracks. Sri Lanka had high literacy rates but poor information literacy, making the problem more acute. It means the population can read and write but tends to immediately believe and uncritically respond to that which they see on social media. . Hate speech content on social media such as Facebook was difficult to monitor or control. Much of it was in the Sinhala language (often also written utilizing the English alphabet) and hence remain undetected'. UN official Lee charged that Facebook had "substantively contributed" to the conflict in Myanmar. Facebook, was used by "ultra-nationalist Buddhists" to incite "a lot of violence and a lot of hatred against the Rohingya. According to reports, Facebook's role in the anti-Muslim violence in Sri Lanka in March 2018 too cannot be overstated. Posts spreading blatant misinformation about the community,

inciting hate and violence, remained online for days after they were reported.. There is a call to strengthen hate speech laws to tackle both online and offline hate; but there are also concerns about both the authorities abusing such laws to prosecute their political opponents as well as the hesitancy to use the available laws against culprits, thereby leading to impunity.

Way Forward

Sri Lanka is facing a crisis of impunity. A common factor in all of the communal violence was the successive governments who are afraid to call out and condemn extremist ethno-religious nationalism for the toxic influence that it is. It is increasingly difficult, in fact nearly impossible, for people who have suffered serious violations of their human rights to receive justice and accountability. Victims and survivors do not receive redress, and perpetrators are not brought to justice. The absence of justice removes an important deterrent to future perpetrators. This situation constitutes a serious breach of Sri Lanka's international obligation to protect and promote human rights. The failure by public authorities, whether due to legal obstacles or lack of political will, to fulfil that international obligation and bring perpetrators of human rights violations to account, is the definition of impunity. Ultra-nationalism is a very dangerous trend and if meaningful steps are not taken by the authorities, Sri Lanka will face ruination. The failure to hold to account, or to take action against these groups has only emboldened them further and plunged minorities in a deeper state of fear. In the Post- war period, such horrors have been visited upon the country's Muslim minority in many occasions.

A parallel, problematic trend was the increasing political pressure, and eventual control, exerted over all institutions involved in State accountability. The politicization of the Attorney-General's office in recent years has significantly weakened the ability of the Sri Lankan government to provide accountability, in particular for violations perpetrated at the hands of State agents. Legal and constitutional analysts inside and outside Sri Lanka have noted with concern the weakening of the Attorney-General's independence over the years.. Further, an independent judiciary, free of any interference from the executive and legislative branches, is a necessary precondition for the fair administration of justice and the promotion and protection of human rights. It is central to maintaining the rule of law and holding the State accountable for its actions, as required under international law. The United Nations General Assembly has also on more than one occasion stressed the importance of an independent judiciary in promoting and protecting human rights.

Despite many UN resolutions, Sri Lanka's failure to act to encourage reconciliation revealed significant governance problems including a lack of will to improve the rule of law and reverse the culture of impunity. The government has done little since the war to get at the fundamental problems that led to violence, in particular the repression of minorities. Sri Lankan officials did not make conciliatory gestures that might foster a genuine dialogue. A US Department of State Report says that government officials and others tied to the ruling coalition enjoy "a high degree of impunity"((Department of State: 2015, 2).

Recommendations of the International Commission of Jurists(ICJ)

Overcoming impunity in Sri Lanka will require more than just pledges to respect a commitment for law reform from the Government. While the barriers to state accountability are systemic

and institutionalized, the real issue is the lack of political will. There commitments are meaningless if they are not supported by actions; only when the Government takes concrete steps to bring State officials to account for their conduct will they be able to restore rule of law and public faith in the justice system. If the government and law enforcement authorities were not able to break this cycle of impunity and inaction in the face of violence due to the incitement and the hate speech, against ethnic and religious minorities, perpetrators would feel so emboldened. Particularly, the 'near immunity' enjoyed by the Buddhist monks and the politicians to shield themselves from hate speech/ crime charges have still escaped official attention.

- Sri Lanka must remove all barriers to State accountability for violations of human rights and humanitarian law. Impunity is the failure or impossibility by State authorities – due to legal obstacles or a lack of political will – to bring perpetrators of human rights violations to account. Legal obstacles include: statutory provisions conferring immunity to State officials for their conduct; the absence of a criminal offence for the human rights violation (i.e. enforced disappearance); the statutory defence of superior orders; the absence of a criminal offence for command responsibility. These legal obstacles or barriers to accountability foster a climate of impunity, undermining efforts to respect human rights and the rule of law.

- States must at all times guarantee victims a right to effective remedy and reparations for human rights violations. As part of this obligation, Sri Lanka must put into place effective constitutional remedies for violations and investigate credible allegations of human rights violations and violations of international humanitarian law effectively, promptly, thoroughly and impartially, taking action where appropriate to bring those persons responsible to trial. Sri Lanka must also ensure victims of a human rights or humanitarian law violation have equal and effective access to justice.

- Investigations into credible allegations of human rights violations must be carried out by authorities that are not, individually or institutionally, involved in the alleged human rights violations. States must take steps to ensure victims, victims' families and witnesses are protected from threats, intimidation and violence. The State must also take steps to ensure that officials implicated in human rights violation are suspended pending the outcome of the investigation or trial. The State must ensure that victims and victims' families are kept abreast of developments in the investigation as well as given access to the final investigation report or transcripts of hearings.

- It falls on the State to guarantee judicial independence and it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. Sri Lanka must also take steps to strengthen the independence of the Attorney-General. Given the widely reported and analysed indifference of the judiciary and the incapacity and apathy of government officers/ law enforcement, it is crucial that the government formulate a sound plan of action to reform these institutions.

- Sri Lanka must limit or institute greater accountability over the powers of the President. States must bring perpetrators of human rights violations to justice, irrespective of their designation or role within the government.

Other recommendations

- Due Enforcement of Existing Laws Imperative: There is an overriding view that the issue with hate speech laws in Sri Lanka is not about their adequacy, but due and proper enforcement. The lack of equal and objective enforcement of these laws appears to be the crux of the issue. The problem is essentially an institutional one. It relates to the inability and reluctance of public officials including judicial and law enforcement officers to prevent and prosecute religious attacks, and promote an overall climate of religious coexistence. This institutional incapacity and apathy is perhaps indicative of a systemic institutional subservience to the socio-cultural, economic and political context that prevails over community relations in Sri Lanka.

- The law enforcement apparatus must first outline and then pursue a systematic mechanism to practically implement and enforce the legal framework fairly and objectively at all realms. Article 19(3) of the ICCPR 3-part test should be ideally applied. Presently, there have been many cases where the provisions of the ICCPR Act have been misused and/or arbitrarily applied.

- There should be 'balanced' laws to curb the use of internet and social networking hate speech as social media also provide 'low risk, low cost and high impact online spaces to spread hate harm and hurt against specific communities, individuals or ideas'.

- Public reporting of hate speech/crimes should be encouraged and Police should not refuse to record complaints, in order to monitor the trends properly

- Religious and political leaders must communicate to the public that "violence against minorities will not be tolerated and that no ethnic or religious community are entitled to the country over anyone else". Democracy fails when citizens fail to speak up. For democracy to survive and thrive, those who are responsible in societies to keep the masses educated should do their job without failure.

- Inter faith dialogue and programs should be worked out both in schools and in the media to allay the historical insecurity of the Sinhalese who see themselves as a threatened minority"(Tamils being seen as part of a larger Tamil community across the Palk strait in neighbouring India's Tamil Nadu, while the Muslims are seen as "part of a larger collectivity - the global Islamic community - who may one day take over Sri Lanka).

In the overall context, what will ultimately work thus will be a holistic approach to preventing racial discrimination and racial/ religious hatred, that avoids over-reliance on legal prohibition and sanction and focuses on positive measures, especially education, to combat racial intolerance and discrimination. The strategic response to hate speech is more speech: more speech that educates about cultural differences; more speech that promotes diversity; more speech to empower and give voice to minorities, for example through the support of community media and their representation in mainstream media. More speech can be the best strategy to reach out to individuals, changing what they think and not merely what they do'

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Right to Strike

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History and the legality of Strikes

Striking has been recognized globally as a right entitled to employees to be used with due diligence upon the violation of certain rights entitled upon them. Organized strikes bear an interesting history that can be traced back into the past. A strike is commonly known as "a refusal to work organized by a body of employees as a form of protest, typically in an attempt to gain a concession or concessions from their employers."

As a first step in the direction of legality, the concept of "freedom of association" was drafted and brought into discussion by the International Labour Conference in 1927. But, during the sessions held in 1928 by the conference the workers group rejected the placing of this item on the agenda for certain reasons. Later in 1948 this all important Convention entitled the "**Freedom of Association and Protection of the Right to Organization"** Convention No 87. In 1949 this was adopted and followed by the "**Right to organize and Collective Bargaining**" Convention No 98.

A definition for the right to strike has been provided in the 'Freedom of Association' – 2nd edition by the International Labour Organization in 1987 which specifies that the withdrawal of labour is "one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests". In the International Labour Conference held in 2012 in Geneva, the employers group very clearly articulated the position that the International Labour Organization Convention on freedom of association contains no explicit or implicit text on a right to strike. It was clearly pointed out that countries can have legal domestic provisions with regard to strike action. Also that each country is free to legislate as it sees fit but such development arises from within a country and not for any international obligation arising from any International Labour Organization convention.

For a member state to be bound to honour the provisions of a convention, ratification of the same is necessary. However in practice, very often, countries which have not ratified the convention use it as a bench mark. Hence even though Sri Lanka did not ratify the Convention No 87 it is used as a benchmark for affairs pertaining to Labour. Examining the list of ratifications of the Conventions passed by the International Labour Organization, a point which may spark interest is that the United States of America has only ratified very few Conventions, in fact only as few as 7 Conventions, but in actual practice, there are numerous laws and safeguards in its system guaranteeing the observance of conditions which are in line, or sometimes more stringent than the requirements of the relevant Conventions of the International Labour Organizatioin.

Sri Lankan law does not expressly recognize the right to strike, but legal recognition has been given to strikes in the form of certain immunities granted by legislation to strikers and

their trade unions. Sri Lankan law gives protection in respect of strikes in contemplation or in furtherance of a trade dispute against a civil action for inducing breach of contract and against torts and crimes.

The right to strike generally flows from the right of workers to organize for trade union purposes and the right to bargain collectively which is protected by the right itself. Although the right to strike is not protected by the Constitution of Sri Lanka, Article 14 of the same protects freedom of association and the right to join a trade union of choice.

The only statutory definition for a strike in Sri Lanka is found in the Trade Unions Ordinance of 1935. According to the Industrial Disputes act, the term **strike** shall have the same meaning as so contained in the Trade Unions Ordinance, which reads as "the cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding of a number of persons who are, or have been employed, to continue to work or to accept employment". However a strike is not legal in Sri Lanka if it is in violation of the Public Security (amended) Ordinance No. 25 of 1947, the Industrial Disputes (Amended) Act No 43 of 1950 or the Public Services Act No. 61 of 1979. Therefore in the context of the Sri Lankan labour law, strike action can be regarded as a legitimate trade union activity except in situations where it is restricted by the law.

In spite of lacking legal recognition, the act of striking is recognized within Sri Lanka. It is a benefit enjoyed by the employees which has to be used with care. The voice of the minority or the less fortunate is been made heard so that their rights and other benefits are not forsaken in the rat race of making their rich employers richer despite of the toll it takes on the employees. Hence subject to these limitations, the right to strike is enshrined and utilized within Sri Lanka.

Strike as a right

A strike opens the eyes of the employees in any particular institution to the nature, not only of the entrepreneurs but also of the laws and the government of a country as well. It shows the employees the power of unity and how their rights can be secured as a collective body, and standing up against oppression.

Hereinafter strikes shall be discussed in the view point of it being a **right**. A right is "any advantage or benefit conferred upon a person by a rule of law". The term right is often used in a wide sense to include **liberty** as well, but a person does not have the right or the liberty to interfere with matters pertaining to others. A right can be defined to be two fold. A right could be concerned with those things which one person ought to do for others or, it could be concerned with those things that one may do for oneself. Both of them are advantages derived from law. Both classes of rights are distinct species that are derived from the same genus.

The right to strike is one of the most fundamental rights enjoyed by employees and their unions while it acts as an integral part it their right to defend their collective economic and social interests. It also provides employees with the guarantee that their employers will bargain in good faith with organizations of employees.

This right to strike can be justified by the fact that it is the one weapon which can correct the unequal bargaining position between the employer and employees. Hence a strike is a breach of a collective agreement as opposed to an individual contract of employment and thereby cannot claim the same justification even though they often bargain on an equal footing.

The right to strike, as of other rights, is not absolute; it is limited and bound by certain restrictions. The extent and nature of the limitations to strike varies from country to country. There is no universal reason as to the changes in these limitations; the reasons for these varying limitations are not always the same. Limitations may stem from different political ideologies. The fact pertaining to the existence of suitable alternative methods for the settlement of industrial disputes could be a common reason for these changes. Another viable fact would be that various countries are in different stages of development.

According to Karl Marx, "economic factors alone are responsible for change in society. Economic conditions are the deciding factor in the change in the society." A constant and regular struggle occurs in society where the economically strong tries to exist and survive while downtrodding the rest of the society.

The main purpose behind the formation of a Trade Union is presenting the economically weak party or employees in a strong manner. According to Section 2 of the Trade Unions Ordinance, "Trade Union means any association or combination of workmen or employers whether temporary or permanently having among its objects one or more of the following objects: …….. (d) The promotion or organization or financing of strikes or lockouts in any trade or industry of the provisions of pay or other benefits for its members during a strike or lockout… However, a strike is a Trade Union activity; in Sri Lanka a strike does not require the support of a Trade Union.

It is commonly interpreted that all rights whatsoever resemble to duties, but legal liberty is in reality a legal right not to be interfered with by another person in the exercise of one's activities. It is alleged by the Trade Unions that the real meaning of the proposition that - Trade Unions have a legal right to go on a strike as and when they wish - is that the other section of the society is under a legal duty not to prevent them from going on strike. However Trade Unions or workers cannot go on strike in situations where the rest of the society may be disadvantaged.

If it is legally acceptable for the Trade Unions to have a sphere of lawful and innocent activity, it usually takes care at the same time to protect this sphere of activity from alien interference. Trade unions can take steps to further their legal and reasonable objectives for which they were formed in the first place. An employee before employment has the liberty to decide on his career status, but once the employee is contractually bound to an employer the discretion of rendering his services ceases to exist. After an employee is employed, considerations such as payment of wages, providing statutory benefits, observation of welfare legislations, are key features which upon violation would entitle the employees the right to strike, but the most crucial factor that should be looked into is, whether the work done by the employee under the contract is legal or not.

A dispute arising between the employees and the management not only affects them but also affects the society as a whole. Therefore if by exercising their right to strike the society is

affected in a grander scale than the reason for the strike then the right to strike shall not be enforced. It cannot be disputed that the right of the workmen to go on strike is subject to the larger interest of the society and the morality of the public. The right to go on a strike was not granted by any of the statutes but various restrictions and conditions were imposed which were to be fulfilled by the employees before going on strike. Imposing restrictions before going on strike itself indicates that the employees were not vested with any unconditional right to go on strike. It further implies that they can go on strike without following certain statutory formalities.

If the rights of these employees are understood and realized by the management, but if the employee believes that the right in fact is not a right but a liberty which cannot be equated to a right, then the employees could claim to go or to not go on strike. In certain scenarios the reasons for going on strikes as given by the employees are for being paid less or other benefits not being provided, these reasoning could justify a strike, whereas when employees of institutions such as banks, life insurance corporations and other like institutions where job security and wages are at its peak go on strike for minor issues such as paying revision, bonuses etc. they do not seem to be reasons to justify a strike.

In private undertakings, the employer is generally interested in profits and profits alone, hence the welfare of his employees and other important factors are ignored in the pursuit of profits. However in public sector undertakings strikes are seen more commonly. It can be observed that the reasons for these strikes cannot be seen expressly but upon close analysis justifiable reasons can be seen. It is undoubtedly the wish of all citizens for progress and development in living standards, but this should not be so at the cost of others or of the society. Although in theory it is possible to say that the rights of one person are subjected to the interest of the society in practice it's sadly not so.

In the prevailing system of administration of justice, when wages are not paid in accordance with the law it is highly impractical for employees to go to courts and wait for years to obtain redress for their grievances. Hence employees turn towards exercising their right to strike in order to obtain fast solutions and resolve their issues despite of which their daily bread would suffer. Nevertheless, the management which is interested only in profits would rather be concerned with their benefits than try to arrive at solutions for these problems. Under these circumstances, sometimes it becomes necessary to protest in order to attract the attention of the management to solve their problems. Further, the right to strike is nowhere provided in any statute, but should in fact be earned through fights and sacrifices of employees. However, it should be accepted by the employees that the mere organization of a strike since it is their right, only to be interpreted as liberty, and subjected to restrictions is not in fact a "right" in the true sense.

Subjected to the changes that took place in the journey of a "strike" to be made legal, it has come a long way in ensuring that the world is not too biased towards those that have everything while the persons with lesser or nothing are at the mercy of an almost dictatorship if the right had not been recognized. The power of striking was not made absolute but was subjected to many limitations to ensure that the benefit was not abused. Many employees benefit from this right of striking, and manage to work with dignity and self-respect as many strikes in the past had earned respect to the workforce as well. It is up to trade unions to fight for what is due on

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ඔහු කිසිවෙකු ජනිත නොකළේය. තව ද ඔහු ජනිත කරවනු නොලබුවේය.

තව ද ඔහුට සමාන කිසිවක් නොමැත'. (අල් කුර්ආන් 112:1-4)

දේව සංකල්පය පිළිබඳ සාකච්ඡා කිරීමේදී මුස්ලිම් නොවන සහෝදර ජනයාගේ සිත් තුළ බොහෝ විට ඇතිවන්නේ දේවාලයක වැඩ හිඳිනා බව විශ්වාස කරන දේව ආකෘතීන්ය. මෙලෙස දේවත්වය ලබා දී නැමදුම් කරන දෙවිඳුන්ගේ ඓතිහාසික තොරතුරු විමසීමේදී දකින්නට ඇත්තේ මේ සැවොම සමාජයේ ජීවත් වී අප අතරින් සමුගත් යහ මිනිසුන් බවය. මෙලෙස මිනිසුන්ට දේවත්වය ආදේශ කිරීමෙන් වැළකී සත්‍යය දෙවිඳුන් කවරේ ද යන්න පිළිබඳ ඉතාම වැදගත් කරුණු ඉහත අල් කුර්ආන් වැකියෙහි දැක්වේ. මෙම වැකි හතරකින් යුත් අල් කුර්ආන් පරිච්ඡේදය දේවත්වය පිළිබඳ උරගල ලෙස හැඳින්විය හැක. සත්‍යය දෙවිඳුන්ගෙන් මිත්‍යා දේවත්වය වෙන්කර හඳුනා ගැනීමේ නිර්ණායකයන් ලෙස ඉහත අල් කුර්ආන් වැකි මගින් ඉදිරිපත් කරන්නාවූ කරුණු දැක්විය හැක. අප අතරේ විවිධ ආකාරයේ දෙවිවරු හා එම දෙවිවරු සඳහා ඉදිකළ දේවාල දක්නට ඇත. මෙම දෙවිවරු සියල්ල පාහේ මෙයට පෙර ජීවත් වූ යහ මිනිසුන් සඳහා පසු කාලීන ව ජනයා විසින් දේවත්වය ආරුඪ කිරීමෙන් ඇති වූ දේව සංකල්පයකි. ඉස්ලාමයේ දෙවිඳුන් හැඳින්වනු ලබන්නේ 'අල්ලාහ්' යන නාමයෙනි. මෙම 'අල්ලාහ්' යන අරාබි පදයට එම භාෂාවෙහි බහු වචනයක් හෝ ස්ත්‍රී පුරුෂ ලිංග භේදයක් හෝ නොමැත. එහෙයින් විශ්වය සහ එහි අඩංගු සියල්ලෙහි නිර්මාතෘ මෙන්ම විශ්ව පාලක හා පෝෂක මහා කාරුණික ඒකීය සත්‍යය දෙවිඳුන් ආමන්ත්‍රණය කිරීමට වඩාත් සුදුසු නාමය 'අල්ලාහ්' ය. එයට අමතරව මහා කාරුණික දෙවිඳුන්ටම ආවේනික වූ සුවිශේෂී ගුණාංග මත ගුණාංග නාමයන් 99ක් අල් කුර්ආන් හා මුහම්මද් තුමාණන්ගේ ප්‍රකාශන අනුව ගොනුකොට ඇත.

අල්ලාහ් ඒකීයය හා අසමසමය

- අල්ලාහ් හට හවුල්කරුවන්, සමානයන් හෝ ප්‍රතිවාදීන් නොමැත.
- අල්ලාහ් හට පියෙකු, මවක්, පුතුන්, දියණියන්, බිරින්දන් හෝ පවුලක් නොමැත.
- නැමදුමට සුදුස්සා අල්ලාහ් හැර අන් කිසිවෙකු හෝ කිසිවක් නොමැත.
- විශ්වයේ සියල්ල කෙරෙහි පරිපූර්ණ අධිකාරය, ශක්තිය හා බලය අල්ලාහ් සතුය.
- සියල්ලෙහි සදාතන සරණ අල්ලාහ් වෙතය.
- අල්ලාහ් වෙත අවනත වීමෙන් අල්ලාහ්ගේ බලය වැඩිවීමක් හෝ අවනත නොවීමෙන් බලය අඩුවීමක් හෝ සිදු නොවේ.
- අල්ලාහ් පරම පරිපූර්ණත්වයෙන් යුක්ත වන අතර මිනිස් සීමාවන් කිසිවක් අල්ලාහ් හට නොමැත.

- මිනිස් ජීවිතයේ ප්‍රධාන පරමාර්ථය අල්ලාහ් විසින් තම ධර්ම දූතයන් මගින් ලබාදුන් මාර්ගෝපදේශයන් අනුව ජීවිතය සකස් කර ගනිමින් අල්ලාහ්ට අවනත අයුරින් ජීවත් වීමය. මෙම ධර්ම දූත මෙහෙවරේ අවසාන ධර්ම දූතයා ලෙස පැමිණ ඇත්තේ මුහම්මද් තුමාණන් වන අතර එතුමා මගින් ලබා දුන් දේව පණිවිඩය අල් කුර්ආන් වෙයි. මෙම මාර්ගෝපදේශය මුළුමහත් මනුෂ්‍ය වර්ගයා වෙනුවෙන් ම ලබා දුන්නකි.

නුදුටු දෙවිකෙනෙකු විශ්වාස කිරීම හරි ද?

වර්තමාන ලෝකයේ නැමදුම් කරනු ලබන සියළු දෙවිඳුන් ම නුදුටු දෙවිවරුන්ය. එම දෙවිවරුන් පිළිබඳ ව ඇත්තේ මනුෂ්‍ය හස්තයෙන් භෞතික ද්‍රව්‍යයන් උපයෝගී කරගෙන සෑදූ ප්‍රතිමා පමණි. අපගේ දෑතින් ම නිර්මාණය කරගන්නා වූ ප්‍රතිමා නැමදුම ඉස්ලාමය සහමුලින් ම ප්‍රතික්ෂේප කරයි. අපගේ නැමදුම් සියල්ල යොමු විය යුත්තේ අපගේ නිර්මාතෘ වූ සත්‍යය වූද ඒකීය වූද අල්ලාහ් වෙත පමණක් යන්න ඉස්ලාමීය ඉගැන්වීමයි.

අදේවවාදී සංකල්ප හා අදේවවාදී දහම් අදහන්නන් අතරේ ද ඇතැම් විට සෘජු ව මෙන්ම වක්‍ර ආකාරයෙන් දේව විශ්වාසයක් දැක ගත හැකිය. මිනිස් මනසේ තිබෙන යම් හේතුවක් නිසා මෙසේ විශ්වාස කරන බව මෙතුළින් පැහැදිලි වෙයි. ඇත්තෙන්ම සෑම මිනිසෙකුගේම චෛතසිකය අභ්‍යන්තරයේ මුළු මහත් විශ්වයට අධිපති ගුප්ත පාලන ශක්තියක් තිබෙනවා යන හැඟීමක් පවතී. මෙම විශ්වාසය ඔවුන්ට ලැබී තිබෙන්නේ උපතින්මය. මනෝ විද්‍යාඥයින් ද මේ බව පැහැදිලිවම සඳහන් කරති. මේ පිළිබඳ ව කර ඇති විද්‍යාත්මක පර්යේෂණයක ප්‍රතිඵල පහතින් උපුටා දක්වා ඇත්තෙමු.

'ඔක්ස්ෆර්ඩ් විශ්ව විද්‍යාලයේ මනෝ විද්‍යාඥවරියක වූ ආචාර්ය ඔලිවෙරා පෙට්‍රොවිච් පවසා සිටි පරිදි බිළින්දන් දේව විශ්වාසය හා තදින් බැඳී ඇති අතර අදේවත්වය ඔවුන් පසු ව අත් කර ගන්නක් බවයි. බටහිර ඕස්ට්‍රේලියානු විශ්ව විද්‍යාලය මගින් 'දහම හා මනෝ විද්‍යාව' යන තේමාව යටතේ පවත් වන ලද සම්මන්ත්‍රණයකදී පෙර පාසැල් දරුවන් පවා ඔවුන්ගේ භෞතික ලෝකය පිළිබඳ අවබෝධය තුළ දේවධර්ම සංකල්පයන් නිර්මාණය කළ බවද ආචාර්ය ඔලිවෙරා පෙට්‍රොවිච් පවසා සිටියාය. දහම් පිළිබඳ මනෝ විද්‍යාත්මක විශේෂඥවරියක් වන ආචාර්ය ඔලිවෙරා පෙට්‍රොවිච් පවසා සිටියේ මිනිසාගේ ස්වභාවිකත්වය දේව විශ්වාසය ද නැතහොත් අදේවත්වය ද යන්න පිළිබඳ මනෝ විද්‍යාඥයින් අතරේ විවාදයක් තිබූ අතර ඇගේ මතය වුයේ දේව විශ්වාසය උගන්වනු ලබන්නක් නොව ස්වභාවයෙන් ම වර්ධනය වන්නක් බවයි. **'The Age'** සඟරාව වෙත ඇය පවසා සිටියේ දේව විශ්වාසය මිනිස් චෛතසිකයට ඉතා තදින් ම බැඳී ඇති බවය. ආචාර්ය පෙට්‍රොවිච් පවසා සිටියේ තම නිගමනයන් විවිධ අධ්‍යයනයන් මත පදනම් වූවක් වන අතර විශේෂයෙන්ම වයස අවුරුදු **4** සිට **6** දක්වා වූ ජපාන දරුවන් අතරේ හා ආගමික විශ්වාසයන් හතකට අයත් වූ වයස අවුරුදු **5** සිට **7** දක්වා වූ බ්‍රිතාන්‍ය දරුවන් **400** ක් අතරේ කළ අධ්‍යයනයන් මෙම නිගමනයට ඒමට උපකාරී වූ බවය. අදේවත්වය සහතික වශයෙන්ම තමන් විසින් අත් කර ගන්නා ස්ථාවරයක් වන අතර මිනිස් සහජත්වයේ කොටසක් නොවන බව ඇය විසින් තරයේම පවසා සිටින ලදී'. මේ පිළිබඳ වැඩි විස්තර ආචාර්ය ඔලිවෙරා පෙට්‍රොවිච්ගේ **'Child's Theory of the World'** නම් ග්‍රන්ථයේ සඳහන් වෙයි.

එලෙසම ඔක්ස්ෆර්ඩ් විශ්ව විද්‍යාලයේ මානව විද්‍යාව හා මනස පිළිබඳ මධ්‍යස්ථානයේ ජ්‍යෙෂ්ඨ පර්යේෂකයෙකු වූ ආචාර්ය ජස්ටින් බැරට් **(Dr. Justin Barrett)** ද මිනිසුන් තුළ තිබෙන මෙම සහජ දේව විශ්වාසය පිළිබඳ ව මෙසේ පවසයි. 'පසුගිය දශකයක පමණ කාලයක් තුළ ඒකරාශී වූ විද්‍යාත්මක සාක්ෂීන් විමසුමකට ලක් කිරීමේදී තවත් වැදගත් කරුණක් අනාවරණය වෙනවා. එනම් අපි පෙර සිතුවාට වඩා බොහෝ දේවල් ළමා මනසේ වර්ධනය තුළ සහජයෙන්ම අන්තර්ගත වී

තිබෙනවා. ස්වභාවික ලෝකය නිර්මාණය වූ එකක් හා එයට අරමුණක් ඇති බවත් යම් ආකාරයක ඉහළ බුද්ධියක් මෙම අරමුණ පසුපස සිටින බවත් පිළිගැනීමේ හුරුපුරුදු බවක් ළමා මනසේ ස්වභාවිකවම ඇති වී තිබෙන බව දැකගන්න පුළුවන්'.

ආචාර්ය ජස්ටින් බැරට් (**Dr. Justin Barrett**) පවසන අන්දමට 'යොවුන් වියේ සිටින්නන් ලොව සියලූ දෑ අරමුණක් ඇති ව නිර්මාණය කොට ඇති බව සිතන නිසා ඔවුන් අතර උත්තරීතර දෙවි කෙනෙකු විශ්වාස කිරීමේ පූර්ව නැඹුරුවක් තිබෙනවා. එනම් කෙනෙක් දෙවියන් ව විශ්වාස කරන්නේ මිනිස් මනස එසේ විශ්වාස කිරීමට ස්වභාවිකවම හැඩ ගැසී තිබීම නිසයි'. ජස්ටින් බැරට් පවසන්නේද මෙම විශ්වය නිර්මාණය කර පරිපාලනය කරන්නා වූ නිර්මාණකරුවෙකු සිටිනවා යන විශ්වාසය සමාජයේ බලපෑමෙන් කෙනෙකුගේ සිත තුළ ඇති නොවන බවයි **[Justin L. Barrett, Jonathan A. Lanman) 'The Science of Religious Beliefs']**. දෙමව්පියන් විසින් හෝ පාසල් අධ්‍යාපනය තුළින් දේවත්වය පිළිබඳ ඉගැන්වීමක් නොකළ ද කුඩා දරුවන් තුළ දේව විශ්වාසයක් ඇති වන බව පවසන ඔහු කාන්තාර දූපතක තනි ව හදා වඩා ගත්තත් මෙම විශ්වාසය ඇති වීම වැළැක්විය නොහැකි බව ඔහුගේ අවසාන තීරණයයි.

'අපි ළමුන් කිහිප දෙනෙක් එක් දූපතකට දැමුවාට පසු එහි ඔවුන් විසින්ම ස්වභාවික ව හැදී වැඩුණා නම් ඔවුන් දෙවියන් ව විශ්වාස කරනවා. **[Justin L' Barrett) 'Why Would Anyone Believe in God?']**. මෙම පරීක්ෂණ වලින් අපට පෙනී යන්නේ මිනිසා සහජයෙන් අදේවවාදියෙකු හෝ නාස්තිකවාදියකු නොව දෙවි කෙනෙක් විශ්වාස කරන්නෙක්, දේවවාදියෙක් ලෙස උපදින බවය. මුහම්මද් ධර්ම දූතයාණන් වරෙක පවසා සිටියේ සෑම දරුවෙක් ම මෙම පිවිතුරු සහජ හැඟීම (ෆිත්රා) සමග බිහි වන අතර එම දරුවාගේ දෙමව්පියන් විසින් විවිධ විශ්වාසයන් කරා දරුවා ව යොමු කරවන බවයි **[Sahih Muslim" Hadees No.2658]**. මෙම සත්‍යය ස්වභාවයෙන් බැහැර ව එයට පටහැණි වූ ආදේශකයන් තබා ගැනීමයි අද සිදු වෙමින් පවතින්නේ. එනම් සමාජයේ කිසිදු බලපෑමකින් තොර ව මිනිසුන් හැදී වැඩුණා නම් ඔවුන් විශ්වයට ම අධිපති පාලක එක් දෙවි කෙනෙකු විශ්වාස කරන පිරිසක් ලෙස සිටීම නියතය. මෙය ඇතැම් ගවේෂකයන්ගේ ගවේෂණ ප්‍රතිඵල වලින්ද සනාත වී ඇත.

'එමිල් ඩර්ක්හයිම්' නමැති සමාජ විද්‍යාඥයා විසින් බාහිර ලෝකය සමග කිසිදු සබඳතාවකින් තොර ව වර්ෂ දහස් ගණනක් තිස්සේ ඕස්ට්‍රේලියාවේ ප්‍රාථමික සමාජ සංස්ථාවන් සහිත ව ජීවත් වූ ආදිවාසී ජන සමුහයක් පිළිබඳ ව පවත් වන ලද පර්යේෂණයක කරුණු අන්තර්ගත කොට ඩබ්ලිව්. එස්. එෆ්. පිකරින්ග් විසින් සකස් කරන ලද, **'Durkheim on Religion'** නමැති ග්‍රන්ථයේ පහත සඳහන් අයුරින් කරුණු විග්‍රහ කොට තිබේ.

''මෙම ආදිවාසී පිරිසගේ දෙවිඳුන් සදා ජීවමාන සදාතනිකයෙකි. ඔහුගේ ආරම්භය අන් කිසිවක් මත නොමැත. විශ්වයේ සියල්ල කෙරෙහි බලය ඇත්තෙකි. හිරු සඳු ආදී සියලූ තාරකාවන් පාලනය කරන්නේ ඔහුය. සියල්ලෙ හි නිර්මාතෘ ඔහුය. විදුලි කෙටීම් හා අකුණු සැර ඔහුගේ අණ පරිදි සිදු වේ'' **[W. S. F. Pickering, 'Durkheim on Religion' Routledge and Kagan Paul, London 1975].** මෙම ආදිවාසී ජන සමුහයේ දේව විශ්වාසය හා ඉස්ලාමයේ දේව විශ්වාසය අතර කිසිදු පරස්පරතාවක් නැත. බාහිර සමාජ බලපෑම් කිසිවක් නොමැති ව තම ජන්මතාවට අනුකූල ව 'විශ්වාසය' සකස් කර ගන්නට යමෙකුට අවස්ථාවක් ලැබෙන්නේ නම් ඔහුගේ තත්ත්වය සත්‍යය වශයෙන්ම සැකසෙන්නේ මේ අයුරින් බව කිසිදු සැකයක් නොමැත. මෙම කරුණු මගින් සනාත වන්නේ 'දේව විශ්වාසය' මිනිසාගේ සහජ හැඟීම් වලින් එකක් බව නොවේද? මෙලොව ජනිත වන සෑම මිනිසෙකුම මෙම ප්‍රතිඥාව 'පරමාධිපති' දෙවිඳුන් වෙත ලබා දී බිහි වී ඇති හෙයින් ඔවුන්ට කුමන සංස්කෘතික හා සමාජයීය තත්ත්වයන්ට මුහුණ පෑමට සිදු වුවත් තම චෛතසිකයේ නොමැකිය හැකි ආකාරයෙන් සනිටුහන් වී ඇති දේව විශ්වාසයෙන් බැහැර විය නොහැකිය. ඉහත ගවේෂණය මෙයට ඉතා උචිත අයුරින් සාක්ෂි සපයයි.

Reimagining the Sri Lankan Muslim Identity [1]

"Who is the Sri Lankan Muslim? What is their identity?"

Amjad Mohamed Saleem, Development Practitioner

Introduction

These two questions indicate the conundrum currently faced by the Sri Lankan Muslim community as it navigates being caught in between trying to find an ethnic identity and remaining true to religious values. It has been shown historically[2] that the Muslim identity came out of wanting to be different in the light of the Sinhala and Tamil identity in a pre and post colonial era as Barth (1969, 10) writes in how "ethnic groups are categories of ascription and identification by the actors themselves", but how the formation and continuation of the ethnic groups are dependent upon interaction with 'others' and how ethnic boundaries entail social processes of exclusion and incorporation whereby discrete categories are maintained, despite changing participation and membership in the course of individual life histories.

Yet it is a history not fully understood, discussed or articulated properly. This is as much a problem that is internal within the Muslim community as well as outside the Muslim community. In the course of a number of pieces of work that I have done in the country and written about with regards the community, I have been struck by the ignorance of the history about the Muslim community as well as a superficial understanding about the Muslim community narrative. Statements such as "The Muslim community has been in Sri Lanka over the last 1000 years and have coexisted with the Sinhalese and Tamils" display an ignorance not only about the history but how the Muslim community interacts with history as well as the relationships with the rest of the communities. To say that the Muslim community has been in Sri Lanka over the last 1000 years, indicates that en masse, there was a migration of an entity of a race called 'Muslims' who came to Sri Lanka, settled down and populated it. At best this is a disingenuous process which reinforces the 'us' and 'them' perspective. This is farther from the truth because Islam through the Arabs came to the island and through inter marriage spread to the inhabitants here. To indicate otherwise is not representative of the situation and removes the agency of migration, religion and so on. Unfortunately, the Muslim community is as guilty of this as others outside the community, as it reinforces the narratives that predicate the relationships currently. This does not help to ground the narrative of the community as indigenous from originating within the country and being from the country. It also means that the basis of a conversation around identity becomes even more problematic moving forward because of a misunderstanding of history.

This is a gap that essentially also does a disservice to the Sri Lankan context as Sri Lanka is a country of the 4 major world religions that have interacted in a dialogical manner and where

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2 See Asad (1993), Bush (2003) and others

faith plays a major role in shaping peoples lives and identity. Furthermore, not understanding this particular element means that you ignore the process of polarisation between ethno-nationalist communities as well as religious communities that is manifesting itself, particularly in the post 2009 era with a growing Buddhist Christian tension and the emergence of an anti Muslim campaign. As Fernando (2008,7) writes "A careful study of the complex situation shows that the conflict in Sri Lanka which revolves around a dogmatic belief in a nation state reflects the complicity between the dominant Sinhala Buddhism nationalism and western imperialism. The cultural nexus of this complicity lies in the representation of the other in the projects of colonial practice and postcolonial nation building. It operates with an Orientalist-Occidentalist interpretation of each other within a network of asymmetrical local and global power relationships initiated by colonialism and continued by postcolonial nation-building and the present phase of globalisation. This belief is mainly supported by dominant interpretations of ethical and religious traditions where the particular cultures and religions have been interpreted and continue to be interpreted in unchangeable homogenous categories. Its main characteristic is the essentialist perception of ethnicity, religion and nationhood, through which ethno-religious myths have been transformed into political myths of exclusivist types of nationalism and national identity."

Thus, it is in this light, that the discussions of Muslim identity need to be framed, understood and discussed. There needs to be a re-imagination of what this identity could be. This identity has occupied a perilous position, being compressed between two dominant identity groups, the Sinhalese and the Tamils, whilst also being subject to a context of Sri Lanka of "cultural and religious beliefs that imbricate with economic and political factors in forming the dominant power structures such as nation-states in a network of local and global powers" (Ibid, 8).

This 'politics' of interpretation (within and without the Muslim community) has undoubtedly created a tension in the institutionalisation of the Muslim identity as it wrestles between the distinction of faith as a theological marker, i.e. a religious motivator, and faith as an identity marker, i.e. a communal galvanizer. This tension for the Muslim community in Sri Lanka centres around the nexus of political and ethnic identity vs religious expression which the latter incorporates personal (and social) capital for whilst the former incorporates social capital. In this regard, Benedict Anderson's 'imagined community' thesis is transformed into an 'imagined Muslim community' with a schizophrenia of being split between the local and the universal, i.e. the local community vs the global transnational Islamic community or the 'Ummah'. As such there is always a dynamic tension between the relatively local focus and the civilizational focus, and the concept of moral patriotism and how it may inform notions of giving and conceptions of belonging to a larger collective such as the Islamic community. In this perspective the tension and challenge for the Muslim community is how it interprets its relationship on a transnational scale and within the local context. For example, it is interesting to see how Muslims in Sri Lanka mobilise on the issue of Palestine versus issues in Sri Lanka whilst reflecting on issues in Sri Lanka. For many the representations and feelings towards Palestine for example, are because of the affinity of the transnational concept of the Muslim based on the theory of the Ummah and yet this seems to be at odds with feelings of affinity with similar causes within the country and highlights the conundrum for the Muslim community. In this perspective from a theological perspective, every Muslim is supposed

to feel the pain of other Muslims. There is even a saying from the Prophet (Peace Be Upon Him) to this effect. This is the concept of the Muslim nation, the Ummah, and has been used and abused by the community. Hence the impression given is that Muslims care more for other Muslims and not really concerned about their own country because they are not able to respond to internal crises unless if affects them directly. The impression then is one of apathy and not caring about the country which is seized on by extremist nationalists.

Thus, this is a real confusion and challenge for the Muslim community in Sri Lanka, yet must not be seen in isolation to the context of Sri Lanka at the time it also emerged. This has been a trend that has been replicated in other communities, within the context of an emerging religious identity connected to ethnic expression, particularly in the late 19th century and earlier 20th century as a result of colonial activity.

An Imagined Community with Imagined Geographies

The Muslim identity in Sri Lanka has emerged from a constructivist perspective, constructing an ethnic identity for political reasons but also instrumentalising religion for the same reason to achieve that political end. In this sense they are unique in that they have become an 'imagined community' (Anderson 1983) with an 'imagined geography' (Said 2000). I have deliberately chosen both concepts because I think they are particularly pertinent to the discussion about the Sri Lankan Muslims and their identity formation and in fact influence. It also illustrates the particular predicament that the Muslim community is in.

Benedict Anderson's concept of imagined communities is useful to anchor the narrative of the Sri Lankan Muslim community, since, despite not actually knowing all other members of the community – or even having face to face contact at the time of discussion, the community was 'imagined' by political elites in the sense of horizontal comradeship and shared history; despite the actual inequalities and hierarchies that existed in reality; and the limitations because of an understanding of a 'boundary' (Anderson 1983). This boundary is better explained clearly through the imagined geography narrative, that Edward Said (2000) has used to evolve this thinking as a form of social constructionism from the imagined community narrative. In this term, "imagined" is used not to mean "false" or "made-up", but rather "perceived". In Culture & Imperialism, Said (1993) pointed to how none of us are completely free from the struggle over geography, over territory, over space, and over place.

In this sense, the formation of the Sri Lankan Muslim identity is one of perception – a perceived link to history, time and space; to define oneself against the 'other'. This imagined geography for the processes of cultural intervention of the Sri Lankan Muslim narrative has been shaped by a long tradition of efforts to forge effective political formations in times of global crisis, in other words, efforts with transnational ambitions that have profoundly shaped the history of the 20th century— including, in particular, the legacies of anti-colonial movements and other internationalist thought. According to Said (1993,2000), imaginative geography is a form of invention used by practitioners of empire to re-interpret the meaning of certain territories and create discourses justifying the need for control over such re-imagined places. This exercise in imagination begins by reconstructing the history of those places coveted by empire builders. This practice of constructing alternative representations of places and people is what Edward

Said refers to as the crafting of "imaginative geographies." (Ibid.)[3]. Thus "institutionalising Muslim difference, the British, in a crucial sense, helped 'create' Muslim identity" (Q. Ismail 1997, 73).

It is perhaps worth referring to how Barth (1969) explores that discussions around 'ethnic boundaries' canalizes social life entailing a frequently quite complex organisation of behaviour and social relations whilst recognising a limitation of shared understandings and differences in criteria for judgement of value. In this sense, the argument is that ethnic groups persist as significant units if they imply marked differences in behaviour and allow the persistence of cultural differences. What this means is that ethnic divisions in Sri Lanka have been formed and reinforced as a result of the boundaries placed by them and the interaction between them.

In doing this, the Muslim community led by the political elites, institutionalised their identity founded on an imagined assumption. Identities have been imagined where global, regional, national and local spaces have entered into relationships of replication, consequences and repercussion. Appadurai (2006) calls this phenomenon, 'geography of anger', stating that this "is one way to examine how the fear of small numbers and their power shape the mutual relationships of different spatial scales and sites" (Ibid, 93). Thus the concept of imagined communities and geographies lead to this concept of the geography of anger, where global concerns and tensions can produce complex replicas of the larger struggles and that creates "a freshly charged relationship between uncertainty in ordinary life and insecurity in the affairs of states" (Ibid, 101).

In other words, this imagination which has led to a blurring of certainty and identities has become a flash point for insecurities as a consequence of the 'othering', and the minorities subsequently evolve to face those circumstances. This is indeed the predicament that is faced by the Muslim community in Sri Lanka.

Reimagining Identity

It is clear that there is a paradox in the Muslim identity and that the Sri Lankan Muslim community is at best a complex mix of different ideologies and thoughts processes. Faith is not only a theological marker (a religious motivator) but also an identity marker (a communal galvanizer), which means there remain tensions and fault lines along racial and religious lines. In defining themselves as such, the identity of the Sri Lankan Muslim community has been developed and evolved not only based on ethno-nationalist tendencies but also from a theological and spiritual basis.

This duality construct of a 'Muslim' identity has become a challenge for the Sri Lankan Muslim community as they attempt to profess their Sri Lankan identity (and sense of belonging). By identifying themselves ethnically as 'Muslims', politically constructed from the late 19th century, the Muslim political elites played on blurring the distinctions between faith as a theological marker (religious motivator) and faith as an identity marker (communal

3 It is clear that the formation of the Moor / Muslim identity by the political elites in response to colonial periods, also tried to imagine a `geographical` space with links to a pan Arab citizenship and transnational Islamic expression.

galvanizer). This meant that the Muslims energetically constructed their 'racial' identity as a distinct ethnic group that is founded on religious and cultural identity. They interchanged religious motivators and communal galvanisers as and when it suited them. Largely helped with a renaissance in Islamic theological movements and thinking globally, the concept of Muslim representation in Sri Lanka evolved into theological and ideological formations on top of political representations.

It is this that provides a challenge, with respect to the classification and representation of the Sri Lankan Muslim as an ethnic identity, whilst the generic definition of Muslim does not relate to an ethnic representation but to a religious connotation. Thus in Sri Lanka the concept of an ethnic 'Sri Lankan Muslim' is slightly misleading and confusing as it ascribes a homogeneity beyond just religious practice to cultures, traditions, experiences and language which is made difficult by the heterogeneous nature of the geographical location of the Muslim community in Sri Lanka, religious practices and traditions and often at odds with the concept of nationalism or the nation-state. By deliberately blurring the lines between theology and identity, the political elites were able to utilize it to serve their own interests to the detriment of their community. Ultimately this also caused a sense of disengagement and isolation.

Hence this identity has emerged as a double edged sword, with a negative aspect being a minority but reifying an identity that is not singular and cohesive but that evolved influenced by global politics and a securitised lens. In that reification of a Sri Lankan Muslim identity, this process doesn't recognise the challenges faced by and from different communities, both internally and externally. This means that the singular point of identity doesn't negotiate the lived experience and challenges of the community and communities. There is thus a real tension between the reified identity (of a singular binary expression) and the lived reality of political experiences.

In other words, there has been a transformation, institutionalisation and politicisation of the Sri Lankan Muslim identity into a religious / ethnic identity over time where Islamic became an ethnic boundary marker that was instrumentalised politically. However, this did not take into account the local and global lived experiences of the Muslim communities. This left the community with a political identity that was also influenced from outside but didn't take into account evolving individual identities.

So what does this mean?

There is a lack of clear articulation and policy of identity, instead choosing to move between both notions of religious marker and community galvaniser as and when circumstances provided. In the wake of rising religious consciousness by the Muslim community and by neglecting the necessary theological discussions necessary for developing identities, and contextualizing faith and failing to provide leadership in articulating this, the sole aim of developing a separate identity for the Muslim community in Sri Lanka has fallen prey to the global malaise afflicting Muslims, which is the push for a 'pure' Islamic identity based on a theological construct but taking the identity of a global community/race, neglecting local contexts and cultures. This is a new phenomenon within Islamic teachings and history because there is no such thing as a pure community identity. There are different manifestations of

Islam and Muslim communities united with a pure theological marker, of which the latter is mistaken to be the identity. It is this that is now causing global concerns and issues of the rise of 'conservative' Islam.

By pushing for a new political identity without understanding the changing dynamics of the context, what has happened is that the doors have been opened for discussions on a religious identity that is not only foreign to Sri Lanka but fails to take into account local contexts and cultures, making any future discussion of post conflict reconciliation even more challenging, as people feel that the Muslim community is more isolated (linguistically, culturally and socially) than before.

So what needs to be done?

It is here where one can start talking about multiple identities as elaborated by Sen (2006). The encouragement and retention of multiple identities means that people have several enriching identities: nationality, gender, age and parental background, religious or professional affiliation (Sen 2006). It is the recognition of this plurality and the searching for commonalities within this pluralism that will lead to greater respect and ultimately understanding and acceptance. Thus these new solutions will have to challenge people to accept diversity and create equal opportunities for diverse communities, ethnicities, traditions, cultures and faiths. This is in fact something that echoes what Barth (1969) acknowledged in terms of the need to possess and celebrate multiple identities and that is problematic and reductive to limit the individual to having one superordinate ethnic identity. By reducing these pluralities we in turn risk reducing the dynamics, potential for creativity and future transformation and emergence of ethnic groups and identities. Thus the point is simply that "if identities are always constructed, then they can also be deconstructed, perhaps even reconstructed" (Q. Ismail 1997, 95).

So for the mainstream Sinhalese there needs to be a recognition of the plurality of the nation in terms of Non Buddhist and Non Sinhala people. Equally the minorities need to rethink the concept of multiple identities and pluralism.

Change of Narrative

There thus needs to be a holistic re-imagination of Sri Lankan Muslim identity, expression and agency and an approach to the conversation. This can be done in phases as part of an evolution of re-imagination. The **first phase** starts from a re-imagining of the historical narrative. The Muslim narrative is and has been the fact that 'Muslims have been existing and co-existing with other communities in Sri Lanka over the last 1000 years without any problem'. This in itself is a problematic statement. It presupposes that there is a noble race of people called 'Muslims' who decided one day to move to Sri Lanka, 1000 years ago, fell in love with the country, decided to settle, intermarry with the local people and it is their descendants who are living today in Sri Lanka making up the population of Sri Lankan Muslims and whose constituents are facing the problems of racism and xenophobia. This reasoning is completely simplistic, assumes homogeneity for a religion that thrived on heterogeneity, and simply does not consider the complexity of relationships and lived experiences between communities. This reasoning also assumes that Muslims are one race which again is not true. Muslims are a heterogeneous community from different races, ethnicities, languages and countries all bound

by the simple, universal principles of Islam and its teachings.

The narrative of Muslims has to change in Sri Lanka starting from this simple fact. Islam came to Sri Lanka 1000 years and not Muslims. The latter are made up of a number of people who sought to believe in the former including definitely Arab traders who came and settled in the country, interacted with the locals and married local women (from the Sinhalese and Tamil community); Sinhalese and Tamil communities who converted to Islam; Muslim communities who came from Malabar in south India; communities who came to Sri Lanka as part of colonial migration and slave trade including the Malays, Memons and Gujaratis and other forms of migration and trade during the ages. Thus the Muslim community in Sri Lanka is a mosaic of people who are Moor (if they want to claim Arab heritage), Memon, Malay, Bhora, Pakistani, Afghani, Tamil and Sinhala. Even the Moor label is slightly disingenuous because it assumes a direct and pure link with Arabs (of a patriarchal element and no link to a matrilineal past) instead of acknowledging the intermarriage over centuries between communities. It is clear that the Muslim community is a mixture and hybrid of a whole heritage of people descended from Malays, Memons, Sinhalese and so on, because of the intermarriage that took place over the centuries. Colombo is an example of where different communities coexisted and lived together and then intermarried means that people are descended from different communities. So the concept of Moor to define a Muslim is a fallacy for many. Muslims don't have that link anymore and they are a cocktail of different people. Muslims in fact epitomise to some extent the pluralistic nature of the country.

So the narrative has to move away from a label of "Muslims who have come from a 1000 years ago" to something that holistically represents in a true form the spectrum of Muslim ethnicity. We can't continue to have this narrative which then presupposes everything else including a need for institutionalisation of identity based on a homogeneous race and which becomes confused with a need for religious expression.

The **second phase** of this reimagination has to be around the political identity and expression of the Muslim community. With the transformation of identity in Sri Lanka amidst the political and conflict context changes the political elites from the Muslim community have failed to understand the change in political context in Sri Lanka.

The experience of the political challenges of the Muslim community in Sri Lanka also raises questions about complex political transitions (especially in post conflict scenarios), where politically active minorities have to tread a fine line in terms of balancing national plus community sentiments. In politically complex transitions, politically active minorities can't rely on block votes as this only works in the short run and depends on dividing the majority. However, this scenario is a narrow window. Thus in order to remain active and viable, ethnic block voting has to transition and evolve to produce another narrative of identity. This new narration of identity has to consider multiple identities that also splits the majority vote and to some extent this is what Sen (2006) alluded to as well. Identity is flexible and changing and minority polity has to be flexible and to evolve to respond to this. The process of minority block voting only works if the majority community is divided politically which was largely the case during the conflict, in Sri Lanka but the moment with the end of the conflict, the Sinhala community was largely aligned politically with the state, the Muslim community concept

of block voting became irrelevant. In other words, block voting has a shelf life and can't be considered a panacea for minority politics. There has to be a realisation of an evolution of politics and thinking which is also affected when politically active ethno-religious minorities have a double problem in traversing their ethnic and religious duties and principles.

Thus the transformation of a constituency at the grassroots in the light of changes in political and global contexts could undermine the legitimacy of political elites if they fail to understand, appreciate and respond to meet those challenges. What the example of the Sri Lankan Muslim community shows, which is useful for elsewhere is that whilst Muslim democrats (a Muslim political party) can protect the right of an ethno religious minority in the wake of political challenges, religious expression which can lead to a homogenisation of identity and the process of the homogenisation of the political identity of the Muslim community can lead to their isolation away from key political debates. So a Muslim Democratic (political) party can not exist easily in a situation of a minority where a faith identity is also part of a conversation of an ethnic identity. The experience from Sri Lanka is that such a scenario is very difficult if it is just managed as a binary expression. It works much better if there is a recognition of the multiplicity of identities as well as a changing context at the grass roots and at the top.

We see this taking place in Sri Lanka where political elites from the Muslim community failed to understand grassroots dynamics and is actually part of a cycle that has been experienced before. This happened in the mid 1980s which led to the formation of the Sri Lanka Muslim Congress (SLMC) as elites from the South failed to understand the security concerns of the eastern Muslims and thus it was felt that the eastern Muslims needed their own separate party to look after their secure interests. It then happened again in 2009 after ethnic politics lost legitimacy after the conflict and the dynamics of the community changed at the grass roots. From being largely a divided polity during the conflict and focussing elsewhere, the Sinhala majority community became 'united' at the end of the conflict which emboldened extreme nationalists thereby weakening the Muslim polity. The grassroots also underwent a change in context as the political context also changed. In other words, at the grass roots, the Sinhala Muslim relation did not really improve after the conflict and in fact exposed all the weaknesses and fractures that had so far been masked by the conflict and the focus perhaps on Sinhala Tamil relations. During the conflict, the Sinhalese forgot about their relations with the Muslims and the Muslims were naively and blissfully ignorant developing their identity and expression almost in a vacuum to the conflict and those dynamics. This was exposed and exploited by the extreme Sinhala nationalists post 2009 leading to the violent incidents of 2014, 2017 and 2018 but the Muslim political elites did not understand this bottom up change in community dynamics and also did not understand the emergent of the nationalist mainstream politics. The Muslim community also being led by political and religious dynamics failed to appreciate these dynamics as well. Lewer and Ismail (2011) allude to this when they talk about the next steps for the Muslim community in the east of Sri Lanka as a three pronged approach of Muslim political thought: one that is really regional and context specific so for example, how in the East the Muslim polity engages with their Tamil counterparts; how these regional politics renogitiates a position with the Government of Sri Lanka and the central perspective; and a politics that stands for a more nationalistic solution. So elaborating on this, thinking about a three pronged approach of Muslim political thought has to take into

account the changing context and an evolution of the community in terms of influences and externalities. Part of this starts from a rethinking around collective mobilising for addressing community concerns is undertaken. What we have seen especially in the past decade, is that this type of political engagement is no longer the way forward for the Muslim community.

The **third phase** is about the classification of identity. The concept of piety and spirituality has to be divorced from the political reality of identity expression. So the premise is that one can be a good political Muslim and a bad spiritual Muslim: one can practice the spiritual aspects of Islam, be a 'practicing' Muslim but a bad political representative; of course, one can also be both. However, the issue here is not to be too prescriptive on linking being Muslim in Sri Lanka to simply being about spirituality and piety.

The **fourth phase** of the re-imagination to be addressed thus is around the deconstruction of an ethnic identity embedded within a religious framework, which poses several challenges for the community and the relationships with others. Despite a heterogeneity ascribed to an ethnic identity, the concept of a Muslim identity label can lend itself to a growing homogenizing tendency based on a religious outlook. This is especially given the global trend of Islamic reformation which based on influences from Saudi leads to a certain understanding around the concept of a 'pure' Islam which can lead to other issues around religious identity. This means that the overarching Muslim identity has evolved within this diversity. It is this tension due to prevailing socio-political conditions of conflict that leads us to think of a need for a reimagining of identity, agency and expression as a result of this. There is a need to take into account the changing circumstances of the context in Sri Lanka in order to understand that things are now different. It is perhaps, best seen as a dialectical process where pre-existent discourses become reconfigured and circulated when public and political discourse in society at large support and nurture such discourses. What is at stake is how the Muslims identify themselves. To a large extent the shape this discourse takes will depend on the macro political environment but a reimagining of the Muslim identity will also have an important role to play in shaping the future of these discourses. Thus the conversation has to centre around traversing a ethno-religious discourse whilst attempting to define a political stance. We have to redefine who the Sri Lankan Muslim is!!

This is the contention of this paper that the Muslim community have become victims of their own doing. Whilst the Muslim community (like the other two communities in Sri Lanka) have succeeded in becoming an 'imagined' community, based on an 'imagined geography' that has an imagined political community that disregards the majority of the other inhabitants within the nation and reproduces their imaginations with cultural roots (Anderson 1983), they have underestimated the ethnic confrontation with the pan – Islamic influences that would result and the changing temporal and spatial dynamics of religious expression especially Islamic reformism from the late seventies. Hence there was a perfect storm as the global pan Islamic reformism coincided with the search for the Muslims in Sri Lanka to articulate a separate identity in the face of the conflict and trying to develop an expression for themselves separate from the 'other'. This was seized upon by the Muslim elites in Sri Lanka who somehow did not understand or comprehend that this would have a life of its own and evolve. With pan–Islamic influences, there became a preoccupation with looking internally as opposed to considering the external message of reform that is at the heart of the

original Islamic message: that of changing the society for the better. This lack of synergy between the practices through which Muslim society is transformed and energized and the practices of society at large, exhibited by these reform groups, means that there was and is as yet no meeting point between the language of the piety movement and the demands of social expression for ethnic representations in the larger Sri Lankan context. The reification of the Sri Lankan Muslim identity assumes the homogeneity of identity because of a religious edict without recognising the diversity of individual communities and identities.

Recalibrating the Premise

Thus, the premise is that the reimagining of the Muslim identity for Sri Lanka has to be one where Islamic reformism in piety and theology makes sense, in recognising the diversity and homogeneity of the Muslim community; in guiding an ethnic and local agency and expression whereby, cultural practices and traditions are enhanced not replaced by theology; to struggle for greater justice and against discrimination; defend civil responsibilities and the democratic processes and restore the dignity of conscience and human values (Ramadan 2004). In this sense Muslim political representatives and a Muslim political party (or even a reformist group) who define themselves with guidelines from the Qur'an and "Islamic principles", should have focussed on conveying honesty and incorruptibility, and with grassroots support, to have used those same principles towards building an identity and relations with other communities by emphasising an ethical system and orientation that promotes social justice through equal rights and opportunities.

This re-imagination of the community identity has to include rethinking what the Muslim community is, represents and ultimately identifies with. In its evolution it has undertaken a number of different forms of identity as it sought to carve a place in Sri Lanka, however it is clear that from the the recent anti Muslim violence, the community is now at a crossroads. The role that they carve out for themselves is dependent on them being seen as part of the solution and not as an additional problem. This comes back to the fact that they need to articulate a comprehensive platform and identity (based on their Islamic principles of ethics) that takes into consideration the whole community and country. The community can not shed its religious label, and thus a rethinking of the identity has to start from understanding how one approaches Islamic reformation.

In this sense, it is worth exploring how Asad (1986) argues that Islam should be understood as a 'discursive tradition' producing doctrine and practice that are historically situated. Hence what Asad is talking about is a tradition that consists essentially of discourses that seek to instruct practitioners regarding the correct form and purpose of a given practice that, precisely because it is established, has a history. These discourses relate conceptually to *a past* (when the practice was instituted, and from which the knowledge of its point and proper performance has been transmitted) and *a future* (how the point of that practice can best be secured in the short or long term, or why it should be modified or abandoned), through *a present* (how it is linked to other practices, institutions, and social conditions). An Islamic discursive tradition is simply a tradition of Muslim discourse that addresses itself to conceptions of the Islamic past and future, with reference to a particular Islamic practice in the present. This discursive tradition is constituted and reconstituted not only by an ongoing interaction between the

present and the past, however, but also by the manner in which relations of power and other forms of contestation and conflict impinge on any definition of what it is to be a Muslim. Such a view of Islam, Asad suggests, helps avoid essentialist constructions that strive to judge all facets of Islamic thought, ideals, and practice in terms of how they relate to (or, more often than not, fail to relate to) Islam's foundational texts, even as it seeks to steer clear of the temptation to reduce the variety of religious and cultural expression to different, local 'Islams'. This is perhaps essentially how the Muslims of Sri Lanka fashioned their narrative. While Asad's definition helps to challenge and overcome problems of the conceptualisation of change in Muslim society, by historically situating the production of doctrine and practice it mainly captures the element of time and not space. This is what we see about the limitations of the construct of the narrative currently put out by the Muslim community in Sri Lanka.

Thus, in order for there to be a reimagining of this, we need to be aware of more than the discursive. We need to be aware of the dialogical process of relationships and religions in Sri Lanka, where the discursive is also met with interactions and relationships, in demographic and other spaces as much as it is affected by the context and situation at the time. Thus the complexity in Sri Lanka of an identity based on the history and heritage of the Muslim / Moor community versus the relationship and external facets of what happened when the community developed and had external factors. We also have to discuss the 'objectification' of Islam (Eickelman and Piscatori 2004) in Sri Lanka, whereby the process by which basic questions come to the fore in the consciousness of this did not occur specifically as a result of a disillusionment with secularisation, modernisation, democracy or the nation-state. It came about as a significant push to define oneself against the 'other'. Hence any discussions around religion and theology has to take these considerations into context.

There needs to be a rethink about the identity for the Muslim community (and beyond). We need to come back to the concept that we are not just Muslims but Moors, Malays, and so on as well as Sinhalese and Tamil. We are not homogenous but heterogeneous and made up of multiple identities. We are no longer one entity. We also need to more away from the concept of Muslims being in Sri Lanka for 1000 years. We have emerged and evolved and although linked with religion, we are different to regions and need to work on that to ensure some better relationships. So it is vital for the Muslims of the east that the Muslims in the south and central are in good relationship with the Sinhalese but equally it is important to the Muslims of the south and central to realise that there are cultural and other differences that they need to understand especially with Muslims out of those regions.

The gist is that the Muslim community cannot be ignored nor marginalised (by either the Tamil or the Sinhala polity) when considering the future of Sri Lanka in a post conflict scenario. However, the role that they carve out for themselves is dependent on them seeing themselves as part of the solution not an additional problem. This comes back to the fact that they need to articulate a comprehensive platform and identity (based on their Islamic principles of ethics) that takes into consideration the whole community and country. Their part in reconciliation and forgiveness (based from their Islamic references) is vital.

However, they cannot afford to be politically naive and need to develop a sophisticated argument and agenda. Because of global concerns about the rise of conservative Islam

it is easy to conflate terminology and ideology with radicalisation, violent extremism and potential conflicts. In this case, Muslims especially those living in areas where Sinhalese are the majority and who have legitimate grievances, need to pay attention. While Muslims are aware of the challenges they are facing, they have to be able to understand where they have gone wrong. There needs to be a realization that exclusive social practices and values practice among Muslims themselves have to be curtailed. This allows the beginning of a potential conversation in ensuring that tensions can be alleviated.

Final Reflections

In Sri Lanka attempts at redefining politics and religion are not useful and in a practical context can be seen as meaningless mainly because of the interconnectedness between the two entities. The argument has been that Islam, ethnic and politics religion are intertwined and constitute a different perspective that creates a political / ethno / religious representation. This is definitely different to how we traditionally approach this classification where religion, ethnic and politics through the state are understood as fixed and separate. Instead we need to look at how a hybrid of these representations are done with the process of how the boundaries between these concepts move, what factors cause these movements and its implications. The process of shifting, breaking and remaking the boundaries of religion whilst ensuring institutionalisation can indeed be described as the evolution of the institutionalisation of religious identity.

As a 'third party' in the complex ethnic politics of Sri Lanka, the Muslim community have been transformed under its influence and forced to define themselves and seek their own discourse. However, this has also meant that there has been an element of naivety in how they have conducted themselves trying to forge their own identity, in particular with the simultaneous combination of balancing the combination of external ethno-nationalist rivalries with the internal Islamic doctrinal conflict.

So what is the answer to the question posed as to what the Muslim community should do now?

The way forward has to be about a re-imagination of what the Muslim community is, represents and ultimately identifies with. The way forward has to include thinking about how well the community manage the formation of attitude towards 'other' ethnicities and practices adopted to mitigate negative attitudes. In this regard much work is needed by the Muslim community to work towards possible behaviour change in order to experience 'other' communities.

Muslims have struggled and still continue to struggle to articulate Muslim grievances from the conflict in a manner that brings confidence to the other two parties of a sincerity of goals for the benefit of the whole country and in a manner that perhaps changes the current misconceptions regarding Muslims' place in the conflict.

However, the role that they carve out for themselves is dependent on them being seen as part of the solution and not as an additional problem. This comes back to the fact that they need to articulate a comprehensive platform and identity (based on their Islamic principles of ethics) that takes into consideration the whole community and country. This is one of the antidotes that can neutralize the advances of a minority of Sinhala Buddhist extremists.

The Muslim community has found itself caught between a rock and a hard place. Undoubtedly, their future prospects could be based on their past, but the past should not become a ball and chain for the future. Muslim politicians have made mistakes in reacting and developing a separate identity. Their naivety and quest for political representation obscured the gains that could have been made for the country. Coupled with the now rising religious consciousness of the community, which confuses religious and ethnic identity, there are real challenges for representation and identification.

Any movement forward needs to articulate a common space for all of these representations to take place.

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Salient Features of Muslim Personal Law

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Chapter 1

Marriage Discipline

It has been opined that some changes should be brought in the Muslim Personal Law of Sri Lanka. Herewith we present our opinions on these changes in two chapters.

Family is the basic unit in the Islamic social life. The disciplined functioning of the society depends on the discipline within the family. Family is the first medium that transfers Islamic beliefs, worships and cultures to the successive generations. Therefore, the family could be considered as the primary school and training center. In this context, the Quran has codified lot of laws with a view to strengthen and discipline family life. The Sunna has further explained them.

The Islamic legal scholars too had codified the laws well that are related with the Islamic family life. They have also reviewed the family laws based on the legal problems that arose with the change of time. Imam Ibnu Thaimiya's research work could be cited as an example in the olden days.

During the early period of the Ottoman Empire family laws were reviewed and a volume of Personal Laws were published on Hijri 1336 Muharram 02 under the title "Kanoon Hookook Al Aila". Later, Personal Law volumes were codified and published in Egypt and Syria. Thus the Personal Law had undergone changes according to the social changes and the problems that were faced by the society. It is very important to note that in this context, the fundamental laws didn't change, certain subsidiary laws only changed. Issues that are connected with the Marriage Law are discussed below:

1. Marriageable Age:

Human beings should get qualified to accept responsibilities and carry out their duties. This is called maturation. There is age limit for maturation. All laws, including the Islamic Law, accept this age limit.

As marriage is a responsibility, it should have been allowed when maturation takes place. However, child marriage had been practiced in almost all societies in the olden days. Child marriage was allowed during the period of the Prophet (Sal) and thereafter. Majority of the Islamic scholars followed this tradition and considered that child marriage is allowed in the religion.

Uncomplicated social life and the mutual support within a collective family system didn't show child marriage as a problem. The responsibility of bringing up a child was not considered as the sole responsibility of the child's parents, it was also considered as the responsibility of

the extended family.

But our era is entirely different from this social structure. Collective family system has undergone big transformation and they are rapidly becoming micro families. Cost of living has become a big burden. Bringing up the children have become highly complicated and a heavy responsibility. In this context, it is natural to think of the definition of the marriageable age.

Following factors could be observed in the Islamic Law in connection with marriageable age:

I. Majority of Scholars who consider that child marriage is allowed in Islam express the following opinion:

(a) The version in Sura Thalaq:

"And for such of your women as despair of menstruation, if ye doubt, their period (of waiting) shall be three months, along with those who have it not" (Sura Thalaq 65:4).

Here, it is very clear that "women as despair of menstruation" indicates the minors. As the Quran talks about their period of waiting, it suggests that the minors could get married.

(b) Aisha (Rali) informs as follows:

Prophet (PBUH) got married to me when I was six years old. When I was nine years old, he had sexual relationship (Sahih Muslim: Hadis No.1422).

II. Legal scholars such as Ibnu Shubruma, Usman al Baththi and Abubucker al As-sammu opine that underage marriage is not valid.

They put forward the following to support their opinion:

(a) Following version in Sura An-Nisa:

"Prove orphans till they reach the marriageable age; then, if ye find them of sound judgement, deliver over unto them their fortune" Surah An-Nisa (4:6).

This version indicates that the status of minority is ending with reaching the marriageable age[1]. If marriage is allowed during the childhood, the above qur'anic version that imposes a limitation to marriageable age would lose its meaning.

(b) Relationship between husband and wife, child birth, creation of family etc. are the objectives of marriage.

Child marriage is not going to fulfil all these objectives. Therefore, this marriage will become meaningless. Further, these marriages will result in other type of evils.

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The childhood marriage of Ayisha (Rali) to Prophet Muhammad (Sal) may be a unique permission. We have observed in Prophet's life that there were special permissions and controls for him. They are not being considered as common law[2].

Child marriage seemed to be a social tradition in those days. Al Quran didn't want to break it all of a sudden. It gave solution for one problem and also indicated that the age of marriage should be after passing the childhood.

When explaining this problem, Imam Abu Hajra says that in the Islamic context, the state could define the age of marriage based on time, place and event[3]. This is being called "Al Ziyasath Al Sharaffiya" in Islamic Law.

The law could organize this legal problem in the following manner:

1. Dividing maturation in to two stages:

(a) Commencement of maturation

This will commence as soon as attaining of age: This may be 14 years for females and 15 for males.

(b) Matured stage

For males this may be 20 years for males and 18 years for females.

When it comes to marriage, it should take place after the matured stage. This should be the fundamental principle.

However, marriage could be consummated before maturity under exceptional circumstances. When this takes place, following conditions should be maintained:

I. Both parties should have attained age. For female this should be 14 years and for males it should be 15 years.

II. Permission of the Guardian, father, should be obtained. (Only the father should be the Guardian - other guardians cannot be responsible for this marriage).

III. Quazi's approval should be obtained. He should ensure the following two conditions:

a) This marriage should take place under an exceptional circumstance that justifies the marriage.

b) He should ensure that both male's and female's physical condition is suitable to get married[4].

2 Prof Mustafa Shifayyih : Sharah Kanoon Al Ahwal Al Shaksiyyah. Pg 258

3 Imam Abu Sahra Al Ahwaal Al Shaksiyyah Pg 124

4 Prof Mustafa Shifayyih : Sharah Kanoon Al Ahwal Al Shaksiyyah. Pg 120

In fact, the age of marriage should be decided based on the collective advice of the Psychologist, Medical Doctors and Social Scientist.

Freedom of Choice:

Another important factor is that whether male and female has freedom of choice in the selection of spouse? There is no difference of opinion as to the freedom of choice of the spouses for males. There is difference of opinion on the choice of their spouses for females.

The Imams such as Shafie and Malik had opined that a father could force his daughter to get married to a person of his choice. But, Imams such as Abu Hanifa, Awjaie and Thowry had opined that it is compulsory to get women's consent and the fathers cannot force them. They have also opined that if the marriage is consummated without women's consent, it will not be a valid marriage. There are several Hadis that support this opinion. Some of them are given below:

Prophet Muhammad (PBUH) stated that a widow or a young girl will not be given in marriage until such time they give their consent. When he was questioned as to how they give their consent? He said "by observing silence" (Saheeh al Buhari: Hadis No. 5131 four Sunan Books).

Ibnu Abbas (Rali) states, once a young girl appeared before the Prophet (PBUH) and complained that her father had given her in marriage without her consent. He gave her the freedom of choice (Musnath Ahmad 2469, Abu Dawood: 2096, Ibnu Maja: 1875).

Saheeh Muslim reports as given below:

The father of a young girl should get her consent for her marriage (Kitab al Nikah: 3415).

Islam has given each woman the choice of freedom in the selection of her husband. Therefore, this freedom should be given protection in the law. The minimum protection is to allow her to signify her consent by placing her signature on the Marriage Registration Form.

Imam Abu Hanifa (Rah) had expressed the opinion that a girl can get married without a guardian (Wali). He gives two following qualifications for this:

1. Although an agreement to get married without a Wali is valid, it is desirable to get the permission from him.

2. Although a marriage is valid without a Wali, there are two following conditions that should have been fulfilled:

    1. The girl should have selected a suitable partner for her.

    2. She should have received the required Mahar.

If the guardian finds that there are problems in connection with the above two conditions, he can complain to the Quazi Court and seek redress.

The above opinion of Abu Hanifa (Rah)[5]combines both positions, Guardians' consent is necessary and not necessary, and gives a practical opinion.

As there are possibilities for complications to arise in connection with the Guardians in marriages, this could be included in the Draft Islamic Marriage Law under exceptional circumstances.

(3) Polygamy:

Islam approves polygamy unanimously. But, it should be noted that it is a permission only. Islam doesn't promote it. Instead, it had imposed control on it. Islamic religion didn't d formulate laws on Polygamy. Actually, it had regulated the social behaviour which was irregular and unjust. The following Quranic verse give explanation about polygamy:

"And if ye fear that ye will not deal fairly by the orphans, many of the women, who seem good to you, two or three or four, and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hands possess. Thus it is more likely that ye will not do injustice" (Surah An-Nisa 4.3).

This verse explains the following:

I. Polygamy is allowed in Islam. It is imposing restriction on the number of women as four a male can get married. This number was not restricted in the Arabian society in which the Quran was revealed.

II. Quran doesn't allow polygamy as a separate law. Instead, it allows polygamy as a medium for the provision of justice for orphans. It is speaking to a person who fears that whether he will cause injustice by getting married to an orphan who is under his custody and suggest that person to get married to the women other than the orphans under his custody.

III. This verse makes it is compulsory for the polygamist to behave justly with all wives. Quran prohibits a person from marrying several women, if he fears that he will not be able to treat them fairly.

Fair treatment of wives is one of the conditions for marrying more than one woman. Economic strength should be considered as another condition for polygamy. This means that the polygamist should possess the economic strength to maintain two wives and their children. Even a person who get married to one wife too should possess economic strength. The Prophet (PBUH) says even the person who wants get married to one wife should possess economic strength, if not, he should not get married.

Abdullah Ibnu Masood (Ral) informs that Prophet (PBUH) told the following:

Oh youth, whoever possess economic strength amongst you should get married. This will help you to low their gaze and protect them from misbehavior. Let all those who do not possess

5 1.See Mustafa Al Sifayi:Sharah Kanoon Al Ahwal Al Shaksiyya: Pgs 131,132

wealth should observe fast. This will weaken their feelings. (Saheeh Buhari: 5065, Saheeh Muslim: 1400).

In addition to the above conditions, they also should possess physical fitness to satisfy their wives.

A provision should be included in the Muslim Marriage Law for a person who possess all the above qualifications and desirous of having more than one wife to do so through the Quazi court. A system should be developed to assess whether the person who is desirous of getting married to more than one wife has fulfilled all these conditions. This will result in the prevention of negative effects such as ignoring the first wife and ill-treating her and lack of proper maintenance of children and pave the way for the protection of family life.

(4) Marriage Registration:

The event of marriage is ending with the words that express both parties' satisfactory words. From the bride's side the guardian tells the name of the bride and says that "I am giving her in marriage". On the other side, the bridegroom says that he has accepted it. There will be witnesses from both sides. The wedding is consummated according to Sharia.

The question that arises here is what is the value of registering the marriage in writing under the Sharia Law? Some say that "This is being done to satisfy the government requirement. There are no connection between this process and the Sharia Law. Expressing both parties' satisfaction is the Sharia Law". This is not true. Marriage registration also a part of the Sharia Law. This opinion is explained here.

There is a section in Islamic Law which is called Al Siyasa - Al – Sharayiya. This has two meanings as given below:

- Common Meaning: This means that governing people's affairs and world affairs through religious law. This is being defined as "becoming the representative of the Prophet (PBUH) by protecting the religion and managing world affairs.

- Actual Meaning: The laws and decisions that are declared by the rulers with the expectation of certain irregular events that will take place or may take place.

Imam Ibnu Al Kaiyim in his book titled "Al Turk Al Hukumiya" quotes as explained by Imam Ibnu Akeel al Hanbali as given below:

"It may be a subject for which revelation had been made and not explained. It may be something that Prophet (PBUH) didn't speak about. Siyasa Sarayiya means the actions that keeps people closer to discipline and also keeps them away from indiscipline. There are no Imams who have not explained this concept".

This type of actions by the state will contain Masalih, beneficial discipline. It is commonly accepted truth to enact laws where there is a lack of direct legal arrangements. In Sharia law this is being called as Masalih Mursala, meaning undefined benefits.

Below we give some examples from Sahabas actions. These are given in the above mentioned book of Imam Ibnu Kayim:

- Umsan (Rali) appointed a committee to gather the Quran. Then he collected the Qurans that were written with personal comments by the Sahabas and burnt them.
- Umar (Rali) declared half of the assets that were earned by the Governors due to their honorary position as state assets.
- Umar (Rali) observed that the attention of the people is more on the Hadis and going away from the Quran. Therefore, he made it compulsory for the Sahabis to reduce the reporting of Hadis.

Umar (Rali) made it compulsory to perform Umra during the Non Haj period with a view to make the Kaaba to become lively with the presence of the people6[6]. In the modern world there are several laws such as the laws related to the transportation, registering the land and buildings in the owners' name, laws that regulate health activities, laws for educational administration etc. Therefore, registration of marriage should be made a compulsory law.

There is no doubt that the marriage will be valid with verbal agreements. Written registration is compulsory for the attestation and witnessing of the marriage. This will prevent indiscipline and chaos in the married life.

(5) Incorporating Conditions in the Marriage Agreement:

Generally, during the agreements incorporation of conditions take place. Usually they protect the interests of both parties. In this connection Hanbali Madhab has broad opinion. This Madhab is of the opinion that the conditions of the agreement should not be in conflict with the Quran and Hadis. Therefore, both parties could include conditions to protect their interests. As marriage is an agreement, the people of Hanbali Madhab are of the opinion that as an application of the common law, it is possible to freely include terms and conditions in the marriage agreement[7].

Following examples are provided in support of inclusion of terms and conditions freely by both parties:

I. Prophet Muhammad stated that except for making the Haram as halal and Halal as Haram, Muslims should obey the terms and conditions that were included by them. (Sunan Thirmithee Hadis No 1352)

6 (1) See: Imam Ibne Kayim; Al Turk Al Hukoomiya Page 13 – 19. Dr. Yoosuf al Karlavi: Al Siyasa Al Sharaiyah: page: 82 – 104
(The thoughts and examples were obtained from these two books)

7 Imam Abu Jahra and Dr. Musthafa Ahmed Jarka have clearly explained that when it comes to the inclusion of terms and conditions, Hanbali Madhab has strong opinion.1 (Imam Abu Jahra: Imam Ibnu Hambal: Hayathuhu wa Asruhu - wa – Arahu- Wafiquhu Pages: 258 – 266
Dr. Musthafa Ahmed Jarkau: Al madhal Al Fiquhi Al-aam: Page 469 – 500)

II. An example from Prophet's life: When Jabir (Rali) sold a camel to Prophet (PBUH) and included the condition that he will travel on it up to Medina. Prophet Muhammad accepted this condition. (Saheeh al Buhari: 2718, Saheeh Muslim: 715)

Accordingly a marriage agreement may contain the terms and conditions from both parties. Further, it is the confirmed opinion that it is possible to include terms and conditions to this agreement freely.

The Personal Law of Syria has divided them in to two parts. With the view that they may be relevant for us too, we reproduce them below:

(1) Terms that are non-implementable and terms that lacks recognition. One part of this terms and conditions are the ones that are different from the matrimonial discipline. Terms and conditions not to pay Mahar, requiring wife to spend for the husband etc. are some of the relevant examples.

Conditions that are contrary to the objectives of Shariah is another part. Example: condition not to have sexual relationship between husband and wife.

This has been accepted by all madhabs.

(2) Conditions that should be compulsorily fulfilled by the husband: Those conditions that will not affect others rights and those rights that is accepted by husbands' Madhab and those conditions that will not impinge on the rights of others and those will bring benefits to the wife.

Examples:

Imposing conditions not to take abroad

Imposing conditions requesting one of the parties to abandon one's employment.

These are the opinions of the Hanbali Madhab. Husband should fulfill these conditions. A husband could be forced to implement them through a court. If the husband violates them, the wife has the freedom to break the marriage.

(3) Legally recognized Terms and Conditions:

These terms and conditions may be legally recognised. But, the Court will not enforce them on the husband. They are the personal activities of the husband that are recognised by the Sharia Law.

Examples: Terms that prevent the husband from getting involved in an employment. Terms that prevent from getting involved in politics.

Not to get married to another woman.

Although it is not compulsory for the husband to fulfill these terms and conditions, had he

accepted them during the negotiation for marriage and didn't honour them, the wife has the right to terminate the marriage relationship.

This opinion is expressed by Hanbali Madhab[8]

Female Judges

We can observe that the general opinion of Islam is that females cannot hold leadership positions. It is natural for this opinion to become influential during the period of low participation of women in the social life. It is very important to review this opinion today due to the increased female social participation and the emergence of feminist thoughts.

There are several Islamic Scholars who have reviewed this opinion. It has been observed that the reasons that were submitted against women to hold leadership positions seems to be not strong and unclear. Generally, women are equivalent to men in their status and they are capable of accepting responsibilities. There may be some exceptions between the males and females in carrying out certain duties. This should be supported by reasonable factors.

If there are lack of strong and clear reasons to support that women cannot hold leadership positions, it is clear that women also can hold those positions equivalent to men.

To understand this concept clearly, we will look at the factors that support the argument that women should not hold leadership positions.

The group that denies the leadership position for women depend on the following two factors:

I. Following versions in the Quran:

"Men are in charge of women, because Allah hath made one of them to excel the other, and because they spend of their property (for the support of women). (Surah An-Nisa: 4:34)

II. Following Hadith:

Reported by Abu bucker (Rali):

When the Prophet (PBUH) heard the appointment of Kisra's daughter as the Queen of Persia, he said "The society that appoints women as responsible person for their affairs will not attain victory"

Those who argue against female leadership quote the above Quranic verse and the Hadis argue that they are very clear about the about their opinion.

The other group that argue in support of female leadership argue as given below:

I. The above Quranic verse is connected with the family life. The verses that precede and succeed argue about family affairs. Therefore, it is not suitable to generalize the versions that speak about family life. Family is a separate institution. The responsibility

8 Mustafa Al Sifai:Sharah Kanoon Al Ahwal Al Syakhsiyyah Pg:113,114

of formation and maintenance of the family are assigned to men. It is pertinent for men to accept the family responsibility. Social Institutions are not similar to the family. It is wrong to generalize this will be incorrect[9]

II. Modern Islamic Scholars look at the above mentioned Hadis from a different viewpoint as given below:

a. Prophet Muhammed referred to the Queen of Persia. It was the highest political authority. What he meant was that a female should not accept the leadership of Khilafa. This means that women can accept the leadership of the institutions that come under it.

b. This Hadis means that "A society which is under the leadership of a female will not be successful". This is not a law, an opinion only. We formulate a law from an opinion. This opinion is common to the Muslims and non - Muslims. This was stated in the context of the Persian political context.

Prophet Muhammad's opinion never go wrong. But, this Hadis is contrary to the Sura An - Naml (Sura An - Naml: 27: 23 - 44) which speaks about the Queen of Sheba. According to the Quran, as a result of her intelligence she avoided the destructive war and guided the people on good path. We come across female rulers in history. We have seen female rulers in the modern world too. Therefore, it may be wrong to accept the direct meaning of this Hadhiths. It will be correct to say that Prophet (PBUH) said this in the context of Persia.

Imams such as Abu Haniffa and Imam Ibnu Hajm are of the opinion that females can hold the position of a Judge. Imam Thabaree too of the opinion that generally females and hold any leadership positions[10]. This opinion is not a new one. It is very clear that the old Legal Experts too accepts this[11]

In the background of these explanations, it is clear that appointing females as Judges of the Quazi Courts is not contrary to the Sharia Law. However, female Judges could be appointed step by step due to the opinion prevailing in the society.

1. Appointing two females as Jurors and the Quazi Judges could give his judgement in consultation with them.

11. Appointing two or three females to represent females in the National Board of Quazis.

These arrangements will prevent females' inconvenience in divulging the highly personal matters. This will ensure justice for women in the problems related to the family affairs. Step by step, these arrangements will make the society to realize the importance of female participation. This will result in the acceptance of female judges in the next step.

9 See Sheikh Abdul Haleel Abu Shakka: Thahreer Al MarAth Fee Asr Al Risalath: Chapter 03 Pg: 446-460, Hiba Rauf Ijjath: Al MarAth – Wa- AlAmamAlSiyasi-Ruqyath Islamiyyah: Pgs: 127-135

10/11 See Sheikh Abdul Haleel Abu Shakka: Thahreer Al MarAth Fee Asr Al Risalath: Chapter 03 Pg: 446-460, Hiba Rauf Ijjath: Al MarAth – Wa- AlAmamAlSiyasi-Ruqyath Islamiyyah: Pgs: 127-135

If the appointment of females as Jurors and Judges is recognized by the Sharia Law, it is clear that appointing them as Marriage Registrars will not be contrary to Sharia.

As the Marriage Registration takes place in the mosque, some may argue that sometimes they will not be in a position to come in to the mosque. We present two solutions for this problem:

1. Record keeping and writing could be done at home.

11. The office could be established in the mosque premises.

Chapter 2

Termination of Marriage/Divorce

Marriage will be terminated in 3 ways:

(1) Thalaq from the husband's side

(2) Kulu from wife's side

(3) Separation by the court

We will look at the all three above mentioned termination and separation. We are not going to look at these three points in an extensive manner.

(1) Thalaq from Husband's side:

When there are relevant justification only the husband can use Thalaq. Although the court will not hear about the Thalaq, Thalaq without justification is a punishable offence in the presence of Allah.

Thalaq should follow the following order:

1. Declaring Thalaq when the wife is clean without menstruation and in a condition where no sexual intercourse had not taken place.

2. Declaring Thalaq once only.

3. Having witnesses for Thalaq.

There are no differences of opinion as to the above mentioned conditions. However, there are difference of opinion as to the consequences, if Thalaq had been declared without following the above conditions.

There are no differences of opinion as to it is a sin to declare Thalaq after having sexual intercourse with the wife during menstruation or when she is clean. Several Imams are of the opinion that this Thalaq will be accepted. However, Imams such as Ibnu Thaimiya, Ibnu

Kaym, Ibnu Hajm and the Imam of Thabayeens Sayid Ibnu Al Mussayyab are of the opinion that this Thalaq will not valid[12]

It will not be not suitable to look at both parties opinions in detail. I think it is relevant to touch one opinion. More relevant opinion is that when Allah and his Messenger (PBUH) lay down certain order for an activity and if it is being violated, the particular activity too will not be accepted.

When declaring Thalaq, it should not be repeated several time. It should be declared once only. All Imams accept this. However, there are legal experts who say that if Thalaq it is uttered two or three times at once, it will be accepted. But, Imams such as Ibnu Thaimiya and Ibnul Kaiyoom accept the point that it will be treated as uttered once. Following Hadis explains this:

Ibnu Abbas (Rali) informs that, during the period of Prophet (PBUH) and during the first two years of Abu bucker (Rali) and Umar (Rali), uttering three Thalaq had been considered as one. Umar (Rali) said that "People are hurrying up at a time they should observe patience. What if we make it to happen that way?" After that he made it as it is. (Sunan Abu Dawood 2199, Saheeh – Albanee 189)

I had been the practice in the early period to treat uttering several Thalaq as one. Umar (Rali) observed people's behaviour and decided to allow it with a view to correct the people. But, during the present day, this action will be a cause for the quick breakup of family. Therefore, it much better to follow the practice that was followed during the period of Prophet (PBUH) and Abu bucker (Rali). Majority of the laws in the Arab countries follow this practice[13]

Having witnesses while declaring Thalaq is another important factor. Following Quranic verse shows this.

"Then when they reach their term , take them back in kindness, and call to witness two just men among you, and keep your testimony for Allah" (Surah Al – Thalaq 65:2)

It is very clear that this verse requires to have witnesses when declaring Thalaq and while withdrawing it. However, there is a difference of opinion as to whether this revelation makes it a duty or a Sunnah? Majority of the legal experts say this is a Sunnah. Imams such as Lahiri Madhab are of the opinion that this is a duty. Therefore, it is good to pay attention to the second opinion. It should be noted that Intellectuals such as Shiek Ahmed Shakir, Imam Abu Jahra, Shiek Ali Al Habeeb and Dr. Yusuf Musa are of the opinion that this is Wajib[14]

12 (Dr. Abdul Rahman Al Saabuni See: Nilam Al Usra – wa – Hallu Mushthilathi Haafi Layil Islam Pages: 140, 141

13 (See: Dr. Abdur Rahman Al Sabuni: Nilam Al Usra -wa-Hallu, Mushthila thiha- filauyili Islam Page 137 & 138)

14 (Dr. Abdul Rahman Al Saabuni See: Nilam Al Usra – wa – Hallu Mushthilathi Haafi Layil Islam Pages:142, 143

(2) Thalaq from Wife's side – Kullu

Just like men, women also has the right to terminate the marriage. A man who hates the wife and he hates her o the extent that he cannot live with her declares Thalaq. In the same way, the woman who feels excessive hatred towards the man to the extent that she cannot live with the man and feels that she cannot carry out her duties and responsibilities with satisfaction can separate from the husband. Al Quran joins the male right, together with woman's right and opines as given below:

"A divorce is only permissible twice; after that the parties should either hold together on equitable terms, or separate with kindness. It is not lawful for you, (men) to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something for her freedom....." (Sura Baqara 2: 229)

We give below the Hadis that explains the above opinion:

Abdullah Ibnu Abbas (Rali) informs,

The wife of Thabith Ibnu Kais came to the Prophet (PBUH) addressed him as follows: O! the Prophet of Allah, I didn't see any offence regarding Thabith Ibnu Kais about his religiousness or his discipline. But, I am scared about committing sin while in Islam." Then Prophet (PBUH) asked her whether she will return his land to him? She agreed to it. Then the Prophet told Thabith to get the land and declare Thalaq for her. (Sheehul Buhari Hadis No: 5273) This system of Kullu which allows women to get Thalaq should be well considered and included in the Muslim Marriage Act. Following should be closely considered in this connection:

1. It will be an injustice to request to return the Mahar when the wife asks for divorce due to the serious sickness of husband or his torture, not giving for family expenses.

11. According to the Hadis, wife didn't see any defects in husband's religiousness or in his discipline. She couldn't live properly with the husband due to lack of psychological agreement with the husband, she wanted to get separated from the husband.

(3). Separation by the Court:

Divorce is fundamentally in the hands of husband and wife. In certain circumstances it goes in to the hands of the courts. They are given below:

(a) Either Husband or wife is having serious sickness or having serious defects.

(b) Failure of the husband to meet family expenditures.

(c) Torture

(d) Disappearance of husband or imprisonment

(a) Serious Sickness or having serious defects:

Having serious sickness and defects that prevents the couple to lead a life of love and compassion. Majority of the Islamic scholars are of the opinion that either husband or wife can resort to the help of the court for separation.

Shafie and Hunbali Madhabs are of the opinion that in this context, separation should be treated as "Fusk".

According to the Hanafi and Maliki Madhabs it should be considered as Thalaq. A legal code should be developed incorporating these ideas.

Following could be included in this:

(i) Proof of the sickness or defects

(ii) Seriousness of the sickness or defects

(iii) Both, husband and wife should have these rights.

(iv) Inability to Spend

It is the set law in Islam that the husband is responsible for wife's and children's expenditures. There is a possibility for the husband to become poor and may not be able to spend properly. Under this circumstance a noble wife will patiently cooperate with the husband. However all will not be ideal wives. Majority of the wives fall in to the category of average. Majority of the intellectuals are of the opinion that in this circumstances a wife can seek divorce from the husband.

"A divorce is only permissible twice; after that the parties should either hold together on equitable terms, or separate with kindness." Sura Baqara (2: 229) Legal experts argue that this verse emphasize this opinion. There is no doubt that spending in an orderly manner is part of keeping the family well. Hanafi and Lahiri Madhabs don't accept this opinion of seeking divorce when the husband cannot meet the family expenses. They depend on the following Quranic verse in support of their opinion.

"Let him who hath abundance spend of his abundance, and he whose provision is measured, let him spend of that which Allah hath given him. Allah asketh note of any soul save that which he has given it. Allah will vouch - safe, after hardship, ease." (Sura Thalaq 65:7)

It is much better to pay attention to Imam Thaymi's opinion on this:

1. Husband has the ability to spend and doesn't spend for family in an unjust manner.

2. Cheating by the husband. A poor husband shows himself to be a rich man during the agreement to Marriage.

It is suitable to consider the Thalaq for inability to spend should be a retractable divorce.

(v) Torture:

There are occasions in the matrimonial life husband and wife have serious differences and the wife is physically and psychologically tortured. It is important to make peace between them as much as possible. Quran says the following regarding this:

"If ye fear a breach between them twain (the man and wife), appoint an arbiter from his folks and an arbiter from her folks. If they desire amendment Allah will make them of one mind. Lo! Allah is ever knower, aware. (Sura Nisa 4:35)

Maliki Madhab opines that when peace efforts fail to succeed, wife can complain to the court and obtain divorce.

Dr. Abdur Rahman Sabooni thinks that some general restrictions could be imposed for divorce for torture:

1. Giving same status for male and female for ill treatment and torture.

2. Without imposing limitations on the cause for divorce, allow this to be decided by the husband wife environment and the Judges assessment.

3. If found, that they are not willing to separate, one of them can request the court to give a suitable punishment for the Torturer.

4. The Judge should get the involvement of two family members with a view to make peace between them.

Disappearance of the husband or Imprisonment: If the disappearance or imprisonment of the husband is prolonged, definitely wife will get affected and may compel her to get involved in bad activities.

Hanbali and Maliki Madhabs had understood this well. Imam Ibnu Kumatha says in his book "Mugini" that when the husband is separated from the wife for a very long time without just reason to the extent of affecting the wife, she can request the Judge for divorce.

The intellectuals who belonged to the Maliki Madhab didn't divide the reasons as just and unjust. They only looked at the negative effect of it on the wife. Imprisonment and disappearance also should be taken in to consideration in this manner.

The period in which the husband is away from wife should be defined. The reason for being away from the also should be taken in to consideration. It should be noted that based on the reason for imprisonment, the judgement may be different.

The topic on "Separation by the Court" was written based on the book "Nilamul Usra - wa -

hallu - Mushkilathiha - fi lail Islam" Page: 149 – 161

Reference:

1. Imam Abu Jahra: Al Ahwal Al Shaksiya
2. Dr. Mustapha Sifayi: Sharah Kanoon al – Ahwal Shakshiya
3. Dr. muhamed Mustapha al Shalafi: Ahkam al Usra fi al Islam
4. Dr. Abdur Rahman Al Saabooni: Nilam al Usra wa halluMushkilathiha fi Lelail Islam

Resolving the Anomaly in Contract Formation Under the UNCITRAL Rules and the Common Law

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Abstract

Lord Justice Denning's judgement in Entores Ltd v Miles Far East Corp (1955) supports the proposition that in cases of instantaneous communications, a contract is formed only when the acceptance is 'received' by the offeror. However, based on the language of Denning LJ, it is also clear that whether an acceptance was received must be objectively assessed. Thus, where an offeree reasonably believes that the acceptance message was received by the offeror, a contract may come into existence even in circumstances where the latter is unaware of the acceptance, provided that the lack of communication of the acceptance to the offeror is brought about by his own fault. Bizarre as it may sound, it is not impossible for such an eventuality to occur where parties resort to electronic means to contract. The purpose of this paper is to rationalise the interplay between this unique, yet possible, eventuality under the common law of contracts and the rules set out by the United Nations Commission on International Trade Law ('UNCITRAL') pertaining to the dispatch and receipt of electronic communications in its 1996 Model Law on Electronic Commerce and 2015 Convention on the Use of Electronic Communications in International Contracts.

Keywords–electronic contracts, acceptance, offeror's fault, receipt, common law, UNCITRAL

Introduction

Consider the following hypothetical, yet realistic, scenario. Assume that A accepts O's offer by email, email being an agreed form of communication between the parties and the respective email addresses being designated by the parties for the purposes of the transaction. The email reaches O's email address, upon which A receives a delivery notification. Assume that the two email addresses form part of two separate information systems.[1] Assume also that O had previously set up a filter such that all email communications containing the word 'offer' in the subject line are automatically deleted on a permanent basis. This was done by O with the hope of reducing spam, *albeit* O's filtering rules were far more stringent than the usual spam

1 This would be the case where the contracting parties use two different email service providers (e.g. Gmail and Outlook).

filters available in popular email clients.[2] Assume further, that because A's email acceptance contained the word 'offer' in the subject line it was automatically deleted after it reached O's email address. In effect, although the acceptance email did reach O's designated email address, O was completely unaware of the acceptance. In these circumstance, could it be said that a contract has come into existence between A and O?

In this paper, we respond to the above question from a common law perspective, but within the framework of the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts ('the Convention'), which the United Nations Commission on International Trade Law ('UNCITRAL') prepared with the aim of supplementing the 1996 UNCITRAL Model Law on Electronic Commerce ('the Model Law'). We aim to demonstrate that the application of the two international instruments and the common law principles on the formation of contracts to the hypothetical scenario set out above gives rise to inconsistent outcomes that must be avoided. We conclude by proposing a modest, yet effective, amendment to the Convention, which could set aside any uncertainty and provide greater consistency between the legal and technical dimensions of contract formation.

Formation of contracts under the common law

Consensus ad idem or assent, is the basis for a legally enforceable contract under the common law. In determining assent, however, common law courts focus on the external appearance of a transaction in view of the difficulty in ascertaining with any certainty the subjective intent of the contracting parties. As a wise judge once said "the intent of a man cannot be tried, for the devil himself knoweth not the mind of men."[3] As such, the standard that is adopted in determining assent is an objective one where courts are "concerned not with the presence of an inward and mental assent but with its outward and visible signs."[4] In any given case, in order to determine the existence of an agreement, it has long been usual for common law courts to employ the language of offer and acceptance.[5] That is, it is said that a contract comes into being when one party makes an offer and the other accepts it. Under this approach, however, it is only logical to suggest that the party accepting (i.e., the offeree) must have

2 Ordinarily, filters that can be created in email clients such as Outlook or Gmail permit users to set up rules that result in emails identified as spam being automatically transferred to the spam or trash folder when they arrive. Moving emails to spam or trash, however, does not permanently delete those emails. In order to permanently delete emails in the spam or trash folder they must be manually deleted. Although this is how filters in email clients such as Outlook or Gmail work, that does not mean that a filter cannot be set up in such a way that identified spam emails are permanently deleted without being stored in an intermediate folder. The hypothetical scenario we have chosen envisages a filter of the latter kind, which although extreme, is not entirely impossible.

3 *Anon* (1477) YB 17 Edw 4, Pasch. fo. 1, pl. 2 (Brian CJ).

4 See, *Smith v Hughes* (1871) LR 6 QB 597 (Blackburn J)–"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the many thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." See also, M Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (16th edn, Oxford University Press, 2012), 42.

5 M Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (16th edn, Oxford University Press, 2012), 42.

had full knowledge of the offer at the time of acceptance, and the party making the offer (i.e., the offeror) must have had full knowledge of the acceptance–for it cannot be said that in the absence of such knowledge there is any 'agreement' between the contracting parties, particularly in the context of bilateral contracts.[6]

Postal rule–*Adams v Lindsell*

The advent of new forms and methods of communication have challenged the traditional process by which the existence of an agreement is determined using the criterion of offer and acceptance. Postal communications aptly illustrate this point. Thus, in *Adams v Lindsell*,[7] the English Court of King's Bench had to determine as to what constituted the *external* manifestation of the acceptance, when an acceptance is sent by post–i.e., (1) when the letter of acceptance is put into the postbox, (2) when the letter of acceptance is delivered to the offeror's address, or (3) when the letter of acceptance is actually read by the offeror. The Court was inclined to favour the first of the three possibilities, and now it is settled law that acceptance takes place upon the act of posting,[8] even where the letter of acceptance does not reach the offeror because it is lost in post.[9] Strangely, however, the law dispensed with the strict requirement that acceptances must actually be communicated before contracts are formed in respect of postal contracts–a requirement that has more significance to contracts made by post *inter absentes*.[10]

Of course, whether the postal rule was devised for the right reasons, or is even applicable to the modern context, is questionable. In *Adams v Lindsell*, the Court's reasoning for rejecting the view that no contract will be formed until the letter of acceptance is received by the offeror was that:

> "[If] that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*."[11]

But if the point of the offer and acceptance analysis is to provide guidance in respect of whether parties had assented to certain terms, then the analysis must stop once the offeree's conduct manifests an acceptance. For at that point, there is an agreement or *consensus ad idem* on the terms proposed by the offeror. Unlike what the Court in *Adams v Lindsell* seems

6 In the case of a unilateral contract, where acceptance is by performance, the offeror implicitly waives the requirement of communication of acceptance.

7 *Adams v Lindsell* [1818] 1 B & Ald 681.

8 See, *Household Fire and Carriage Accident Insurance Co v Grant* (1879) 4 Ex D 216, which followed *Adams v Lindsell*.

9 See, *Byrne v Van Tienhoven* (1880) 5 CPD 344, 348.

10 M Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (16th edn, Oxford University Press, 2012), 70.

11 *Adams v Lindsell*, 683 (Law J) (emphasis added).

to have suggested, there is no further need for the offeror to notify the offeree that the former assents to the latter's acceptance–that would be a redundant exercise for the purpose of establishing an agreement. In *inter praesentes* situations, ie where parties are in the physical presence of one another, or use a mode of communication that has that effect (e.g. online chat applications where both parties remain online), it is reasonable to treat the communication of the acceptance to the offeror as the external manifestation required to determine assent. This is because, when parties are in one another's presence or are able to immediately perceive the other's reaction to an offer, it is only logical to suggest that unless the acceptance is perceived by the offeror, there would have really been no assent in the first place. The act of assent and the communication of the assent to the offeror take place together. Yet, in *inter absentes* situations, such as when post or any other form of non-instantaneous communication is used, this is not possible. It is impossible to know the reaction of the offeree upon receiving an offer. Hence, the external manifestation of acceptance in such situations could take many other forms, although communication of the acceptance to the offeror is one possible, and perhaps the best, manifestation of assent. Thus, the conduct of the offeree in posting the acceptance letter, being a possible external manifestation of assent, is sufficient to constitute a contract as there is *consensus ad idem* at that point. For that reason, the outcome in *Adams v Lindsell*, in treating the act of posting as completing acceptance and forming a contract, is right, but not for the reason set out in the judgement itself. There is really no need for communication of the acceptance, if the basis for a contract is assent or agreement, and it could manifest in other ways.[12]

Of course, this is not to say that there is no utility in a rule that requires an acceptance to be communicated to the offeror before the acceptance has *binding* effect. This is more so in *inter absentes* situations. But that is not because there is no 'agreement' without communication of the acceptance. Rather, it is for practical reasons–"[t]he main reason for the rule is that it could cause hardship to the offeror to be bound without knowing that the offer had been accepted."[13]

It seems that the Court's concern in *Adams v Lindsell* about the possibility of *ad infinitum* communications between parties having no legal effect was misconceived, and this is more so in today's context where letters can be tracked and an offeree could ascertain with certainty if and when the letter of acceptance reaches the offeror. Moreover, and according to Michael Furmston, it appears that *Adams v Lindsell* was decided at a time when the rules regarding communication of acceptance (or the receipt rule) had not even been developed by the common law courts–thus the postal rule somewhat being anterior to the general rule on communication of acceptance.[14] In fact, David Pugsley, having made a comparison between the application of the postal and receipt rules to varying contexts and circumstances, reaches the following conclusion:

12 For example, in the case of unilateral contracts, the offeree's conduct supplies the external manifestation of the acceptance: see, *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256. Acceptance could manifest in the form of the offeree's conduct even in the case of bilateral contracts: see, *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 (HL).

13 H Beale (ed), *Chitty on Contracts: Vol. 1–General Principles* (32nd edn, Sweet & Maxwell), para 2-045.

14 M Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (16th edn, Oxford University Press, 2012), 70.

> "We should therefore recommend that as a general rule, in accordance with the reasonable expectations of the man on the Clapham omnibus and the fundamental principles of the modern law of contract, a letter of acceptance should take effect, and the contract should therefore be complete when the letter is received by the offeror."[15]

Regardless of the merits of the postal rule, and assuming that the rule still retains a place in the modern context, its application is clearly limited to non-instantaneous forms of communications, which take place *inter absentes.* Whereas, when parties are *inter praesentes*, and even when they are separated physically but make use of instantaneous forms of communications, there is no room for the postal rule of acceptance. In other words, whether the postal rule applies depends on the nature of the communication made use of by the parties.

Acceptance by email

It is necessary to consider how email communications are to be treated, in light of the principles discussed above. After all, this is what needs to be addressed in responding to the question posed in the hypothetical scenario set out in the introduction. The postal rule devised in *Adams v Lindsell* applies to contracts that are made *inter absentes*–ie where parties are separated by both time and space. As such, at first blush, there might be an inclination to resolve that the postal rule applies to email communications. Yet, despite the similarities between post and email (in how they function), email communications have evolved to become near instantaneous, if not instant. As such, there should be no difficulty in applying the receipt rule to email.[16]

The question as to the applicability of the postal rule to email communications has been considered by courts, but only on a few occasions. In *Chwee Kin Keong v Digilandmall*[17] the Singapore High Court considered the formation of contracts by email *albeit* the Court did not form a definitive conclusion about the applicability of the postal rule. According to Rajah JC:

> "An e-mail, while bearing some similarity to a postal communication, is in some aspects fundamentally different. Furthermore, unlike a fax or a telephone call, it

15 D Pugsley, 'Postal Contracts' (1976) 11 *Irish Jurist* 3, 6. Pugsley makes a strong case against the postal rule. He argues (at p10) that if the offeree "chooses to rely on a contract before the earliest moment at which it could have come to the notice of the offeror, it is not unreasonable that he should do so at his own risk" and "[i]n any case the time of posting plays no part in the plans of a layman making a contract." According to Pugsley, just as much as an offeree should be permitted to revoke his postal acceptance by a more expeditious form of communication, the offeror should have the same opportunity to revoke his offer before the acceptance reaches him. Pugsley claims (at p10) that "[t]he law should be the same for both parties. The contract should come into existence and produce its full legal consequences only when the acceptance is received by the offeror."

16 See, SWB Hill, 'Email contracts–When is the contract formed?' (2001) 12 *Journal of Law and Information Science* 46, 51.

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

> is not instantaneous. E-mails are processed through servers, routers and Internet service providers. Different protocols may result in messages arriving in an incomprehensible form. Arrival can also be immaterial unless a recipient accesses the e-mail, but in this respect e-mail does not really differ from mail that has to be opened. Certain Internet service providers provide the technology to inform a sender that a message has not been properly routed. Others do not.
>
> Notwithstanding some real differences with posting, it could be argued cogently that the postal rule should apply to e-mail acceptances. […] There are, however, other sound reasons to argue against such a rule in favour of the recipient rule. It should be noted that while the common law jurisdictions continue to wrestle over this vexed issue, most civil law jurisdictions lean towards the recipient rule. In support of the latter it might be argued that unlike a posting, e-mail communication takes place in a relatively short time frame. The recipient rule is therefore more convenient and relevant in the context of both instantaneous or near instantaneous communications. Notwithstanding occasional failure, most e-mails arrive sooner rather than later."18

Although Rajah JC's observations concerning email were made *obiter*[19] it may be posited that the judge's language suggests that he favoured the receipt rule for email communications.[20] Before his elevation to the judiciary, Andrew Phan, in the course of a lucid evaluation of Rajah JC's approach in *Chwee Kin Keong v Digilandmall* has suggested that "*general (or recipient) rule* ought to govern e-mail transactions"[21] and even went on to suggest that the possible abolition of the postal rule must be seriously considered.[22] This view has been shared by courts in other jurisdictions forming part of both the civil law and common law legal traditions. For instance, in *Jafta v Wildlife*, the Labour Court of South Africa in Durban held that "[t]he assumption that postal contracts are concluded when a letter or telegram of acceptance is handed at the post office cannot apply to acceptance by email or SMS because the forms of communication differ substantially."[23] Similarly, the English High Court has held that:

> "The general rule is that the acceptance of an offer is not effective until communicated to the offeror. The "postal rule" is an anomalous exception to the general rule, which is limited to its particular circumstances. *It does not apply to acceptances made by some "instantaneous" mode of communication. […] the same principle applies to communi-*

18 *Chwee Kin Keong v Digilandmall*, [97]-[98] (Rajah JC).

19 The case ultimately was decided on the basis of mistake, and not on whether a contract was formed.

20 A Phang, 'Contract formation and mistake in cyberspace–the Singaporean experience' (2005) 17 *Singapore Academy of Law Journal* 361, 377.

21 A Phang, 'Contract formation and mistake in cyberspace–the Singaporean experience' (2005) 17 *Singapore Academy of Law Journal* 361, 379.

22 A Phang, 'Contract formation and mistake in cyberspace–the Singaporean experience' (2005) 17 *Singapore Academy of Law Journal* 361, 379.

23 *SB Jafta v Ezemvelo Kzn Wildlife* Case No D204/07 (Labour Court of South Africa, Durban) (1 Jul 2008) (*Jafta v Wildlife*), [79] (Pillay J) (citation omitted).

cation by email…"[24]

From the case law discussed above, it is undeniably clear that the postal rule has no application to acceptances communicated by email.[25] Whereas, the external manifestation of 'assent' in the context of an email acceptance is when the email is communicated to, or received by, the offeror–as email is regarded as near instantaneous. Hence, in determining whether a contract is formed in the hypothetical scenario set out in the introduction it is necessary to respond to the following question: is A's email acceptance *received* by O?

Acceptance in cases of instantaneous communications

In *Entores v Miles Far East Corp* [26] the question of communication of an acceptance arose in the context of telex, an instantaneous form of communication. The English Court of Appeal held that a contract made using an instantaneous mode of communication is only complete when the acceptance is *received* by the offeror.[27] Although the postal rule was well established by the time *Entores v Miles Far East Corp* had to be decided, the rule in respect of instantaneous communications had not been developed. Thus, Denning LJ's observations in *Entores v Miles Far East Corp* were important because they provided important guidance in relation to instantaneous communications. These observations are reproduced below:

> "Now take a case where two people make a contract by telephone. Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes "dead" so that I do not hear his words of acceptance. There is no contract at that moment. The other man may not know the precise moment when the line failed. But he will know that the telephone conversation was abruptly broken off: because people usually say something to signify the end of the conversation. If he wishes to make a contract, he must therefore get through again so as to make sure that I heard. Suppose next, that the line does not go dead, but it is nevertheless so indistinct that I do not catch what he says and I ask him to repeat it. He then repeats it and I hear his acceptance. The contract is made, not on the first time when I do not hear, but only the second time when I do hear. If he

24 *Thomas & another v BPE Solicitors* [2010] EWHC 306 (Ch) (*Thomas v BPE Solicitors*), [86] (Blair J) (emphasis added).

25 Eliza Mik is not in agreement with this view, and instead argues that a case-by-case analysis should be preferred in determining whether the postal rule should be applied to an email acceptance. She argues that "[i]n principle, email does not provide a communication process resembling face-to-face dealings. An acceptance sent via email should not be effective on receipt but on dispatch. At the same time, it is difficult to equate email with the post–at least in terms of reliability. One is therefore left with the necessity to examine each communication scenario involving an emailed acceptance on a case-by-case basis. In the event, however, an acceptance is communicated by means of instant messengers or web-based interactions it can be stated with confidence that there is no other option but effectiveness on receipt": see, E Mik, 'The Effectiveness of Acceptances Communicated by Electronic Means, Or–Does the Postal Acceptance Rule Apply to Email' (2009) 26 *Journal of Contract Law* 68, 96. However, it must be noted that *Thomas v BPE Solicitors*, decided a year after Mik's publication, somewhat dilutes the strength of her view, at least insofar as to the common law understanding of email acceptances is concerned.

26 *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327 (*Entores v Miles Far East Corp*).

27 *Entores v Miles Far East Corp*, 333-34.

> does not repeat it, there is no contract. The contract is only complete when I have his answer accepting the offer.

Lastly, take the Telex. Suppose a clerk in a London office taps out on the teleprinter an offer which is immediately recorded on a teleprinter in a Manchester office, and a clerk at that end taps out an acceptance. If the line goes dead in the middle of the sentence of acceptance, the teleprinter motor will stop. There is then obviously no contract. The clerk at Manchester must get through again and send his complete sentence. But it may happen that the line does not go dead, yet the message does not get through to London. Thus the clerk at Manchester may tap out his message of acceptance and it will not be recorded in London because the ink at the London end fails, or something of that kind. In that case, the Manchester clerk will not know of the failure but the London clerk will know of it and will immediately send back a message "not receiving." Then, when the fault is rectified, the Manchester clerk will repeat his message. Only then is there a contract. If he does not repeat it, there is no contract. It is not until his message is received that the contract is complete."[28]

The above extract from Denning LJ's judgement in *Entores v Miles Far East Corp* clearly sets out the general rule about acceptance.[29] When an instantaneous mode of communication is used, a contract will be formed only when the acceptance is *received* by the offeror. Hence, for all purposes, the external manifestation of assent in the case of instantaneous communications is when the acceptance message reaches the offeror. Yet, there is still a further issue to be resolved. When does an acceptance really 'reach' the offeror? Lord Justice Denning's observations suggest that in the case of 'true' *inter praesentes* situations the matter of communication is a non-issue, as the parties are in one another's presence (either physically or virtually) and there will be no contract until the acceptance is *perceived* by the offeror through one or more of his senses. Here, the receipt of the acceptance at the offeror's end is also capable of imputing actual knowledge of the acceptance on the part of the offeror. Telephone (referred to by Denning LJ) or instant chat used in today's context (eg Facebook's messenger app) provide examples of technology that could offer 'real-time' communications.

Email communications are asynchronous, not synchronous

The problem with email is that although it is more expeditious than post, it is not truly 'real-time'.[30] That is, although an email does get transmitted *virtually* instantly from the sender's server to that of the addressee,[31] receipt at the addressee's end does not necessarily mean that the addressee is made aware of the email's arrival. Thus, if an acceptance was emailed, there is still a gap in time between the receipt of the email acceptance at the offeror's email

28 *Entores v Miles Far East Corp*, 332-33 (Denning LJ).

29 *Entores v Miles Far East Corp* has been followed in a number of cases including *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34 (*Brinkibon v Stahag Stahl*) (as regards telexes) and *Eastern Power Ltd v Azienda Communale Energia and Ambiente* [1999] O.J. 3275 (Court of Appeal, Ontario) (as regards faxes).

30 See, H Beale (ed), *Chitty on Contracts: Vol. 1–General Principles* (32nd edn, Sweet & Maxwell), para 2-080.

31 A distinction needs to be drawn between email communications sent between networks that are directly linked to one another and internet based email communications, which use the public network for

server and when the offeror becomes actually aware of the acceptance–eg through a push notification between the server and the email client or application[32]–although even this delay is negligible today. For this reason, email communications are not truly an *inter praesentes* form of communication; nor are they truly *inter absentes* communications.[33] This is precisely why determining when an email acceptance is communicated to, or received by, the offeror is a complex exercise. Is it when the acceptance email reaches the offeror's email server (constructive knowledge)? Or is it when the offeror actually is notified of the email and reads it (actual knowledge)? The answer to this question does not seem to have been settled in the common law world.[34] Lord Wilberforce in *Brinkibon v Stahag Stahl* was of the view that "[n]o universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgement where the risks should lie."[35] It appears, however, that when the offeror has constructive knowledge of the acceptance, it is normally sufficient for the acceptance to take effect. Thus, for instance, where an acceptance email (or any other form of instantaneous communication) is sent 'within working hours' that is sufficient to impute constructive knowledge of the acceptance on the offeree.[36]

Yet, in the hypothetical scenario set out at the outset, the offeror (O) has neither actual, nor constructive, knowledge of the acceptance, as the email acceptance is deleted permanently upon reaching O's email address. As such, A's acceptance is not 'received' by, or 'communicated' to, O. Yet, despite the lack of communication of the acceptance to the offeror, it appears that O could still be bound to the contract. This is in view of Denning LJ's fault-based analysis in

transmission. There could be more delays in respect of the latter. However, Kathryn O'Shea and Kylie Skeahan have suggested that "despite the possibility that a delay may occur between the sending and receipt of an e-mail message, given the decisions of the courts in relation to telexes and facsimiles it is most likely that the courts will conclude that e-mail is a "virtually instantaneous" method of communication": see, K O'Shea and K Skeahan, 'Acceptance of Offers by E-Mail–How Far Should the Postal Acceptance Rule Extend?' (1997) 13 *Queensland University of Technology Law Review* 247, 259.

32 This is assuming that an email client (eg an app like Outlook) is used on the receiver's PC or device, to which email messages received at the server are sent (or pushed) on a periodical basis, without the receiver having to himself access the server to check for new email.

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

34 *Thomas v BPE Solicitors*, [90] (Blair J)–"Once one sets aside the "postal rule" as inapplicable to email communications, the question whether an email acceptance is effective when it arrives, or at the time when the offeror could reasonably be expected to have read it, is not a straightforward one, and does not appear to be settled by authority."

35 *Brinkibon v Stahag Stahl*, 42 (Lord Wilberforce).

36 See, *Thomas v BPE Solicitors*, [90]. See also, H Beale (ed), *Chitty on Contracts: Vol. 1–General Principles* (32nd edn, Sweet & Maxwell), para 2-047–"If an acceptance is sent and duly received during business hours by telex or fax but is simply not read anyone in the offeror's office when it is there transcribed or printed out on his machine, it is probably taken to have been communicated at that time; if such a message is received out of business hours, it probably takes effect at the beginning of the next business day. *Similar rules probably apply (mutantis mutandis) to determine when an acceptance sent by email is duly received, but not read by the offeror or anyone in his office, is, or taken to be, communicated to the offeror.*" (citations omitted) (emphasis added).

Entores v Miles Far East Corp. Thus, building on the discussion on acceptances communicated face-to-face or by use of telephone or telex, Denning LJ made the following qualification:

> "In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it. But, suppose that he does not know that his message did not get home. He thinks it has. This may happen if the listener on the telephone does not catch the words of acceptance, but nevertheless does not trouble to ask for them to be repeated: or the ink on the teleprinter fails at the receiving end, but the clerk does not ask for the message to be repeated: so that the man who sends an acceptance reasonably believes that his message has been received. *The offeror in such circumstances is clearly bound, because he will be estopped from saying that he did not receive the message of acceptance*. *It is his own fault that he did not get it. But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance—yet the sender of it reasonably believes it has got home when it has not—then I think there is no contract*."[37]

In the examples cited in the above extract, the acceptance message is never 'communicated' to, or 'received' by, the offeror–i.e., the offeror has no knowledge of the acceptance, constructive or actual. Yet, a contract is said to have come into existence, because the acceptance was not communicated owing to the fault of the offeror, and the offeree has no reason to believe that his acceptance was not received–because in the hypothetical scenario, A does in fact receive a notification that the acceptance email was delivered to O's email server. In such circumstances, the doctrine of estoppel operates disentitling the offeror from denying that he did not *receive* the acceptance *when* the offeror's own action or inaction was the cause for the failure in the acceptance being communicated. In effect, Denning LJ introduced an exception to the general rule that an acceptance must ***in fact*** be received by, or communicated to, the offeror to constitute the external manifestation of assent in cases of instantaneous communications. Whereas, when there is no fault on the part of the offeror, there will be no contract. Thus, the receipt rule would generally apply to instantaneous communications, and arguably to email as well, except that when an acceptance is not communicated to the offeror owing to his own fault, there will nevertheless be a contract, in cases where the offeree had no reason to believe that his acceptance was not communicated. This approach is in no way inconsistent with the rule that 'assent' is the key requirement for the formation of contracts. It has been pointed out that:

> "Despite many statements to the effect that a contract is complete 'only' when acceptance is 'received', as it is only then that it can be said that there is a meeting of minds, as noted earlier, the objective theory of contract does not dictate that communication must occur. *The key to an enforceable contract lies in there being evidence of assent rather than there being a meeting of minds."*[38]

Arguably, in the hypothetical scenario, O's act of setting up an email filter that was more

37 *Entores v Miles Far East Corp*, 333 (Denning LJ) (emphasis added).

38 M Furmston and GL Tolhurst, *Contract Formation: Law and Practice* (Oxford University Press, 2010),

stringent in comparison to the usual industry standard (the usual practice being the transfer of a spam email to a designated spam or trash folder and not its permanent deletion) and failure to deactivate the filter, it being reasonably foreseeable that a prospective acceptance could contain the word 'offer' in the subject line, together implicates fault on O's part. Accordingly, the answer to the question posed at the outset of this discourse is that a contract *does* come into existence between A and O under the common law, even though the acceptance email is *not* in fact brought to the notice of the offeror–O being estopped from denying receipt of the acceptance email in view of his own fault.[39]

Dispatch and receipt of electronic communications under the Model Law and the Convention

The Model Law, and later the Convention, are UNCITRAL's attempts to bring about greater uniformity in relation to commercial transactions that take place in the online space. Although neither the Model Law nor the Convention seeks to set out substantive rules regarding contract formation, they do provide guidance on when an electronic communication is dispatched and received. These rules regarding the dispatch and receipt of electronic communications could inform and supplement the substantive common law rules regarding contract formation.

The Model Law

The Model Law provides that "[u]nless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator..."[40] Assuming that the postal rule of acceptance has a place in the modern context, the rule regarding dispatch of a data message could provide guidance as to when an electronic acceptance takes effect in the context of non-instantaenous electronic communications. Importantly, according to the Model Law, the time of receipt of a data message has to be determined based on whether the addressee had designated an information system for the purpose of receiving the messages.[41] Thus, unless the parties to a communication had agreed otherwise, where the addressee has designated an information system for the purpose of retrieving data messages, receipt occurs at the time when the data message enters that designated information system.[42] In such circumstances, if the message is sent to an information system not designated by the addressee, then receipt occurs only when it is retrieved by the addressee.[43] In the case where no information system has been designated by the addressee, then receipt of a data message occurs when it enters an information system of the addressee.[44]

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para 4.93 (citations omitted).

39 See, J Cartwright, *Formation and Variation of Contracts* (Sweet & Maxwell, 2014), 101.

40 UNCITRAL Model Law, Art 15(1).

41 UNCITRAL Model Law, Art 15(2)(a) and (b).

42 UNCITRAL Model Law, Art 15(2)(a)(i).

43 UNCITRAL Model Law, Art 15(2)(a)(ii).

44 UNCITRAL Model Law, Art 15(2)(b).

For the purposes of the hypothetical scenario set out in the introduction, we have assumed that the offeror had designated an email address for receiving the acceptance,[45] and in terms of the Model Law receipt occurs the moment A's email acceptance *enters* O's information system. The guidance provided by UNCITRAL to the Model Law suggests that a data message is deemed to have entered an information system when it is *capable of being processed* by that information system.[46] Notably, the Model Law premises receipt not on whether a data message *was* processed, but rather on the notion of its *capabliliy* of being processed. This is of significance to the hypothetical scenario upon which this discourse is based, as arguably the acceptance email sent out by A was capable of being processed, although it may not really have been processed in view of its immediate deletion upon reaching O's email address. In effect, in terms of the Model Law, it would appear that A's email acceptance was in fact received by O, which seems to be consistent with the outcome under the common law on the formation of a contract between A and O.

The Convention

In assessing the hypothetical scenario under the rules set out by UNCITRAL, it is also necessary to consider the 2005 UN Convention that supplements the Model Law. Art 10(2) of the Convention provides that:

> "The time of receipt of an electronic communication is the time when it becomes *capable of being retrieved* by the addressee at an *electronic address designated by the addressee*. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address *and the addressee becomes aware that the electronic communication has been sent to that address*. *An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address*."

When Art 10(2) of the Convention is applied to the hypothetical scenario, whether A's acceptance email was received would depend on its capability of being retrieved by O at O's electronic address. UNCITRAL's explanatory note on the Convention suggests that 'capable of being retrieved' takes the same meaning as 'available for processing', which was used to determine receipt under the Model Law:

> "In fact "entry" in an information system is understood under Article 15 of the Model Law as the time when an electronic communication "becomes available for

45 UNCITRAL, Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) (Guide to Model Law), para 102–"By "designated information system", the Model Law is intended to cover a system that has been specifically designated by a party, for instance in the case where an offer expressly specifies the address to which acceptance should be sent. The mere indication of an electronic mail or telecopy address on a letterhead or other document should not be regarded as express designation of one or more information systems."

46 Guide to Model Law, para 102–"A data message enters an information system at the time when it becomes available for processing within that information system."

> processing within that information system", which is arguably also the time when the communication becomes "capable of being retrieved" by the addressee."[47]

Yet, Art 10(2) of the Convention contains a notable variation to the Model Law's corresponding provision–i.e., the Convention introduces a *presumption* as to receipt.[48] Accordingly, an electronic communication is presumed to be capable of being retrieved by the addressee the moment it *reaches* the addressee's 'electronic address'. In this regard, another change in the language between the Model Law and the Convention must be noted–i.e., the reference to 'electronic address' as opposed to 'information system'. Information system seems broader than electronic address, and if this were the case, for an electronic communication to be received by the addressee, it is not sufficient that it simply was capable of being retrieved (or available for processing) after crossing into the addressee's 'information system' but must have been capable of being retrieved at the relevant electronic address. In other words, adoption of specific language seemingly favours the sender, as the presumption will not come into operation until the electronic communication reaches the addressee's electronic address. However, the Convention's explanatory notes suggest that the new terminology "should not lead to any substantive difference"[49]–although Art 10(1) of the Convention seems to suggest otherwise.[50] In any case, what matters insofar as the hypothetical scenario is whether A's email acceptance was capable of being retrieved at O's electronic address. Arguably, since the acceptance email is deleted by a filter that was set up by O, the email would have been *capable* of being retrieved even momentarily at O's electronic address. Hence, it would appear that A's email acceptance is *presumed* to have been received by O.

Rebutting the presumption of receipt

Presumptions are rebuttable. The Explanatory Note on the Convention suggests that although by default, under Art 10(2), receipt of an electronic communication occurs when it is capable of being retrieved at the addressee's electronic address, the said provision recognises that "concerns over security of information and communications in the business world have led to the increased use of security measures such as filters or firewalls which might prevent

47 UNICTRAL, Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts (Explanatory Note on Convention), para 183 (citation omitted).

48 Art 10(2) (third sentence) of the Convention provides that–"An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address."

49 Explanatory Notes on the Convention, para 185.

50 Art 10(1) of the Convention reads as follows–"*The time of dispatch of an electronic communication* is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, *if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received*." This provision suggests that an electronic communication is regarded to have been dispatched at the time it leaves the 'information system' under the sender's control, whereas when a communication is sent within a single information system, the time of dispatch of a communication is the same as the time it was received by the addressee. Of course, since receipt of a message is determined under Art 10(2) of the Convention, it must mean that a communication is dispatched within a single 'information system' at the time it reaches the addressee's *electronic address*. This means that an electronic address is something which resides within an information system, suggesting that the latter subsumes the former.

electronic communications from reaching their addressees."[51] UNCITRAL's Working Group on Electronic Commerce, which considered the provisions of the UN Convention on Electronic Commerce in its drafting stage, made the following comment regarding the presumption about receipt:

> It was noted that the presumption established in the third sentence of the proposed new text of draft paragraph 2 could be rebutted in cases when security or other devices would prevent the communication from being retrieved. It was further argued that the operation of the presumption would allow greater flexibility in the assessment of facts, should there be arguments as to whether a communication had been received or not.[52]

Essentially, what this means is that the use of a filter (such as a spam filter), as in the hypothetical scenario, *could* (although not always)[53] rebut the presumption that an electronic communication becomes capable of being retrieved when it reaches the addressee's electronic address, leading to the outcome of the communication being treated as *not* received by the addressee. Thus, even though a contract is formed between A and O under common law principles, this is in circumstances where the electronic communication containing the acceptance is technically not received by O (the offeror) in terms of the provisions dealing with dispatch and receipt under the UNCITRAL Model Law and the UN Convention. Such a conclusion is problematic, creates uncertainty and does not stand to reason.

Conclusion–harmonising the conflict

Although UNCITRAL's Model Law and the Convention do not aim to determine the formation of contracts under substantive law, we posit that there must be consistency between the outcome of applying the common law principles and UNCITRAL's rules in relation to electronic communications pursuant to which contracts are formed. We propose that a simple amendment to the rules pertaining to 'receipt' of electronic communications can bring about the needed consistency. The amendment, of course, concerns the presumption that applies in determining whether an electronic communication is capable of being retrieved at the addressee's end.

51 Explanatory Notes on the Convention, para 180.

52 UNCITRAL, Report of the Working Group on Electronic Commerce on the work of its forty-fourth session (A/CN.9/571) (Report of the Working Group on Electronic Commerce), para 160.

53 In *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd* [2012] NSWSC 1123, the Supreme Court of New South Wales, Australia, held on the facts of that case that an email caught up by the spam filter was capable of being retrieved. The Court held (at [77] (Sackar J))–"They certainly do not require an email to be opened, let alone read. Again the Oxford dictionary defines "retrieve" in its primary sense as "to get or bring back from somewhere". In its secondary sense it is said to mean "to find or extract (information stored in a computer)". According to the evidence when an email is caught by the Adjudicate Today spam filter, it is nonetheless archived and accessible by Adjudicate Today *via* its external IT consultant." Thus, it seems that an electronic communication will not be capable of being retrieved when it is, for instance, deleted permanently (not merely archived in a spam folder) or becomes corrupted beyond recovery.

Currently, an electronic communication that is successfully dispatched (i.e., leaves the originator's information system), is received by the addressee when the communication becomes capable of being retrieved–it being presumed that a communication becomes capable of being retrieved when it 'reaches' the electronic address of the addressee. Interestingly, the UNCITRAL Working Group on Electronic Commerce in its 44th session (which took place during the drafting stage of the 2005 UN Convention) considered the following provision to be immediately inserted *after* the provision introducing the presumption, although it was not ultimately adopted:

> "This paragraph does not apply to an electronic communication whose capability of being retrieved or whose arrival at the electronic address is prevented [or significantly delayed] by the operation of *reasonable technological measures* implemented to preserve the integrity, security or usability of the addressee electronic communication system."[54]

Had the above draft provision been approved, it would appear that the presumption will not apply, or if applied will be rebutted, in relation to an electronic communication that became incapable of being retrieved owing to operation of a *reasonable* technological measure. In other words, where an electronic communication becomes incapable of being retrieved as a result of an *unreasonably active spam filter* (which we argue is an *unreasonable* technological measure), the presumption as to receipt would continue to apply and will not be rebutted.

This approach can be reconciled with Denning LJ's fault-based approach in *Entores v Miles Far East Corp*. Thus, it would appear that the use of a filter to automatically and permanently delete all email communications containing the word 'offer' in the subject line (as was the case in the hypothetical scenario we proposed at the outset) is a technological measure that is not 'reasonable'. In essence, although the email containing A's acceptance is deleted beyond recovery, since the deletion took place only upon the email reaching O's electronic address,[55] the presumption that the email was capable of being retrieved remains intact and unrebutted. The outcome is that the acceptance email is considered as being *received* at O's electronic address. This outcome in turn could be reconciled with the outcome that a contract *does* come into existence between A and O in view of O's fault (of setting up an unreasonably robust filter that was beyond the usual industry practice, and in any case failing to deactivate the filter in anticipation of the acceptance email).

It is, however, important to note that, although the *outcome* of a contract is the end result whichever route we took, differences exist in the *juridical* basis for the conclusion. Lord Justice Denning's fault-based approach is based on estoppel which prevents the offeror from saying that he did not receive the acceptance, whereas our proposal to amend the 2005 UN

54 Report of the Working Group on Electronic Commerce, para 153 (emphasis added).

55 JC Bindman, 'The Spam Filter Ate My E-Mail: When Are Electronic Records Received' (2013) 39 *William Mitchell Law Review* 1295, 1327-28–"…the recipient does control the location of its spam filters and the intensity of those filters. If an overactive spam filter within the recipient's system incorrectly intercepts a legitimate message […] the message is likely received because it already entered the system. In such a situation, the recipient has the responsibility to check the junk mail folder or be held responsible for receipt of the message" (emphasis added) (citations omitted).

Convention presumes irrefutably that he did receive the acceptance.

We also believe that although the failure to use 'reasonable' technological measures is one avenue by which fault may be attributed on the party to whom an electronic communication is addressed (i.e., the offeror (O) in our hypothetical example), there could be many other ways by which fault could be attributed. As such, in order to reconcile the inconsistency between the legal and technical dimensions of electronic contract-making, we propose that the following, more general, fourth sentence be added to Art 10(2) of the 2005 UN Convention:

> "The presumption that applies in determining whether an electronic communication is capable of being retrieved shall not be rebutted in circumstances where the electronic communication is rendered irretrievable owing to the addressee's own fault."

Perhaps the time is ripe for UNCITRAL to provide clearer guidelines on the effect of eletronic communications losing their capability of being retreived owing to a fault on the part of the addressee. In the aftermath of the recent Cambridge Analytica's Facebook data breach, and the natural reaction of internet and email users to protect their confidential information from unlawful or unauthorised access, the use of firewalls and other defensive technological stratagems might throw not only the bath water but the baby as well. Such situations raise difficult and challenging questions concerning contract formation and the need to draw a 'plimsoll line' between fault and caution, particularly when filtering technology and firewalls are used by parties entering into contracts using electronic means.

When The Noose is Loose;
Insights into the Instances where a Suspect/Accused can be Released, Discharged and Acquitted During the Investigation, Inquiry or Trial and Even After the Conviction

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Foreword

It's so true that there isn't anything worth which are gained by fear. As Tony Blair[1] frequently stated, *"we have to be tough on crimes, but also tough on the causes of crimes."*Roots of crimes may differ from each other and ought to be assessed individually, on their specific qualities, since they are circumstantially different from each other. Even though crimes can be divided into different groups such as murder, rape, theft etc. any crime can't be claimed as less important. Due to this argument, it's very unfair to punish every criminal in the same way; even they fell into the same category of crime.

Crimes are punished according to their seriousness. More serious crimes are given harsher penalties. Punishments may include, fines, terms of imprisonment (time in jail/prison), probation or parole, restitution (repayment), and death penalty (capital punishment). In certain circumstances, judges can give other punishments, such as community service.[2] Punishments make people understand that laws are there to be obeyed. Punishments should create a space for change and also discourage others from committing the same.

The Criminal Justice System is the process of law enforcement-from the police, to the courts and finally to the enforcement of the punishment. It is widely recognized that there are four aims of this system namely, **deterrence, incapacitation/Restraint, rehabilitation, retribution**.

Penalties for crimes greatly vary from country to country. They reflect the policy decisions made by the courts and the lawmakers. In deciding an appropriate sentence, a judge may consider the accused's prior criminal record, age, and other circumstances surrounding the crime, including accused's cooperation with law enforcement officers.

In Sri Lankan legal regime **Penal Code No. 2 of 1883 as amended** encapsulates the offences

1 **Anthony Charles Lynton Blair** is a British politician who served as Prime Minister of the United Kingdom from 1997 to 2007 and Leader of the Labour Party from 1994 to 2007.

2 Discussed in pg 4 of this article.

and the penalties respectively[3] while the procedural law is stipulated by the **Code of Criminal Procedure Act No. 15 of 1979 as amended** (hereinafter referred to as CCPA). Within the procedure of a criminal case, from the investigation stage to conviction stage, there are special circumstances in which a suspect/accused can be released, discharged and acquitted entirely or subjected to a punishment of a lesser degree.

This piece of article prospects to give a stage by stage outline of those special instances set out by law wherein a suspect/accused is released, discharged and acquitted.

These can be identified as statutory reliefs and opportunities which are available to any suspect, accused or convicted person to avoid or to mitigate the punishment prescribed by the law.

Investigation Stage

Section 116 (1) of the CCPA[4] at the commencement of the investigation, a discretion is devolved on any inquiring officer (police officer) to decide between continuing the investigation and cessation of it where the information is not either strong or well founded.[5]

As per Section 120 (3) of the CCPA at the conclusion of the investigation where the Officer in Charge of Police (OIC) forwards the Final Report (final report of the investigation) and there isn't enough allegation framed against the suspect the Magistrate is bound to discharge the respective suspect. The significance of such discharge is, it amounts to a release (නිදහස් කරනවා / මුදා හරිනවා) but not to an acquittal (නිදොස් කොට නිදහස් කරනවා) and if police later finds any evidence on the same offence against the same suspect there is always possibility to frame charges.

Further when it appears to an officer in charge of a police station or an inquirer that there is no sufficient ground for entering on an investigation he shall have the authority not to investigate the case as per Section 109 (5) (b) of the CCPA.

The objective of these legal provisions is to prevent the unnecessary hardship which is likely to be undergone by the Authorities (including the Judiciary) as well as the suspect, avoid the prisons being overcrowded and to reduce the burden to be borne by the government due to some groundless allegations.

Inquiry/Trial Stage

After a properly conducted investigation and discovering adequate evidence against the suspect he'll be known as the accused and a plaint shall be filed against him. In this stage of preliminary inquiry whenever the Magistrate realizes that the evidence against the accused is not sufficient enough to initiate trial, subject to the *reasons be recorded* the Magistrate is capable of ordering the accused to be discharged.[6]

3 Substantive Law

4 as amended by Act No. 52 of 1980

5 *Henpitigedara Gnanaseeha thero case* (63 NLR 154)

6 Section 153 of Criminal Procedure Code Act No. 15 of 1979 as amended

During the summary trial, according to the Section 186 of the CCPA, Magistrate has the power to discharge the accused at any time and in any stage of the case. Moreover if further proceedings not result in proving the accusation, Magistrate shall acquit the accused.

And also under the Section 188 (1) of the CCPA[7] in case of a private plaint filed under Section 136 (a) of the CCPA where a complainant/plaintiff does not appear at the trial the Magistrate shall acquit the accused unless for some reason he considers to adjourn the hearing of the case, subjected to the complainant's appearance in reasonable time and satisfies the Magistrate that his absence was due to a reasonable cause beyond his control, then the Magistrate shall cancel any such order made.

In addition to that, where the summons have been served subsequent to a plaint filed under Section 136 (b) or (c) of the CCPA and the prosecution holds themselves not ready on the particular scheduled date, the court may discharge the accused.[8]

According to the sub section (3) of the Section 188 of the CCPA, the discharge mentioned above, shall operate as an acquittal where either, if case against the accused was not reopened within a period of one year or the case had been reopened and the order of discharge was made for the second time.

Moreover if any complainant at any time before judgment is given satisfies the Magistrate on sufficient grounds for withdrawing the case the Magistrate may permit him to withdraw the same and shall acquit the accused, but must record his reasons for such withdrawal.[9]

Section 190 of the CCPA conveys that the accused may be released by the Magistrate subjected to the sanctions of the Attorney General otherwise than upon a complaint under Section 136 (1), paragraphs (a), (c) and (d) of the CCPA.

From Section 256 to Section 259 of the CCPA it is dealt with tendering ***pardon to an accomplice***.[10] Subject to the authority obtained from the Attorney General the Magistrate can tender pardon to such an accused.

Stage of Conviction

Basnayake A.C.J in *Attorney General vs. H.N De Silva*[11] manifested that, '*a judge should in determining the proper sentence first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective*.'

7 as amended by Act No. 15 of 1989

8 Sec. 188 (1) of the CCPC as amended by Act No. 15 of 1989

9 Sec 189 CCPC –*Jayawardena vs Dharmarathna (1951) 54 NLR 524*

10 An accused who agrees to give evidence against the other accused who committed the same offence

11 57 NLR 121

When it comes to the stage of conviction there are several very special circumstances and practices in offering the punishment in a mitigated manner.

As per Section 172 (2) if Supreme Court or the Court of Appeal in the exercise of its powers of appeal or revision is of opinion that the facts of the case are such that there is no valid charge against the accused in respect of the facts already proved or where the circumstances so warrant, it shall ***quash the conviction***.

From Section 306 to 310 of Chapter XXV of the CCPA the court has power to permit ***conditional release*** of the offenders. Although the charge is proved, paying attention to many other factors as to the age, health, mental condition of the offender, trivial nature of the offence committed, and circumstances under which such offence was committed etc. without proceeding to the conviction court may either discharge the person under admonition or discharge conditionally[12] with the promise of maintain good and acceptable behavior where he is bound to produce himself as specified by the court. (Within a period of three years)

In *Solicitor General* vs. *Kritnasamy*[13] it was held that this rule of conditional discharge is not an inflexible rule that a first offender should not be sent to the prison when crimes of violence are concerned. An accused person who uses a knife should not be treated with leniency unless there are good grounds for so doing.

The principle that first offenders should not be sent to jail is not one that should be applied where the offence committed is of a grave nature.[14]

Apart from that, Section 18 of the CCPA[15] mentions that how ***the community service orders*** can be given to a convicted as the punishment.

The seriousness of the offence committed, the reason behind the offence (poverty, addictions and being abandoned etc.) balancing the accused's family life, social life and future shall be taken into account. Most importantly it is all about setting an example to the entire system.

According to Voltaire[16]; '*let the punishments of criminals be useful. A hanged man is good for nothing; a man condemned to public works still serves the country, and is a living lesson*.'

When it comes to the ***plea of guilty to a lesser offence,*** as per Section 154 of the CCPA[17], at the trial before the High Court, the accused may communicate that his willingness to plead guilty to a lesser offence, whereas he shall receive punishment for that offence. No any obligation

12 With or without sureties – *Anchapullai vs Baker et.al (31NLR 149)* – The accused was discharged and ordered to give security for good behavior.

13 42 NLR 347

14 *Ghouse vs. Eliatamby (Inspector of Police)* 48 NLR 557

15 as amended by Act No. 49 of 1985

16 **François-Marie Arouet** *(*21 November 1694 – 30 May 1778), known by **Voltaire** was a French Enlightenment writer, historian and philosopher

17 as amended by Act No. 14 of 2005

shall be casted on the Court or the Attorney-General to accept such plea of guilt made by the accused in the High Court to a lesser offence.[18] However Section 197 of the CCPA[19] provides that when the offence so pleaded to is in nature of murder, the judge has the discretion to refuse such plea.

A criminal act in which a person agrees not to report the occurrence of a crime or not to prosecute a criminal offender, in exchange for money or other consideration is known as ***compounding of offences***. In the situation of certain offences the law enables the aggrieved person himself to get satisfaction other than actual punishment in the substitution of the abuse. It really is for such offences, which is often labeled as offences which are not very grave or serious in the eyes of a reasonable individual, that the law allows the offences to be compounded.

Section 266 (1) of the CCPA states that, when an offence is not pending in a Magistrate Court the person who has received such injury or suffered loss could compound such offence. However, when such offence is pending in a MC then that offence can only be compounded with the consent of the Magistrate.

Section 266 (2) of the CCPA states when any offence is compoundable under this section the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

Section 266 (3) of the CCPA states when such matter has to be considered by a minor, an idiot, or a person of unsound mind, then the guardian of such person may be entitled to compound such offence.

Section 266 (4)[20] of the CCPA states subject to the provisions of any other law the compounding of any offence under this section shall—

a) When a prosecution for such offence is not pending in the Magistrate's Court, not have the effect of an acquittal of the accused;

b) When a prosecution for such offence is pending in a Magistrate's Court, have the effect of an acquittal of the accused.

Section 266 (5) of the CCPA states that any offence not described in this section shall not be compounded.

According to *Edwin Vs. Sinna Thambi* [21]compounding of an offence has the effect of an acquittal of the accused and a Magistrate cannot retry a case which has been compounded.[22]

18 Section 154 (4) of the CCPA amended by Act No. 14 of 2005

19 as amended by Act No. 14 of 2005

20 Section 266(4) subsequently amended by Section 5 of Act No.11 of 1988

21 53 NLR 424

22 *Don Harry Vs. Vetto Hami* [43 NLR 431]

Another such special mode of reducing the punishment is ***suspended sentences.*** Section 303 of the CCPA amended by Act No. 20 of 1995, Act No.19 of 1997 and Act No. 47 of 1999[23] and Section 304 amended by Act No. 47 of 1999 articulate the application of law with regard to suspended sentences. The court shall be delivered with the mitigation speech by the respective counsel for the offender illustrating the circumstances mentioned under Section 303(1) which create the environment to suspended sentence. The period for which the whole or a part of a sentence may be suspended shall be determined and specified, by the court and such period shall not be less than five years. Such offender shall not serve any part of the imprisonment unless the offender commits another punishable offence.[24]

Limitations to suspended sentences are listed under Section 303 (2) where the minimum sentence of imprisonment has been prescribed by law, offender is serving, or is yet to serve, a term of imprisonment not suspended, offence committed while offender was subject to a probation order ,conditional release or discharge. In suspended sentence the offender is shown that he has violated the tenets of the society provoked its' wrath, but is immediately forgiven and permitted to continue to live in society with the hope that he would not indulge in that form of behavior again.

In *Kumara* vs. *Attorney General*[25] held that, 'a suspended sentence is a means of re-educating and re-habilitating the offender, rather than alienating or isolating the offender.

No offender shall be confined to prison unless there is no alternative available for the protection of the community and to reform the individual.

In *Attorney General vs. H.N De Silva*[26] it was recognized that, in assessing the punishment that should be passed on an offender, the judge should consider the matter of sentence both from the point of view of the public and the offender.

Other Significant Areas

Subject to the objections of the complainant whenever a court acquits or discharges the accused alleging the complaint was groundless and vexatious, court is entitled to order the complainant to pay State costs in a sum determined by the court. In addition, court may order the complainant to pay to the accused such ***compensation*** as it shall think fit. Also when an arrest takes place without any sufficient ground, the court may award such compensation as it thinks fit to be paid by the person so causing the arrest to the person so arrested for his loss of time and income and for his expenses in the matter.[27]

As per Section 311 of CCPA ***President has an exclusive power to grant pardons***, reprieves, respites, or remissions of punishment to any wrongdoer. Further as per Section 312 of CCPA

23 The Act which is currently in operation

24 Section 303 of CCPA as amended

25 (2003) 1 SLR 139

26 57 NLR 121

27 Section 17 (1) –(3) of CCPA

the President may, without the consent of the person sentenced, commute Rigorous or simple imprisonment for life or for any other term, any lesser term of rigorous imprisonment, or any term of simple imprisonment not exceeding the term to which such person might have been sentenced, or fine etc.

Another interesting concept comes under the Section 314 and 315 of CCPA namely ***double jeopardy***; *autrefois convict and autrefois acquit.* In *Connelly vs. Director of Public Prosecution*[28] cited in *Liyanarachchige Indika Thusara vs. Attorney General*[29], **Lord Devlin** held that; "*For the doctrine of autrefois to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word 'offence' embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law*. "

Afterword

In light of the above contentions it is well understood that the legal atmosphere has adequately created space for those who don't deserve to be punished. Especially when evidence does not sufficiently support the conviction of a suspect he is provided with an ample of opportunities to walk out as a free man. On the other hand, the situation is well balanced as no such space is formulated to secure an actual criminal.

However the rising number of crimes proves the failure this system based on punishments. Focusing on a rehabilitation aimed system shall be the best solution to overcome such negative impact of the current system based on punishments. The aforementioned legal arrangements such as community service, suspended sentence, conditional discharge etc. definitely make some difference and rectify the situation.

Although there is no possibility to correct what has happened, it is capable of reducing the rates of re-offence, which automatically reduces the suffering associated with future crimes and safeguards the society. In addition such system reduces governmental expenses, which should be spent to ensure the civil protection and public well-being.

It is high time to identify the strengths of the existing Criminal Justice System and sail towards other progressive directions. Rather than experiencing the most effective list of punishments it's always a blessing to be a part of a crime-free nation.

'Power is of two kinds. One is obtained by the fear of punishment and the other by acts of love. Power based on love is a thousand times more effective and permanent than the one derived from fear of punishment.' **-Mahatma Gandhi**[30]

Reference

28 [1964] 2 AC 1254, [1964] 2 All ER 401

29 CA (PHC) APN 39/2015 Decided on : 13.05.2016

30 *Mohandas Karamchand Gandhi* was an Indian activist who was the leader of the Indian independence movement against British colonial rule. Employing non-violent civil disobedience, Gandhi led India to independence and inspired movements for civil rights and freedom across the world.

Cases

1. *Anchapullai vs Baker et.al 31NLR 149*
2. *Solicitor General vs. Kritnasamy 42 NLR 347*
3. *Ghouse vs. Eliatamby (Inspector of Police) 48 NLR 557*
4. *Edwin Vs. Sinna Thambi 53 NLR 424*
5. *Don Harry Vs. Vetto Hami 43 NLR 431*
6. *Kumara vs. Attorney General (2003) 1 SLR 139*
7. *Jayawardena vs Dharmarathna (1951) 54 NLR 524*
8. *Henpitigedara Gnanaseeha thero case (63 NLR 154)*
9. *Attorney General vs. H.N De Silva 57 NLR 121*
10. *Liyanarachchige Indika Thusara vs. Attorney General CA (PHC) APN 39/2015 / Decided on : 13.05.2016*

Statutes and Statutory Instruments

1. Code of Criminal Procedure Act No. 15 of 1979 as amended
2. Code of Criminal Procedure Act No. 52 of 1980 (amendment)
3. Code of Criminal Procedure Act No. 49 of 198 (amendment)
4. Code of Criminal Procedure Act No.11 of 1988 (amendment)
5. Code of Criminal Procedure Act No. 15 of 1989 (amendment)
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1. Peiris G L, Criminal Procedure in Sri Lanka, Stamford Lake publishers, (2012)
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Is Freedom of Speech an Absolute Right?

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Freedom means the power or the right to act, speak or think as one wants. The power or the right to express one's opinion without any censorship, restraint or legal penalty can be called as the Freedom of Expression. Freedom of expression is a basic human right which has been accepted by every society disregarding whether it is developed or not.

Freedom of expression has been recognized as a human right by the Universal Declaration of Human Rights (UNHR) and the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the UDHR says, "Everyone shall have the right to hold opinions without interference and everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers either orally, in writing or in print, in the form of art or the media of his choice."

The first African American President of the United States, Barack Obama, is of the view that, "We have to uphold a free press and freedom of speech because in the end, lies and misinformation are no match for the truth". According to George Washington, "If the freedom of speech is taken away, the dumb and silent we may be led, like sheep to the slaughter".

What does our constitution say about the freedom of speech?

The freedom of an individual or community to articulate their ideas or opinions without any fear of legal sanction has been accepted as a fundamental right by the constitution of Sri Lanka. According to article 14(1)(a) of our Constitution, "every citizen is entitled to the freedom of speech and expression including publication".

Even though this has been entrenched in the Constitution, this is not an absolute right as this may be subjected to certain restrictions in respect of the rights of the individuals, their reputation or for the national security. According to Article 15(2) of the Constitution, the rights declared by Article 14(1) (a) shall be restricted in order to ensure national security, racial and religious harmony, parliamentary privileges and to protect individuals from defamation and contempt of court. Therefore expressing one's view should be done with responsibility especially when it comes to national security and religious harmony.

Does the 19th Amendment to the Constitution have an impact on the freedom of speech and expression?

With the insertion of the new Article 14A to the constitution through the 19th Amendment every citizen shall have the right of access to any information that is required for the exercise or protection of a citizen's right held up by any public authority. Therefore every citizen, incorporated or unincorporated body in this country shall be entitled to this as a fundamental right.

With the introduction of the Right to Information Act No.12 of 2016 in order to promote good governance and enable the public to participate in it, every citizen has the right of access to information which is in the possession of a public authority unless the information has no relationship to any public activity or interest, if it is likely to be prejudicial to the national security, economy or the financial policies of the country or the impartiality of the judiciary.

Even though we are entitled to this as the citizens of this country this too is not an absolute right because exercising this as an absolute right may harm or damage the freedom of another individual which is a basic right of them.

As everyone is entitled to the freedom of speech and expression every other person has the right to privacy as it is a right of everyone to live in dignity and every other individual has the responsibility to not to violate it. According to Sir Winston Churchill, "Some people's idea of free speech is that they are free to say what they like, but if anyone says anything back, it is an outrage"

Therefore, the right to information and freedom of expression must be exercised without any violation of the rights and the freedom of the others.

Impact of social media on Freedom of Speech and Expression.

With the improvement of technology the use of social media has made a big impact on the freedom of speech and expression. In general it is a good platform to connect people and allow to express their ideas. Besides the positive impact of this what we can see is the negative impact of this right as one is free to express whatever his idea or opinion is without any sanction or restriction. Therefore the spread of hate speech, fake news, rumors and slander due to lack of filter or focus has increased.

Even though social media has played an important role in advocating equality, human rights and justice around the world, it does not confer the right to speak or publish whatever they want without any responsibility. The legislature of the country should enact laws to strike a balance between the misuse of social media and the freedom of speech. A national framework should be enacted in order to protect the rights of the individuals as the violation of this may lead to civil wrongs, criminal offences and to fundamental violations as well.

The right has been recognized by the United Nations Human Rights Resolution on the Promotion, Protection and Enjoyment of Human Rights on the Internet as well. It says, "The same rights that people have offline must also be protected online." Though the legislations that are in existence does not per se refer to this matter they may touch upon or have a considerable effect on the issues related to social media as well as on the freedom of speech they can be used to maintain the above said balance. They are the Penal Code, Prevention of Terrorism Act No.48 of 1978, International Covenant on Civil and Political Rights (ICCPR) Act No.56 of 2007, Public Security Ordinance No.25 of 1947, Parliamentary Privileges Act No.21 of 1953, Article 105(3) of the Constitution and the Roman Dutch Principles related to defamation.

Sanctions under the Penal Code.

According to section 120 of the Penal Code, whoever by words, either spoken or intended to be read or by sign or by visible representation excites or attempt to excite feelings of disaffection towards the government or attempts to excite hatred or to contempt of administration of justice or attempts to raise discontent or disaffection amongst the subjects or to promote feelings of ill-will and hostility between different classes of the subjects shall be punished with imprisonment for a term which may extend to two years.

As per section 285 of the Code, whoever sells or distributes, imports or prints for sale or hire or willfully exhibits to public view, any obscene book, pamphlet, paper, drawing, painting, photograph, representation or figure or attempts or offers to do so shall be punished with imprisonment.

Prohibition of Publications under the Prevention of Terrorism Act No. 48 of 1979.

As per section 14 of the Prevention of Terrorism Act, without any approval in writing of a competent authority, no person shall print or publish about any act or offence under this act or on the investigation of such or incitement to violence which is likely to cause religious, racial or communal disharmony or ill-will between communities.

International Covenant on Civil and Political Rights.

Section 3(1) of the above says that no one should advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Pubic Security Ordinance on Control of Publication.

According to section 15(1) of the above ordinance, a competent authority may restrict the publication of matters which could be prejudicial to the interest of national security or preservation of public order of the country.

Parliamentary Privileges Act No. 21 of 1995.

According to section 3 of the Parliamentary Privileges Act the members of the Parliament shall have the freedom of speech, debate and proceeding in parliament and shall not be liable to be impeached in any court or place out of parliament.

As in section 4, no member shall be liable to any civil or criminal proceedings, arrest, imprisonment or damages by reason of anything he may have said in the Parliament.

Article 105(3) of the Constitution.

When publication has led to a contempt of court, according to article 105(3) of the Constitution, the Supreme Court and the Court of Appeal shall have the powers to punish for contempt of itself or elsewhere.

Defamation

Roman Dutch Law principles shall apply for defamation and it can be considered as a civil wrong. If a statement published is defamatory, refers to the plaintiff and when there is a

animus injuriandi which means the intention to defame the person knowing that the plaintiff's reputation will be harmed by such an act can considered as defamation.

What we should understand from the above legal provision is that the right of freedom of speech and expression should not be misused as it may lead to civil wrongs when there is a defamation punishable by fine or compensation. When it comes to a criminal offence it could be punishable by a fine or compensation or imprisonment or rehabilitation. An infringement of a fundamental right or imminent infringement by an executive or administrative, action can be challenged under Article 126 of the Constitution which should be read with Article 17 within a period of one month.

When we talk about the misuse of social media, a proper legislative network should be brought in order to monitor the publications in social media with the help and control of the Telecommunication Regulatory Commission and other related authorities in order to make one responsible for what they say and publish through social media in order to protect the others from hate speech, fake news, rumours and slander.

முஸ்லிம் பெண்களுக்கான மறுக்கப்பட முடியாத உரிமைகள் - இலங்கையின் முஸ்லிம் தனியார் சட்டத்தின் கீழ் ஓர் பார்வை

சட்டத்தரணி செல்வி கிப்சியா செய்னுல் ஆப்தீன் (LL.B)[Col]

"உங்களுடைய மார்க்கம் உங்களுக்கு எங்களுடைய மார்க்கம் எங்களுக்கு"[1]

"இன்னும் எவர் மறுமையை நாடி தக்க பிரயாசையுடன், மு.ஃமினாகவும் இருந்து முயல்கிறாரோ, அத்தகையவர்களின் முயற்சி அல்லாஹ்விடத்தில் நற்கூலிக்குரியதாக ஏற்றுக் கொள்ளப்படும்."[2]

இற்றைக்கு 1400 வருடங்கள் பழமையின் பொழிவுடனும், இன்றைய புதியவையுடன் கரைந்து போகாமலும் செழிப்பாய் மிளிரும் இஸ்லாமிய ஷரீஆ சட்டத்தில் இருந்து இந்த நாட்டு சூழலுக்கும் மக்களுக்கும் ஏற்றாற் போல் ஒரு முஸ்லிம் சட்டத்தை, பௌத்த பெரும்பான்மை கொண்டதும் பல்லின காலாசார பிணைப்பையுமுடைய நாடொன்று வழங்கியிருக்கிறது என்றால் அது குறைபாடு நிறைந்ததாகவே காணப்படும் என்பதில் மாற்றுக் கருத்திற்கு இடமில்லை. தற்காலத்திலும் இன்னும் எதிர்காலத்திலும் முறையே பேசும் பொருளாக காணப்படும், காணப்பட போகும் இலங்கையின் 1951ஆம் ஆண்டு 13 ஆம் இலக்க முஸ்லிம் விவாக மற்றும் விவாகரத்து சட்டத்தின் (இதன் பிற்பாடு இந்த சட்டம் என சுட்டப்படும்) திருத்தங்கள் மற்றும் மாற்றங்கள் பற்றி புத்திஜீவிகளும், சட்ட வல்லுனர்களும் ஆய்வுகளில் இன்றும் ஈடுபட்ட வண்ணமே உள்ளனர். நிச்சயமாக மாற்றத்தை எதிர்பார்த்து நிற்பது சட்டம் மாத்திரமல்ல. இந்த சட்டத்தில் காணப்படும் புராதன வழக்காற்றினை கட்டியாழும் நமது சமுதாயமும், இலங்கைக்கே உரித்தான இந்த சட்டத்தினை அடிப்படையாக கொண்டு இஸ்லாம் எனும் புனித மார்க்கத்தினை எடை போட பழகியவர்களின் கண்ணோட்டமும், சட்டத்தின் பிரிவுகளை தனக்கு சாதகமாய் பயன்படுத்தி உரிமை துஃபிரயோகம் செய்து கொண்டிருக்கும் நமது முஸ்லிம் மக்களும் தான். பல தார மணம் செய்வதற்கு இஸ்லாம் நியாயமான வரையறைகளை விதித்திருக்கும்3[3] அதே நேரம் இந்த சட்த்தில் அதற்கான கட்டுப்பாடு குறைவாக காணப்படுவதை தனக்கு ஏற்றாற் போல் பயன்படுத்தி இஸ்லாம் விதிவிலக்கான சூழலில் அனுமதித்த உரிமையை வழக்காறாக மாற்றி செயற்படுவது, அதற்கு சிறந்த உதாரணமாகும். இன்றும் காதி நீதிமன்றங்களில் இந்த சட்டத்தின் பிரிவு 24 இன் படி இரண்டாவது திருமணம் செய்து கொள்ள விரும்பும் ஒரு ஆண், காதி நீதிமன்றத்திற்கு 30 நாட்களுக்கு முன்பு அறிவித்தல் கொடுக்க வேண்டும் என்ற நடைமுறையானது வெறுமனே கண் துடைப்பு நிகழ்வாக தான் காணப்படுகிறது. குறித்த நபருக்கு தனது மனைவிகளுக்கு

1 The Holy Quran (Translated by Moulavi A.Kuthbudeen Ahmed Bahavi & Moulavi R.Abdur Rauf Bahavi) Sura Khafiroon, verse 6

2 The Holy Quran (Translated by Moulavi A.Kuthbudeen Ahmed Bahavi & Moulavi R.Abdur Rauf Bahavi) Sura Banee israyil, verse 19

3 நீங்கள் அவர்களிடையே நியாயமாக நடக்க முடியாது என பயந்தால் ஒரு பெண்ணையே மணந்து கொள்ளுங்கள்□.. இதுவே நீங்கள் அநியாயம் செய்யாமலிருப்பதற்கு சுலபமான முறையாகும். வுாந Holy Quran (Translated by Moulavi A.Kuthbudeen Ahmed Bahavi & Moulavi R.Abdur Rauf Bahavi) Sura An-Nisa, verse 3

மத்தியில் நியாயமாக நடந்து கொள்ள தகுதி காணப்படுகிறதா என்பதையும் தாண்டி வெறுமனே தனது இரண்டாம் திருமணத்தை ஊருக்கு தெரியப்படுத்தும் நிகழ்வாக தான் அது கருத்திற் கொள்ளப்பட தக்கது.

எனவே ஒப்பீட்டளவில் இந்த சட்டமானது முஸ்லிம் பெண்களுக்கு அநீதியை அள்ளித் தருவதாகவே ஊகிக்கப்படுவதுடன், நாட்டின் பின்தங்கிய பிரதேசங்களில் காணப்படும் காதி நீதிமன்றங்கள் சில அந்த அநீதியை நடத்தியும் காட்டும் நிலைப்பாடு தான் கசப்பான உண்மை. இந்த அசாதரண நிலை காணப்படுவதற்கு காரணங்களாக, முஸ்லிம் விவாக மற்றும் விவாகரத்து சட்டம் பற்றி காணப்படும் தவறான புரிதல் அல்லது சட்டம் பற்றி மற்றும் சட்டம் வழங்கியுள்ள சில மறுக்க முடியாத உரிமைகள் பற்றிய தெளிவின்மை என்பவற்றை அடையாளப்படுத்த முடியும். இந்த சட்டத்திற்கு மாற்றம் கட்டாயமானது, ஆனால் சட்டம் பற்றிய தெளிவினை வழங்குதல் தவிர்க்க முடியாதது. ஏனைய நீதிமன்றங்களில் போல் காதி நீதிமன்றங்களில் சட்ட வல்லுனர்களையும், நீதவான்களையும் கொண்டு நிவாரணம் பெற்றுக் கொடுக்கப்படுவதில்லை என்பதனால் தானோ, சட்டம் பற்றியும், அதன் கீழான உரிமை பற்றியும் எந்த விளக்கமும் இல்லாத நிலையில் அநீதி இழைக்கப்பட்டதாய் நமது சமுதாய பெண்கள் அறைகளினுள்ளே முடங்கி விடுகின்ற பரிதாப நிலை நாடெங்கிலும் பரவலாய் காணப்பட செய்கிறது. புத்தகங்களை சற்றே மூடி வைத்து விட்டு சில முஸ்லிம் பெண்களின் இதயவறைகளை தட்டி கேட்டால் தெரியும் அந்த இருண்டு போன ஒளிமயமான நாட்களின் கதை.

எனவே சட்டத்தில் இல்லாதவற்றை தேடி களைத்தலில் இருந்து விடுபட்டு, இருக்கும் அம்சங்களை எவ்வாறு வினைத்திறனாய் பயன்படுத்தலாம் என்பதான கண்ணோட்டம் காலத்தின் தேவையாகவே காணப்படுகிறது. அந்த வகையில் முஸ்லிம் விவாக மற்றும் விவாகரத்து சட்டத்தின் கீழ் விவாகரத்து, தாபரிப்பு மற்றும் பிள்ளையின் பராமரிப்பு அத்தோடு காதி நீதிமன்ற தீர்ப்பில் அதிருப்தி ஏற்படும் போது அந்த தீர்மானம் தொடர்பில் மேன்முறையீடு செய்தல் பற்றி குறிப்பிடத்தக்க உரிமைகள் மற்றும் வாய்ப்புக்கள் காணப்படுதல் ஐயங்களைக்கப்பட்ட உண்மை.

விவாகம் மற்றும் விவாகரத்தின் போது பெண்களுக்கு காணப்படும் உரிமைகள்.

இலங்கையின் முஸ்லிம் சட்டமானது இஸ்லாத்தின் தனியான மத்ஹப்களை அடிப்படையாக கொண்டு உருவாக்கப்பட்ட போதிலும், முக்கியமான இரு மத்ஹப்களான ஷாபி மற்றும் ஹனபி என்பவற்றிற்கு முக்கியத்துவம் கொடுக்கப்படுகின்றது. எனினும் இலங்கையில் பெரும்பான்மையாக ஷாபி மத்ஹபினை பின்பற்றும் முஸ்லிம்கள் வாழ்வதனால் ஷாபி மத்ஹப் பொதுவாக ஏற்புடையதாக்கப்படும்[4] எனவும் வேறு வகையில் முரண்பாடுகளும் சான்றுகளும் இல்லாத போது இலங்கையின் முஸ்லிம்கள் ஷாபி பிரிவினை சேர்ந்தோராகவே ஊகிக்கப்படுவார்கள்[5] என்பதன் அடிப்படையில் சட்டத்தின் பிரிவு 25 இன் படி ஒரு பெண்ணினை மணம் முடித்துக் கொடுப்பதற்கு வலியின் சம்மதம் தேவைப்படுத்தப்பட்டுள்ளதுடன், திருமணப் பதிவில் மணப் பெண்ணின் கையொப்பம் கூட ஒரு தேவைப்பாடாக உள்ளடக்கப்படவில்லை, இந்த வலியின் சம்மதம் என்ற அம்சமானது "இளம் பெண் அவளிடம் அவளது தந்தை கட்டாயமாக திருமணத்திற்கான கட்டளையை பெற வெண்டும்"[6] என்ற ஸஹீஹ் முஸ்லிமின்

4 Justic Saleem Marshoof> The Muslim Law of Marriage Applicable in Sri Lanka> (Law College Law review 2006) pp.33-34

5 5 Ibid, 35

6 Uzthat M.A.M.Mansoor(Naleemi) > Muslim Taniyaar sattam - oru avadhanam> 1st edition (2017)> pp.7

ரிவாயத்திலும் இன்னும் பல ஸஹீஹ் ஆன ஹதீஸ்களிலும் சொல்லப்பட்டதற்கிணங்க கொண்டு வரப்பட்டதாகவும் இருக்கலாம். ஆனால் இந்த சட்டப் பிரிவினதும் ஹதீஸ்களினதும் தாற்பரியம் புரியப்பட்டு அனைத்து திருமணங்களும் நடைபெறுகின்றதா என்பது திருமண பந்தத்தில் இணைந்து வாழும் பெண்களிடம் தனிப்பட்ட முறையில் விசாரிப்பதனால் அறிந்து கொள்ள கூடிய அரிய அம்சமாகும். இருப்பினும் நமது தனியார் சட்டத்தின் பிரிவு 47(2) இன் படி வலியாக வரக் கூடியவர் நியாயமற்ற முறையில் தனது சம்மதத்தை வழங்காது தடுத்து வைக்கும் போது அந்த பெண்ணின் சார்பாக ஏதேனும் புகாரின் பேரில் காதி குறித்த வலியிடம் விசாரணை நடத்துவதற்கும், குறித்த திருமணத்தை செல்லுபடியாக்குவதற்கும் தேவைப்பட்டால் சம்மதம் வழங்கவும் முடியும். எனவே, இஸ்லாத்திற்கு மாறாக, தனியார் சட்டத்தை கையிலெடுத்து நடாத்தப்படும் கட்டாயத் திருமணங்களையும், திருமணத்திற்கு முறையான சம்மதம் வழங்கப்படாத போது அதற்கான தீர்வினையும் பெறக் கூடிய ஏற்பாடு காணப்பட தான் செய்கிறது. இருப்பினும், கிராமங்களில் காணப்படும் காதிமார்கள் சட்டத்தையும் தாண்டி வழக்காறுகள் மற்றும் தொன்று தொட்ட பழக்க வழக்கங்களுக்கும் முக்கியத்துவம் கொடுக்க முற்படும் போது, இந்த விசாரணையானது வினைத்திறனற்றுப் போகலாம்.

மேலும், இச்சந்தர்ப்பத்தில் விவாகரத்து பற்றி பேச வேண்டியது கட்டாயமானது.விவாகரத்திற்கு அனுமதி வழங்கப்பட்டாலும் கூட, அல்லாஹ்விடத்தில் வெறுப்பிற்குரிய விடயமாக தலாக் காணப்படுகிறது. இருந்த போதிலும், இலகுவாக விவாக முறிவினை பெற்று தரும் மார்க்கம் இஸ்லாம் என்ற எண்ணப்போக்கினை நமது தனியார் சட்டமானது சில முஸ்லிம்களின் மத்தியிலே ஏற்படுத்தி விட்டது என்றால் கவலைக்குரிய கூற்று தான் அது. அந்த வகையில் முஸ்லிம் விவாக மற்றும் விவாகரத்து சட்டத்தின் பிரிவு 27 இன் படி கணவன் தனது மனைவியை மணவிலக்கு செய்ய முடியும் அதே நேரம் அவர் குறித்த சட்டத்தின் இரண்டாம் அட்டவணையில் சொல்லப்பட்ட நடபடிமுறைகளை பின்பற்றப்பட வேண்டியது கட்டாயமானதாகும். இங்கு கவனிக்க வேண்டிய முக்கிய விடயம் என்னவெனில், அட்டவணையின் விதி 2, 6 மற்றும் 7 இற்கிணங்க தலாக் சொல்லப்படும் மூன்று சந்தர்ப்பத்திலும் மனைவி காதி நீதிமன்றுக்கு சமுகமளிக்காத போதும் தலாக் கணவரால் நிறைவேற்றப்பட்டு மனைவிக்கு பின்னர் அறிவிக்கப்படும். ஆனால், சட்டத்தின் பிரிவு 28 இன் படி மூன்றாம் அட்டவனையில் சொல்லப்பட்ட நடபடிமுறைகளை பின்பற்றி தனது கணவனை மணவிலக்கு செய்ய கருதும் மனைவியானவர் கணவனின் சமூகம் இல்லாது மண விலக்கினை மேற்கொள்ள முடியாது. மேலும் மூன்றாம் அட்டவனையின் விதிகள் 2,3,4 மற்றும் 5 இன் பிரகாரம் காதி குறித்த விவாகரத்து விண்ணப்பம் தொடர்பான அறிவித்தலை கணவனுக்கு தெரியப்படுத்த அதிகூடிய பிரயத்தனம் எடுக்க வேண்டும் என்பது மறைமுக உண்மை. ஆனால் இரண்டாம் அட்டவனையின் விதிகளின் பிரகாரம் காதி நீதிமன்றிற்கு மனைவி வருகை தராத போது, மணவிலக்கு செய்யப்பட்ட தகவல் மாத்திரமே மனைவிக்கு காதி நீதிமன்றினால் அனுப்பி வைக்கப்படும். இருப்பினும் குறித்த இரண்டாம் அட்டவனையின் விதி 1 இன் படி, கணவன் தனது மனைவியை மணவிலக்கு செய்ய நாடினால் தனது மனைவி வசிக்கும் பிரதேச காதி நீதிமன்றில் தான் தனது விண்ணப்பத்தை முன் வைக்க வேண்டும் என்றும் மூன்றாம் அட்டவனையின் விதி 1 இன் பிரகாரமும் மனைவி தனது கணவனிடம் இருந்து மண விலக்கினை நாடினாலும் மனைவி, தான் வசிக்கும் பிரதேச காதி நீதிமன்றில் விண்ணப்பம் செய்ய வேண்டும் என நடபடிமுறைக் ஏற்பாடு செய்யப்பட்டு இருப்பதானது, சட்டத்தை துஷ்பிரயோகம் செய்யும் கயவர்களிடம் இருந்து பாதுகாப்பு பெற்றுக் கொள்ள காணப்படும் ஒரு பாதை தான் என சற்றே அமைதி கொள்ளலாம். எனவே, விண்ணப்பமானது சரியான முறையில் செய்யப்பட்டதா என்பதனை உறுதி செய்வதன் ஊடாக சட்டத்தின் படியான தனது உரிமைகளை காத்துக் கொள்ள முடியும். ஆக பெண் வாழும் பிரதேச

காதி நீதிமன்றம் நியாயாதிக்கத்தை கொண்டுள்ளது என்ற அம்சமானது பெண் சார்பான கருத்துக்கள் சரியாக சொல்லப்படவும், காதி நீதிமன்ற நிலவரங்கள் அவளை உரிய முறையில் சென்றடையவும் பாலமாக அமையும் என்றாலும் அதன் நடைமுறை சாத்தியத்தில் தான் பிரச்சினை காணப்படுகிறது.

"சீரிய முறையில் அவர்களை வைத்துக் கொள்ளுங்கள் அல்லது சிறந்த முறையில் அவர்களை விலக்கி விடுங்கள்"[7] இது எல்லாம் வல்ல இறைவன் வாக்கு ஆனால், சட்டத்தின் பிரிவு 27, இரண்டாம் அட்டவணை விதி 3 இன் படி காதியானவர் கணவன் தனது மனைவியை விவாகரத்து செய்வதற்கான காரணங்களை பதிய தேவையில்லை என்ற அம்சமானது கணவன் தனது மனைவியை தகுந்த காரணமின்றி விவாக விலக்கு செய்யலாம் என்ற நிலைப்பாட்டை வலுக் கட்டாயமாக தாங்கி நிற்கிறது. மறு பக்கத்தில் சட்டத்தின் பிரிவு 28 ஆனது, மனைவி தனது கணவனை மணவிலக்கு செய்வதற்கு கணவனின் முறையற்ற பராமரிப்பு, அவரது செய்கை செய்யாமை தொடர்பில் வலிமையாக காரணங்கள் கூறப்பட வேண்டும் என்பதுடன், மூன்றாம் அட்டவனையின் விதிகளின் படி, காதிக்கு மேலதிகமாக குறித்த பிரதேசத்தின் நன்னடத்தை கொண்ட முஸ்லிம் பிரதிநிதிகளை கொண்டு அந்த காரணங்கள் விசாரிக்கப்பட்டு விவாகரத்து பதியப்பட வேண்டும் என வலியுறுத்தப்படுகிறது. இது உண்மையிலேயே நீதிக்கு புறம்பானதும் அநியாயத்திற்கு வழிவகுக்க கூடியதுமான பிரிவு என்றாலும் கூட இதே சட்டத்தின் பிரிவு 60 இன் படி மூன்றாம் அட்டவனையின் கீழ் மேற்கொள்ளப்படும் விசாரணையின் போது அநீதி தென்பட்டால் அல்லது அந்த விசாரணை மற்றும் தீர்வில் திருப்தியில்லாத போது மனைவி காதி சபைக்கு மேன்முறையீடு செய்ய முடியும் மற்றும் காதி சபையின் தீர்மானத்திற்கு எதிராகவும் பிரிவு 62 இன் படி மேன்முறையீட்டு நீதிமன்றுக்கு மேன்முறையீடு செய்யலாம், காலம் தாழ்த்தி செய்யப்படும் விண்ணப்பங்களை கூட ஏற்றுக் கொள்ளக் கூடிய ஏற்பாடுகள் சட்டத்தின் பிரிவு 63 (அ) மற்றும் (ஆ) இன் கீழ் வழங்கப்பட்டுள்ளதுடன் நியாயமான காரணங்களின் மேல் தாமதமான மேன்முறையீடு ஏற்றுக் கொள்ளப்படும். எனவே இங்கு கவனிக்கப்பட வேண்டிய முக்கிய விடயம் யாதெனில் குறித்த மேன்முறையீட்டு வாய்ப்பானது, மூன்றாம் அட்டவணைக்கு கீழான விசாரணைகளின் போது மாத்திரமே சாத்தியமானது, என மேன்முறையீட்டுக்கான பிரிவு 60 இனை வாசிக்கும் போது விளங்கிக் கொள்ள முடியும். சட்டம் பின்வருமாறு ஏற்பாடு செய்கிறது,

"Any party aggrieved by any final order made by a Quazi under the rules in Third schedule or in any inquiry under section 47 shall have a right of appeal to the Board of Quazi…."[8]

குறித்த மேன்முறையீட்டு சந்தர்ப்பமானது கணவன் தரப்பிற்கும் காணப்பட்ட போதிலும், நமது பெண்கள் இந்த மேன்முறையீட்டு வாய்ப்பினை தங்களது உரிமைகளை தக்க வைத்துக் கொள்வதற்காக சிரமத்தை பாராது முன்னெடுக்க வேண்டும்.

7 Supra no 6, p.25

8 Muslim Marriage and Divorce Act no 13 of 1951

தாபரிப்பு பணம் பெறுதல் தொடர்பில் காணப்படும் உரிமைகள்.

தாபரிப்பு பணம் பெற்றுக் கொள்வதை பொருத்தவரையில், சட்டத்தின் பிரிவு 34[9] மற்றும் 35[10] என்பன முறையே கணவனிடம் இருந்து மனைவி தாபரிப்பு பணம் பெறுதலையும் தந்தையிடம் இருந்து பிள்ளை தாபரிப்பு பணம் பெறுதலையும் சுட்டி நிற்கின்றது. அந்த வகையில், மனைவியானவள் தன் கணவனுடன் வாழுகின்ற காலப்பகுதியில் தாபரிப்பிற்கான விண்ணப்பத்தினை தாக்கல் செய்ய முடியாது என்பதுடன், தந்தையின் அரவணைப்பில் வாழும் பிள்ளைகளுக்காகவும் தாபரிப்பு பணம் கோரப்பட முடியாது. எனினும் விவாகரத்தின் போது தனது மனைவி மற்றும் மனைவியின் பராமரிப்பின் கீழ் வாழும் பிள்ளைகளுக்காக கணவன் தாபரிப்பு பணம் செலுத்த வேண்டும். அத்துடன் செய்யது மொஹமத் எதிர் மொஹமத் அலி லெப்பே[11] என்ற வழக்கின் ஊடாக, கணவனின் வீட்டை விட்டு போதுமான காரணங்கள் இல்லாது பிரிந்து சென்ற மனைவி தாபரிப்பு பணம் பெறும் உரிமையினை இழக்கிறாள் என்ற விடயம் முன்மொழியப்பட்டது. எனவே, கணவனுடன் வாழும் நிலையில் மற்றும் கணவனை விட்டு தகுந்த காரணங்கள் இன்றி பிரிந்த நிலையிலும் ஒரு முஸ்லிம் பெண் தனக்கான தாபரிப்பினை பெறும் உரிமையினை இழக்கும் நிலைக் காணப்படுகிறது.

பெண்களுக்கான தாபரிப்பு பணத்தை பெற்று தருதலில் காதி நீதிமன்றம் நியாயாதிக்கத்தை கொண்டிருப்பதோடு சட்டத்தின் பிரிவு 47(1) (ஆ) இன் கீழ் மனைவியின் தாபரிப்பு கோரிக்கைகளை விசாரிப்பதற்கான அதிகாரம் காதிக்கு வழங்கப்படுகிறது. காதியானவர் அந்த குறித்த சூழலில் இருந்து அந்த சூழலுக்காகவே நியமிக்கப்படுவதனால் பெண்ணுக்கான தாபரிப்பு பணத்தின் தேவையானது பாரபட்சமற்ற நிலையில் உணரப்பட்டு வழங்கப்படுவதற்கு வழி வகுத்துக் கொடுக்க வேண்டும். அடிமட்ட தாபரிப்பு பணத்தை பெற்றுக் கொடுப்பதில் சில காதி நீதிமன்றங்கள் முன் நின்று உழைக்கும் வரலாறுகள் மறுக்கப்பட்டவையா, மறைக்கப்பட்டவையா என்பதில் இன்னுமே சந்தேகங்கள் ஊசலாடுகின்றன.

தாபரிப்பு பணத்திற்கு மேலதிகமாக ஒரு பெண் அல்லது மனைவி தனக்கு சேர வேண்டிய ஆனால் கணவனால் கொடுக்க மறுக்கப்பட்ட மஹர் பணத்தினை கேட்டுப் பெற்றுக் கொள்ளவும் சட்ட ரீதியாக உரிமை உடையவளாகும், ”நீங்கள் மணம் செய்த கொண்ட பெண்களுக்கு அவர்களுடைய மஹர் திருமண கொடைகளை மகிழ்வோடு கொடுத்து விடுங்கள்”[12]என்ற புனித அல்-குர்ஆனின் கட்டளைக்கிணங்க மஹர் மறுக்கப்படும் போது அதனை சட்ட ரீதியாக பெற்றுக் கொள்ளும் உரிமை நமது சட்டத்தில் தரப்பட்டுள்ளது, மேலும், சட்டத்தின் பிரிவு 47(1) (அ) இன் படி மனைவியின் மஹர் தொடர்பான கோரிக்கைகளை விசாரிக்கும் அதிகாரம் காதிக்கு வழங்கப்பட்டுள்ளது. இது தவிர, சித்தி ரஹீம் எதிர் ஹபீல்[13] என்ற வழக்கிலும் குறித்த விடயமானது வலியுறுத்தப்பட்டது மற்றும் மஹர் வேண்டி நிற்கும் ஒரு மனைவியின் கோரிக்கையானது வழக்காக கொண்ட வரப்பட வேண்டுமென்றால், திருமணமானது இறப்பினாலோ அல்லது

9 'A wife or any person on behalf of a wife shall not be entitled to claimed or to received maintenance in respect of any period during which the wife lives or has lived with her husband whether on the orders of a Quazi or otherwise'

10 35(1) 'A child or any person on behalf of a child not entitled to claim or to receive maintenance in respect of any period during which the child is or was living with or support by the father'

11 NLR-307- of 54 [1953]>LKSC 16

12 The Holy Quran (Translated by Moulavi A.Kuthbudeen Ahmed Bahavi & Moulavi R.Abdur Rauf Bahavi) Sura An-Nisa> verse 4

13 டேசு-34- ழக 59 ஜ1957ஸ டுமுளுஊ 27

மணவிலக்கினாலோ முடிவுறும் வரை கொண்டு வரப்பட முடியாததோடு, அவை நடந்தேறி மூன்று வருடங்களுக்குள் வழக்கு தாக்கல் செய்யப்பட வேண்டும்[14]. இது தவிர, கைக்கூலி என சொல்லப்படும் பெண் வீட்டாரினால் மணமகனுக்கு தங்களது மகளின் தேவைக்காக வழங்கப்படும் சொத்து அல்லது பணம் என்பவை கூட கணவனிடம் இருந்து மீளப் பெறக் கூடியதாகும்[15] இருப்பினும் இந்த கைக்கூலி நடைமுறையானது நேரடியாக இஸ்லாத்தில் இருந்து பெறப்பட்ட முறையொன்றல்ல என்பதுடன் இது இலங்கையின் வழக்காற்றினை அடிப்படையாக கொண்டதாகும். சட்டத்தின் பிரிவு 47(1)(ஊ) இன் படி கைக்கூலி தொடர்பான மனைவியின் கோரிக்கைகளையும் விசாரணை செய்யும் அதிகாரம் காதி நீதிமன்றுக்கு காணப்படுவதுடன், மேற்குறித்த தங்களது உரிமைகளையும் தங்களுக்கேயுரிய கொடுப்பனவுகளையும் காதி நீதிமன்றில் நியாயம் கேட்டு பெறுதல் ஒவ்வொருவரதும் கடமையாகும், இந்த கைக்கூலிக்கான வழக்கானது மனைவியால் குழப்பமற்ற விதத்திலும் தெளிவாகவும் தாக்கல் செய்யப்படும் போது மாத்திரமே வினைத்திறனான பயன் கிடைக்க கூடியதாக இருக்கும்.[16] இருப்பினும் சட்டத்தில் காணப்படும் இந்த ஏற்பாட்டினை நடைமுறைச் சாத்தியப்படுத்தும் நபர்கள் விரல் விட்டு எண்ணக் கூடிய வகையிலேயே காணப்படுவதுடன் தங்களின் சட்ட ரீதியான உரிமைகள் தொடர்பிலான தெளிவின்மையினாலும், தவறான வழி நடாத்துதல்களாலும் தன்னிலையிழந்தோர் தான் அதிகமானோர் என்பதே உண்மை.

இவற்றுடன், தலாக் சொல்லப்படும் போது விவாகரத்து முடிவாக பதியப்படும் வரையிலான மனைவியின் இத்தா காலத்தில் மனைவிக்கு தேவையான தாபரிப்பு பணம் கணவனால் வழங்கப்பட வேண்டும் என்பது பிரிவு 47(1) (ஈ)[17] இன் கீழ் அத்தகைய தாபரிப்பு தொடர்பான விசாரணைகளை மேற்கொள்ளும் அதிகாரம் காதிக்கு வழங்கப்பட்டதன் அடிப்படையில் தெள்ளத் தெளிவாகின்றது.

முஸ்லிம் சட்டத்தில் மேற்குறித்த விடயங்கள் தொடர்பான மேன்முறையீடுகளும் முறையே பிரிவு 60 மற்றும் 62 இன் கீழ் காதி சபை மற்றும் மேன்முறையீட்டு நீதிமன்றுக்கு செய்யப்பட முடியும். அநீதிகள் இழைக்கப்படும் போது உயர் தளத்திற்கு நியாயம் கேட்டு செல்லுதல் ஒரு போதும் பிழையாகாது.

பிள்ளையின் பராமரிப்பு

இலங்கையினைப் பொருத்தவரையில் முஸ்லிம் தனியார் சட்டமானது பிள்ளை பராமரிப்பு அல்லது பிள்ளையின் பாதுகாவல் தொடர்பில் எந்த சட்ட ஏற்பாட்டையும் கொண்டிருக்கவில்லை. அதன் அடிப்படையில் முஸ்லிம்களின் பிள்ளை பராமரிப்பு தொடர்பான பிரச்சனைகள் எழும் போது ஷரீஆ சட்டம் ஏற்புடையதாக்கப்பட்டு வழக்குகள் இலங்கை நீதிமன்றங்களால் தீர்த்து வைக்கப்பட்டதுடன், பராமரிப்பு தொடர்பான வழக்கினை கேட்பதற்கான நியாயாதிக்கமானது காதி நீதிமன்றத்திற்கு அல்லாது சாதாரண குடியியல் நீதிமன்றத்திற்கே வழங்கப்பட்டுள்ளது. அதாவது இலங்கையின் முஸ்லிம் தனியார் சட்டத்தில் ஏற்பாடுகள் இல்லாத விடத்து அல்லது போதிய

14 Section 39 , Muslim Marriage and Divorce Act no 13 of 1951

15 Manzil v Mihilar and others SLR 69, Vol 2 of 2002 [2001] LKCA 50

16 Haseena Umma v Hashim NLR 239 of 57 [1955] LKCA 72

17 Any claim by a divorced wife for maintanace until the registration of the divorce or during her period of iddat, or, if such woman is pregnant at the time of the registration of the divorce> until she is delivered of the child;

ஏற்பாடுகள் இல்லாத போது ஷரிஆ சட்டம் ஏற்புடையதாக்கப்படும்.[18] எனினும், இலங்கையில் மாவட்ட நீதிமன்றம் தான் குழந்தையின் மேலான பாதுகாவலர்[19] என்ற அடிப்படையில் மாவட்ட நீதிமன்றங்கள் நியாயாதிக்கத்தை கொண்டுள்ளன.

பொதுவாக இலங்கையின் பொது சட்டத்தை பொருத்தவரையில் பிள்ளையின் பாதுகாவல் அல்லது பராமரிப்பு தொடர்பில் பிள்ளையின் தந்தைக்கே முன்னுரிமை வழங்கப்படுகின்றது.[20] ஆனால் ஷரிஆ சட்டத்திலோ பிள்ளையின் தாய்க்கே பிள்ளை தொடர்பிலான நுட்பமான அக்கறை காணப்படுவதாக ஏற்றுக் கொள்ளப்பட்டுள்ளது. அந்த வகையில் பெண் பிள்ளை தொடர்பான அதிகூடிய அக்கறையானது பிள்ளையின் தாய்க்கு காணப்படுவதுடன் அந்த குழந்தைக்கு தேவையான பழக்க வழக்கங்களை புகட்டும் பொருட்டு குழந்தை பருவ வயதை அடைந்து திருமணம் முடித்துக் கொடுக்கும் வரை தாயிடமே பராமரிப்பு காணப்பட வேண்டும் என்ற நிலைப்பாடு இருப்பதாக அறியப்படுகிறது.

ஆண் பிள்ளைகளை பொருத்தமட்டில், பிள்ளையானது தனது வேலைகளை தானே செய்து கொள்ளும் காலம் வரையில் தனது தாயின் பராமரிப்பில் இருக்க வேண்டும் என்பது பொது விதி எனினும், ஒரு ஆண் பிள்ளை தனது ஏழாவது வயதினை எட்டும் போது அதற்குரிய முதிர்ச்சி நிலையினை அடைந்து கொள்ளும் என்ற நம்பிக்கையின் படி, ஏழு வயது வரை கட்டாயமாக தாயிடம் வளர வேண்டும் என ஏற்றுக் கொள்ளப்பட்டுள்ளது.[21]

இவை தவிர பிள்ளையின் தாய் மரணித்த நிலையில் தந்தை உயிருடன் இருக்கையில் பிள்ளையினுடைய பராமரிப்பானது தாயின் தாயிடம் கொடுக்கப்பட்டு பிள்ளை வளர்ப்பில் தாய் மற்றும் தாய் வழி உறவினர்களின் முக்கியத்துவம் எடுத்தோதப்பட்ட[22] வரலாறுகளும் இலங்கை நீதிமன்ற வரலாற்றில் காணப்படுகின்றது. எனவே பிள்ளையின் மீதான அக்கறையானது தாயின் வழியாகவே முன்னுரிமைக் கொடுக்கப்பட்டு வந்த போக்கு இன்றும் நிலவி வருகிறது.

முடிவுரை

மனிதன் கட்டுப்பாடு இன்றி வாழ்வதனை கட்டுப்படுத்தவே சட்டங்கள் உருவாக்கப்படுகின்றன. நீதிகள் சட்டத்தின் மூலம் தான் எட்டப்படுகின்றன என்ற நிலைப்பாடு ஒரு பக்கம் இருக்க, சட்டங்கள் நீதியையும் பார்க்க ஓட்டைகளை தானே தாங்கிப் பிடித்துக் கொண்டிருக்கின்றன என்ற அங்கலாய்ப்புக்கள் நீதியை நாடும், நாடாத அனைவரிடமும் காணப்படுகின்றன. இந்த விமர்சனம் விடையளிக்கப்பட முடியாதது. ஏனெனில், உரிமைகளின் மீது வீரமாய் தூங்கி விட்டு, உரிமைகள் மீறப்பட்டதாகவும் நீதி உடைக்கப்பட்டதாகவும் சொல்லித் திரிவதில் அர்த்தங்கள் தேடி விட முடியாது. இல்லாத சட்ட ஏற்பாடுகளுக்கு கொடுக்கப்படும் முக்கியத்துவத்தைப் போல் இருக்கும் சட்ட ஏற்பாடுகளுக்கு கொடுப்போமேயானால் நீதியை பெற்றுக் கொள்ள முடியாது போனாலும் அநீதியிழைக்கப்படுவதையாவது தடுக்கக் கூடியாதாக இருக்கும். தங்களின் நிலை என்ன, சட்ட ரீதியில் என்ன நிவாரணங்களுக்கு நாங்கள் உரித்துடையவர்கள் என்பது தொடர்பான விழிப்புணர்வு ஒவ்வொரு தனிமனிதனுக்கும் இன்றியமையாத ஒன்றாகும்.

18 Justice Saleem Marsoof P.C, Muslim law relating to the custody of children, pp 1

19 Section 5 of the Judicature Act No. 2 of 1978 as amended by Act No. 71 of 1981.

20 *Invaldy v Ivaldy* (1956) 57 N.L.R 568

21 Mohideen v. Sithy Katheeja (1958) 59 N.L.R 570;

22 (1892) 9 S.S.C 42 (1962) 1 M.M.D.L.R 30

இருப்பினும் முஸ்லிம் விவாக மற்றும் விவாகரத்து சட்டத்தின் படி கொடுக்கப்பட்ட சில சட்ட ரீதியான நிவாரணங்களும் கூட எமது சமுதாயத்தின் பராமுகமான செயற்பாட்டின் காரணமாக பெற்றுக் கொள்ளப்பட முடியாதுள்ளது என்பது நடைமுறையில் காணப்படும் பெரிய பிரச்சனையாக அடையாளங்காட்டத்தக்கது. சீதனம் என்ற பெயரில் வழங்கப்படும் கைக்கூலியானது திருமணப்பதிவின் போது உரிய முறையில் பதியப்படாமை அல்லது பதிவில் சேர்த்துக் கொள்ளப்படாமை என்பவற்றின் காரணமாக பல பெண்கள் விவாகரத்தின் போது அந்த கைக்கூலியை சட்ட ஏற்பாடுகளுக்கு இணங்க மீளப் பெற்றுக் கொள்ள முடியாத சந்தர்ப்ப சூழல் தான் பொதுவானது.

இவைத் தவிர, காதி நிதிமன்றங்களில் பெற்றுக் கொள்ளப்படும் முடிவுகள் நியாயமற்றதாக காணப்படுமிடத்து அதற்கு எதிராக மேன்முறையீடு செய்யப்படும் சந்தர்ப்பங்கள் அரிதிலும் அரிதாக காணப்படுவதுடன், முஸ்லிம் பெண்கள் கலாசார ரீதியாக அவ்வாறு செய்வதனை விரும்பாததுடன், சமுதாய கண்ணோட்டங்களுக்கும் விமர்சனங்களுக்கும் அச்சம் கொள்ளும் பாங்கு கவலைக்குரியதாகும். இன்றைய காலகட்டத்தில் முஸ்லிம் விவாக மற்றும் விவாகரத்து சட்டத்தின் கீழ் காதி நீதிமன்றை நாடும் மகளிர் எந்த விதமான சட்ட அறிவுரைகளும் இல்லாது வெறுமனே குடும்ப பெரியார்கள், ஊர் பெரியார்களின் அறிவுரை, புத்திமதிகளுடன் தான் தங்களது கோரிக்கையை முன்னெடுத்து செல்கின்றனர், காரணம் காதி நீதிமன்றங்களில் சட்டதரணிகளுக்கு இடமில்லை என்பது தான். எனினும் அவ்வாறான மகளிர் கட்டாயமாக சட்டத்தரணியின் அறிவுரையுடன் தனது வேண்டுகோளை காதி நிதிமன்றில் முன்வைத்தலானது பலனை பெற்றுதரவல்லதாக இருக்கலாம். காதிமார்களின் செயற்பாடுகளும் 100□ சட்ட ஏற்பாடுகளுக்கு உட்பட்டு நடப்பதனை உறுதி செய்தல் இங்கு முக்கியமானதாகும்

ஆகவே, ஷரிஆ சட்டத்தை தழுவியதே இலங்கையின் முஸ்லிம் விவாக மற்றும் விவாகரத்து சட்டமே தவிர அது ஷரிஆ சட்டமல்ல. இலங்கை வாழ் இஸ்லாமிய மக்களுக்கான தனியான சட்டம் தான் இந்த சட்டமே தவிர இதுவே இஸ்லாம் அல்ல. இருப்பினும் இலங்கை நாட்டு மக்கள் என்ற ரீதியில் இந்நாட்டு சட்ட திட்டங்களை மதித்து பின்பற்ற வேண்டிய கடப்பாடு எமக்கு காணப்படுகிறது. சட்டத்தை தெளிவாக அறிந்து செயற்படுத்த வேண்டிய பொறுப்பும் காணப்படுகிறது.

Protection of Human Life in Maqasid Shari'ah Perspective

Mrs. Ayma Nihmathulla (B.Sc)

The Meaning and the Concept of Maqasid Shariah (Objectives of Shariah)

Literally Maqasid is the plural of the Arabic word Maqsad literal meanings of Maqasid is objective which is derived from the word Qasada , a word that conveys a number of meanings, including: 1) to aim at something, to come to it, to head towards it; 2) straightness of a path; and 3) justice, moderation and avoidance of excess. We can then say that maqa sid are things that the Shari'ah aims at in its rulings, and toward which it strives on a path, which is balanced and moderate.

Technically, many definitions have been given to the term Maqasid Shari'ah , particularly, by contemporary scholars. Al Imam Al Shatibi who is the founder of Maqasid al-Shari`ah in Islamic jurisprudence did not provide any definition for this Islamic discipline. But, two major definitions of Maqasid al-Shari'ah have been provided by two other scholars Ibn Ashur and Alal al-Fasi who came after Al Shatibi and they have played tremendous role in the development of Maqasid al-Shari`ah in Islamic jurisprudence.

Ibn `Ashur defined Maqasid al-Shari'ah based on two aspects:

1: The general aspect which is the purpose and wisdom behind the enactment of all or most of the shari'ah ruling. This definition is more related to the general objective of Shari'ah. Those overall principles that guide the enactment of Islamic law in their totality.

2: The second definition of Maqasid al-Shari'ah is very specific.It is related to specific objective to those objectives that are designed to achieve specific benefits to people in their day to day activities, such as the importance validation of contracts.

Alal al-Fasi defined Maqasid Shari`ah as the end sought behind the enactment of each of the ruling of Shari`ah and the wisdom involved. This definition covers the General Maqasid (aa'maa) and the Exclusive Maqasid (khaass'aa).

The definition focus on the end sought behind the enactment of each of the rulings of Islamic law, and the wisdom of these rulings. The wisdom of the Islamic rulings means the goals intended by Allah in the law.

Maqasid al-Shari`ah aims to protect the interest of mankind and prevent the evil from them, and also realize the public benefit for the society, and encourage virtues and avoid vices.

Al-Raysuni stated that *"Al Maqasid* are the purposes which the Law was established to fulfill for the benefit of humankind".

Therefore the Law is not an end in itself; it serves to attain an objective, a purpose which is the Maslahah (benefit). The word benefit in this context means achievement of profit or the prevention of harm.

Dimensions of Maqāsid

Maqasid al-Shari`ah is divided into three major categories according to its inner strength namely:

1. The necessities or essentials (daruriyyat).

2. The needs (hajiyyat).

3. The complementary (tahsiniyyat).

The necessities or essentials (Daruriyyat). : It refers to the necessities and the essentials that the people depend on them, and without them the hall society will be in a total disaster and disorder and disruption, and end with the total collapse. Ibn Ashur defined the dharuriyyat as: "..Are thing whose realization is essential for the community both collectively and individually, the social of the community will not function properly if there is any defect in these things". These dharuriyyat must be protected because they are considered as the fundamental need in life in mankind.

The primary categories contains five ultimate purposes of the law, and considered the most valuable matter in life, which are:

– preservation and protection of religion (al-din),

– preservation and protection of life (al-nafs),

– preservation and protection of progeny or dignity (al-'ird),

– preservation and protection of intellect (al-aql),

– preservation and protection of wealth (al-mal).

These five categories are considered the primary purpose in Islamic law. Imam Al Ghazali said: "preventing the loss of these five fundamentals and protecting them can never be neglected in any religious community (millah) or legal system that is meant for the good and well-being (sulh) of human beings … and this would be a consideration of a Maslaha that we know by necessity was intended by the Shari`ah, not on the basis of one single proof or particular rule, but on multiple proofs that are beyond enumeration".

Al-Shatibi mention that the knowledge of these five daruriyyat is definitive, and the certainly of this knowledge does not depend on one specific or single proof, however the knowledge of these five are congruent with the purpose of the Shari`ah rather flows from multiple proofs that are not confined to one particular sort. These five fundamentals must be preserved in order to maintain the category of Dharuriyyat.

According to Shatibi there are two ways in preventing them. the first one is by establishing and strengthening them and the second one is by averting all harm that might affect them.

The Needs (Hajiyyat) : The needs is the second important category in Maqasid al-Shari`ah. It is refer to the supporting needs and interests required in order to have smooth life. The life without protection of these needs leads to hardship and affects the social functions very badly. Shatibi defined it as "it consists of what is needed to attain conform and alleviate hardship. If it is neglected, human subjects (mukallafin) will suffer distress and hardship. The harm resulting from neglecting it cannot be equated with that relating to the fundamental universals.

Other definition provided by Ibn `Ashur who says hayjiyyat: "it consists of what is needed by the community for the achievement of its interest and the proper functioning of its affairs. If it is neglected, the social order will not actually collapse but will not function well. Likewise, it is not on the level of what is indispensable (dharuri).

The examples under the category of hajiyyat is most of the permissible in business transaction, such as the exemption of the advance payment in the Islamic business transaction (salam), this type of contract is allowed and granted by law in order to facilitate transactions, because this business operation is needed in the trade.

The complementary (Tahsiniyyat) : The complementary or embellishments or tahsiniyyat refer to the interest which provide improvement in the society and lead to better life, and give progress in the moral and spiritual in the Muslim society.

The disappearances of complementary don't affect the society function, and will not interrupt the normal process life in the society. The examples of this category are: voluntary (sadaqah), and ethical and moral rules, and others. Al Ghazali defined the complementary by saying: "They function as embellishing elements facilitating the achievement of the virtues and fine ways in manners and dealings".

According to Ibn Ashur the complementary comprises what leads to the perfection of the community's condition and social order so that it leads a peaceful life and acquires the splendor and beauty of human society in sight of the other nations". The complementary are part of restoring to people their fine and lofty sensibilities.

As result of that the nation will become an attractive model for other. The examination of the scholars of the various dispositions the Islamic ruling of Shari`ah result that all the Shari`ah ruling are revolving around these three categories.

The Guidance of Holy Quran and the Prophetic hadith in Preservation of Human Life.

The second of the darooriyaat (essentials) is al-Nafs (Life) Nafs is term meaning 'soul', 'life' and 'person'. It comes from a root verb (na-fu-sa) meaning to be 'precious', 'valuable'and 'priceless'. These meanings taken together help us to appreciate how the concept of life is understood in Islam and why its protection is so important. Our life is obviously one of, if not the most, valuable things that all of us as human beings share and is therefore considered to be daroori (essential).

“One view identifies Shari’ah with Islamic laws regulating the Man-God relationship and interactions between people. Shari’ah in this perspective is limited to the domain of law that regulates practical aspects of human life: personal, societal, state or international relationships. When Shari’ah is reduced to Islamic law, it is then often equated with fiqh. In this dimension, maqasid al-Shari’ah are put in the framework of the objectives of ‘Islamic law or the objectives of Islam in legislation. A second view of Shari’ah is wider, considering it a system of life that encompasses all aspects of the belief system, the system of ethics and morals and the rules governing the Man-God relationship and human relationships. Shari’ah in this perspective covers the entire spectrum of Islamic life, including belief, morality, virtues and principles of guidance on economic, political, cultural and civilizational matters that concern not only the Muslim community but all of humanity. By this consideration, Shari’ah could be understood as synonymous with religion, encompassing all of human life.”

Protection of Life (Al-nafs) The Shariah has enacted harsh punishment for those who kill others in order to protect life. Sariah as well implement various rules and regulation to protect life from abuse, harm. In the light of the above sariah provide the criminal law to ensure the protection of life.

وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّـهُ إِلَّا بِالْحَقِّ ۗ وَمَن قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لِوَلِيِّهِ سُلْطَانًا فَلَا يُسْرِف فِّي الْقَتْلِ ۖ إِنَّهُ كَانَ مَنصُورًا

And do not kill anyone which Allah has forbidden, except for a just cause. And whoever is killed (intentionally with hostility and oppression and not by mistake), we have given his heir the authority [(to demand Qisas, Law of Equality in punishment or to forgive, or to take Diya (blood money)]. But let him not exceed limits in the matter of taking life (i.e. he should not kill except the killer only). Verily, he is helped (by the Islamic law). [17:33]

مِنْ أَجْلِ ذَٰلِكَ كَتَبْنَا عَلَىٰ بَنِي إِسْرَائِيلَ أَنَّهُ مَن قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا ۚ وَلَقَدْ جَاءَتْهُمْ رُسُلُنَا بِالْبَيِّنَاتِ ثُمَّ إِنَّ كَثِيرًا مِّنْهُم بَعْدَ ذَٰلِكَ فِي الْأَرْضِ لَمُسْرِفُونَ

Because of that We ordained for the Children of Israel that if anyone killed a person not in retaliation of murder, or (and) to spread mischief in the land - it would be as if he killed all mankind, and if anyone saved a life, it would be as if he saved the life of all mankind [5:32]

قُلْ تَعَالَوْا أَتْلُ مَا حَرَّمَ رَبُّكُمْ عَلَيْكُمْ ۖ أَلَّا تُشْرِكُوا بِهِ شَيْئًا ۖ وَبِالْوَالِدَيْنِ إِحْسَانًا ۖ وَلَا تَقْتُلُوا أَوْلَادَكُم مِّنْ إِمْلَاقٍ ۖ نَّحْنُ نَرْزُقُكُمْ وَإِيَّاهُمْ ۖ وَلَا تَقْرَبُوا الْفَوَاحِشَ مَا ظَهَرَ مِنْهَا وَمَا بَطَنَ ۖ وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّـهُ إِلَّا بِالْحَقِّ ۚ ذَٰلِكُمْ وَصَّاكُم بِهِ لَعَلَّكُمْ تَعْقِلُونَ

Say (O Muhammad SAW): "Come, I will recite what your Lord has prohibited you from: Join not anything in worship with Him; be good and dutiful to your parents; kill not your children because of poverty - We provide sustenance for you and for them; come not near to Al-Fawahish (shameful sins, illegal sexual intercourse, etc.) whether committed openly or secretly, and kill not anyone whom Allah has forbidden, except for a just cause (according to

Islamic law). This He has commanded you that you may understand. [6:151]

Abu Bakrah (May Allah be pleased with him) said: Delivering the sermon during the Farewell Pilgrimage on the day of Sacrifice at Mina, the Messenger of Allah said, "Verily your blood, your property and your honor are as sacred and inviolable as the sanctity of this day of yours, in this month of yours and in this town of yours. Verily! I have conveyed this message to you.

Narrated Anas bin Malik:The Prophet (صلى الله عليه وسلم) said, "The biggest of Al-Ka`ba'ir (the great sins) are (1) to join others as partners in worship with Allah, (2) to murder a human being, (3) to be undutiful to one's parents (4) and to make a false statement," or said, "to give a false witness.")

Moreover, Shari'ah suggests the following ways to protect the human life.

01.Eat the forbidden only for necessity:

وَقَدْ فَصَّلَ لَكُم مَّا حَرَّمَ عَلَيْكُمْ إِلَّا مَا اضْطُرِرْتُمْ إِلَيْهِ

While He has explained to you in detail what is forbidden to you, except under compulsion of necessity? [6:119]

Gog's mercy is clearly shown when contemplating Allah's permission to Muslims to eat or drink the forbidden for necessity. For example, when comparing fatal death because of famine, to the eating a dead animal; a taboo- which proved to be harmful for heath, here, man's life is given the priority. Allah gives the permission for the Muslims to eat whatever may keep them alive at this condition. The same case is with using wine in certain medicines. If there is no alternative medicine that keeps one's life except medicines that include wine in their ingredients, it is acceptable to use these medicines. This asserts the importance human life in Islam.

02.Institution of Marriage

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُم مِّنْ أَنفُسِكُمْ أَزْوَاجًا لِّتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُم مَّوَدَّةً وَرَحْمَةً ۚ إِنَّ فِي ذَٰلِكَ لَآيَاتٍ لِّقَوْمٍ يَتَفَكَّرُونَ

And among His Signs is this, that He created for you wives from among yourselves, that you may find repose in them, and He has put between you affection and mercy. Verily, in that are indeed signs for a people who reflect.[30:21]

Marriage is a sacred relation in Islam in which a husband and a wife keep the procreation of the human life. In this relation the couples have mutual respect, love, and cooperation in bringing up the children. Marriage is the heavenly bond in which men and women fulfill their physical and psychological needs to the other gender.

03- It is forbidden to kill a Mu'ahid

Narrated `Abdullah bin `Amr:The Prophet (صلى الله عليه وسلم) said, "Whoever killed a Mu'ahid (a person who is granted the pledge of protection by the Muslims) shall not smell the fragrance

of Paradise though its fragrance can be smelt at a distance of forty years (of traveling).)

Non-Muslims lives are protected in the Muslim community just as Muslims lives. The prophetic Hadith, here, teaches that Non-Muslims' lives are not less important than Muslims' lives in the Muslim community. Whoever kills a Non-Muslim, Mu'ahid, is deprived from paradise. All people's lives are protected in the Muslim communities regardless of any respect, even if this respect is religion.

04-No Retaliation or Punishment stipulated in the Quran on the Pregnant

A woman of Ghamidia came to the Prophet (صلى الله عليه وسلم) and said: I have committed fornication. He said: Go back. She returned, and on the next day she came to him again, and said: Perhaps you want to send me back as you did to Ma'iz b. Malik. I swear by Allah, I am pregnant. He said to her: Go back. She then returned and came to him the next day. He said to her: Go back until you give birth to that child. She then returned. When she gave birth to the child, she brought the child to him, and said: Here it is! I have given birth to it. He said: Go back, and suckle him until you wean him. When she had weaned him, she brought him (the boy) to him with something in his hand which he was eating. The boy was then given to a certain man of the Muslims, and he (the Prophet) commanded regarding her. So a pit was dug for her, and he gave orders about her and she was stoned to death. Khalid was one of those who were throwing stones at her. He threw a stone at her. When a drop blood fell on his cheeks, he abused her. The Prophet (صلى الله عليه وسلم) said to him: Gently, Khalid. By Him in whose hand my soul is, she has repented to such an extent that if one who wrongfully takes extra tax were to repent to a like extent, he would be forgiven. Then giving command regarding her, prayed over her and she was buried.

The story in this Hadith shows the importance of life in Islam starting from its primitive level. Human life should be cared for and saved from its very beginning, from the woman's womb stage. Prophet Muhammad (peace be upon him) didn't execute stoning the woman until the baby is born. The woman admitted her guilt, but she was pregnant. The priority was given to the new coming life of the baby not to executing the punishment. The baby was born, yet the stipulation was not executed until the baby is able to eat and given to a man to bring him up. The woman cleaned herself from the sin by repentance and taking the stipulation in life, Dunia. The life of the baby was regarded and saved from his mother's womb stage.

05-Revenge for bloodshed

وَلَكُمْ فِي الْقِصَاصِ حَيَاةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ

And there is (a saving of) life for you in Al-Qisas (the Law of Equality in punishment), O men of understanding, that you may become Al-Muttaqun [2:179]

Avenging the murder keeps life. Once the murderer is sure to be killed, he would consider this act a hundred times before daring to do that sin. Keeping one life is just as keeping humanity, and killing one life is as murdering the whole humanity. When the action is accepted for one soul, it would be accepted for everybody. If the murdered is avenged there would be no murderers to repeat the action. For evil people, the applied stipulation is enough to stop them from doing any evil against the others.

06-Forbidden fighting:

Abu Hurairah (May Allah be pleased with him) said: The Messenger of Allah said, "None of you should point at his brother with a weapon because he does not know that Satan may make it lose from his hand and, as a result, he may fall into a pit of Hell-fire (by accidentally killing him).")

The Muslim should care about his brother life as he cares about as his own life. It is clear in these Prophetic Hadiths. The Muslim should not use a weapon against his fellow brother even in humor. The two Muslims who fight to death together are threatened hell. All these teachings creates a safe community in which brotherhood prevails.

07- Causing No harm:

Abu Huraira reported Allah's Messenger as saying that he saw a person enjoying himself in Paradise because of the tree that he cut from the path which was a source of inconvenience to the people.)

Islam is built on the rule (No Harm). Accordingly, any type of causing harm to others is forbidden. Thus, air pollution, water pollution and noise pollution, are all types of causing harm. These things are taboo from Islamic perspective.

Crisis of Religious Extremism

The greatest favors God can bestow on His servants are well-being and security. Preservation of security in a society is one of the most fundamental objectives of the Shari'ah. As such, it is one of the most important obligations of a Muslim ruler. Therefore, acts that destabilize society, violate its security, and terrorize Muslims and non-Muslims with whom Muslims have a non-aggression pact are crimes against humanity that clearly oppose the overall goal of the Shari'ah. Also of concern is that fanatics comb works on jurisprudence in search of statements by renowned scholars which they can use to justify their actions or legal rulings on specific situations which they claim as a pretext for their acts of hostility and aggression.

There are three types of juristic parochialism, which serve to destabilize countries and endanger people's security. These emerge through: 1) an atomistic view of religious legal texts that fail to take the Shari'ah's overall objectives into account and drawing faulty inferences from juristic textual evidence without factoring in the consequences and contingencies associated with such an inference and its practical application; 2) a failure to address important questions relating to the meaning and necessity of jihad; and 3) defective approaches to the issuance of legal rulings which lead, in turn, to defective application of such rulings.

The need to maintain security in society during times of tension or crisis may compel those in authority to take additional precautions, tighten their surveillance of what they see as sources of danger, and adopt strict measures of deterrence. Such steps might bear fruit if they were taken in response to a purely concrete, physical threat. However, on this battlefield of ideological convictions and influences, the only appropriate weapons are sound thinking, irrefutable proofs, and moderate, fair minded religious concepts marked by neither extremism nor laxity.

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Waves of Plastic; an Islamic Perspective

Sajla Anees, AAL

"Dive into the oceans, they said,
Pearls, you will find, they said.
Dove into the ocean, I did,
Plastic I found, amidst."

Marine pollution is one of the major pressing issues by which the globe is currently under threat. The Cambridge Dictionary defines 'marine' as "related to the sea or sea transport" and defines 'pollution' as "damage caused to water, air, etc. by harmful substances or waste." Hence it is evident that marine pollution brings the meaning of damage caused to the sea by harmful substances or waste.

Marine pollution occurs in numerous ways such as blast fishing or dynamite fishing (a means of a destructive fishing technique that is illegal in many countries yet common in practice amongst fishermen of Africa, Southeast Asia and the Aegean Sea as per the AWI - Alfred Wegener Institute for Polar and Marine Research), oil spills (release of liquid petroleum hydrocarbon from tankers), ocean dumping (releasing of waste materials from factories and industries into the oceans and seas) and littering (dumping of garbage in beaches and coastal lines which get washed off into the sea).

If all methods of ocean pollution were to be assessed, pollution by plastic is frighteningly on the rise and is discussed extensively by environment protection authorities around the world. If a total of marine debris were to be taken, 60%-80% comprises of plastic.[1] In order to understand the impact that plastic has on the ocean, it is important to understand the value of the ocean to mankind and other living beings.

According to Protect Planet Ocean, an initiative by the IUCN (International Union for Conservation of Nature), ocean based businesses contribute more than $500 billion to the world's economy.[2] The sea is not only a means of livelihood to those involved in the fisheries industry along coastal lines but it also serves as a means of income to those involved in international trade. If no initiative is taken to prevent ocean pollution and garbage disposal, this could obstruct sea routes in years to come. As of now, there are whirlpools of trash found in the midst of oceans, the Great Pacific Garbage Patch also known as the 'Pacific Trash Vortex' being one of them; a gyre of debris. According to The Ocean Cleanup, a non-governmental environment organization, if they were to adopt an approach of using barriers to scoop up marine debris, it would take five years to clean up 50% of the debris of the Great Pacific Garbage Patch.[3] And this gyre is only one out of five.

Apart from man's benefit of navigation in the sea, there is also life in the ocean that is highly disadvantaged by the amount of plastic. Most often, marine creatures such as seagulls, turtles, puffins, gulls, seals, whales and fish are victimized by swallowing plastic or becoming entangled in plastic objects. This results in an extinct of such species whilst affecting food chains. Even though plastic is a non-degradable material, due to sunlight and waves of the sea,

floating plastic material get broken down into smaller particles. Such toxic plastic particles enter the systems of marine animals and when subsequently consumed by humans, the said particles enter the human body, consequently threatening human health.

Arthur C. Clarke stated, "How inappropriate to call this planet Earth, when it is quite clearly Ocean." There is a great responsibility placed on our shoulders to protect the ocean. Given that we are citizens of a country completely surrounded by the ocean, we should take serious measures towards effective garbage disposal and ensuring that the coastal line is always kept clean. Our pristine beaches are an attractive destination for tourists. Sri Lanka earns a substantial revenue through tourism. If our coastal lines and beaches were not taken care of and no measures were taken to combat ocean pollution there would be a drastic drop in the country's revenue. Unfortunately, according to an article published in the Daily News in 2017, Sri Lanka was ranked 5th out of the top 20 countries polluting oceans in the world.[4] According to a research carried out in 2010 by the US based International Business Times, it was found that Sri Lanka dumps 1.59 metric tons of garbage annually into the Indian Ocean. This must waken our nation as the threat to our eco system is rising as a result of our own actions.

Conservation of the environment and the sea has also been given emphasis in Islam, even though marine pollution was not a major threat at the inception of its teachings. Islam, being a faith applicable to all times, advocates protection of the sources given to mankind by The Creator. This factor may be of wonder to some, as the essence of Islam is worshipping One Creator. However, worship is not limited to praying five times a day, fasting in the month of Ramadhan and the pilgrimage of Hajj. Even a smile is an act of charity, and if done with a good intention for the sake of Allah, would amount to worship. As such, protecting the creation too would amount to worship. Nothing on this earth was created without a purpose. It could be said that, solutions to protection of the ocean and the life within it is provided within Islam.

- Realizing that the sea is one out of the many bounties of Allah and expressing gratitude

- Allah points out the many favours given by Him, as signs, in the Qur'an. With regard to the sea being a favour given to man as a means of transport, Allah states,

" It is Allah who subjected to you the sea so that ships may sail upon it by His command and that you may seek of His bounty; and perhaps you will be grateful." (45:12)

The words "perhaps you will be grateful" implies gratitude which can also be in the form of conserving this invaluable source for the benefit of future generations. Gratitude also amounts to worship and there is a reward even in making an effort to protect the environment. It wouldn't suffice simply to verbally utter words of gratitude or to admire nature, rather one must play an active role in protecting this bounty.

- The Qur'an also mentions the other favours Allah has bestowed upon man as a means of livelihood;

"And it is He who subjected the sea for you to eat from it tender meat and to extract from it

ornaments which you wear. And you see the ships plowing through it, and [He subjected it] that you may seek of His bounty; and perhaps you will be grateful." (16:14)

Man benefits from the sea not only as a means of sailing across oceans but also as a means of livelihood, be it a fisherman whose sole income depends on it or a wealthy man who occasionally consumes seafood as a part of his meals. Apart from food, the sea also possesses pearls which is used as ornaments. Even in the latter part of this verse from the Qur'an, gratitude is made mention of.

- Protecting the ocean is man's responsibility

According to the teachings of Islam, Allah is the ultimate owner of whatever is in the heavens and the earth. To man belongs nothing. Allah created man as His vicegerent on earth.

"And it is He who has made you successors upon the earth…" (6:165)

Whatever man possesses is for a limited time period and this upon him is a trust. Whatever he has been bestowed with, he must use with great care keeping in mind that those to come also have a right to benefit. Hence, it is incumbent upon man to use natural resources without dilapidating them and conserving them for the benefit of generations to come.

There is a duty upon each individual, society and nation to take up the responsibility of preventing ocean pollution. It could be by means of awareness programmes or workshops to educate fishermen, school teachers, local and senior government officials. Sustainable fishing techniques could be taught to the fishing community. Voluntary organizations could organize beach cleanup projects. Government institutes could monitor such programmes by implementing policies and laws to curb the usage of plastic. People need to be taught the value of the sea and life inside the sea so they will instill in themselves passion and concern. Industries that encourage the use of bio degradable material must be uplifted by states. An effective change could not be brought about without the cooperation and participation of communities.

- Organizing projects or campaigns that promote cleaning up of waterways or coastal lines

On the authority of Abu Hurayrah (may Allah be pleased with him) who said:

The Messenger of Allah (peace and blessings of Allah be upon him) said, *"Every joint of a person must perform a charity each day that the sun rises: to judge justly between two people is a charity. To help a man with his mount, lifting him onto it or hoisting up his belongings onto it, is a charity. And the good word is a charity. And every step that you take towards the prayer is a charity, and removing a harmful object from the road is a charity."* (Al-Bukhari)

In relation to the above hadith, Sheikh Muhammad Bin Saleh Al-Uthaymeen said, *"If removing something harmful from a pathway is charitable, then throwing something harmful onto a pathway is evil."* [Sharh Riyadh As-Saliheen (3/37)]

This statement shows that there is good in removing something harmful and evil in throwing something harmful. There is a collective responsibility on the part of societies and nations towards protection of resources. Most often garbage that is dumped in waterways end up getting deposited in the sea. If a group of people were together clean up a beach, this would amount to charity and likewise, if someone were to throw garbage deliberately into the sea or is aware that the garbage they dump in drainage systems would ultimately make its way to the sea, this would amount to evil, according to the teachings of Islam.
Therefore, based on the above teachings it can be understood that there is a responsibility upon man to remove that which is harmful to the sea, be it even in a small capacity.

As impossible as it may seem to protect the vast ocean that covers most of earth, if one individual steps forward with passion, many others can be inspired and so much more could be done to protect this bounty. The question people need to ask themselves is, "Who bears the brunt?"

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Are We Ready for the Future of Work?

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Introduction

"The future is already here – it's just not evenly distributed.
- William Gibson, The Economist, December 4, 2003

Technological change is a pervasive part of economic development; it is generally viewed as the key driver of productivity growth and employment. The internet is changing the way we work, spend our leisure time and communicate with one another. These new developments differ from that of past industrialisation revolutions. No longer is technology tacking over repetitive and routine tasks. With the giant strides in machine learning, technology is gearing up to take over cognitive and non-routine tasks as well. In view of the technological 'Tsunami' expected, and an inevitable after-wave in global industrial relations, the International Labour Organisation launched the "Future of Work Initiative" July 2019, in its Centenary celebrations this year.

The Shifting Landscape of the Labour Market

Fourth Industrial Revolution (4IR)

"The changes are so profound that, from the perspective of human history, there has never been a time of greater promise or potential peril."
— Klaus Schwab, The HYPERLINK "https://www.goodreads.com/work/quotes/48730776" Fourth Indust HYPERLINK "https://www.goodreads.com/work/quotes/48730776"rial Revolution

Debate around new technology has reignited decades-old concerns about automation and artificial intelligence, the fear of a dystopian future where human workers are replaced by machines. It is useful in this backdrop, to look at 4IR closer and attempt to comprehend just how significant it will be in the Future of Work. Unlike the three former industrial revolutions which happened in 18th (1780-1840) century mechanisation, steam and water power, 19th century (1870-1920) mass production and electricity, and in the 20th century (1975-present) Electronic and IT systems automation. Also referred to as 'the second machine age', 4IR is going to transform the way that we live and work in unprecedented levels. The phrase was first introduced by Klaus Schwab, the founder and executive chairman of the World Economic Forum, in an article in Foreign Affairs, titled "Mastering the Fourth Industrial Revolution" (2015). It was also the subject and title of Schwab's book The Fourth Industrial Revolution (2016). He predicts that a combination of hardware, software, and biology will result in cyber-physical systems, emphasizing at the same time advances in communication and connectivity.

And it is expected to happen at an unprecedented speed. The resulting work environment is set to disrupt the workplace ecosystem for good, and new business models brought in by 4IR will question the purpose and relevance of labour market institutions.

Future of Work

"Adaptability is about the powerful difference between adapting to cope and adapting to win."
- *Max McKeown*

The "future of work" is used for general discussions of the evolution of work (ILO). It is a topic reverberated by professionals and academics in recent times resulting in an enormous amount of literature. Academics, think tanks and policy makers have fuelled rich discussions about how the future of work might look like and how we can shape it. Although the future of work is not emerging uniformly across the world, gators such as globalisation and gig economy will demand the rest of the world to follow-suite. The sooner the adaptation, the better for the socio-economic future of the country.

The main challenge reiterated over and over again, is that today's skills will not match the jobs of tomorrow. All attempts to predict emerging jobs have, so far, failed. And newly acquired skills may quickly become obsolete. To the future labour force this means that employment will hold many uncertainties and result in financial insecurity for the workers. Hitherto, we have been used to aiming our education towards a particular career. This will change in the future of work. A part of Generation Z and to all of Generation Alpha will have to learn how to continue learning, rather one particular discipline. However there is some evidence that while middle level jobs will suffer most, for businesses this will mean more opportunities to reshape their production processes, conserve labour and, in some cases (discussed further below), adopt new business models. The crucial distinction therefore is between job destruction and job transformation. Employment relations scholars will face the questions about how job transformation – or 'redesign' – is being negotiated and accomplished. Increased demand for new roles will offset the decreasing demand for others. However, these net gains are not a foregone conclusion. They entail difficult transitions for millions of workers and the need for proactive investment in developing a new surge of agile learners and skilled talent globally.

The Gig-Economy

Meanwhile the Gig-economy or platform economy, ushered in by internet connectivity and online platforms is adding to the future of work challenge. The trend is described as "a way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer". In some parts of the world, the Gig economy is already unfolded, and with it conventional employment models as we know them, are rapidly being taken over by freelance, part-time and virtual workers. Future Labour force will lose conventional employee rights, being identified as independent contractors. Therefore, the gig economy is the frontline in the battle for the future of labour rights, testing the ability of workers to retain their essential security and benefits in employment or see them

sacrificed on the altar of securing higher revenues for shareholders. No matter what motives drive gig workers, the popularity of the internet, with its capability for remote work, has caused the gig economy to thrive.

Other Factors to Consider

The disruption risks posed by technological change do not take place in isolation and there is a range of other socio-political drivers which are influencing workforce and employment trends. These include the level of workplace regulation and trade union membership, rising inequality, the continued shift towards globalization, aging population and changing consumer demands. They too must be taken into consideration by national and international policy makers and policy advocates, to influence the legal infrastructure that supports a just and equitable future for all workers of the future.

"If you exclude 50% of the talent pool,
it's no wonder you find yourself in a war for talent"
- Theresa J. Whitmarsh, Executive Director, Washington State Investment Board.

Women empowerment and economic development are closely related. Even with women's economic contributions growing, gender inequalities remain persistent. Acknowledging the important role women play globally in socio-economic context, the United Nations Sustainable Development Goals (SDG) - 5 targets to achieve gender equality by 2030 and empower all women and girls. The ILO advocates investing in gender equality and women's economic empowerment, more jobs and decent work for women because it is the right thing to do and it promotes sustainable growth and development. The focus is on inclusive growth and social protection, employment and migration, agriculture, trade and sustainable development.

"The phenomenon of globalization is not reversible. The sense of a unipolar or bipolar world is not there anymore… technologies will continue with the velocity that is happening today. In fact, the velocity will only exponentially escalate."
- Jayraj Nair, Chief Training Officer at Indian IT multinational Wipro.

Multilateralism can be useful to bridge widening inequalities across the world. However, discontent with globalization is a key factor behind the temptation to advance policy goals through unilateral actions rather than by working together. The WEF points out that what we need is more (and better) multilateralism, not less. According to WEF, the benefits of multilateralism outweighs its weaknesses, and the key lies in improving the system rather than denouncing or discarding it. Hence, despite the criticism of the international, rules-based order, international cooperation would provide venues to resolve differences peacefully; platforms to agree on common rules of the game; mechanisms to better manage international flows; and channels for exchanging ideas, experiences and practices so that countries learn from each other. The OECD, at their 2018 Ministerial Council Meeting, placed 'reshaping multilateralism' at the center of their agenda, with a focus on to making multilateralism more responsible, effective and inclusive. And "Multilateralism for an equitable future of work" was

one of the seven thematic forums at the 108th session of the International Labour Conference (ILC) of the ILO.

"With the ageing population across the world, care of the elderly will probably be one of the fastest-growing sectors in the human labour market"
- Yuval Noah Harari, 21 Lessons for the 21st Century, 2018.

The world's population is ageing while many countries' birth rates fail to keep up. There are now more people over the age of 65 than there are under the age of five. From 2025 to 2050, the older population is projected to almost double to 1.6 billion globally, whereas the total population will grow by just 34 percent over the same period. From one angle, technology can be seen as a solution for an ageing population. Yet, there are still roles that humans are expected to be better than technology, such as creative thinking, problem-solving, leadership, teamwork and initiative. The solution is then for humans to leverage technology to provide a better world for all of us. A historian and a leading public intellectual of our times Yuval Noah Harari (2018) asserts that the potential solutions will fall into three main categories: what to do in order to prevent jobs from being lost; what to do in order to create enough new jobs; and what to do if, despite our best efforts, job losses significantly outstrip job creation.

The ILO Global Commission on the Future of Work looked into the urgency of the changes that the world of work is facing and to provide ideas on how to manage and leverage these transformations. Their recommendations are to increase investment in people's capabilities, institutions of work and in decent and sustainable work. The report emphasizes:

Lifelong learning that enables people to acquire skills and to **reskill** and **upskill**,

Policies and strategies that will support people through future of work transitions,

A transformative and measurable agenda for **gender equality,**

A **Universal Labour Guarantee** to all workers, regardless of their contractual arrangement or employment status,

Maximum **limits on working hours**,

Protection of **safety and health** at work,

Expanding **time sovereignty**,

Ensuring **collective representation**,

Harnessing and managing **technology** for **decent work**,

Incentives for **investments** in key areas for decent and sustainable work, and

Reshaping **business incentive structures** for human development and well-being, among others.

The recommendations also note the importance of taking responsibility for building a just and equitable future of work and urgent action to strengthen the social contract in each country requires increasing investment in people's capabilities and the institutions of work and harnessing opportunities for decent and sustainable work.

Reflection on Sri Lankan Labour Laws

"Nowadays one country cannot go alone. This is a global village. With neighbouring countries some problems may remain but it can be solved amicably, bilaterally, through discussion."
- Prime Minister of Bangladesh Sheikh Hasina (2019),
Annual Meeting of the New Champions,
World Economic Forum.

To Sri Lanka, all this might seem a little premature. However, these challenges may be encountered far earlier than most perceived, due to the inherent nature of the problem: speed of change. Sri Lanka, despite its size has from ancient history yielded a position of global significance, particularly in terms of trade and commerce. With developing infrastructure and globalization, a small economy with limited natural resources such as ours, could benefit immensely from the future of work. Planning and preparing in advance is crucial. The potential Sri Lanka holds has been demonstrated by initiatives such as the upcoming Colombo International Financial Hub. Sri Lanka is already moving forward somewhat in terms of physical infrastructure. However the question arises, whether we will be hampered by our archaic legal framework, which was tailor-made for a different era, and patched and altered along the way. The global developments are bound to hold many challenges and paradigm shifts, in the exercise of securing our future. And looking at the rest of the world, labour legislation will be one key area. Labour rights will need to be shaped anew, as the shifting realities smudge the very definition of conventional employment.

Contractual Obligations

The traditional common law considered employment as a contract made with free will of the parties, and it paved the way for exploitation of employees by their employers because of the unequal bargaining power. Thereafter, labour legislation came in being, to provide the terms and conditions of employment, establishing labour courts with just and equitable jurisdiction, promoting collective bargaining and giving legal effect to collective agreements. This managed to somewhat balance the scale between the two contracting parties. When it comes to employment in Sri Lanka, the public sector is governed by the Establishment Code. The private sector and semi-government sector employment is covered by labour laws ie. contract of employment and collective agreements etc. But when it comes to the independent contractors, they fall into the jurisdiction of traditional common law, where it is considered that a contract is made with free will of the parties. Therefore, within the jurisdiction of Civil courts, and an award civil remedies for breach of contractual terms apply in the latter case.

Labour legislation, in contrast, ensures to a large degree that the rights of the employee are protected and a just and equitable solution in the case of breach of employment terms by the employer. The intention in labour legislation in a welfare state is that the unequal bargaining power between a dominant employer and a vulnerable employee should be neutralised, placing the employer on an equal footing as the employer to obtain justice in an equitable form. Even in the case of undocumented employment contracts, the labour courts shall, under

the touchstone of 'just and equitable', ensure that the employee's interests be protected, with the power vested in the labour courts, unfettered by any written contract of employment, may disregard unfair employment terms and spell out new terms that fulfil the principles laid out in the labour legislation.

Employer Vs. Independent Contractor

This brings the focus on the distinction between the employer and the independent contractor. If a worker is characterized as an employer, he enjoys access to a just and equitable remedy. If the worker is an independent contractor, he is at the mercy of the terms of the written contract, and comes under jurisdiction of Civil courts. Such being the case, identifying a worker as an employer is crucial for security and a stable footing in life. In the context of future of work discussed above, this brings to question the rights of workers amidst a changing employment landscape, and whether the resulting employment models will identify workers as employees or independent contractors. The challenge is that distinction may be impossible using the present yardsticks used to identify an employee from and an independent contractor. Tests such as Integration Test, Control Test, Economic Reality Test, and Multiple test may have to be redefined, specially with regard to the flexible working arrangement, and ownership of tools, ability to work in other places and delegation to others will have to be reassessed in a new light.

Labour Reformation is Under Way

We have a large number of labour laws, overlapping, and with many gaps. Marking the ILO centenary in Sri Lanka recently, the Labour Minister announced plans to simplify and bring about 40 different laws and regulations into one structure to improve implementation and increase economic competitiveness. Discussions have already commenced between different departments within the Ministry. The blueprint would be shared among stakeholders, including the private sector, trade unions, and public at which point, ideas and responses would be collected to be incorporated into the new legislation. Gaps in the present legislation such as safety regulations for agricultural work, uniform maternity benefits across all levels of blue and white collar workers are set to be addressed in the reformations.

However, critics argue that the government solution will only create more problems for the working class, and especially women. Their view is that the required reforms are not fixed terms contracts or flexi hours, but laws that can curb the unequal power balance that lies in those new employment forms and guarantee equal rights to all workers across the spectrum regardless of whether they are men or women, or if they are employed in traditional or non-traditional forms of employment.

A Lesson from Australia

In 2008, the Senate Select Committee on the Future of Work and Workers of the Parliament of Australia looked into the varied forces shaping society and the world of work. In the spotlight were globalization, geopolitical factors, climate change and the ageing population, among others. Mandated to recommend a suitable framework to counter the challenges faced by the

Australian government, the committee recommended that the Australian Government prepare and commit to a long-term plan to prepare workers, business and the economy for the coming technological change. It would be prudent to look at their approach to consider learning points in Sri Lanka's own journey towards the future of work.

The recommendations in summary:

To establish a central body, within the government, to coordinate planning for the future of work with overall responsibility for coordinating analysis, forecasting and policy development, and informing the public.

Policies to also ensure a positive future of work for specific demographics of at-risk workers identified in the report.

to position the country as a leader in the development and ethics of artificial intelligence, and in other emerging fields.

that workplace legislation be amended, to strengthen the protections available to workers and their unions,

to ensure that all citizens share the economic gains arising from technological and other change.

Further, country's future workplace laws and legislators to rapidly adapt to and anticipate the evolving nature of work and employment relationships, so as to ensure that workers, however classified, are afforded fundamental workplace rights and entitlements.

Conclusion

"Change is the law of life. And those who look only to the past or present are certain to miss the future."
- John F. Kennedy (1963).

4IR is presenting new and unprecedented challenges to the future of work, and Sri Lanka is no exception. And the sooner we prepare, the better for our socio-economic future. Changing employment models means job losses are inevitable, and the gig or platform economy and other factors such as gender inequality, aging population and globalization are also contributing to employment 'Tsunami'. The result is an uncertain future of work, and unpredictable job roles. Conventional education system is being rendered obsolete for the employment needs of the future. The hour demands a new approach, in terms of education, occupational mobility and supporting legal reformations to help people thrive in the future of work.

There are many opportunities lying in wait if Sri Lanka is ready take it. Labour reforms need to address employment security, decent work, gender equality, universal basic income (UBI) and other criteria set out by the ILO in International labour law standards, is open to question. Organizations lobbying for reforms that support the employer cite economic growth

and flexibility for employers, at the cost of employee job-security.

One challenge the author sees is the distinction between workman and independent contractor. Will the present yardstick be adequate? Or will this ambiguity be exploited by the employers, resulting once again in unequal bargaining power for the workers? The future of labour rights must encompass the ability for workers to retain their essential security and benefits in employment. Reformations must guarantee equal rights to all workers across the spectrum regardless of gender, or the form of employment. The ultimate solution, the author feels, lies in mutually progressive and inclusive approach.

Adapting international labour standards while working closely with international agencies and at the same time reviewing case studies, of countries that are ahead of us in addressing the future of work challenge, would be the prudent way forward. It would ensure that reformations are just and equitable to all parties; i.e. the employee, the employer and the society because the employer-employee relationship, is one as old as human civilization, and one that far-succeeds the decisions of the labour courts.

To Believe or Not to Believe: An Analysis of Fake News

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Introduction

The term fake news has gained momentum in Sri Lanka's traditional and social media during the past few months and there have been discussions, comments and arguments on how the curbing of this should be handled - whether it should be through regulation, censorship or awareness.

There is no universally accepted definition for the term "fake news". The Cambridge Dictionary defines fake news as "false stories that appear to be news, spread on the internet or using other media, usually created to influence political views or as a joke"[1]. The term "fake news" has also been used interchangeably with "misinformation", "disinformation", "false news" and "rumours". The statutory definition of "fake news" adopted by various countries also differs, depending on whether the term is defined in a broad or narrow sense. In a general sense, the term refers to a deliberate attempt by an individual or organisation to create and spread information, while knowing or having reason to believe that the information is false.

With the increase in usage of social media such as Facebook, Whatsapp and Twitter, the spread of fake news has also increased since users are now able to send mass messages at low rates and within a short period of time. In addition to the human element, social media platforms also have their own automatic methods of spreading information through algorithms and advertisements. The ability to remain anonymous or to operate under a fake identity has also aided this trend. While fake news can be spread through any medium, the focus of this article is on the spread of fake news via social media.

The primary objectives of this article are to provide an idea to the reader as to what factors lead people to believe fake news, the dangers that arise as a result of believing fake news and to provide an overview of the steps taken by selected governments and organisations to combat fake news. The article also looks at existing legislation in Sri Lanka to address fake news and if new legislation is needed.

Why do people believe in fake news?

In a study conducted by the Institute of Policy Studies, Singapore[2], the authors have identified

1 https://dictionary.cambridge.org/

2 "What lies beneath the truth: A literature review on fake news, false information and more", Carol Soon Wan Ting and Shawn Goh Ze Song, 30 June 2017, https://lkyspp.nus.edu.sg/docs/default-source/ips/report_what-lies-beneath-the-truth_a-literature-review-on-fake-news-false-information-and-more_300617.pdf

the reasons as to why people believe fake news and why attempts at correcting false beliefs fail sometimes.

The reasons for believing fake news were summarised as:

- *Confirmation bias*: people's tendency to embrace information consistent with their pre-existing beliefs and reject information that contradicts them

- *Motivated reasoning*: motivations of people that cause them to seek justifications for their desired conclusions, thus permitting them to believe what they want to. The authors also cite research which shows that an individual's political beliefs and identity contribute to motivated reasoning, and can increase one's susceptibility to believing false information. These also play a role in an individual's rejection of the validity of a scientific source

- *Emotions*: Information that evoke negative emotions has a stronger impact than information that evokes positive emotions, with negative information being processed more thoroughly, leaving a stronger impression and more resistant to disconfirmation. Emotions also play a role in dissemination as information that evokes an emotional response is more likely to be shared, regardless of its believability.

- *Conformity cascades*: people go along with the majority view in order to conform to expectations and membership within a group

- *Informational cascades*: people believe in a rumour simply because a significant number of others appear to believe it as well

The reasons why attempts at correcting false beliefs sometimes fail were summarised as:

- *Belief perseverance*: individuals retain newly created beliefs even after being informed that the initial basis upon which the beliefs were created are false

- *Illusory effect*: repeated exposure to false information can influence people to believe that a falsehood is true as it feels more familiar and true even if it goes against what an individual already knows

The authors have also attempted to explain the ways in which correcting of false information can backfire where people not only fail to change their minds when faced with the facts, but instead become even more committed to the false information.

- *Over-kill backfire effect*: occurs when relatively simple and straightforward false beliefs are corrected using overcomplicated corrective information.

- *Worldview backfire effect*: occurs when corrective information challenges people's fundamental beliefs about how society should operate.

What are the dangers of fake news?

Fake news is created for various reasons such as for humour, to ridicule and to incite political

discontent. The following are some examples where the circulation of fake news had negative repercussions.

Anti Vaccine Movement

The Anti Vaccine Movement gained momentum after a study published in a prestigious medical journal *The Lancet* by Andrew Wakefield, a British surgeon, suggested a link between the Measles, Mumps and Rubella (MMR) vaccine and autism in British children[3]. This led to a decline in the number of vaccinations in America and Europe and then globally. However, in 2010, the UK's General Medical Council revoked Wakefield's medical licence and removed his name from the register after it was found that he had acted dishonestly, had conducted research without ethical approval and had also received funding which indicated conflicts of interest. Wakefield's paper was subsequently retracted from The Lancet[4]. However, the damage was already done.

Even though Wakefield's study has been discredited and subsequent studies have shown no link between the MMR vaccination and autism[5], fake news connecting the MMR vaccination to autism continues to be circulated primarily via social media even today, without giving sufficient information to the reader regarding the discrediting of Wakefield's paper[6]. This has led to measles outbreaks in several countries as parents shy away from vaccinating their children.

India

In 2017 and 2018, rumours began circulating via Whatsapp over bands of strangers travelling to villages in India to kidnap children. In one version of the rumour, the organs of children were being harvested to be sold. The messages were at times accompanied by a video purportedly showing the bodies of lifeless children lying in a row covered by sheets. Investigations revealed that while the photo was genuine, its source was different: the bodies were those of children who were killed during a chemical attack in Syria[7]. At least 31 people had died across the country as a result of mob violence over these rumours[8].

3 "Vaccine myths debunked", https://www.publichealth.org/public-awareness/understanding-vaccines/vaccine-myths-debunked/

4 "Who is Andrew Wakefield and what did the disgraced MMR doctor do?", 4 May 2018 https://www.independent.co.uk/news/health/andrew-wakefield-who-is-mmr-doctor-anti-vaccine-anti-vaxxer-us-a8328326.html

5 "A large study provides more evidence that MMR vaccines don't cause autism", 4 March 2019 https://www.npr.org/sections/health-shots/2019/03/04/699997613/a-large-study-provides-more-evidence-that-mmr-vaccines-dont-cause-autism

6 "Social media caused the anti-vax movement to mutate. Now tech is finally fighting back", 24 April 2019 https://www.globalcitizen.org/en/content/social-media-anti-vax-movement/

7 "How Whatsapp fuels fake news and violence in India", 12 December 2018 https://www.wired.com/story/how-whatsapp-fuels-fake-news-and-violence-in-india/

8 "Whatsapp messages and the mad mob lynching: A timeline", 11 March 2019 https://www.news18.com/news/india/whatsapp-messages-and-the-mad-mob-lynching-a-timeline-1798135.html

In the run-up to the Indian elections held in April – May 2019, social media such as WhatsApp and Facebook was used to spread misinformation and false propaganda. Both of the main parties – Bharatiya Janata Party and the Congress Party – were accused of spreading false or misleading information online[9].

Sri Lanka

In May 2017, a campaign by the Health Ministry to eradicate elephantiasis suffered an unexpected blow when rumours began circulating that people linked to ISIS would visit houses in the guise of medical officials and inject the HIV virus while taking blood samples or while claiming to inject insulin[10].

Access to social media such as Whatsapp, YouTube and Facebook were temporarily banned in March 2018 and April – May 2019 to prevent the spread of hate speech and fake news in the wake of communal riots and bomb attacks in the country respectively.

In May 2019, two persons were arrested for spreading false rumours of poison being mixed into the water supply[11]. That same month, a university student was arrested under Emergency Regulations for publishing a false post on Facebook that the flight en route to China carrying President Maithripala Sirisena had crashed[12].

United States

The issue of fake news gained prominence during the 2016 US elections, where it was alleged that Russia had interfered in the elections to boost President Donald Trump's election campaign. These allegations were investigated and a 448-page report by Special Counsel Robert Mueller[13] was released to the US Congress and the public in April 2019. The report concluded that Russia systematically interfered in the 2016 election but there was "insufficient evidence" as to whether any Americans conspired with the Russians in that effort[14]. The report states that Russian interference in the US elections had commenced in 2014 when the Russia's Internet Research Agency (IRA) mimicked Americans on social media. It says the IRA had used social media accounts to sow discord in the U.S. political system through "information warfare". The IRA had also purchased political advertisements on social media

9 "Whatsapp: The 'black hole' of fakes news in India's election", 6 April 2019 https://www.bbc.com/news/world-asia-india-47797151

10 "Anti-Filariasis campaign suffers as ISIS rumour swells on social media", 14 May 2017 http://www.sundaytimes.lk/170514/news/anti-filariasis-campaign-suffers-as-isis-rumour-swells-on-social-media-240190.html

11 "Two remanded over false rumours of poisoned water", 3 May 2019 http://dailynews.lk/2019/05/03/law-order/184581/two-remanded-over-false-rumors-poisoned-water

12 "Undergrad remanded for posting false rumour on FB", 15 May 2019 http://www.dailymirror.lk/breaking_news/Undergrad-remanded-for-posting-false-rumour-on-FB/108-167230

13 "Report on the investigation into Russian interference in the 2016 presidential election", March 2019, https://www.justice.gov/storage/report.pdf

14 "How Mueller's farewell subtly rebuked Trump", 29 May 2019 https://time.com/5597526/robert-mueller-statement-investigation/

in the name of U.S. persons and entities and had also staged political rallies within the U.S. with IRA employees posing as U.S. grassroot entities and persons.

It was also during the 2016 US elections that a fictitious conspiracy theory dubbed "Pizzagate" started circulating via social media where it was alleged that a Washington pizzeria named Comet Ping Pong was used as a front by Hillary Clinton and her campaign manager John Podesta for a child sex ring[15]. Fuelled by the news, a man from North Carolina was arrested after he attempted to "self-investigate" the conspiracy by entering the pizzeria with an assault rifle and fired inside the restaurant.

A little town called Veles in Macedonia also became infamous due to the US elections 2016 after it was discovered that the town of around 50,000 inhabitants was the registered home to around 150 pro-Trump websites, many of them filled with sensationalist and fake news[16]. Traffic to these websites had been rewarded handsomely by automated advertising engines like Google's AdSense.

On 23 May 2019, a video of a speech by House Speaker Nancy Pelosi at a Center for American Progress event was circulated via Twitter, YouTube and Facebook where the video had been altered to make it sound like she is drunkenly slurring her words[17]. One version of the video had been viewed more than 2 million times, shared more than 45,000 times and received around 23,000 comments with users calling her "drunk" and a "babbling mess". An analysis by the Washington Post journalists and outside researchers had found that the video had been slowed to about 75 percent of its original speed and the pitch of her voice also seemed to be edited to match the slowing of the video to match her natural voice.

These are only a few instances where the spread of false information had led not only to panic but also to the death of innocent lives. Given the dangers posed by false information, the next section talks about the steps that have been taken both on a national level and by individual organisations to combat the spread of false information.

Actions Taken By Governments to Control Fake News

EU Commission

In 2018, the EU Commission led by DG CONNECT published its Action Plan against

15 "How Pizzagate went from fake news to a real problem for a D.C. business", 5 December 2016 https://www.politifact.com/truth-o-meter/article/2016/dec/05/how-pizzagate-went-fake-news-real-problem-dc-busin/

16 "How Facebook powers money machines for obscure political 'news' sites", 24 August 2016 https://www.theguardian.com/technology/2016/aug/24/facebook-clickbait-political-news-sites-us-election-trump; "Inside the Macedonian fake news complex", 15 February 2017 https://www.wired.com/2017/02/veles-macedonia-fake-news/

17 "Fakes Pelosi videos, slowed to make her appear drunk, spread across social media", 24 May 2019 https://www.washingtonpost.com/technology/2019/05/23/faked-pelosi-videos-slowed-make-her-appear-drunk-spread-across-social-media/?utm_term=.9bcc18ca02a8

Disinformation[18]. As a result of a the communication, representatives of online platforms, leading social networks, advertisers and advertising industry agreed on a self-regulatory Code of Practice[19] to address the spread of online disinformation and fake news. These include Facebook, Google, Twitter and Mozilla. Commitments by these organisations include transparency in political advertising and closure of fake accounts. Although this self-regulatory practice is currently in place, an opinion paper by ENISA, the EU Cybersecurity Agency, called for regulation of these platforms at an EU level "to ensure a consistent and harmonised approach across the EU to tackling online disinformation aimed at undermining the democratic process"[20], especially in light of the European Parliamentary elections held this year.

France

In November 2018, the French government passed two bills aimed at curbing the spread of false information during election campaigns. The new law allows candidates and political parties to appeal to a judge to help stop false information three months before an election. The law also empowers the French national broadcasting agency CSA to suspend television channels "controlled by a foreign state or under the influence" of that state if they "deliberately disseminate false information likely to affect the sincerity of the ballot." Anyone who violates the law could face one year in prison and a fine of €75,000[21].

Germany

Germany's Network Enforcement Act (Netzwerkdurchsetzungsgesetz or "NetzDG") came into force on 1 October 2017[22]. Known colloquially as the "hate speech law", the Act does not create new categories of illegal content. Instead, it aims at enforcing in the online sphere 22 offences (such as "public incitement to crime", "insult" and "defamation") that are already in the German Criminal Code (referred to as "unlawful content" in the Act) and holding social media platforms responsible for their enforcement.

Specific details of the Act are as follows:

- The Act applies to providers of large social network platforms with more than 2 million registered users in Germany
- Such providers should have an efficient and transparent process to handle complaints on unlawful content

18 https://ec.europa.eu/digital-single-market/en/news/communication-tackling-online-disinformation-european-approach

19 https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation

20 "Election cybersecurity: Challenged and Opportunities", February 2019 https://www.enisa.europa.eu/publications/enisa-position-papers-and-opinions/election-cybersecurity-challenges-and-opportunities

21 "France passes controversial 'fake news' law", 22 November 2018 https://www.euronews.com/2018/11/22/france-passes-controversial-fake-news-law

22 https://germanlawarchive.iuscomp.org/?p=1245

- Upon receiving a complaint, immediate steps need to be taken to investigate if the said content in unlawful and should be removed or access should be blocked

- Content that is "manifestly unlawful" should be removed within 24 hours of receiving the complaint while other unlawful content should be removed within 7 days, subject to certain exceptions.

- The Act also requires providers of social networks that receive more than 100 complaints per calendar year about unlawful content to publish half-yearly reports about the handling of such complaints

- Although the Act specifies the fines to be imposed for non-compliance with its provisions, the Federal Ministry of Justice issued guidelines for imposing fines in March 2018[23]. The maximum amount of fines is €5 million for natural persons and €50 million for legal persons.

Malaysia

Malaysia's Anti-Fact News Act 2018 (AFNA) came into effect on 11 May 2018 under the Barisan Nasional (BN) coalition government led by former Prime Minister Najib Razak[24]. The salient features of the Act are as follows:

- Fake news has been defined as "any news, information, data and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas"

- The Act provides for extra-territorial application. If any offence under the AFNA is committed through fake news concerning Malaysia or a citizen of Malaysia by a person outside Malaysia, it will be treated as if the offence was committed within Malaysia.

- The maximum punishment for an offence under this Act is 500,000 Malaysian Ringgit or six years' imprisonment or both.

- Any person affected by a publication containing fake news can apply to Court for an order for removal of such publication.

The new Pakatan Harapan Coalition which came into power after the elections held on 9 May 2018, led by Prime Minister Tun Dr Mahathir Mohamad, has vowed to repeal AFNA. According to Dr Mahathir Mohamad, ""When you have a law to prevent people from airing views, then we are afraid that the government itself may abuse it, as has happened in the past[25]. An attempt to repeal the Act was defeated by the BN-dominated Dewan Negara (upper

23 "Network Enforcement Act Regulatory Fining Guidelines", 22 March 2018 https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/NetzDG/Leitlinien_Geldbussen_en.pdf?__blob=publicationFile&v=2

24 Anti-Fake News Act 2018 http://www.federalgazette.agc.gov.my/outputaktap/20180411_803_BI_WJW010830%20BI.pdf

25 "Dr M: Malaysia stands firm over repeal of Anti-Fake News Act", 9 April 2019 https://www.thestar.com.

house of the Parliament of Malaysia) but Article 68 of the Federal Constitution of Malaysia states that the Dewan Negara can only delay bills for up to a year[26]. Hence it is only a matter of time before AFNA is repealed.

Russia

The Russian Foreign Ministry runs a website which publishes screenshots of articles considered to have false information with a seal containing the words "Fake" superimposed on them in red[27]. In addition, the head of the country's media regulator has announced plans to set up a database of news considered as fake[28].

Singapore

The Protection from Online Falsehoods and Manipulation Act, No 18 of 2019 came into effect on 28 June 2019[29]. The preamble to the Act states:

An Act to prevent the electronic communication in Singapore of false statements of fact, to suppress support for and counteract the effects of such communication, to safeguard against the use of online accounts for such communication and for information manipulation, to enable measures to be taken to enhance transparency of online political advertisements, and for related matters.

Some key features of the Act are as follows:

- The Act defines a statement as false "if it is false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears"
- Communication in Singapore refers to when the statement or material is made available to one or more end-users in Singapore on or through the internet, SMS or MMS.
- The Act imposes fines and imprisonments, which have been differentiated based on whether the offender is an individual or others such as an internet service provider. The fines can reach up to S$60,000 in the case of individuals and S$1 million for others.
- Any Minister can issue orders to a Competent Authority established under the Act to address false statements of fact if the Minister is of the opinion that it is in the public interest to do so.
- The Act specifies the various orders that a Minister can issue (termed as "directions")

my/news/nation/2019/04/09/dr-m-malaysia-stands-firm-over-repeal-of-anti-fake-news-act/

26 "No silver bullet for fake news in a new Malaysia", 12 January 2019 https://thediplomat.com/2019/01/no-silver-bullet-for-fake-news-in-a-new-malaysia/

27 The Ministry of Foreign Affairs of the Russian Federation: http://www.mid.ru/en/nedostovernie-publikacii

28 "Russia to set up fake news database", 16 May 2019 https://www.themoscowtimes.com/2019/05/16/russia-to-set-up-fake-news-database-a65613

29 https://sso.agc.gov.sg/Acts-Supp/18-2019/Published/20190625?DocDate=20190625

such as Correction Direction, Stop Communication Direction and Targeted Correction Direction.

- A person may appeal against a Direction to the High Court but only after applying first to the Minister who issued such Direction to vary or cancel it and if the Minister has refused the application either in whole or in part.

Measures Taken By Organisations

Some of the measures taken by social media platforms to tackle fake news are identified below:

Facebook

- In the first quarter of 2019, Facebook had disabled 2.2 billion fake accounts, compared to 583 million in the first quarter of 2018[30].

- Since 2016, Facebook has a fact checking service where in certain countries, it collaborates with third-party organisations certified by the International Fact Checking Network to identify and review false news[31]. In Sri Lanka, the fact checking is done by Agence France-Presse (AFP)[32].

- Facebook is a signatory to EU's Code of Practice on Disinformation (described in the previous section)

- Facebook has also announced that it will diminish the reach of anti-vaccination information on its platform[33]

Google

In a white paper[34] presented at the Munich Security Conference, Google detailed out how it fights fake news, or "disinformation" as the Company calls it, on its platforms such as Google News, Google Search and YouTube. Google defines disinformation as "deliberate efforts to deceive and mislead using the speed, scale, and technologies of the open web". The company's approach to tackling misinformation is based on a framework of three strategies: make quality count in the Company's ranking systems, counteract malicious actors and give users more context about the information they see. The paper provides specific details of how the Company implements these strategies to their various online platforms and advertising systems.

30 "Facebook removes a record 2.2 billion fake accounts", 23 May 2019 https://www.bloomberg.com/news/articles/2019-05-23/facebook-removed-2-2-billion-fake-accounts-in-first-quarter

31 https://www.facebook.com/help/publisher/182222309230722?helpref=faq_content

32 https://factcheck.afp.com/afp-sri-lanka

33 "Facebook will crackdown on anti-vaccine content", 3 July 2019 https://www.wired.com/story/facebook-anti-vaccine-crack-down/

34 How Google Fights Disinformation, February 2019 https://storage.googleapis.com/gweb-uniblog-publish-prod/documents/How_Google_Fights_Disinformation.pdf

Whatsapp

Whatsapp has set a limit on the number of recipients to whom a message can be forwarded to. Previously, a user can forward a message to up to 20 recipients. This has been now limited to 5, primarily in light of the violence which occurred in India.

However, while this will act to curb the forwarding of messages to individuals, it will have very little effect when the message is forwarded to Whatsapp groups where the official limit per group is 256 members.

Twitter

In June 2019, Twitter acquired Fabula AI, a London-based start-up company that claims it is able to identify "fake news" quickly[35]. In an announcement, Twitter stated that the technology employed by Fabula will be used to help people feel safe on Twitter and help them see relevant information[36].

Arguments against Regulation of Fake News

The argument that is commonly made against the use of regulation to combat fake news is that it limits freedom of speech and could be used by governments to suppress dissent.

In relation to Singapore's Protection from Online Falsehoods and Manipulation Act, some of the arguments[37] put forward before the passing of the Bill were:

- It places too much power in the hands of the Executive as a Minister is able to declare that an article contains false statements of fact and request for correction orders. To this, a counter-argument has been made that there is an appeals mechanism to the Courts.

- Problems with definitions: The Act does not define "fact" and does not cover opinions. The definition of "public interest" is also too wide.

An article by the Transatlantic Working Group[38] highlights five issues arising from the imposition of controls on fake news under the NetzDG of Germany as follows:

- Over-removal: the review of unlawful content would require expertise in German language and jurisprudence. The complaints would also require case-by-case analysis and investigations. Given the tight deadlines and heavy fines, social media companies would

35 Twitter buys tech start-up that claims to quickly spot fake news, 4 June 2019 https://www.independent.co.uk/news/world/americas/twitter-fake-news-fabula-ai-misinformation-machine-learning-a8942091.html

36 "Twitter acquires Fabula AI to strengthen its machine learning expertise", 3 June 2019 https://blog.twitter.com/en_us/topics/company/2019/Twitter-acquires-Fabula-AI.html

37 "Law Minister K Shanmugam addresses concerns over proposed online falsehoods and manipulation law", ChannelNewsAsia, 7 May 2019 https://www.channelnewsasia.com/news/singapore/k-shanmugam-deliberate-online-falsehoods-law-addresses-concerns-11511428

38 "An analysis of Germany's NetzDG law", Heidi Tworek and Paddy Leerssen, 15 April 2019 https://www.ivir.nl/publicaties/download/NetzDG_Tworek_Leerssen_April_2019.pdf

be encouraged to remove content without conducting detailed investigations. This would lead to "over-removal" of content.

- Privatised enforcement: It has also been pointed out that assessment of the content is done by private organisations and not the courts or democratically legitimated institutions. The Act does not require a court order for content to be taken down and there is no independent appeals mechanism for victims to seek redress.

- Definition of "unlawful content": The Act defines unlawful content based on offences already in the Criminal Code of Germany. Critics have argued some of these offences are too broadly defined (e.g. "hate speech") and some offences such as blasphemy should not be considered as offences in the first place[39]

- The Streisand effect (counterproductive outcomes of censorship): It has also been stated that deletion of information may have the unintended consequence of publicizing the deleted material more widely.

- Inspiration for authoritative regimes around the world to restrict speech: The Global Network Initiative has claimed that the Act "posed unintended but potentially grave consequence for free expression in Germany, across the EU, and worldwide" and expressed concerns that it may "empower authoritarian leaders".

The Sri Lankan Experience

At the time of writing this article, the Sri Lankan Cabinet has approved a proposal to make amendments to the Penal Code and the Criminal Procedure Code that will make the publishing and dissemination of fake news which will affect the co-existence among communities and national security an offence[40]. Based on the proposed amendments, a person found guilty of such an offence could be fined up to Rupees 1 million or a prison term not exceeding 5 years.

Are the current laws in Sri Lanka sufficient?

When the Government announced plans of the suggested reforms, critics argued that Sri Lanka has sufficient legislation in place to address the issue of fake news and it is not necessary to make further changes. The following is a review of the existing legislation to tackle fake news.

Emergency Regulations

In the aftermath of the suicide bombings on 21st April 2019, President Maithripala Sirisena issued a set of Emergency Regulations on 22nd April 2019, the Emergency (Miscellaneous

39 "Germany: The Act to improve enforcement of the law in social networks", August 2017 https://www.article19.org/wp-content/uploads/2017/09/170901-Legal-Analysis-German-NetzDG-Act.pdf

40 "Cabinet approves strict punishment for fake news that affects National Security and co-existence", 5 June 2019; https://www.newsfirst.lk/2019/06/05/cabinet-approves-strict-punishment-for-fake-news-that-affects-national-security-and-co-existence/; "Sri Lanka government to bring new laws to curb fake news and hate speech that jeopardize national harmony and national security", 6 June 2019 http://srilankabrief.org/2019/06/sri-lanka-govt-to-bring-new-laws-to-curb-fake-news-hate-speech-that-jeopardize-national-harmony-national-security/

Provisions and Powers) Regulation, No. 01 of 2019[41]. Section 32 of the regulation states

No person shall, by word of mouth or by any other means whatsoever, communicate, disseminate or spread any rumour or false statement which is likely to cause public alarm or public disorder.

Section 49 (1) of the said regulation states the penalty for committing the offence as follows:

If any person contravenes or fails to comply with any emergency regulation, or any order or rule made under any such regulation or any direction given or requirement imposed under any such regulation, he shall be guilty of an offence, and subject to any special provisions contained in such regulation, shall on conviction after trial before the High Court without a jury or before a Magistrate, be liable to rigorous imprisonment for a term not less than three months and not exceeding five years and to a fine of not less than five hundred rupees and hundred rupees and not exceeding five thousand rupees.

Section 120 of the Penal Code

Whoever by words, either spoken or intended to be read, or by signs, or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the State, or excites or attempts to excite hatred to or contempt of the administration of justice, or excites or attempts to excite the People of Sri Lanka to procure, otherwise than by lawful means, the alteration of any matter by law established, or attempts to raise discontent or disaffection amongst the People of Sri Lanka, or to promote feelings of ill-will and hostility between different classes of such People, shall be punished with simple imprisonment for a term which may extend to two years.

Explanation-It is not an offence under this section by intending to show that the State have been misled or mistaken in measures, or to point out errors or defects in the Government or any part of it, or in the administration of justice, defects, or to excite the People of Sri Lanka to attempt to procure by lawful. Means, the alteration of any matter by law established, or to' point out in order to their removal matters which are producing or .have tendency to produce feelings of hatred or ill-will between different classes of the People of Sri Lanka.

International Covenant on Civil and Political Rights (ICCPR)

Sri Lanka has acceded to the aforesaid Covenant on 11th June 1980.

Article 19 of the Covenant states

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of

41 Extraordinary gazette No. 2120/5 – 22 April 2019; http://documents.gov.lk/files/egz/2019/4/2120-05_E.pdf

his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

International Covenant on Civil and Political Rights (ICCPR) Act, No 56 of 2007

Even though Sri Lanka had acceded to the International Covenant on Civil and Political Rights, Act No 56 of 2007 was introduced to address certain political and human rights that are in the Covenant but not given any legislative recognition in Sri Lanka.

Section 3 (1) of the Act states

No person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 (As amended)

Article 14 (1) (a) *Every citizen is entitled to freedom of speech and expression including publication;*

Article 15 (2) *The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.*

Article 15 (7) *The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.*

Article 15 (8) *The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.*

Police Ordinance, 16 of 1865 (As amended)

Section 98

Any person who shall spread false reports with the view to alarm the inhabitants of any place within Sri Lanka and create a panic shall be guilty of an offence, and be liable to a fine not exceeding two hundred rupees, or to imprisonment, with or without hard labour, for any period not exceeding twelve months ; and if he shall be convicted a second time, or shall persist in the offence after warning to desist, he shall be liable to corporal punishment not exceeding twenty lashes.

Computer Crime Act, No. 24 of 2007

Section 6. (1) *Any person who intentionally causes a computer to perform any function, knowing or having reason to believe that such function will result in danger or imminent danger to—*

(a) national security ;

(b) the national economy ; or

(c) public order,

shall be guilty of an offence and shall on conviction be punishable with imprisonment of either description for a term not exceeding five years.

In light of the above-mentioned legislation, does Sri Lanka need further legislation to control the spread of fake news? In my opinion, we do. This is due to the sheer magnitude of complications that arise when information is spread via the Internet, as opposed to the traditional methods of spreading news such as via the television, radio or newspapers.

Reasons as to why we need new legislation

- What is considered as fake news? The existing legislation tends to focus on fake news that affects society as a whole and not individuals. For example, Section 98 of the Police Ordinance refers to false reports that "alarm" or "create a panic". Computer Crime Act refers to actions that will have an effect on "national security", "the national economy" or "public order". The Emergency Regulations also focus on "public alarm" or "public disorder". Within such a framework, will fake news that affects the election campaign of a candidate be considered as an offence?

- Who can be held liable for the offence? Is it the person who created the news or the person responsible for disseminating the news or both? For example, the Emergency Regulations refer to "communicate, disseminate or spread". However, there is no definition given to the term "communicate". Does it include creation as well?

- Complaint mechanism: The current legislation does not specify where complaints should be addressed to and the procedure in place to follow-up on these complaints.

- What is the enforcement mechanism? Even though under the current legislation, action

can be taken against individuals or corporations within Sri Lanka, there is no mechanism to take action against social media platforms. For example, in certain instances, it is difficult to determine who the real perpetrators are. One reason for this is because online platforms allow for the registration of fake identities or accounts. The current legislation does not specify if action can be taken against social media platforms to take down these fake identities or accounts. In addition, the source from which the fake news originates or is disseminated from could be overseas. In such an instance, the existing legislation is not clear as to whether action can be taken against such a person.

- What is the appeals mechanism? It is a natural tendency for people to share information, mainly information on issues that go into their fundamental beliefs or deep-rooted fears. This is especially true during times of crises, where information that warns of an existing or imminent threat will be shared immediately by a person without verifying if it is the truth or not as the focus would be to warn and save as many people as possible. Unknowingly, the person would be committing an offence. In such instances, what is the appeals mechanism available to the offender?

These are some of the reasons as to why reforms are needed. In addition, it would also be useful to create public awareness on both existing and proposed legislation so that people are aware as to what constitutes as an offence under these legislations.

"The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed."

Lord Hobhouse in the case of ***Reynolds v Times Newspapers Limited and Others***[42]

42 [1999] 4 All ER 609, at page 657

Criminal Law and Mental Health Disorders

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Introduction

September 19th, 2019 a five judge Court of Appeal in Singapore dismissed prosecution's appeal against an intellectually disabled 17 year old boy's sentence of reformative training, for rape he committed in November 2014. The teenager, who was 14 at the time, had an IQ of 61 and the mental age between 8 and 10. His victim who was also a school mate was 16 at the time and had an IQ of 50. According to a news report on the day the events took place, the accused hid behind a wall waiting for the victim and after professing his love, sexually assaulted her when she did not respond. He has even threatened to harm her with a knife if she did not oblige to his acts. Though prosecution appealed for a prison sentence of 15 to 18 years with at least 15 strokes of cane, Court of Appeal held "prison and caning is unwarranted for an offender who lacks sufficient maturity and understanding to judge his own conduct".

Considering law's application of the test of reasonable prudent man to judge whether one should be punished for the way he behaved, it is an established fact that a mentally disabled cannot be expected to understand the consequences of his behavior. No one despite all information available understands this fact to the level of a person who has mentally disabled family members or bears the responsibility of taking care of such persons. But what about the victims and their families' point of view?

This article attempts to look at the current stance of law on the mentally disabled and whether law has evolved with the pace of knowledge spreading on mental health disorders.

Mentally disabled and reasonably prudent man

When we consider the above case in Singapore one can argue that considering the teenager's behavior, he was well aware of what he was doing. Matter gets even more complicated considering the fact the victim too had a low IQ hence, leaving us with thoughts on inability to defend herself as an average girl. So should he be punished like any other rapist for the irreparable harm he caused to the girl? But the fact that he behaved in a certain manner knowing he would get the desired result does not mean he had the capacity to analyze all necessary details such as consequences and morality to the level of a reasonable prudent man. That is why grave and sudden provocation is accepted as a special exception to the offence of murder under section 294 of the Penal Code of Sri Lanka. The exception states "culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation…". A person under grave and sudden provocation though acts with a desired result at that point of time, law recognizes the fact that he is not in a state of mind to

make a logical decision considering the consequences.

In the obiter dicta of the *David Appuhamy* case (53 NLR 313) Nagalingam S.P.J stated " It is easy to conceive of cases where the same act of grave provocation may produce different results in different individuals. In the case of a man who has cultivated self-restraint, he would not lose his power of self-control, while a man of quick temper would lose his powers of self-control. Is it, then, to be held that the identical act of provocation is grave in the latter case while not in the former case ? Can it be said that the policy of the law is to deal lightly with a man who has a quick temper as against a man who has control of his passions ?". The objective test carried out in considering whether there was a grave and sudden provocation is carried out against reasonable prudent man who carries characteristics peculiar to the class of society to which the accused belonged. On such logic it seems natural to compare a mentally disabled person's behavior and tolerance level with those of the same condition.

Insanity

For an act of a particular individual to be considered wrongful there must be a guilty mind in connection with it. In order for a Prosecutor to ensure conviction of an offender he must prove beyond reasonable doubt the identity of the accused, Actus reus, and Mens rea (Guilty mind). Criminal responsibility cannot be imposed on a person unless element of mens rea is proven -Actus non facit reum nisi mens sit rea" (mere doing of an act will not constitute guilt unless there be a guilty mind)

Majority of the offences define intention and mindset related with consequences. e.g. dishonestly, negligently, willfully, knowingly, maliciously and fraudulently. Exceptions to these which can be proven medially are intoxicated (involuntarily), postpartum depression, mindset of a child and insanity.

Insanity was first given a legal definition in the *M'Naghten* case (1843). Daniel M'Naghten a Scottish woodturner with a radical political view, was under the belief that we was persecuted by the Tories and was followed by their spies. He even stated this to others including his father who at the time was the Glasgow Commissioner of Police and a MP. Everyone who was aware of this situation treated it as being delusional. In January 1843, M'Naghten shot the Prime Minister's private secretary, civil servant Edward Drummond believing him to be Prime Minister Robert Peel. At trial the position of insanity was taken up as defence. The case laid down rules on insanity as a defence which are summarized as follows;

> Every person is presumed to be sane until contrary is proven.
>
> It is a defence that when the offence was committed suspect due to disease of mind, accused was not in a state to understand the nature or quality of his action.
>
> When a man commits a wrongful act under **delusion** concealing him from the true nature of the act he is committing, his responsibility is to the same degree as if the facts he imagined really took place.

Later, English Law introduced the defence of "diminished responsibility" under the Homicide Act 1957. The defence can establish that the accused is suffering from an abnormality of mind, impairing his mental responsibility of his acts.

Early laws of Sri Lanka on mental health were influenced by lunacy laws in Britain. Let us now focus on current laws applicable for the mentally disabled in the context of criminal law plea of "unsoundness of mind".

Section 77 of the Penal Code of Sri Lanka states as follows;

"Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

Therefore, if an accused proves on a balance of probability that he was incapable of comprehending the nature of his act due to unsoundness of mind, he should be acquitted. What about the victim? Section 91 of the Penal Code of Sri Lanka states, every person has the same right of private defence against an act by a person of unsound mind, which is an offence but not considered an offence due to the fact of unsoundness of mind.

On the matter of proving the unsoundness of mind, Section 45 of the Evidence Ordinance applies. This section speaks of relevancy of opinions of experts. Illustration (b) of the said section states;

"The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary law, are relevant."

Thus, a doctor with MBBS qualification qualified to perform a psychiatric evaluation may provide a report on the mental condition of a person claiming unsoundness of mind.

Chapter XXXI of the Code of Criminal Procedure Act, No. 15 of 1979, provides for procedure regarding persons of unsound mind. Section 374 of the said Act states when a Magistrate's Court holding an inquiry of a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of such unsoundness and shall cause such person to be examined by the Government medical officer of the district or some other medical officer… Section 375 provides the procedure for a person committed before High Court but appears to be of unsound mind. In such case, trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed part of his trial. In a bail application, court may release a person of unsound mind under section 376, provided sufficient security is given that such person will be properly taken care of not to harm himself or any other person. If such sufficient security is not given, court shall report the case to the Minister and the Minister may by writing under the hand of the Secretary to the Ministry order the accused to be confined in a mental hospital or other suitable place. Even when a person is acquitted on the ground of unsound mind, under section 381 court can report the case for the orders of the Minister to be kept in safe custody.

Similar to the Mental Disease Ordinance of 1873 the above provisions seem to heavily focus on institutionalizing or detention of persons affected by mental illnesses.

Mental Conditions except Insanity

In terms of the capacity of a person, English law under the Lunacy Act (1890-1930) and Mental Deficiency Act (1913-1938) categorizes people with mental disabilities."Mentally defective persons" are defined as mentally defective persons who suffer from a condition of arrested development of mind existing before the age of eighteen. They were classified into 4 groups under the Mental Deficiency Act, 1927.

> Idiots - persons so mentally infirm that they cannot guard themselves against common physical dangers
>
> Imbeciles – persons incapable of managing their own affairs
>
> Feeble minded persons – persons of lesser degree of mental infirmity who require supervision.
>
> Moral defectives – persons having strongly vicious or criminal propensities.

However, with the development of medical science society is more aware of complex mental conditions which are considered as disabilities. Hence, the above classification can be found to be a derogative way of describing such mental conditions.

Section 37 of the Protection of The Rights Of Persons With Disabilities Act, No. 28 of 1996, defines "person with disability" as 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.

Mental Health Act Draft (2007) which was an attempt to repeal the Mental Diseases Ordinance states " Every reference to "unsound mind" and "mentally deficient person" in any written law or document relating to this Act shall be read and construed as a reference to "mental illness" within the meaning of that expression as used in this Act." It further provides the definition of "mental illness" as condition listed as an ICD-10 diagnosis which seriously impairs, either temporarily or permanently the mental functioning of a person and is characterized by the presence in the person of any one or more of the following symptoms: delusions, hallucinations, serious disorder of thought form, a severe disturbance of mood, sustained or repeated irrational behaviour indicating the presence of one or more of the symptoms referred. In other words mental illnesses include disorders such as schizophrenia, severe depression, bipolar disorder, delirium, and dementia.

But what about those who suffer from Autism Spectrum Disorders? A neurodevelopmental condition that is characterized by impairments in social-communication and the manifestation of repetitive and/or unusual behaviors. Such persons would fall into the category of intellectually impaired persons as stated in the Singapore case above. Section 75 of the Penal Code of Sri Lanka (as amended) states nothing is an offence done by a child below 12 years

and section 76 states nothing is an offence done by a child above 12 years and under 14 who has not attained sufficient maturity. These sections are limited to an age group. This raises a question with regard to those who may be physically mature than ages of 14 or 12 with a mentality of a child younger than stated due to autism. This has been discussed in many countries due to lack of clearly defined provision of defences available for an intellectually impaired person. Mental Health (Criminal Procedure) Act 1990 No. 10 New South Wales defines "mental condition" as a condition of disability of mind not including either mental illness or **developmental disability of mind**.

In the US case of *Penry v Lynaugh* (1989) (a case which concerned whether instructions given to a Texas jury were constitutionally adequate to emphasize the mitigating factors in sentencing of mental retardation), accused who had an IQ between 50 and 63 was charged for rape and murder. Although he was 22 years of age, his mind was of a six and a half year old child. He raised the defence of insanity and provided psychiatric evidence for the same. Under Texas law he was sentenced to death. In another US case, *Atkins vs. Virginia,* the Virginia Supreme Court was not willing to commute Atkins' sentence of death to life imprisonment 'merely because of his IQ score.Still many legal systems use insanity as a defence to include autism as a mitigatory factor in a criminal trial . However, this could pose challenges to higher functioning autistic individuals.

Hence the best solution is to make clear legislative provisions for those with mental disability allowing them to take a more suitable defence than insanity. The fact remains those with intellectual impairment though not prone to commit crimes do not have the same tolerance level or understanding of consequences as a person with average or above average IQ. Just as children are hyperactive and do not understand consequences of their actions till they get hurt, they cannot comprehend social norms and moral standards as those who are considered normal do. In the case of a child, such child learns from experience. But convicting an intellectually impaired person for a crime, who does not comprehend consequences at the time of offence or lacks the logical thinking to prevent such an act, seems inhuman, as it is questionable whether the system can achieve objectives such as deterrence, rehabilitation and restoration from such a conviction. Convicting such a person seems no differet to convicting a child. Since medical science has come a long way and people are more aware of mental illnesses and disorders, it is time to move away from archaic laws that govern such sensitive matters.

Damages Claims for Personal Injuries and Fatalities Due to Negligence

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1. Introduction
2. Remedies available in delictual actions
3. Types of Damages
4. The quantum of damages under different heads
5. Parties to an action
6. Conclusion

(1). INTRODUCTION

In today's context, it would be of substantial value to any person to understand the basic principles and framework relating to actions for damages arising from personal injuries and fatal accidents. The remedies provided by the Roman Dutch Law in pursuit of the same are immense.

The laws applicable to delictual actions in Sri Lanka, the Lex Aquilia and the Actio Injuriarum, are founded on Roman principles dating back centuries ago.

The Lex Aquilia, thought to be a plebiscite proposed by the tribune Aquilius to the Plebs in the year 287 BC, is essentially aimed at granting **compensation for patrimonial loss**; i.e: losses incurred in respect of property, business or prospective gains.

The action for Injuria, or **wrongs against the person, dignity or reputation** of someone, allowing the victim to recover from the wrongdoer was earlier based on a prescribed fixed money penalty. This was superseded through praetorian edicts allowing the penalty to be assessed by a judex according to the gravity of the offence.

These Roman principles were developed and expanded upon by the jurists of Holland, and later came to be embraced as the residuary law of the island as declared by the British Proclamation of 1799. In the modern day, the Roman Dutch law has also taken on certain characteristics of English Tort Law through judicial decisions awarded by Courts. Therefore, all of these aspects tend to be taken into consideration when assessing the extent or quantum of damages to be awarded.

(2). REMEDIES AVAILABLE IN DELICTUAL ACTIONS

The main objective of resorting to a delictual action is to obtain damages or compensation for injuries or losses sustained. However, McKerron[1] sets out the available remedies in the following manner:

1. Extra Judicial Remedies :

   Remedies by way of self-help

   → The victim of a wrong is entitled to help himself by his own act when the law cannot help him in time to prevent his suffering irreparable injury[2]

2. Judicial Remedies :

   → Remedies by way of an action at law

   I. Damages

   II. Interdict

Of these the remedy of Damages is the most preferred remedy for almost every kind of civil wrong.

(3). TYPES OF DAMAGES

Black's Law Dictionary[3] refers to **'Damages'** as "money claimed by, or ordered to be paid to, a person as compensation for loss or injury".

In making awards of damages, the Court distinguishes between several types of damages:

PECUNIARY/ PATRIMONIAL DAMAGES	For **calculable monetary loss** sustained by the Plaintiff in consequence of the wrong complained of Eg: Medical expenses
NON-PECUNIARY DAMAGES	For losses **not arising through the expenditure** of money Eg: Loss of eyesight as a result of the Defendant's negligence

1 R.G. McKerron, The Law of Delict

2 London and S.A. Exploration Co. v. Rouliot(1890) 8 SC 75, 98

3 8th Edition

SENTIMENTAL DAMAGES	Awarded as **solatium** for wounded feelings/ mental pain and suffering, generally awarded when the wrong complained of is an injuria
SPECIAL DAMAGES	Losses which **can be proven** with relative precision, arising from special circumstances of the case and therefore not presumed. Eg: Exact amount spent on hospital bill
GENERAL DAMAGES	For losses which **cannot be proven precisely** and which is difficult to be quantified, presumed to be a natural or probable consequence of the defendant's act. Eg: Pain and suffering undergone by the Plaintiff
REAL DAMAGES	**Compensation for actual loss** suffered.
NOMINAL DAMAGES	An award not to compensate the Plaintiff for any actual loss suffered, but simply a **token sum** to recognize the infringement of his/her rights by the Defendant.
EXEMPLARY/PUNITIVE DAMAGES	Where the Defendant has been guilty of any high-handed, insolent, vindictive or malicious behavior, these are awarded to punish the Defendant and deter him from acting so again, and also to serve as an example to other offenders[3.1].
COMPENSATORY DAMAGES	An award to **indemnify** Plaintiff/ put the damaged property back to its original condition. Eg: Cost of repairing a damaged vehicle
CONTEMPTUOUS DAMAGES	A **trifling sum** of (nominal) damages awarded where, although the Plaintiff is technically entitled to succeed, the Court is of the opinion that the **action should not have been brought in**[3.2].
PROSPECTIVE DAMAGES	**Future damages**, which, based on the facts pleaded and proved by the Plaintiff, can reasonably be expected to occur. Eg: Medical expenses to be incurred in the future

3.1. Dolby v. Soffantini 1935 E.D.L. 119

3.2. Dr. Wickema Weerasooria, Law Governing Insurance and Negligence Damages and Third Party Motor Claims, 383

(4). THE QUANTUM OF DAMAGES UNDER DIFFERENT HEADS

In a study done by Dr. A.R.B. Amerasinghe in 1971 titled "Compensation for Road Accidents in Ceylon", he identifies the computation of damages under the following heads[4]:

- Medical expenses
    - → Past
    - → Future
    - → Ancillary
- Loss of earnings
    - → Deferred earnings
    - → Loss of profits
    - → Loss of future earnings
- Non-pecuniary losses
    - → Impairment of bodily integrity
    - → Pain and suffering
    - → Loss of the pleasures/amenities of life
    - → Shortening of life
    - → Disfigurement
    - → Post-traumatic neurosis
    - → Damages for nervous shock

4.1) PECUNIARY LOSSES

4.1.1) Past medical expenses

Expenses already incurred in the form of medical treatment, hospital and doctors' charges, cost of medication, cost of attendants, costs of extra nourishment etc. may all be recoverable as special damages if it can be proved that they were reasonably incurred in order to cure or treat the injuries caused by the accident or negligence or intentional act as the case may be.

Provided that the liability has been properly incurred, the expenses may be recovered even though the Plaintiff is yet to make the payment.[5]

4 "Compensation for Road Accidents in Ceylon" Dr. A.R.B. Amerasinghe, Journal of Ceylon Law (Vol. 2, Dec. 1971)

5 Allen v Waters & Co. (1935) 1 KB 200

4.1.2) Future medical expenses

Prospective expenses must be limited to the cash value of the probability or possibility of expenses being incurred[6] when considered in the assessment of general damages.

In Samitha Samanmali v. BMICH[7], the Plaintiff was awarded Rupees 110 million as future medical expenses due to the delicate nature of the injuries sustained.

4.1.3) Ancillary medical expenses

In addition to medical expenses, there may be other related expenses that an injured person may have to incur which might be recoverable. As an example, costs incurred to transport the injured person (who may not be able to rely on public transport) such as cost of a hired vehicle (if his car was damaged in the accident), cost of hiring a driver etc. may be claimed under such title. In the South African case Dickinson v Galante[8] it was held that a husband was entitled to recover the costs incurred by his wife when travelling to the hospital to minister to him.

In the District Court case of Samitha Samanmali v BMICH [9], the fact that she was a paraplegic due to the accident was used to claim damages for the cost of a hired vehicle and driver as she could not possibly rely on public transport for her travelling needs.

4.1.4) Loss of earnings

Loss of earnings would encompass deferred earnings, loss of profits and loss of future earnings.

Deferred earnings refers to income such as a pension or retirement gratuity which is lost or diminished because the service is curtailed.

In South Africa, a proprietor of a business may be entitled to claim the loss of profits sustained on behalf of his absence due to his injuries even though he might not be able to conclusively establish such loss[10].

A person whose ability to earn a living has been temporarily or permanently impaired due to his injuries, is entitled to claim damages representing the income he would have during his period of incapacity.

In computing such damages and the period for which such damage should be assessed, the Court would need to consider several aspects:

- The period during which it is expected the Plaintiff will live and his present age
- General health and physique of the Plaintiff before the accident

6 Swanepol v Parity Insurance Co. Ltd. (1963) 3 SA 819

7 7901-09 DMR

8 Dickinson v Galante (1939) 3 SA 1034,1044

9 Samitha Samanmali v BMICH (7901-09 DMR)

10 Sandler v Wholesale Coal Suppliers Ltd. 1941 A.D. 194

- The nature of his work
- The terms of his employment (if not self-employed)
- Normal age of retirement in the field of work of the Plaintiff
- Whether the Plaintiff has been totally or only partially disabled by the injuries sustained

Once the average annual income of the Plaintiff is established, an annuity calculation might be made upon the principle of compound interest or the present value formula[11]:

=

The capital invested (at the *x*% interest rate will yield a capital of at the end of *n* number of years.

In Samitha Samanmali v. BMICH, Rupees 50 million was awarded as damages for loss of future income of the Plaintiff, considering the fact that she was an exceptional student and considering her scope for career advancement had the accident not taken place.

However, it is accepted that it is virtually impossible to arrive at a precise calculation[12] due to such factors as:

- Errors concerning life expectancy and retiring age
- Likelihood of illness
- Probability of loss of employment
- Inflation or deflation of money
- Cost of transport to and from work
- Pension contributions and contributions to income tax etc.

Therefore, it would be upto the relevant Court to consider all circumstances involved and arrive at a fair and reasonable figure.

In Rosairo v. Basnayake[13], it was held that since the wife was not employed the trial Judge could not have awarded the relevant sum as being part of general damages resulting from the lost opportunity of employment caused through the wife of the plaintiff having to care for the husband.

4.2) NON-PECUNIARY LOSSES

Restitutio in integrum refers to restoration of an injured party to the situation which would

11 "Compensation for Road Accidents in Ceylon" Dr. A.R.B. Amerasinghe, Journal of Ceylon Law (Vol. 2, Dec. 1971)

12 Sigournay v Gillbanks, 1960(2) S.A. 552 (A.D.)

13 2011 1 SLR 34

have prevailed had no injury been sustained[14]. It is rather difficult to comprehend how this principle could be applied in instances where the loss cannot be ascertained in any particularly pecuniary manner.

Although the Lex Aquilia specifically aims to compensate patrimonial loss, there is no doubt that most of the harm sustained in personal injuries and fatal accidents are incalculable in terms of monetary value or arithmetical or logical basis.

As opposed to the recognition of the two actions by McKerron, Wille's Principles of South African Law[15] recognizes three types of actions available in law to a Plaintiff, namely;

1. the Actio Legis Aquiliae or Aquilian Action,
2. the Actio Injuriarum and
3. the Action for pain and suffering.

The fact that the action for pain and suffering or non-pecuniary loss happens to be a hybrid between the other two actions consisting of certain features of both and yet differing from both in certain aspects can be seen as the reason for this divergence.

With regard to the Aquilian action, the action for pain and suffering aspires to compensate damage or injuries negligently caused to one's person, however, there would be no pecuniary standing on which to assess such damage. On the other hand, the action also takes the nature of the Actio Injuriarum in that it aims to compensate non-patrimonial damages or sentimental loss caused by impairment of the Plaintiff's person. However, it would differ from the ordinary nature of an injuria, in that the *animus injuriandi* or **intention** to injure would not always be present in a claim for pain and suffering.

It is pertinent to note that such claims for pain and suffering by the injured person have traditionally been entertained under the Aquilian Action. Since very recently, under the law of our country, claims for pain and suffering **unless explicitly experienced by the injured person himself** could not give rise to an action in law. Therefore, his dependants did not have the option of claiming damages as *solatium* under this head since loss of consortium or companionship or the pain and suffering caused by loss of a loved one is not recognized by the Aquilian Action. This was apparent from the judgment in Union Government v. Warneke[16] which could be said to have had a major impact on delictual actions concerning similar situations in our country.

However, the very newly enacted Recovery of Damages for the Death of a Person Act, No. 2 of 2019, has given much anticipated statutory recognition to the recovery of damages for the death of a person **caused by a wrongful act, omission, negligence or default of another** and to provide for matters connected therewith and incidental thereto.

14 The Law Of Delict in Ceylon, E.B. Wckramanayake, 115

15 Wille's Principles of South African Law, 682

16 1911 A.D. 657

4.2.1) Computation of Damages

Neethling, Potgeiter & Visser[17] list several factors as considerations in computing the amount of the award:

- The extent of the harm (depending on the nature, intensity and duration of the harm
- The purpose of the award
- General considerations of equity
- Parity with previous awards

An interesting point to note is where the injured person is in an unconscious state at the time of litigation and whether an award should be made in such circumstances where the victim cannot appreciate (the harm or the compensation) in any way. In certain cases the essence of the harm is to be found in the conscious experience thereof. Therefore, pain and suffering and nervous shock can only exist if they are subjectively experienced. In Sigournay v. Gillbanks[18], it was held that if the Plaintiff was unconscious as a result of induced anaesthesia, he would be entitled to compensation, whereas if he was unconscious as a result of head injuries sustained he would not be entitled to such compensation.

This is in contrast to instances of loss of amenities of life, loss of life expectancy and disfigurement which can exist whether or not they are subjectively experienced.

4.2.2) Impairment of bodily integrity

Damages would be awarded according to the extent, gravity and duration of the injury[19], taking into account factors such as whether the loss is total or partial, or whether the disability is permanent or temporary etc.

Under this heading Dr. Amerasinghe sets out such injuries as fractures, deformities, loss of senses, cosmetic damages etc.

Rosairo V. Basnayake[20] took into consideration the plight of the plaintiff who lost his eye sight at the age of 44 years and it was held that sufficient compensation should be awarded for loss of comfort, pain of mind and the amount the plaintiff may have to incur to employ some one to care for him in future.

4.2.3) Pain and suffering

The function of the action for pain and suffering is the protection of certain physical and psychological personality interests: it aims at the compensation of negligently caused non-patrimonial loss associated with bodily injury; and in those cases where it is not possible to

17 At 204-7

18 1960 (2) S.A. 552 (A.D.) at 555-6

19 Sellers L.J. in Wise v Kaye (1962) 1 All E.R. 257

20 2011 1 SLR 42

actually compensate such loss, it aims at providing a solatium for the harm suffered[21].

Compensation is recoverable not only for pain and inconvenience already suffered, but also for the pain and inconvenience to be suffered in the future as held in Brown v. Bloemfontein Municipality[22].

In Jayakody v. Jayasuriya[23], it was held that there are really no scales by which pain and suffering can be measured and there is no relationship between pain and money. Court can only give a general equitable assessment.

4.2.4) Loss of the pleasures or amenities of life

Black's Law Dictionary refers to these types of damages also as "hedonic damages". These are damages claimed based on alleged detrimental alterations of a person's life or lifestyle or a person's inability to participate in the activities or pleasures of life that were formerly enjoyed[24]. They may be deprivations of taking part in the usual forms of recreation which the injured party has already suffered or may reasonably be expected to suffer in the future. It can be assumed that the generally healthy young adult may find it possible to claim more under this head as compared to an elderly person or a child[25].

4.2.5) Shortening of life

It may arise that in consequence of the injury suffered, the victim's chances of enjoying a full and complete life were considerably cut short. The thing to be valued is not the prospect of the length of days but the prospect of a predominantly happy life[26].

4.2.6) Disfigurement

Where the disfigurement is severe and leaves the injured person with such disfigurement that would affect him in his choice of profession and in his social life (particularly in contacts with the opposite sex) and also affect the development of his personality, damages may be awarded[27]. The Roman Dutch law tends to award such damages generally in conjunction with damages for pain and suffering and/or loss of amenities of life[28]. European jurisdictions have been held to grant damages for "aesthetic loss" encompassing humiliation and embarrassment involved where females whose prospect of marriage is diminished by such injury may be entitled to claim damages[29].

21 Wille's Principles of South African Law, 682

22 1924 OPD 226

23 2005 1 SLR 217

24 http://www.duhaime.org/LegalDictionary/L/LossofEnjoymentofLife.aspx

25 Bird v Cocking & Sons Ltd.(1951) 2 T.L.R. 1260

26 Rose v. Ford (1937) 3 All E.R. 359

27 Eggeling & Another v. Law Union and Rock Insurance Co. Ltd. 1958 (3) S.A. 592

28 Corbett & Buchanan, The Quantum of Damages in Bodily and Fatal Injury Cases, 42-43

29 International Encyclopedia of Comparative Law, Volume 1

4.2.7) Post-traumatic Neurosis or Nervous Shock

These are instances where someone has undergone a terrifying experience or been in any situation which causes extreme terror, fear or helplessness, for example being a victim in a violent assault or a witness to a traumatic situation such as a road traffic accident. It could cause a range of physical and psychological effects of which symptoms may include: flashbacks, nightmares, anxiety etc. If such a situation has affected a person's health and quality of life, compensation may be claimed.

In Priyani Soysa v. Arsecularatne[30], the Supreme Court restricted the recognition of damage resulting from mental/nervous shock to damage resulting from psychiatric illness and refused to view mere emotional shock as a ground for action.

However, it may be noted that shock suffered as a result of seeing or hearing injury to another person or as a result of the apprehension of such injury might be regarded as too remote a consequence of the negligence to found liability[31].

(5). PARTIES TO AN ACTION

5.1) PERSONS ENTITLED TO SUE

In a delictual action, the rights of several parties are recognized who may present a claim for damages due to the negligent or wrongful act of another:

Party	Reason for claim	Type of loss
Injured person himself	Bodily injuries Specific and prospective expenses Loss of income/future earnings	Patrimonial
Injured person himself	Pain and suffering Disfigurement Shortening of life Loss of amenities Nervous shock	Non-pecuniary
Executor of the estate of the deceased	Medical expenses Funeral expenses Loss of income prior to death	Patrimonial
Dependants	Loss of support	Patrimonial
Heirs and family members	Funeral expenses	Patrimonial

The quantum of damages may be assessed under two main areas

30 2001 2 SLR 293

31 Mulder v South British Insurance Co. Ltd. 1957 (2) S.A. 444

- **Compensation for bodily injury**

  In this instance the claimant would be

  → the injured person himself and he may claim under any of the heads previously elaborated as may befit the circumstances of the case

  → the family members incurring the expenses involved in the treatment of the injuries sustained by their loved one.

- **Compensation for death**

  In this case the claimant would be the dependants or loved ones of the deceased who had suffered death due to the wrongful act, omission, negligence or default of another. The claim would be for damages related to

  → the loss of that person's love, affection, care and companionship[32];

  → the mental pain and suffering suffered as a consequence of such loss[33]

  → loss of support caused as a result of the demise of their loved one

  → The executor of estate of the deceased would also be entitled to claim such expenses incidental to the death itself.

5.2) CLAIMS BY DEPENDANTS AND FAMILY MEMBERS

5.2.1) Patrimonial Loss

Wille's Principles of South African Law[34] sets out that in addition to the claim of the injured person a spouse or parent (or any other person who is obliged by law to support the injured person) who has paid the medical expenses of the injured person, or incurred additional household expenses due to his or her injury, may claim the **amount expended**; for in such an instance, the wrongdoer commits a delict against **both** the injured person and those obliged to support him or her[35].

However, where the **injured person dies** as a result of his injuries, it is a matter for consideration whether his right to claim survives him through his estate. The position today is that if the injured person had sued the Defendant and the stage of litis contestatio (close of pleadings) had been reached, the **whole of the claim** will be transferred to his estate. If that stage had not been reached **only the claim in respect of pecuniary loss** such as expenses and loss of earnings will accrue to his estate.

32 Recovery of Damages for the Death of a Person 1 Act, No. 2 of 2019

33 Recovery of Damages for the Death of a Person 1 Act, No. 2 of 2019

34 at page 677

35 Neethling, Potgeiter & Visser 231

5.2.2) Non-Patrimonial Loss

A dependant of the deceased may sue for **loss of support** caused by the death.

In Gaffoor v. Wilson[36] the indigence of the parent was considered a necessary factor in awarding such a claim to the mother of the deceased who successfully proved that she was dependent on the deceased child who had supported her through a sense of duty backed by filial love and affection.

Proof that the deceased child was capable of providing the required support would also be considered in dismissing the claim of the Plaintiff[37].

Claims for non-patrimonial damages (such as pain and suffering and disfigurement caused by the negligent act itself) were considered extinguished upon the death of the injured person[38]. These can **only** be claimed by the injured person himself according to the Lex Aquilia and do not provide a basis of claim by dependants as evident by such judgments as Union Govt. v. Warneke[39] and more recently, Prof. Priyani Soysa V. Rienzie Arsecularatne[40].

However, the Recovery of Damages for the Death of a Person 1 Act, No. 2 of 2019 has been enacted to address the sentimental loss caused by the death of a person due to another's negligent and wrongful act.

The right of a spouse to claim a *solatium* for loss of consortium (in addition to patrimonial loss) was recognized by our Courts in Attorney General v. Smith[41] in 1907. However, this seems to be the only such instance where an award was made for non-pecuniary loss to a spouse/family member.

It may be noted that both A.G. v. Smith and Union Govt. v. Warneke were contemporaneous cases and that that the latter case could in no way have been followed by the former. The fact that the judgment in AG v. Smith was awarded by English Judges who may not have had much exposure or regard for the principles of Roman Dutch Law as the residuary law of our land may have resulted in the discrepancies existent in the said judgment. Two reasons make this judgment incompatible with the Roman Dutch Law:

- The award of damages for mental distress or wounded feelings (causing no physical injury) is not recognized by the effect of the Law of Holland even though it may have been allowed under the Roman Law[42].

36 (1990) 1 SLR 142

37 "Compensation for Road Accidents in Ceylon" Dr. A.R.B. Amerasinghe, Journal of Ceylon Law (Vol. 2, Dec. 1971)

38 *Ibid*

39 1911 A.D. 657

40 (2001) 2 SLR 293

41 (1907) 10 NLR 263, (1905) 8 NLR 229

42 As per Justice Dheeraratne in Prof. Priyani Soysa v. Rienzie Arsecularatne 2001 2 SLR 303,304

- The RDL does not recognize the claim of a husband to the loss of earnings made by his wife (in their business) unless required as necessary for the maintenance of the common household[43].

In Union Govt. v. Warneke[44], it was held that a husband who has shown that he suffered pecuniary loss through being deprived of the assistance and services of his wife in the care and upbringing of his children can claim damages against a person who negligently caused her death.

The new Act statutorily gives recognition to the claim for sentimental damages by several parties: (a) the spouse; (b) a parent or the parents jointly; (c) a child or the children jointly; (d) a sibling or the siblings jointly; (e) a grandparent or the grandparents jointly; or (f) the guardian.

5.3 WHO MAY BE SUED

Any person who wrongfully and negligently causes harm to another may be sued in delict. In simpler cases a single wrongdoer may be sued but in certain instances, joint wrongdoers may be liable.

Persons who cause harm by ordering, commanding, authorizing, instigating and advising or aiding another person[45] to commit a delict are liable under the maxim: ***Qui facit per alium facit per se*** which means, "He who acts through another does the act himself."

In addition the law also recognizes the principle of **vicarious liability** where certain natural or juristic persons may be liable for the actions of others, as in the following relationships:

- Employer and employee
- Principal and agent
- The owner of a motor vehicle and the person driving it with the owner's permission
- The insurer and the insured

In Nilmini Dhammika Perera v. Nalinda Priyadarshana[46], the vicarious liability of the owner of the vehicle was established, although it was apparent that the wrongful act was committed by her driver and her husband in the said vehicle.

CONCLUSION

However much the law provides for damages to be claimed under various instances, it remains an invariable and unfortunate aspect of the Sri Lankan legal system that remedies provided by the Courts tend to get unduly delayed, causing the claimants much hardship and distress

43 R.G. McKerron, Law of Delict, page 150

44 1911 A.D. 657

45 Wille's Principles of South African Law, 678

46 2013 1 SLR 155

on top of the harm or losses already sustained. After a tedious and long litigation process, the damages finally awarded may be a trifling compared with the damage they have already actually endured in most cases.

It would be prudent to make necessary adjustments to the substantive and procedural aspects of the law to expedite the granting of justice to injured persons or dependents of deceased who were victims of negligence. After all, justice delayed is justice denied.

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පරිවාස සේවාවේ ආරම්භය ඉංග්‍රීසි පාලනයේ මධ්‍ය කාලය දක්වා විහිද යන අතර එහි පියා ලෙස ඇමරිකානු ජාතික ජෝන් ඔගස්ටන් මහතා හඳුනා ගත හැක.

ශ්‍රී ලංකාවේ පරිවාස සේවාව ආරම්භ වනුයේ ශ්‍රී ලංකාවේ බාල අපරාධ කරුවන් පුනරුත්තාපනය කරන 1886 අංක 01 දරන බාල අපරාධ කරුවන්ගේ ප්‍රඥප්තිය මගිනි. පසුව 1944 නොවැම්බර් මස 16 වන දින වරදකරුවන් පරිවාස භාරයේ තැබීමේ ආඥාපනත ප්‍රකාශයට පත් විය.

1956 ඔක්තෝම්බර් මස 1 වන දින විශ්ව ළමා දිනයේදී ආරම්භ කරන ලද පරිවාස හා ළමා රක්ෂක සේවා දෙපාර්තමේන්තුව පිහිටුවීමත් සමඟ එය දීප ව්‍යාප්ත සේවාවක් බවට පත්විය.

1988 වර්ෂයේ 13 වන ව්‍යවස්ථා සංශෝධනයෙන් පසුව මධ්‍යම රජය යටතේ පැවති මෙම සේවාව පළාත් සභා විෂයක් වශයෙන් පළාත් සභා 9 තුලම ක්‍රියාත්මක වීම සිදු විය.මේ වන විට සෑම පළාතකම අධිකරණ කොට්ඨාස මට්ටමින් පරිවාස සේවාව ක්‍රියාත්මක වන බව සඳහන් කල හැක.

පරිවාස සේවාව ප්‍රධාන ආඥාපනත් 8 ක් මුල් කරගෙන ක්‍රියාත්මක වන සේවාවක් බව අනාවරණය වන අතර එම ආඥාපනත් පහත පරිදි වේ.

(1) 1939 අංක 48 දරන ළමයින් හා යෞවනයන් පිළිබඳ ආඥාපනත

(2) 1944 අංක 42 දරන වරදකරුවන් පරිවාස භාරයේ තැබීමේ ආඥාපනත

(3) 1941 අංක 22 දරන අනත්දරු නිවාස ආඥාපනත

(4) 1939 අංක 28 දරන තරුණ වරදකරුවන්ගේ අභ්‍යාස විද්‍යාල ආඥාපනත

(5) 1941 අංක 24 දරන දරුවන් කුලවද්දා ගැනීමේ ආඥාපනත

(6) 1907 අංක 5 දරන රැඳවුම් නිවාස ආඥාපනත

(7) අයාල ආඥාපනත

(8) දඩ මුදල් ආඥාපනත

පරිවාස සේවාවෙහි සෘජුවම බලපාන ආඥාපනතක් ලෙස ළමයින් හා යෞවනයන් පිළිබඳ ආඥාපනත සහ වරදකරුවන් පරිවාස භාරයේ තැබීමේ ආඥාපනත සැලකිය හැක.

1939 අංක 48 දරන ළමයින් හා යෞවනයන් පිළිබඳ ආඥාපනත ළමා අධිකරණ පිහිටුවීමට අදාල ප්‍රතිපාදන සහිත , ළමා වරදකරුවන් අධීක්ෂණයට, ළමා හා තරුණ පුද්ගලයන්ගේ ආරක්ෂාවට සහ එම කරුණු හා සම්බන්ධ අනෙකුත් අරමුණු සඳහා වූ ආඥාපනතකි.මෙය ප්‍රධාන වශයෙන් කාණ්ඩ 6කට බෙදා ඇත.ඉන් පලමු කාණ්ඩ 3 වැදගත් වේ. 1 වන කාණ්ඩයෙන් ළමා අධිකරණ පිහිටුවීම , ළමා අධිකරණ සතු විනිශ්චයාධිකරණ බලතල හා ළමා අධිකරණ තුල නඩු පටිපාටිකරණය දක්වයි. 2 වන කාණ්ඩයෙන් ළමා හා තරුණ පුද්ගලයන් හා සම්බන්දයෙන් වූ සියලූ අධිකරණ සඳහා අදාල වන විශේෂිත ප්‍රතිපාදන දක්වයි. එහි 3 වන කාණ්ඩයෙන් රැඳවුම් නිවාස, අනුමත කල පාසල්, සහතික කල පාසල් හා ළමා හා තරුණ පුද්ගලයන්ගේ ආරක්ෂාව පවරන පුද්ගලයන් පිළිබඳව දක්වයි..

ආඥාපනතේ 1 වන උපලේඛනයෙන් එම ආඥාපනතේ විශේෂිත විධිවිධාන අදාල වන ළමුන් හා තරුණ පුද්ගලයන්ට එරෙහිව යෙදෙන වැරදි දක්වයි.

- දණ්ඩ නීති සංග්‍රහයේ 308 /360 වගන්ති යටතේ එන ඕනෑම වරදක්
- දණ්ඩ නීති සංග්‍රහයේ 296,297,343,345,357,360(අ),364(අ),365,365(අ) යටතේ එන ළමයෙකුට හෝ තරුණ පුද්ගලයෙකුට එරෙහිව කරන ඕනෑම වරදක්
- ආඥාපනතේ 71,72,73,74 වගන්ති යටතේ එන වැරදි
- ළමයෙකුට හෝ තරුණ පුද්ගලයෙකුට ශාරීරික හානියක් කරන ඕනෑම වරදක් එයට ඇතුලත් වේ.

පනතේ 10(2) වගන්තියට අනුව වරදකාරී බව සෙවීමේදී ළමයා හෝ තරුණ පුද්ගලයා සමඟ ගනුදෙනු කල යුත්තේ කෙසේද යන්න තීරණයට පරිවාස නිලධාරිවරයෙකුගෙන් සැපයෙන තොරතුරු සැලකිල්ලට ගැනේ.පනතේ 17 වන වගන්තියට අනුව ළමයෙකු හෝ තරුණ පුද්ගලයෙකු කලා යැයි හැඟෙන වරදක් සම්බන්දයෙන් මහේස්ත්‍රාත් අධිකරණයක් හෝ ළමා අධිකරණයක් ඉදිරියට ගෙන එන විට හෝ ඔහු භාරය හා ආරක්ෂාවේ අවශ්‍යතාවයක සිටින විට පොලිස් ස්ථානාධිපතිවරයා විසින් ඔහුව රැගෙන එන දිනය , වේලාව, චෝදනාවේ ස්වභාවය පිළිබඳ එම අධිකරණ බල සීමාවේ පරිවාස නිලධාරියාව දැනුවත් කල යුතුය. එවන් දැනුම් දීමක් ලබන පරිවාස නිලධාරියෙකු පරීක්ෂණයක් සිදු කර එම ළමයා හෝ තරුණ පුද්ගලයාගේ නිවසේ පරිසරය, පාසල් වාර්තා, සෞඛ්‍ය, චරිතය පිළිබඳ ඔහුට හැඟෙන දේ සඳහන් කර අධිකරණයට මඟ පෙන්විය යුතුය.

38 වගන්තියට අනුව අධිකරණයක් මෙම ආඥාපනතේ විධි විධාන යටතේ ළමයෙකු හෝ තරුණ පුද්ගලයෙකු පරිවාස නිලධාරියෙකුගේ අධීක්ෂණය යටතේ හෝ වෙනත් සුදුසු පුද්ගලයෙකු යටතේ තැබීමට නියෝග කල විට ඔහුව අධීක්ෂණයට යා යුතුය. අධිකරණයට වාර්තා ඉදිරිපත් කළ යුතුය

1944 අංක 42 දරන වරදකරුවන් පරිවාස භාරයේ තැබීමේ ආඥාපනතේ 3 වන වගන්තියෙහි පරිවාස නියෝගයක් නිකුත් කිරීම පිළිබඳ විධිවිධාන ඇතුලත් වේ. එම ආඥාපනතේ 4(අ) වගන්තියට අනුව පරිවාස නියෝගයක් නිකුත් කිරීමට පෙර අදාල අධිකරණ බල ප්‍රදේශයේ පරිවාස නිලධාරිවරයා විසින් ලිඛිතව හෝ වාචිකව අධිකරණයට සපයන චරිතය පිළිබඳ තොරතුරු,

පූර්ව චරිතය, පරිසර තත්ව, මානසික හෝ කායික තත්ව පිළිබඳ තොරතුරු සැලකිල්ලට ගැනේ. 4(ආ) වගන්තියට අනුව පරිවාස කොමසාරිස්වරයාගෙන් ද වාර්තාවක් කැඳවීමට අවස්ථාව ඇත. 5(අ) අනුව පරිවාස නියෝගයකින් පැය 24 ඇතුලත නියෝගයේ සඳහන් කර ඇති ස්ථානයකදී අධීක්ෂණයට පත් කර ඇති පරිවාස නිලධාරියා ඉදිරියේ පෙනී සිටිය යුතුය. 5(ආ) අනුව පරිවාස නිලධාරියා සඳහන් කරනු ලබන අවස්ථා වලදී ඔහු ඉදිරියේ පෙනී සිටිය යුතුය. 5(ඇ) අනුව පරිවාස නිලධාරිවරයා විසින් අනුමත කල පරිශ්‍රයක විසිය යුතුය. 5(ඈ) අනුව පූර්ව ලිඛිත අනුමැතියක් නොමැතිව ජීවත්වන ස්ථානය හෝ රැකියාව වෙනස් නොකල යුතුය. 5(ඉ) අනුව පූර්ව පූර්ව ලිඛිත අනුමැතියක් නොමැතිව කිසිදු ක්‍රමානුකූල රැකියාවක් භාර නොගත යුතුය. 5(ඊ) අනුව පූර්ව පූර්ව ලිඛිත අනුමැතියක් නොමැතිව වෙනත් පුද්ගලයෙකු ඇසුරු නොකල යුතුය. 5(උ) අනුව යහපත් පැවැත්ම තහවුරු කිරීමට පරිවාස නිලධාරිවරයා විසින් ලබා දෙන සියලූ නියෝග වලට කීකරු විය යුතුය.

ආඥාපනතේ 9 වන වගන්තියට අනුව කොමසාරිස්වරයා හෝ පරිවාස නිලධාරියෙකු විසින් අධිකරණයට ඉදිරිපත් කරනු ලබන අයැදුමක් මත පරිවාස කාලය දීර්ඝ කල හැක. නමුත් එය වසර 3 ක් නොඉක්මවිය යුතුය.

ළමුන් හා යෞවනයන් පිළිබඳ ආඥාපනතේ 34(1) ඈ වගන්තියට අනුව බාල අපරාධ කරුවෙකුට දඩුවමක් ලෙස අවම වසර 1 ක් හෝ උපරිම වසර 3ක් දක්වා පරිවාස සුදුසු පුද්ගල අධීක්ෂණ නියෝග යක් පැනවීමට මහේස්ත්‍රාත්වරයෙකුට හැකියාව ඇත.එම නියෝගයේ අධීක්ෂණ නිලධාරියා ලෙස අදාල පරිවාස නිලධාරියා කටයුතු කරයි. විවෘත පරිසරයේ සුදුසු පුද්ගලයෙකුට ඇප මත භාර දී වරදකරු පුනරුත්තාපනය කිරීම මෙමඟින් සිදු කෙරේ. එහෙත් වරදකරු විවෘත පරිසරයේ සුදුසු පුද්ගලයෙකු භාරයේ ඇප මත තැබීමට අපහසු අයෙකු නම් හෝ ඇප මත භාර දී මට කිසිවකු නොමැති නම්, සිටින භාරකරුවන් වරදකරු භාර ගැනීම ප්‍රතික්ෂේප කරන්නේ නම් වරදකරු පරිවාස හා ළමා රක්ෂක සේවා දෙපාර්තමේන්තුව යටතේ පවතින රජයේ සහතික කල පාසලකට වසර 3 ක සහතික කල පාසල් නියෝගයක් යටතේ ඇතුලත් කිරීමට මහේස්ත්‍රාත්වරයෙකුට නියෝග කිරීමට හැකියාව පවතින බව සඳහන් කල හැක. සහතික කල පාසලකට ඇතුලත් කල වරදකරු යහපත් කල් ක්‍රියාවෙන් යුතුව අදාල පුනරුත්තාපන ක්‍රියාවලියේ යෙදී සිටින්නේ නම් පරිවාස හා ළමා රක්ෂක සේවා කොමසාරිස් ,අදාල පාසලේ පාසල්පති හා අදාල පරිවාස නිලධාරි ඇතුලත් කමිටුවක් මගින් ගරු අධිකරණය වෙත ඉදිරිපත් කරනු ලබන කමිටු නිර්දේශයක් මත වරදකරුට වසර 1 කින් කාල පූර්ව නිදහසක් ලැබීමට හැකියාව ඇත. එහෙත් ඔහු ගේ ඉතිරි වසර 1 ක කාලය අදාල පරිවාස නිලධාරිගේ අධීක්ෂණයට යටත් වන බව සඳහන් කරමි. වරදකරුවකු වසර 3 ක සහතික කල පාසල් නියෝගය සම්පූර්ණ කරන්නේ නම් ඔහු යහපත් පුරවැසියෙක් ලෙස ජීවිතයේ ඉදිරි කාලය යහපත් ලෙස ගත කිරීමට අවශ්‍ය සුදුසු වෘත්තීය පුහුණුවක් ලැබූ අයෙකු බවට පත් වීමට හැකියාව ඇත.

වරදකරුවන් පරිවාස භාරයේ තැබීමේ ආඥාපනතේ 3(1) වගන්තිය යටතේ බාල අපරාධ කරුවන් මෙන්ම සියදිවි හානි කර ගැනීමට තැත් කිරීම වැනි ඇතැම් වැඩිහිටි වරදකරුවන් ද අවම වසර 1 ක් හා උපරිම වසර 3ක් පරිවාස භාරයේ අධීක්ෂණයක් යටතේ තැබීමට මහේස්ත්‍රාත්වරයෙකුට නියෝග කල හැක. විවෘත පරිසරයේ ඇප කරුවකු භාරයේ වරදකරු මෙමඟින් පුනරුත්තාපනය කෙරේ. එහි අධීක්ෂණ නිලධාරියා ලෙස අදාල පරිවාස නිලධාරිවරයා කටයුතු කරයි.

කිසියම් බාල අපරාධ කරුවකු ළමයින් හා යෞවනයන් පිළිබඳ ආඥාපනත යටතේ පනවන ලද සුදුසු පුද්ගල පරිවාස අධීක්ෂණ නියෝගය කඩ කරන්නේ නම් පරිවාස භාරයේ සිටියදී අදාල පරිවාස කොන්දේසි කඩ කරන්නේ නම් වරදකරු වයස අවුරුදු 16-22 අතර අයෙකු නම්

ඔහුට දඩුවමක් ලෙස තරුණ වරදකරුවන්ගේ අභ්‍යාස විද්‍යාලයට ඇතුළත් කිරීමට අදාල පරිවාස නිලධාරිගේ නිර්දේශ මත නියෝගයක් කිරීමට මහේස්ත්‍රාත්වරයෙකුට හැකියාව ඇත.

දිවයින පුරා අධිකරණ කොට්ඨාස මට්ටමින් පවත්වාගෙන යන පරිවාස කාර්යාල මඟින් බාල අපරාධ කරුවන් මෙන්ම වැඩිහිටි අපරාධකරුවන්ද පුනරුත්තාපනය කිරීම ඉහළ අගයක් ගනී. එම නියෝග තුලින් වරදකරුවකු කිසිදු ශාරීරික හෝ මානසික පීඩාවකට ලක් නොවන තත්ත්වයක් පවතින බව සඳහන් කරන අතර මෙම දඩුවම් ක්‍රමය තුලින් වරදකරුවන්ට සිය වැරදි නිවැරදි කර ගැනීමට නිසි මඟපෙන්වීම හා සිය ආකල්පමය වෙනස් වීමකට ලක්ව වරදකරුවන් යහපත් පුරවැසියන් බවට පත් වීම සිදු වන බව සඳහන් කරමි.

Inter-University Essay Competition (First Place)

இஸ்லாமும், சுற்றாடல் பாதுகாப்பும்

இஸ்லாமிய மார்க்கமானது முழு மனித குலத்திற்குமான ஓர் வாழ்கை வழிகாட்டி என்ற வகையில் வெனுமனே அது வணக்க, வழிபாடுகளையும், சடங்குகளையும் மட்டும் வலியுறுத்தாமல் ஏனைய பல இதர விடயங்களையும் போதிக்கின்றது.சமூகப்பணி புரிவதை இபாதத்தாக வலியுறுத்தும் இஸ்லாமானது ஓர் அடியான் அல்லாஹ்விற்கு செய்ய வேண்டிய கடமைகளை போன்றே ஏனைய மக்களுக்கும், ஜீவராசிகளுக்கும் செய்ய வேண்டிய கடமைகளும் நிறைய உள்ளன இவற்றைப் பரிபூரணமாக நிறைவேற்றுவதன் மூலமே இம்மை, மறுமை ஆகிய ஈருலகிலும் ஒரு மனிதனால் வெற்றி பெறலாம். இதன் அடிப்படையில் சுற்றாடலைப் பாதுகாபப்து குறித்தும் சன்மார்க்கம் அழகிய முறையில் போதிக்கின்றது.

படைப்புகள் அனைத்தும் அல்லாஹ்வின் பராமரிப்பில் உள்ளனவே. மண்ணில் உள்ளவற்றுக்கு

அன்பு காட்டுங்கள் விண்ணில் உள்ளவன் உங்கள் மீது இரக்கம் காட்டுவான் "(அபூ தாவுத்) இதன் படி இஸ்லாம் கற்றுத்தரக் கூடிய அன்பு காட்டுதல் என்ற வட்டத்தினுள் நாம் வாழக்கூடிய , எம்மைச் சூழவுள்ள சுற்றாடலைப் பேணிப் பாதுகாத்து பராமரிப்பது அடங்கும்"

சுத்தம் ஈமானின் பாதி (முஸ்லிம்-328) என்பதை வலியுறுத்தும் இஸ்லாமானது சுற்றாடலைச் சுத்தமாகவும், அழகாகவும் வைத்திருக்குமாறும் எமது இயற்கைச் சூழலைப் பேணிப் பாதுகாக்குமாறும், அதனை வளப்படுத்துமாறும் போதிப்பதுடன் மூலம் தானும் பயன் பெற்று

பிறகும் பயன்பெற வழியமைத்துக் கொடுக்குமாறு பணிக்கின்றது. இவ்வகையில், "சுற்றாடல் பாதுகாப்பு" என்பது இஸ்லாம் எமக்கு வலியுறுத்தும் மிக முக்கிய பணிகளுள் ஒன்றாகும்.

"நன்மையான விடயல்களிலும், இறைவனைப் பயந்து கொள்ளும் விடயங்களிளும் நீங்கள் ஒருவருக்கொருவர் உதவி செய்து கொள்ளுங்கள்" (5:2) என்பதுனூடாக எமது சுற்றாடலைப் பாதுகாப்பதையும், அதற்குரிய முயற்சிகளில் ஈடுபடுவதையும் நன்மையான விடயமாகக் கருதலாம் ஒரு மனிதன் தன்னைச் சூழவுள்ள சூழலைப் பாதுகாத்துப் பராமரிப்பதனூ டாக அவன் மட்டுமன்றி ஒட்டு மொத்த மனித சமூகமும் நன்மையையே பெறுகின்றது. இவ்வுலகில் அல்லாஹ் அவனது பிரதிநிதியாக மனிதனைப் படைத்து பல பொறுப்புக்களை வழங்கியுள்ளான். ஊலகில் நாம் எவற்றையெல்லாம் பயன்படுத்துகின்றோமோ அவற்றுக்கு எல்லாம் மறுமையில் நிச்சயம் பொறுப்புக் கூற வேண்டும். அது பற்றி விசாரிக்கப்படுவோம்.

"நீங்கள் ஒவ்வொருவரும் பொருப்பாளர்கள் உங்கள் பொறுப்பு பற்றி நிச்சயம் விசாரிக்கப்படுவீர்கள் "(முஸ்லிம்) என்ற நபிபொழி நோக்கத்தக்கது .

இஸ்லாம் எல்லா நற்காரியங்களையும் ஈமானுடன் தொடர்புறுத்துவதால் மனிதர்களுக்கு அதன் மூலம் பயிற்சியளிக்கிறது. "நம்பிக்கை கொண்டு நல்லறம் புரிவோருக்கு அழகிய கூலியுண்டு" (18:88) என்ற அல்குர்ஆன் வசனமும் குறிப்பிடத்தக்கது. எமது சூழலைப்

பேணி அதனை ஏனையோருக்கும் உரியவாறு அமானிதமாகக் கையளிக்க வேண்டியது நம் ஒவ்வொருவரினதும் பொறுப்பாகும்.

இருபத்தியோராம் நூற்றாண்டில் இயந்திர யுகத்தில் வாழ்ந்து கொண்டிருக்கும் எம் மத்தியல் சுற்றாடல் எந்தளவுக்கு பேணப்படுகின்றது என்பதை நோக்கின் அதன் நிலை தினந்தினம் கேள்விக்குறியாகிக் கொண்டு செல்வதைக் காணலாம். இயந்திரங்கள்,

தொழிற்சாலைகள் என்பவற்றுடன் மனிதனின் வாழ்வியல் நடைமுறையில் ஏற்பட்டுள்ள மாற்றங்கள் எமது சுற்றாடலை வெகுவாகப் பாதிக்கின்றன. “வானங்கலையும், பூமியையும், அவற்றுக்கு இடைப்பட்டவற்றையும் விளையாட்டுக்காக நாம் படைக்கவில்லை. தக்க காரணத்துடன் தவிர, அவ்விரண்டையும் நாம் படைக்கவில்லை. எனினும், அவர்களில் பொறும்பாலானோர் அறியமாட்டார்கள்.” (44:38,39) என்ற அல்குர்ஆன் வசனம் மிகவும் பொருத்தமானது. ஏனெனில், தற்கால நடைமுறையில் பலர் இதற்கு முரணாகவே செயற்படுகின்றனர். எம்மைச் சூழவுள்ள சுற்றாடலில் நாம் மட்டும் வாழ்ந்தால் போதாது. இன்ன பிற பறவைகளும், விலங்குகளும் , பூச்சியினங்களும் அதே போல, தாவர, செடி, கொடிகள் உள்ளிட்ட யாவும் நிலைத்து இருப்பதற்கான வழிவகைகளை நாம் செய்ய வேண்டும். இன்றைய அரசுகள் சுற்றாடல் பாதுகாப்பு பற்றி மாநாடுகள், வேலைத் திட்டங்களை மேற்கொண்டாலும் ஒவ்வொரு தனிநபரும் மாறாத பட்சத்தில் எம் நோக்கம் வெற்றியளிக்காது. ஒவ்வொருவரும் எமது பூமியின் இயற்கைத் தன்மையை பாதுகாத்து எதிர்கால சந்ததியினருக்கு உரிய முறையில் கையளிப்பது எமது தார்மீகப் பொருப்பு என்பதை உணர வேண்டும்.

சுற்றுச் சூழலைப் பாதுகாப்ப குறித்த விழிப்புணர்வை உலகளாவிய

ரீதியில் மக்களுக்கு ஏற்படுத்தும் வீதமாக ஜூன் மாதம் 5 ம் திகதி ‘உலக சுற்றுச் சூழல் தினம்’ கொண்டாடப்படுகின்றது. இஸ்லாமிய பார்வையில் எமது கட்டுரைத் தலைப்பான் சுற்றாடல் பாதுகாப்பு குறித்து மேலும் நோக்கின், தற்போது சிலர் தமது செயற்பாடுகளினால் அவர்களைச் சூழவுள்ள சுற்றாடலை மாசு படுத்திவருகின்றனர் இதனால் முழு சமூதாயமும் இன்னலை எதிர்

நோக்குகின்றது. “எருடைய செயல்களிலிருந்து மற்றவர்கள் பாதிக்கப்பட மாட்டார்களே அவரே முஸ்லிம்களில் சிறந்தவர்” (முஸ்லிம் - 57) என நபி (ஸல்) அவர்கள் கூறினார்கள். அத்துடன், இஸ்லாமானது “தீயதைக் கண்டால் கரத்தால் தடுங்கள் அல்லது நாவினால் தடுங்கள் அதுவும் முடியாவிட்டால் மனதால் வெறுத்தொதிக்கிவிடுங்கள்” (முஸ்லிம்-71) என்ற நாயதின் பொன்மொழிக்கேற்ப, சுற்றாடல் பாதிப்படைவதைக் கண்டால் அதனை வேடிக்கை பார்காமல் தடுக்க முயற்சி செய்ய வேண்டும். தவறான நடவடிக்கைகளை சுட்டிக்காட்ட வேண்டாம். யாரை பாதித்தால் நமக்கென்ன என்று ஒரு முஸ்லிம் இருந்துவிடக் கூடாது. “இஸ்லாம் என்றால் பிறர் நலன் நாடுவதே” (முஸ்லிம் - 82) அது மட்டுமன்றி, “மக்களுக்கு இடையூரு ஏற்படுத்தும் பொருட்களை பாதையிலிருந்து அகற்றுவதும் தர்மம்” (புஹாரி - 2989) என பெருமானார் (ஸல்) நவின்றுல்லார்கள். எனவே, இஸ்லாமியக் கண்ணோட்டத்தில் நாம் எமது சுற்றாடலைப் பாதுகாத்து இந்த பூமியில் ஓர் உயிரை வாழ வைப்பது பூமியிலுள்ள எல்லா உயிர்களையும் வாழ வைப்பதற்கு சமன் என இறைவன் பின்வருமாறு கூருகின்றான். “நிச்சயமாக எவன் ஒருவன் கொலைக்குப் பதிலாகவோ அல்லது பூமியில் ஏற்படும் குழப்பத்தை தடுப்பதற்காகவோ அன்றி, மற்றொருவனைகக் கொலை செய்கிறானோ

அவன் மனிதர்கள் யாவரையும் கெலை செய்தவன் போலாவான். மேலும், எவரெருவர் ஓர் உயிரை வாழ வைக்கிறாரோ. அவர் மக்கள் யாவரையும் வாழவைப்பவறைப் போலாவார்" (5:32) என்பது குறிப்பிடத்தக்கது ஆகவே, எமது பொருப்பையுணர்ந்து அதற்கேற்றவாரு செயற்படுவது எமது கடமையாகும்

இஸ்லாமும், சுற்றாடல் பாதுகாப்பும் என்ற இக்கட்டுறையை நகர்த்தி செல்லுகையில் அடுத்த கட்டமாக இஸ்லாமிய வரலாற்றில் எவ்வாறு சூழல் பராமரிப்பு காணப்பட்டது என்பதை நோக்கலாம். சூழல் பாதுகாப்பிற்காக வரலாற்று ரீதியில் எடுக்கப்பட்ட சில நடவடிக்கைகளை அவதானிக்கும் போது வியப்படையாத உள்ளங்களை இழுக்க முடியாது...

"ஈராக்கில் யூப்ரடீஸ் நதிக்கரையில் ஆட்டுக் குட்டி தடுக்கி விழுந்தாலும் அதற்கு நான் பொறுப்பாவேன் எனக்கூறிய உமர் (ரழி) அவர்களின் வார்த்தை இயற்கை வளங்களில் கொடுக்கப்படடுள்ளது என்பதை சுட்டுகாட்டுகின்றது. அது தவிர, கலீபா உமர் இப்னு அப்துல் அஸீஸ் அவர்கள் ஒட்டகங்களின் முதுகில் குறிப்பிட்ட அளவை விடக் கூடுதலாக பொதி சுமத்தக் கூடாது. எனத் தடை விதித்தமையும் நோக்கத்தக்கது.

இவை தவிர, பண்டய காலத்தில் பேக்கரிகளின் கூரை உயரமாகவும் , உலை அடுப்புக்களின் துளை புகை வெளியருமளவுக்கு பெரிதாகவும், மக்களுக்கு அசௌகரியங்களை கொடுக்காத வகையில் இருக்க வேண்டுமெனவும் நுகர்வோர் பாதுகாப்புப் பிரிவினால் சட்டம் இடப்பட்டிருந்தமையையும் காணலாம் சுத்தம், சுகாதாரம், மக்கள் நலன் என்பன சூழல் பாதுகாப்பில் எவ்வளவு முக்கியமானது என்பதை இஸ்லாமிய ஆட்சியாளர்கள் மிகுந்த கரிசனையோடு நடைமுறைப்படுத்தியுள்ளமைக் காணலாம்.

சுற்றாடல பாதுகாப்பு தொடர்பான கருத்தேற்பை ஒழுக்ககப் பண்பாட்டுடன் தொடர்புருத்தி நோக்குவோமானால், சிலர் நல்ல ஒழுக்கங்களை கடைபிடிக்காது தீய பல செயல்களில் ஈடுபட்டு தமக்குத்தாமே சேதத்தை விளைவித்துக் கொளகின்றனர். இதற்கு உண்மையான காரணம் அவர்களிடம் சீரய நம்பிக்கைகள் உருவாக்கப்படாமையும், சிறந்த நெறிப்படுத்தலுக்கு உட்படாமையையும் குறிப்பிடலாம் மனிதன் எப்போதெல்லாம் இறைவழிகாட்டல்களை மீறி அதற்கு முரணாக செயற்படுத்துகின்றானோ அதன் போதெல்லாம் இயற்கை சீற்றம் கொள்கின்றது. அவனது பாவச் செயல்கள் சூழல் சீர்கேட்டுக்கு அமைகின்றதென குர்ஆனும் பல்வேறு இடங்களில் 'ரிவாகப் பேசுகின்றது. ஒரு மனிதன் சீரய பழக்கமுள்ள நல் மனிதனாக வாழ் முனைவது அவனுக்கு மட்டும் நன்மை பயக்கும் விடயமன்று அது அவன் சூழல் பாதுகாப்பிற்கு செய்யும் தொண்டாகும்.

இறைவன் படைத்த இயற்கையின் நியதிகளை மாற்றும் வகையில் தொழிற்படுவது, ஆசிரியர்கள் செய்வது, ஆட்சி அதிகாரம் கிடைக்கப்பெற்றவர்கள் சர்வாதிகாரமாக செயற்படல், மனோ இச்சைக்கு அடிமைபடல் மற்றும் இறைவனின் கொடைகளுக்கு நன்றி செலுத்த மறந்து நன்றி மறந்த வாழ்வு ஒன்றை வாழ்வது என்பன ஒழுக்கமற்ற வாழ்வியல் முறையாகும் இவற்' றினாலேயே இயற்கையாக எம்மைச் சுற்றியுள்ள சூழல் சீர்கெடுகின்றது என வலியுறுத்தியுள்ளான். இதற்கு அல்குர்ஆன் கூறியுள்ள சில 'உதாரணங்களையும் குறிப்பிடலாம் அதாவது, முன்னைய சமூகங்களான ஆத், சமூத் கூட்டம் அழிக்கப்பட்ட வரலாறும், பிர்அவ்னின் சாம்ராஜ்யம் அழிந்து போன கதையும் பௌதீக சூழலின் சீர்கேட்டுக்கான சிறந்த எடுத்துக்காட்டுகளாகும். ஆகவே, ஒழுக்க நீதியான வாழ்வை ஒவ்வொரு மனிதனும் வாழ்வது சூழலை பாதுகாக்க இன்றியமைந்த ஓர் விடயமாகும்.

“மனிதர்களுக்குத் தொல்லை தரும் தெருவில் கிடக்கும் பொருட்களை அகற்றுவது ஈமானின் கிளையில் உள்ளதாகும்” (முஸ்லிம் - 58) என நபிகளார் கூறியுள்ளதும் குறிப்பிடத்தக்கது....

இக்கட்டுரையை மேற்கொண்டு நகர்த்திச்செல்ல அடுத்த கட்டமாக இஸ்லாமிய ரீதியான சுற்றாடல் பாதுகாப்பு என்பதை நான் பல உபதலைப்புக்களின் கீழ் விளக்க முனைகிறேன் அவ்வகையில், முதலாவதாக இயற்கையை பாதுகாத்தல் என்பதை எவ்வாறு இஸ்லாம் அதன் சீரிய போதனைகள் மூலம் எமக்கு உபதேசிக்கின்றது என்பதை பின்வருமாறு நோக்கலாம்.

1. இயற்கையைப் பாதுகாத்தல்

நாம் வாழும் மார்க்கத்தை வெறும் ஆறே நாட்களில் எவ்விதக் குறைகளுமின்றிப் படைத்த அல்லாஹ் அதனை நாம் எவ்வாறு வழி நடாத்த வேண்டும் என்பதற்குமான போதனைகளையும் கற்பித்துள்ளான். சுற்றாடல் பாதுகாப்பு என்பதில் மிக முக்கியமானதாகும் எம்மைச் சூழவுள்ள இயற்கையை பாதுகாப்பது அடங்குகின்றது.

> “அவன் தான் உங்களுக்கு பூமியை (நீங்கள் வசிப்பதற்கு) வசதியாக ஆக்கி வைத்தான் ஆகவே, அதன் பல கோணல்களிலும் சென்று அவன் அளித்திருப்பவைகளை புசித்துக் கொண்டிருங்கள்” (67:15)

அல்லாஹ் அவனது பிரதிநிதியாக இவ்வுலகில் எம்மை எவ்விதக் குறைகளுமின்றிப் படைத்துள்ளான். இதற்கு நாம் எப்போதும் நன்றியுடையவர்களாக செயற்பட்டு அவனது படைப்புகளுக்கு உரிய அந்தஸ்தையும், மதிப்பையும் கொடுக்க வேண்டும். அவற்றை உரிய முறையில் பாதுகாக்கவும் வோண்டும் வீணான செயல்களை, பாதிப்பை ஏற்படுத்தக் கூடிய செயல்களை புரிந்து ஏனைய ஜீவராசிகளுக்கு இடையூறை ஏற்படுத்தக் கூடாது. “பூமியில் குழப்பம் விளைவித்துத் திரியாதீர்கள்” (2 : 60) என எம்மை உபதேசிக்கின்றான். “பூமியை நாம் ‘ரித்து அதில் உறுதியான (அசையா) மலைகளை நிலைப்படுத்தினோம். ஒவ்வொரு பொருளையும் அதற்குரிய அளவின் படி அதில் முளைப்பித்தோம்” (15:19) என அல்லாஹ் தான் திருமறையில் கூறுகின்றான். ஆகவே , மனிதர்களாகிய எமது பொறுப்பை நாம் உணர்ந்து இவ்வுலகில் வாழ வேண்டும். பிற மக்களுக்கு இடையூறு விளைவிக்கக் கூடியவாறு இப்பிரபஞ்சத்தை நாம் மாற்றி விடக் கூடாது. பொது நல சிந்தனையுடன் ஒவ்வொரு விடயத்திலும் செயலாற்ற வேண்டும் ஏனெனில் , இவ்வுலகில் நாம் ஒவ்வொருவரும் பொறுப்புதாறிகளே. “இன்னும், பூமி தன் சுமைகளை வெளிப்படுத்தும் போது” (99 : 2) என்ற வசனம் மறுமை நாளன்று பூமி தன் மீது செய்த அநியாயங்களுக்கெல்லாம் சாட்சி கூறும் என்பதை வலியுறுத்துகின்றது.

மேலும், சுற்றாடலைப் பாதுகாத்தலை இஸ்லாம் வலியுறுத்தும் போது சூழலை இஸ்லாம் ஒரு பொதும் மனிதனின் எதிரியாக குறிப்பிடவில்லை என்பது சுட்டிக்காட்டப்பட வேண்டிய விடயமாகும். ஏனெனில், அது மானிட வாழ்வுக்கு உயிர் நாடியான நீர், காற்று, உட்பட கோடிக்கணக்கான மரங்கள், செடிகள், கொடிகள், மலைத் தொடர்கள், மேட்டு நிலல்கள், விலங்கினங்கள் போன்ற சூழலின் அனைத்து அம்சங்களையும் இஸ்லாம் ஒரு குடும்பமாகவே

நோக்குகின்றது இக்கருத்தை, “படைப்புகள் அனைத்தும் அல்லாஹ்வின் குடும்பம் அவனது குடும்பத்தின் மீது அன்பு காட்டுபவனே அவனது படைப்பில் அவனுக்கு மிகவும் விருப்பத்திற்குரியவன்” (புஹாரி) என்ற ஹதீஸ் வலியுறுத்துகின்றது.

“வானங்கள், பூமியில் உள்ளவையும், இறைக்கைகளை ‘ரித்த நிலையில் பறக்கும் பறவைகளும் அல்லாஹ்வைத் துதிக்கின்றன” (18 : 41) என்ற குர்ஆன் வசனம் கட்டுக்கோப்பும் ஒருமைப்பாட்டையும் எடுத்துக காட்டுவதுடன் அவை ஒவ்வொன்றும் படைப்பாலனுக்கு செலுத்தும் நன்றியையும் எடுத்துக்காட்டுகின்றது.

ஆகவே, இயற்கை என்ற ரீதியில் இறைவனின் சகல படைப்புக்களையும் பாதுகாப்பது அல்லாஹ்வின் அடிமைகள் மீதான ஓர் கடமையாகும்.

2. விலங்குகளைப் பாதுகாத்தல்

சுற்றாடல் என்ற வரையறையினுள் வெறுமென மரஞ்செடி கொடி உள்ளிட்ட தாவரங்கள் மட்டும் அடங்குவதில்லை என்பதை மேற்போந்த கருத்துக்களிலிருந்து எம்மால் அறியலாம் அவ்வகையில், எமது சூழலில் உள்ள அனைத்து உயிருள்ள விலங்கினங்களும் இதனுல்லேயே அடங்கும் இவற்றையும் இஸ்லாம் காட்டித்தந்துள்ள முறைப்படி நாம் பாதுகாத்து பராமரிக்க வேண்டும்.

உணவுக்காக அல்லது ஒரு விலங்கினால் தாக்கப்பட்டால் தவிர தேவையில்லாமல் விலங்குகளைக் கொல்லுவது இஸ்லாத்தில் தடை செய்யப்பட ஒன்றாகும். “ஒரு உயிரை தன்னுடைய (அம்பெரியும்) இலக்காக வைத்துக் கொள்பவர் சபிக்கப்பட்டவர் (திர்மிதி) என நபிகளார் போதித்துள்ளார்கள். அதுமட்டுமன்றி, உணவுக்காக ஒரு விலங்கை அறுக்கும் போது கூட அதை ‘இஹ்சான்’ (மிக அழகிய முறையில்) செய்ய வேண்டுமென நபிகளார் கூறினார்கள் அதன் முன்னால் கத்தியை கூர்மை ஆக்குவதோ, முன்ன மழுங்கிய கத்தியுடன் அதை அறுப்பதோ வெறுக்கத்தக்கது. “ஒரு ஆட்டின் மீது கூட நீர் கருணை காட்டினால் அல்லாஹ் உங்கள் மீது கருணை காட்டுவான” (புஹாரி) என நபிகளார் கூறியுள்ளமையும் நோக்கத்தக்கது.

நபிகளாரின் இத்தகைய போதனைகளை ஸஹாபாக்களும் தம் வாழ்வில் கடைபுடித்தார்கள் ஒரு மனிதன் வீணாக ஒரு சிட்டுக குருவயைக் கொலை செய்தால் மறுமையில் அது இந்த மனிதன் என்னை எந்தப்பயனுள்ள தேவைக்காகவும் கொல்லவில்லை வெறுமென வீனுக்காகவே கொன்றான் என முறையிடும் என்ற நபிகளாரின் வாக்கி பறவைகள் மீது நாம் எவ்வளவு கரிசனையுடன் இருக்க வேண்டுமென்பதை வலியுறுத்துகின்றது இவ்வாறு இஸ்லாம் போதித்திருக்கும் நிலையயில் எமது தற்கால நடைமுறை வாழ்வில் நாம் விலங்குகள் மீது எத்தலை பராமரிப்பை செலுத்துகின்றோம் என்பதை நோக்கின், நம்மில் பலர் தமக்கு ஆறறிவு இருந்தும் அதனை மறந்து ஐயறிவு படைத்த விலங்கினங்களை விட மிகவும் கீழ்த்தரமான செயல்களில் ஈடுபடுவதைக் கண்கூடாகக் காணலாம் மிருகங்களை அடித்துத் துன்புறுத்துவது மட்டுமன்றி, தமது பொழுது போக்கிற்காக அவற்றை வேதனைபடுத்துவதையும் காணலாம்.

குறிப்பாக பசுமாட்டை நோக்கினால் அது மனித நலனுக்காக உள்ள ஒரு பொதுச் சொத்தாகும். ஆகவே, அவற்றை அறுக்காதீர்கள் என நபிகளார் எச்சரித்துள்ளமையும் நோக்கத்தக்கது. நபிகளாருக்கு விருந்தளித்த ஓர் அன்சாரி தோழரிடம் “பால் தரும் ஆட்டை அறுத்து விடாதே” என எச்சரித்த செய்தியை இமாம் முஸ்லிம் பதிவு செய்துள்ளமையும் குறிப்பிடத்தக்கது. அதே நேரம் நாய் கூட மனிதனைப் போன்ற ஒரு சமூகமாகும். அதுவும் எமது சுற்றாடலில் வாழ வேண்டும். அந்த இனம் அழியக்கூடாது. ஆகவே, அதனைக்

கொள்ளாதீர்கள் என நபி (ஸல்) கட்டளையிட்டுள்ளமையும். இங்கு சுட்டிக் காட்டத்தக்கது. ஆகவே சத்திய மார்க்கமான இஸ்லாமானது சுற்றாடல் பாதுகாப்பு குறித்து பேசும் போது விலங்கினங்களின் ஸ்தீரத்தன்மை குறித்தும், அவற்றின் பாதுகாப்பு குறித்தும் எந்தளவுக்கு வறையுரித்திள்ளது என்பதற்கு இவ் விடயங்கள் சான்று பகிர்கின்றன.

03. தாவரங்களைப் பாதுகாத்தல்

எம்மைச் சூழவுள்ள சுற்றாடலில் பெரும்பகுதி தாவரங்களை கொண்டதாகும். தாவரங்களை அவை அவ்லாஹ்வின் படைப்பு என்ற ரீதியில் பேணிப் பாதுகாத்து பராமரிக்க வேண்டியது எமது அரும் பொறுப்பாகும். "படைப்புகள் அல்லாஹ்வின் குடும்பமாகும். அவனுக்கு மிகவும் விருப்பமானவர்கள் அவனது குடும்பத்திற்கு மிகவும் பயன் அளிப்பவர்களே" (புஹாரி) என நபிகளார் குறிப்பிட்டார்கள். இந்த ஹதீஸ் எமக்கு, மனிதன் சக மனிதனை நேசிப்பது போல உயிர்ப் பிராணிகளை நேசிப்பது போல அல்லாஹ்வின் ஏனைய எல்லா படைப்புகளையும் நேசிக்க வேண்டும் அப்போது தான் மனிதன் அல்லாஹ்வின் குடும்பத்திற்கு பயனளிப்பவனாக மாறி அவனது நேசத்தைப் பேறலாம், என்ற ஓர் அடிப்படையான விடயத்தை கற்றுத்தருகின்றது. இவ் வகையில் தாவரங்கள் உள்ளிட்ட மரம், சேடி, கொடிகள் போன்றவற்றைப் பாதுகாப்பதும் இன்றியமையாத ஒன்றாகும்.

இஸ்லாமியப் பார்வையில் நோக்கும் போது அல்லாஹ்வின் அற்புதப் படைப்புக்களில் ஒன்றாகவே எமது சுற்றாடலிலுள்ள பச்சைத் தாவரங்கள் காணப்படுகின்றது. பூமியில் சுமார் 1.̓.3 பங்கினை கொண்ட இவை சாதாரண புற்களிலிருந்து அடர்ந்த காடுகளில் உள்ள இராட்சத மரங்கள் வரை எல்லாம் மனிதர்களுக்கு பயன்தரக் கூடியவையாகவே உள்ளன. தற்காலத்தில் மனிதர்களுக்கு ஏராளமான விசித்திரமான பல நோய்கள் ஏற்படுவதை காணலாம். இவற்றுக்கான மருந்துகளில் சுமார் 50 வீதம் அளவை 3000 வகையான தாவரங்களிலிருந்தே பெறப்படுவதாகவும் குறிப்பிடப்படுகின்றது. இத்தகைய தாவரங்கள் பூமியில் உரிய முறையில் பாதுகாக்கப்பட வேண்டும் இல்லாவிடின் மனித மற்றும் ஏனைய விலங்குகளின் வாழ்வின் ஸ்தீரத் தன்மை சாத்தியமற்றதாகிவிடும்.

அதுமட்டுமன்றி, எமது சூழலிலுள்ள மரஞ் செடி கொடிகளை பூமியின் தட்ப, வெப்ப அமைப்பை உரிய முறையில் பாதுகாக்கின்றன. இவ்வாறான தாவரங்கள் அழிக்கப்படும் போது பூமியின் இயற்கைச் சூழல் பாதிப்படைவது மட்டுமன்றி வரட்சி, வெப்பம் போன்றன அதிகரித்து மனித ஆரோக்கியத்திற்குப் பாரிய சவாலாக மாறிவிடுகின்றது. ஆகவே , இவற்றைத் தடுத்து மரங்களை நடுவது காலத்தின் கட்டயமாகக் காணப்படுகின்றது. இஸ்லாத்தின் அடிப்படையில் மரம் நடுவது ஓர் இபாதத் மட்டுமன்றி,

அது ஒரு நிரந்தர தர்மமுமாகும். "முஸ்லிம் ஒருவர் ஒரு மரத்தை நட்டு ஓர் விதை விதைத்து விவசாயம் செய்து அதிலிருந்து, (அதன் விளைச்சலை ஓர் காய்களை) ஒரு பறவையோ, இரு மனிதனோ அல்லது ஒரு பிராணியோ உண்டால் அதன் காரணத்தால் ஒரு தர்மம் செய்ததற்கான பிரதிபலன் அவருக்குக் கிடைக்கும்" (புஹாரி - 2320) என அனஸ் இப்னு மாலிக் (ரழி) அவர்கள் அறிவிக்கின்றார்கள். இந்நபி மொழியானது மரம் நடுவதை மட்டுமன்றி எம் சூழலிலுள்ள ஏனைய உயிரனங்களின் இருப்பை உறுதிப்படுத்துவதையும் எமக்கு ஓர் வணக்கமாகப் போதிக்கினறது.

இதுமட்டுமன்றி, அபூ பக்கர் (ரழி) அவர்கள் ஒரு படையை போருக்காக அனுப்பும் போது

அதன் தளபதியிடம் மற்ற அறிவுரைகளுடன் பின்வருவனவற்றை உபதேசித்தமையை எம்மால் காணலாம். “கய்க்கும் மரங்களை வெட்டாதீர்கள் மக்கள் வாழும் பகுதிகளை தாக்காதீர்கள். ஆடுகளையும், ஒட்டகங்களையும் உணவிற்காகவன்றி வெட்டாதீர்கள்.

தேனீக்களுக்கு நெறிப்பிட்டு அவற்றைச் சிதற வைக்காதீர்கள்” (முவத்தா) இதன் முலம் இஸ்லாமிய வரலாற்றில் கூட எந்தளவுக்கு மரங்கள் மட்டுமன்றி சுற்றாடலிலுள்ள ஏனைய ஜீவராசிகள் பாதுகாக்கப்பட்டன என்பதை விளங்கிக் கொள்ளலாம். ஆக, இஸ்லாமானது

சுற்றாடல் தொடர்பான பாதுகாப்பை எந்தளவுக்கு வளியுறுத்துகின்றது என்பதையும் எம்மால் இவ்வாதாரங்கள் மூலம் கண்டுகொள்ளலாம். அதே நேரம், சூழலிலுள்ள தாவரங்களை உரிய முறையில் பாதுகாக்காவிட்டால் நீர் சம்பந்தப்பட்ட பல பிரச்சினைகளும் உருவாகும் மிக முக்கியமாது நீர் வற்றுவதால் ஏற்படுகின்ற பல சிக்கல்கள், பிரச்சினைகள் அல்லது சுற்றாடலிலுள்ள தாவரங்கள் அழியும் போது ஏற்படும் தட்ப, வெட்ப நிலை மற்றங்கள் என்பன மனிதனை மட்டுமன்றி எம்மைச் சூழவுள்ள ஏனைய உயிரினங்களையும் பாதிக்கின்றன. இவ்வகையில், இத்தகைய பாதிப்பிற்குக் காரணமானவர்கள் யாவரும் அல்லாஹ்வின் குடும்பத்திற்குத் துரோகம் செய்பவர்களாகவே கருதப்படுவர் இதனால் அல்லாஹ்வின் அன்பு, நேசம் என்பவற்றை பெறத் தவறுவதுடன், ஏனையோரின் சாபத்திற்கு ஆளாகின்றனர் ஆகவே, இவற்றிலுருந்து நாம் ஒவ்வொருவரும் எம்மைக் காத்துக் கொள்ள வேண்டும். அல்லாஹ்வின் அருள்களில் ஒன்றான தாவரங்கள் எமக்கு எந்தளவுக்கு இன்றியமையாதது எனில் நாம் ஆரோக்கிய வாழ்வை வாழ வேண்டுமெனில், இவை எமக்கு மிகவும் அவசியம்.

பூமியில் சுமார் 50 வருடம் வாழும் ஒரு மரம் 2700 மப ஒட்சிசனை எமக்கு உற்பத்தி செய்து தருகின்றது. ஒட்சிசன் போதியளவு கிடைக்காவிட்டால் எம் ஒவ்வாருவரினதும் வாழ்வு கேள்விக்குறியாகி விடும். இன்றைய கால கட்டத்தில் மரங்கள் கூடுதலாக வெட்டப்பட்டு சூழலின் இயற்கைத் தன்மை பூராகவும் தொழிநுட்பமயமாகிக் கொண்டு வருவதைக் காணலாம். அபிவிருத்தித் திட்டங்கள் என்ற பெயரில் தாவரங்கள் மட்டுமன்றி மக்களின் ஆரோக்கிய வாழ்வும் பறிக்கப்படுகின்றது. மனிதர்களின் அசட்டுப் போக்கினால் இறைவனின் அளப்பரிய அருட் கெடைகள் பாதிக்கப்படுகின்றன. “அல்லாஹ்வின் அருட் கொடையை நீங்கள் எண்ணுவீர்களாயின் அதனை நீங்கள் கணக்கிட முடியாது. நிச்சயமாக மனிதன் அநியாயக் காரனாகவும் நன்றி அற்றவனாகவும் இருக்கின்றான்.” (இப்ராஹிம் : 34) என அல்லாஹ் தன் திருமறையில் கூருவதை இவ்விடத்தில் நினைவு கூறலாம்.

எம்மில் பலர் சுற்றாடலை அழகிய முறையில் பேணி, பராமரித்து, பாதுகாக்கக் கூடியவர்களாக உள்ளனர். இயற்கைத் தன்மையை மாற்றாமல் அதற்குரிய வழிவகைகளை செய்து சூழலிலுள்ள ஏனைய உயிரினங்களின் இருப்பிற்கும், வழிசெய்வது குறிப்பிடத்தக்கதொரு விடயமே. உண்மையில் இஸ்லாமியக் கண்ணோட்டத்தில் அல்லாஹ் மிகவும் அழகானவன்.அவன் அழகையே விரும்புகின்றான். நபிகளாரின் இந்த பொன்மொழி எம்மில் பயபக்தியுடையோருக்கு ஓர் வழிகாட்டியாகும். பூமியை அழகாகப் படைத்த அல்லாஹ் அவ்வழகை இரசிக்கும் அழகுனர்ச்சியே மனிதனில் ஏற்படுத்தியுள்ளான். இதனாலேயே மனிதன் தன் வீட்டைச் சுற்றி சூழலை பராமரித்து பூந்தோட்டங்களை அமைத்து அவற்றில் தன் ஓய்வு நேரத்தை செலவிடுகின்றான். அதன் மூலம் அவன் நிம்மதியையும், நிறைவான வாழ்வையும் பெறுகின்றான் சுற்றாடலை பாதுகாத்து பேணுவதில் நாம் சுயநலத்தை கடைப்பிடிக்கக் கூடாது. அதன் மூலம் நாம் மட்டுமன்றி எம்மைச் சார்ந்த எல்லா ஜீவராசிகளு’ம்

பயன் பெறும் வகையில் நாம் எம்மை மாற்றிக் கொள்ள வேண்டும். ஏனெனில், தானும் பயன் பெற்று பிறரும் பயன் பெறக் கூடியவாரான வேலைகளில் ஈடுபடுவதையே இஸ்லாம் விரும்புகின்றது.

உலகில் நாம் ஒவ்வொருவரும் பொருப்பாளர்கள், எனற வகையில் அல்லாஹ்வின் ஒவ்வொரு அருட்கொடையையும் அதற்கு சேதங்களை இழைக்காமல் அளவுடன், உண்மையான முறையில் பயன்படுத்த வேண்டும். நன்மைகளை அள்ளித் தரும் பெருமதி மிக்க செயல்கள் என்றடிப்படையில் தாவரங்களையோ, பயிர் பச்சைகளையோஅநியாயமான முறையில் அழிக்க வேண்டாம் என்றும் மாறாக பூமியில் அவற்றை தருவதன் மூலம் நல்ல காரியங்களை புரியுமாறும் இஸ்லாம் மனிதனை பணிக்கின்றது. இதற்கு நபி (ஸல்) அவர்களின் போதனைகள் எமக்குச் சான்று. "எவரொருவர் ஒரு மரத்தை நட்டி அதனை பயன் படுத்தி பூரணமாக வளர்ச்சியடைய செய்கிராரோ அவருக்கு மறுமையில் நற் கூலியுண்டு" (முஸ்னத்) என நபிகளார் நவின்றுள்ளமையை காணலாம். " உங்களில் ஒருவரின் கையில் ஒரு பயிர் இருக்கும் நிலையில் மறுமை வரப் போகின்றது அப்பயிரை நட்டி விட முன் மறுமை வந்து விடமுன் என்ற நிலை காணப்படினும். ஆதனை நட்டி விடுங்கள்" என நபியவர்கள் கூரியதாக அனஸ் (ரழி) அறிவிக்கிறார்கள். ஆகவே, இஜ்லாமானது மரம் நடுவதை எந்தளவுக்கு

முக்கியமான செயலாகப் போதிக்கினறது என்பதை இச் சான்றுகல் மூலம் அறியலாம்: உலகில் வெறுமனே வாழ்ந்தோம், மரணித்தோம் என்றின்றாமல் ஏனையோருக்கு பயன் தரக் கூடிய சிறிய ஒரு செயலையாவது ஒவ்வொரு தனி மனிதனும் செய்ய முயற்சிக்க வேண்டும். நபிகளாரின் காலத்தில் இடம் பெற்ற ஒரு சம்பவம் இதனை மேலும் வலியுறுத்துகின்றது. அதாவது, ஒரு முறை நபியவர்கள் ஒரு பேரீச்ச மரத்தை சுட்டிக்காட்டி "யார் இந்த பேரீச்சை மரத்தை நட்டியது முஸ்லிமா ? அல்லது காபிரா ? என வினவினார்கள். அதற்கு அப்பெண் முஸ்லிம் என பதிலளித்தார் அதைக் கேட்ட நபியவர்கள் "முஸ்லிமான ஒருவர் ஒரு பயிரை நட்டி அதிலிருந்து ஒரு மனிதனோ, ஒரு மிருகமோ அல்லது ஒரு பறவையோ சாப்பிடுமாயின் அது அவருக்கு மறுமை வரை ஸதகாவாக அமையும்" எனக் கூறினார். ஆகவே, இத்தகையதோரு சிறிய செயலான மரம் நடுதல் என்றாலும் கூட அது அவருக்கு அதாடர்ந்தும் நன்மையை தேடித் தரக் கூடிய ஒன்றாக இருக்கும்.

மேலும், தாவரங்களைப் பாதுகாத்தல் என்பதனுல் பயிரிடுதல் என்ற விடயத்திற்கு உமர் (ரழி) அவர்களின் காலத்தில் இடம் பெற்ற சம்பவம் ஒன்றையும் இங்கு நோக்கலாம். இமாரா பின் ஹுஸைமா பின் ஸாபித் (ரழி) அவர்கள் கூறினார்கள் உமர் (ரழி) அவர்கள் எனது தந்தையை நோக்கி பின்வருமாறு கூறுவதை நான்செவியுற்றேன். "நீர் உமது பூமியை பண்படுத்தி பயிரிடாமல் இருப்பதற்கான காரணம் என்ன? " அதற்கு எனது தந்தையோ, "நான் ஒரு வயது முதிர்ந்த மனிதன் நாளை மரணித்து விடலாம்" எனப் பதிலளித்தார். அதற்கு உமர் (ரழி) அவர்கள் " நீர் நிச்சயமாக பயிரிட

வேண்டும் என்பதில் நான் உறுதி கொண்டுள்ளேன் "என்றார்கள். பின்னர் உமர் (ரழி) அவர்களும் எனது தந்தையுடன் இனைந்து தனது கைகளாலேயே பயிரிடுவதைக் கண்டேன் எனக் கூறினார்கள் . (அல் ஜாமியுல் கபீர் - இமாம் ஸீயுத்தி) இவை தவிர, உமர் (ரழி) அவர்கள் உஸ்மான் பின் ஹுனைப், அபூ ஹுதைபா அல் யமானி போன்றோரை பஹ்ரைன் பகுதி நிலங்கள் பற்றிய தரவுகளை எடுக்க நியமித்து அவர்கள் கொடுத்த முடிகளின்

படி அப் பகுதிகளில் பயிர் இடுவதற்கான நடவடிக்கைளை எடுத்த வரலாற்றையும் காணலாம். நிலங்களை வைத்திருத்தவர்கள் 3 வருடங்களுக்கு மேல் அவற்றை தரிசாக வைத்திருக்காமல் பயிரிட வேண்டும் என்று கட்டளையிட்டதுடன், திம்மிகள் விவசாயத்திற்கு பயன்படுத்தும் நிலங்களை விற்கக் கூடாதெனவும் தடைவிதித்த வரலாற்றையும் காணலாம். ஆகவே, இஸ்லாமிய வரலாற்றிலும் நிலங்கள் எந்தளவுக்குப் பாதுகாக்கப்பட்டு வந்துள்ளது அதற்கு ஆட்சியாலர்களால் என்னென்ன நடவடிக்கைகள் பின் பற்றப்பட்டு வந்தது என்பதை எரலாற்றினூ டாக விளங்கிக் கொள்ளலாம். இந்தளவுக்கு சுற்றாடல் மீதான பாதுகாப்பை இனிய மார்க்கமான இஸ்லாம் வலியுறுத்தியுள்ளது.

இன்றைய கால கட்டத்தில் இஸ்லாம் கூறியவாறான பாதுகாப்பு முயற்சிகள் செய்யப்படுவதில் இன்னும் மக்கள் தவறி விட்டனர். இறைவனின் அருட்கொடைகளில் பெரும்பாலானவை அதன் பயனை இழந்து விட்டன: காடுகள் அழிக்கப் படுவதும், தொழிற்சாலைகளின் கழிவுகளால் நீர்நிலைகள் மாசடைவதும் மனித வாழ்விற்கு மட்டுமன்றி ஏனைய சகல படைப்புகலுக்கும் அசௌகரியங்கலை ஏற்படுத்தியுள்ளது. மனிதன் உண்ணும் உணவும், சுவாசிக்கும் கற்றும் நஞ்சாக மாறிவிட்டன. பணமும், பொருளும் தேடும் மனிதனது வேட்கையே இவற்றிற்குக் காரணம் தொழநுட்பம் வளர வளர பசுமையான எமது சூழல் யாவும் பாலை நிலங்களாக மாறி வருகின்றது. சூழல் வெப்பநிலை வெகுவாக அதிகரித்து வருகின்றது. அடுத்த 50 வருடங்களில் பூமியின் சராசரி வெப்பம் நான்கு பாகையால் கூடுமென அறிக்கைகள் வெளியிடப்பட்டுள்ளன பனிக்கட்டிகள் கரைந்து செல்லக் கூடிய அபாயமும் ஏற்பட்டுள்ளது. இஸ்லாம் இத்தகைய அநியாயச் செயல்களை கடுமையாகக் கண்டிக்கின்றது.

நவீன இஸ்லாமிய அறிஞரான ஸெய்யித் ஹுசைன் நஸ்ர் கூறும் போது, "மனிதன் சூழலிலுள்ள சமநிலையை சீர்குலைத்துள்ளான். வானுலகிற்கெதிரான இக்கலகத்திற்கு முற்றுப்புள்ளி வைக்காது வரை பூமியின் இந்தக் கட்டுக்கோப்பை சீர்படுத்த எடுக்கப் படும் எந்த முயற்சியும் வெற்றியலிக்க முடியாது" என்ற கருத்து குறிப்பிடத் தக்கதாகும். சுற்றாடல் பாதுகாப்பு என்ற ரீதியில் இஸ்லாம் தாவரங்களைப் பேணிப் பாதுகாப்பதை எவ்வாறு வலியுறுத்தியுள்ளது என்பதை மேற் கூறியவாறாக நோக்கலாம் . அடுத்து ஏனைய இயற்கை வளங்களான நீர், நிலம், காற்று மற்றும் காடுகள் என்பவற்றை பாதுகாக்கும் வழிமுறை குறித்து எவ்வாறு குறிப்பிடுகின்றது என்பதை பின்வருமாறு நோக்கலாம்.

04. நீரைப் பாதுகாத்தல்

எம்மைச் சூழவுள்ள சுற்றாடலில் பல இயற்கை வளங்களை அல்லாஹ் அவனது அருட் கொடைகளாக அருளினான் அவ்வகையில் நீர் மிக முக்கியமான ஒன்றாகும் சுற்றாடலில் பெறும் பகுதி நீரினாலேயே சூழப்பட்டுள்ளது நடைமுறை வாழ்வில் எம்மில் பலர் நீரைத் தேவைக்கதிகமாக வீணாக்குகின்றனர் மறுபுறம், தாக்கத்திற்குக் கூட நீர் கிடைக்காமல் மக்கள் உயிரை விடும் நிலை ஏற்பட்டுள்ளமையையும் கண்கூடாகக் காணலாம்.

நீரைப் பாதுகாப்பதை இஸ்லாமியக் கடமைகளுள் ஒன்று. நபிகளார் இவ்விடயத்தில் மிகவும் கவனமாக இருந்துள்ளமையை அவதானிக்கலாம். அவர் மிக குறைவானளவு நீரைக் கொண்டே வுழச் செய்துள்ளமையை அவரது நடைமுறைகள் சொல்லித் தருகின்றன. "ஓடும் நதியில் வுமுச் செய்தாலும் வீண்வரயம் கூடாது" என நபிகளார் எச்சரித்துள்ளமையைக் காணலாம்.

நீரைச் சிக்கனமின்றிப் பயன்படுத்துவதும், அதனை அசுத்தப் படுத்துவதும் தற்காலத்தில் பாரிய பிரச்சினைகளாகும். உலகளவில் 1990 களை விட தற்போது குடிநீரைப் பெறுவதற்கான வாய்ப்பு அதிகரித்துள்ளது 1990 களில் உலகளவில் 76மூ ஆளோருக்கு குடிநீர் வசதி காணப்பட்டது. ஆனால், 2015 ஆகும் போது 91மூ ஆக அது, அதிகரித்துள்ளது, எனினும், உலகளவில் 1.8 பில்லியன் மக்கள் எச்சம் கலந்த நீரையே பயன்படுத்துகின்றனர். முறையான குடிநீரைப் பெறும் வாய்ப்புக்கள் இவர்களுக்கு இல்லை. இதனால் கொலாரா போன்ற நோய்களும் ஏற்படுகின்றன.

ஒரு நாய் தாகித்திருந்த போது விபச்சாரியான ஒரு பெண் அதற்கு நீர் புகட்டி சுவர்க்கம் நுழைந்த வரலாற்றை இஸ்லாம் எமக்கு கற்பிக்கின்றது. ஒருவர் பொது மக்களுக்கு நீர் வழங்குவதற்குரிய ஏற்பாடுகளைச் செய்திருந்தால் அவர் மரணித்த பின்னரும் அதற்குரிய நன்மை தொடர்ந்தும் கிடைக்குமென நபிகளார் கூறுகின்றார்கள். ஆகவே, அல்லாஹ்வின் மாபெரும் அருளான நீரைப் பாதுகாப்பது எம்மீதுள்ள ஒரு பொறுப்பாகும் அதனை உணர்ந்து நாம் செயற்பட வேண்டும்.

மேலும், "பாதையோரங்களிலும், நிழல் தரும் இடங்களிலும் மலசலம் கழித்து மக்களின் சாபத்தை பெறுவதை இட்டும் நீங்கள் பயந்து நடந்து கொள்ளுங்கள்" (முஸ்லிம்) என்ற ஹதீஸானது, சுற்றாடலை சுத்தமாக வைத்திருப்பதன் அவசியத்தை வலியுறுத்தும். "ஓடாமல் தேங்கி நிற்கும் தண்ணீரில் உங்களில் எவரும் சிறுநீர் கழித்துவிட்டு பின்னர் அதில் குளிக்க வேண்டாம்" (புஹாரி - 239) என நபியவர்கள் கூறியதாக அபூ ஹுரைரா (ரழி) கூறும் செய்தி நீரைப் பாதுகாப்பது பற்றிக் கூறுகின்றது. இந்நபி மொழியில் தேங்கி நிற்கும் நிலையான நீரில் சிறுநீர் கழிப்பதை நபியவர்கள் தடுத்துள்ளமையைக் காணலாம். இஸ்லாம் கூறுமளவிற்கு வேறெந்த பதமும் நீரைச் சிக்கனமாகப் பயன்படுத்த வேண்டுமெனக கூறியிருக்க முடியாது.

தற்காலத்தில் நிலத்தடி நீர் பல காரணங்களால் இல்லாமல் போகின்றது. அத்துடன் வரட்சி, நீர்ப்பற்றாக்குறை போன்றனவும் மக்களின் அநியாயமான செயல்கள் மூலம் ஏற்படுகின்றன. நபிகளாரது காலத்தில் பள்ளிவாயல்கள் கூட வெறும் தரையாகவே காணப்பட்டது பாதை போன்றன தவிர்க்க முடியாவிட்டாலும் சீமெந்துக் கற்களால் பூமியை அழகு படுத்துவதை விடப் புற்களால் அழகு படுத்தலாம். இஸ்லாத்தைப் பொறுத்தவரை நாம் இருக்கும் சூழலை சுத்தமாக வைத்திருப்பது மார்க்கக் கடமையாகும். இதனை உணர்ந்து சூழலைப் பேணிப் பாதுகாத்து எதிர்கால சந்ததிகளும், ஏனைய ஜீவராசிகளும் நிம்மதியாக வாழும் இடமாக அதனை கையளிப்பது எமது தலையாயக் கடமையாகும் இதில் அரசுகலும், குடி மக்களும் கூடிய கவனத்துடனும், தூர நோக்குடனும் செயற்பட வேண்டியதும் காலத்தின் கட்டாயமாகும்.

இவை தரை, சுற்றாடல் பாதுகாப்பில் நீரின் பாதுகாப்புத் தொடர்பில் மேலும் நோக்கின். உலகில் 3ம் உலகயுத்தமொன்று மூண்டால் நிச்சயம் அதற்குக் காரணம் நீராகத்தான் இருக்கும், எனவும் சில தரவுகள் குறிபிடுகின்றன. இத்தகைய முக்கியத்துவம் மிக்க நீர் தான் அனைத்துக்கும் மூலாதாரமானது என அல்குர்ஆன் குறிப்பிடுகின்றது. "ஒவ்வொரு உயிரினத்தையும், நீரிலிருந்து நாம் படைத்தோம்" (21 : 30) என்பது நோக்கத்தக்கது. மேலும், "இறந்து போன பூமிக்கு அதனால் உயிர் அளிக்கிறோம், நாம் படைத்துள்ளவற்றில் இருந்து கால் நடைகளுக்கும் ஏராளமான மனிதர்களுக்கும் அதை பருகும் படி செய்கிறோம்"

எனவும் குறிப்பிடுகின்றது.

நீரை மனிதன் மட்டுமன்றி எம் சூழலிலுள்ள ஏனைய விலங்கினங்களும் பயனபடுத்துவதால் நீரிற்கு நாம் மாசினை ஏற்படுத்தக்கூடாது. அதனால் ஏராளமான ஜீவராசிகள் இன்னலை எதிர்நோக்கும். தோழிற்சாலைக கழிவுகள் மட்டுமன்றி வீட்டுக கழிவுகளையும் நீரில் கலக்க விடுவதனால் அது பயன்படுத்தாமல் போவதுடன். ஏராளமான தொற்று நோய்களும் பரவும் ஆகவே, முஸ்லிம் என்ற வகையில் எம் பொறுப்பை உணர்ந்து நீரைப் பாதுகாக்கும் நடவடிக்கைகளில் நாம் ஈடுபட வேண்டும். நீர்பற்றாக்குறையைத் தடுப்பதற்கான நடவடி முறைகளை பின்பற்ற வேண்டும். மழைநீர் சேகரிப்புத் திட்டங்களை அமுல்படுத்த வேண்டும் உரிய முறையில் வடிகால் அமைப்பு மற்றும் அசுத்தமான நீரை வெளியேற்றுவதற்குரிய திட்டங்களை கையாள வேண்டும்.

05. காற்றைப் பாதுகாத்தல்

“மேலும், (மேகங்களை) கருக் கொள்ளச் செய்யும் காற்றை நாமே அனுப்புகின்றோம்” என அல்குர்ஆன் காற்றைப் பற்றிப் பேசுகின்றது. காற்றும் எமது சுற்றாடலில் இன்றியமையா விடயமொன்றாகும். “தனது அருளுக்கு முன் நற்செய்தி கூறுவதற்காக அவனே காற்றை அனுப்புகின்றான்” (125 : 48) என அல்லாஹ் குர்ஆனில் குறிப்பிடுகின்றான். உலகில் 3 மில்லியன் மக்கள் காற்று மாசுபடாமல் ஆண்டு தோறும் இறக்கிறார்கள்.

இது ஆண்டு மரணங்களில் 6மூ ஆகும். உலக சுகாதார அமைப்பு (WHO) இன் அறிக்கைப்படி, வளி மாசடைதலின் காரணமாக 30மூ மரணங்கள் குறிப்பிட்ட காலத்திற்கு 15 வருடங்களுக்கு

முன்னரே நிகழ்ந்து விடுகின்றதாகக் குறிப்பிடப் படுகின்றது. பல்வேறுபட்ட புகைகள், நச்சு வாயுக்கள் என்பன வளியில் கலப்பதனால் ஏராளமான நோய்களும் ஏற்படுகின்றன. மேலும் ஓசோன் படைப் பாதிப்பும் தற்காலத்தில் வெகுவாக ஏற்பட்டு வருகின்றது. ஆகவே, இவற்றைத் தடுப்பதற்கு உரிய முயற்சிகளை நாம் எடுக்க வேண்டும். இறையருளுக்கு, நாமே நமது கறல்களால் பாதகம் விளைத்துவிட்டு வேறு காரணங்களைத் தேடுவதில் அர்த்தமில்லை இதனையே அல்குர்ஆன் “உங்களுக்கு ஏற்பட்டுருக்கும் எந்தவொரு துன்பமானாலும் அது உங்கள் கைகள் சம்பாதித்தவைதான்” (42 : 30) என்று குறிப்பிடுகிறது.

06. காடு மற்றும் ஏனைய நில வளங்களின் பாதுகாப்பு

நாமும், நம்மைச் சார்ந்தோரும், இன்ன பிற உயிரினங்களும் இந்த நிலத்தைத் தன் வசிப்பிடமாகக் கொண்டுள்ளோம். “பூமியை அவன் எல்லா படைப்புகளுக்காகவும் அமைத்தான்” (55 : 10) அல்லாஹ் தான் காட்டிய பாதையில் பூமியை எவ்வாறு நிர்வகிக்கிறான் என்பதை அறியவே இவ்வுலகில் மனிதனைத் தனது பிரதிநிதியாகப் படைத்துள்ளான். இவ்வகையில் மனிதன் தன் மீது சுமத்தப் படும் பொறுப்புக்கு பதில் சொல்லியாக வேண்டும். அதற் கேற்ற வகையில் தனது பணிகளைச் செப்படைவேண்டும். இவ்வகையிலேயே சுற்றாடலையும் பாதுகாக்க உரிய முயற்சிகளை எடுக்க வேண்டும்.

தற்போது உலகில் காடழிப்பு என்பது பாரியளவில் மேற்கொள்ளப்பட்டு வரு மொன்றாக உள்ளது எமது சூழலில் உள்ள மரங்கள் வெட்டப்படும் போது சூழலில் நிலவுகின்ற ஒட்சிசன், காபனீரொட்சைட் சமநிலையும் குழம்பி பாதிப்பு அடைகின்றது. இது மனித

சுவாசச் செயற்பாட்டை நேரடியாக பாதிக்கும் ஓர் செயற்பாடாகும். முரங்களை வெட்டி, காடுகளை அழிப்பது நமக்கு நாழும் செய்து கொள்ளும் அநியாயமாகும். இவை முற்றாத் தடை செய்யப்பட வேண்டும் ஏற்கனவே மரம்

தடுதலை இஸ்லாம் எந்தளவு தூரத்திற்கு ஊக்குவித்து உள்ளது என்பதை நாம் முன்னர் நோக்கினோம். ஆகவே சுற்றாடல் சார் பிரச்சினைகளை இயன்றளவு தருக்கக கூடிய வகையில் ஒவ்வொரு மனிதனும் சிந்தித்து செயலாற்ற வேண்டும்.

இக்கட்டுறையின் அடுத்த கட்டமாக, சுற்றாடலைப் பாதுகாப்பது தொடர்பில் நாம் அனைவரும் எதிர்நோக்க கூடிய சமகால பிரச்சினைகள் குறித்து நோக்கின், இன்றைய அரசுகள் தத்தமது நாட்டினுள் பல்வேறு அபிவிருத்தித் திட்டங்களை முன்னெடுக்கும் வகையில் சர்வதேச கம்பனிகள் மற்றும், பண முதலைகளின் பொருளாதாரத்தை வளப்படுத்தும் வகையிலேயே செயற்பட்டுக் கொண்டு இருக்கின்றன. இதனால் சூழல் மற்றும் ஏனைய வளங்களின் எதிர்காளம் பாதிப்படையும் என அறிந்திருந்தாலும் கீழத்தேய அரசியல் தலைமைகள் பணத்தை வாங்கிக் கொண்டு அத்தகைய திட்டங்களுக்கு அனுமதியளிக்கின்றனர். இதன் பின்னர் முழுமையாக கழிவகற்றும் திட்டம் இல்லாமல் கம்பனிகள அவற்றின் கழிவுகளை ஆற்று நீரிலும், குளங்களிலும் கலக்கும் வண்ணம் வெளியேற்றி சூழலை மாசடையச் செய்கின்றனர். மேலும், சில திட்டங்கள் நமகாலத்தில் கோடி கோடியாக பணத்தையீட்ட வழிவகுத்தாலும் எமது, சில பணக்கார நாடுகள் ஏழை நாடுகளை தமது குப்பைத் தொட்டிகலாக, பயன்படுத்தி வருவதையும் காணலாம். தாய் நாட்டின் சுற்றாடல் பாதிப்படையக் கூடாது, நீர் வளம் குன்றக் கூடாது என்பதற்காக ஏழை நாடுகளைச் சுரண்டி ஆக்கிரமிக்கின்றனர். தமது தொழிற்சாலைகளை அந்நாடுகளில் அமைத்து அங்குள்ள குறிப்பிட்டசில வீதமானவர்களுக்கு தொழில் வாய்ப்பையும் வழங்குகின்றனர். இதற்கு ஊழல் அரசியல்

வாதிகளும் ஒத்துழைப்பது கவழைக்குரிய விடயமாகும். அது மட்டுமன்றி, இன்று எமது சுற்றாடல் பெறும் வெப்பமாதலை நோக்கி நகர் வதை எம்மால் காணலாம். 1789” 1793 வரையான ஆண்டுகளில் ஏற்பட்ட எல்-சினோ எனும் வானிலை மாற்றம் காரணமாக ஐரோப்பாவில் கடும் வரட்சி தாண்டவமாடிய செய்திகளையும் குறிப்பிடலாம். ஆகவே, இத்தகைய சமகால பிரச்சினைகள் குறித்து உரிய விழிப்புணர்வில்லாவிட்டால் எமது சுற்றாடல் சுயநல வாதிகளால் சீர்குலைக்கப்பட்டு எமது எதிர்கால சந்ததியினர் பலத்த சவால்களை எதிர்நோக்குவர். எனும் போது நிலம், நீர், நெருப்பு, ஆகாயம், காற்று ஆகிய இயற்கையின் ஐம்புலன்களை எமது நினைவுக்கு வருகின்றன. அல்லாஹ் அருளிய இம்மாபெரும் அருள் வளங்கள் குறித்து ஒவ்வொரு மனிதனும் சிரத்தையுடன் செயற்பட வேண்டும்.

ஆகவே, இஸ்லாமிய நோக்கலான சுற்றாடல் பாதுகாப்பு தொடர்பில் ஆராயும் இக்கட்டுறையின் இறுதி விடையமாகும், சூழலைப் பாதுகாக்க நாம் ஒவ்வொருவரும் என்ன செய்ய வேண்டும், நம் பொறுப்பு என்ன என்பதை நோக்கின், ஒரு நாடு என்ற வகையில் உறுதியான சூழல் பாதுகாப்பு குறித்து சில விடயங்களில் கவனக்குவிப்பு காணப்பட வேண்டியது அவசயம் அதாவது, இஸ்லாம் காட்டித்தந்தது சூழல் பாதுகாப்பு பற்றிய போதனைகளை பின்பற்றுவதுடன் பூமியன் இயல்புக்கு மாற்றமான வெப்பநிலை மாற்றம் மற்றும் காபன் உறுதிப்படுவதைக்

குறைக்க வினைத்திறனான நடவடிக்கைகளையும் மேற் கொள்ள வேண்டும் அது தவிர, இயற்கை வளப் பாதுகாப்பு, முறையற்ற கிருமிநாசினி பாவனை, கழிவுப் பொருட்களை அற்றுதல் மற்றும் முகாமைத்துவம், பசுமை நுகர்வு, தேசிய சுற்றாடல் கொள்கைகளை சர்வதேச சூழல் பற்றிய ஒப்பந்தங்களுடன் ஒருங்கிணைத்தல் உள்ளிட்டபல்வேறு விடயங்களைத் திட்டமிட்டு செயற்படுத்த வேண்டும் இவற்றைப் பாதுகாப்பதற்காக இளம் சந்ததியினருக்கு விழிப்புணர்வூட்டுவதுடன் நாட்டு மக்களின் பொதுக் கொள்கையில் ஓர் தாக்கத்தை ஏற்படுத்தும் வகையில் பரப்புரை செய்தல் , தடுப்புச்சட்டங்களை இயற்றுதல்

உள்ளிட்ட நடவடிக்கைகளில் அரசு முனைப்புடன் செயற்பட வேண்டும்.

துனிநபர் என்றவகையில், எம்மீதுள்ள பொறுப்பை நாம் ஒவ்வொருவரும் உணர்ந்து சில எளிமையான விடயங்களில் கரிசனை செலுத்துவதன் மூலம்

எமது சுற்றாடலைப் பாதுகாக்கலாம்.

- மரம் நடுவதன் மூலம் சுற்றாடலுக்கு ஏற்படும் சில தீங்குகளைத் தடுப்பதற்கு முய்சிக்கலாம். மரம் நடுதல் இஸ்லாத்தில் ஸதகதுல் ஜாரியாவில் ஒன்றாகும் இதன் மூலம் ஈருலகிலும் நன்மையைப் பெறலாம் .

- நீர் வளம் என்பது வாழ்வின் உயிர்நாடி என்ற வகையில் அதனை வீண்விரயின்றிக் காக்க வேண்டும். “தண்ணீரைப் பொருத்தவரை மனிதர்கள் யாவரும் அதன் பங்காளிகள்” என நபிகளார் கூறினார்கள். நீரில் ஏனையோருக்கும் பங்குண்டு என்பதையுணர்ந்து ஒவ்வொருவரும் பயன்படுத்த வேண்டடும்

- பொலித்தீன் ஆரோக்கிய வாழ்விற்கான எதிரி என்ற வகையில் அதன் பாவனையை தடுப்பதற்கான நடவடிக்கைகளிள் ஈடுபட வேண்டும் அது புற்று நோய், ஆண்மைக் குறைபாடு மற்றும் தீராத நோய்களை உருவாக்குகின்றது. பிளாஸ்டிக் பொருட்களை சுற்றாடலில் கலப்பது வி‘த்தைக் கலப்பதற்குச் சமன். ஆகவே, முடிந்தளவு இவற்றின் பாவனையைக் குறைக்க வேண்டும்.

- தற்காலத்தில் பேசப்படும் ஓர் விடயமாக டெங்கு ஒழிப்பு நடவடிக்கைகள் காணப்படுகின்ற. அவற்றிற்கு நாமும் கை கொடுக்க வேண்டும். நீர் தேங்கி நிற்கும் பொருட்களை முறையாக அகற்றுவதுடன், நுளம்பு பெருகும் பொருட்களை முறையாக அகற்றவும் வேண்டும். கூட்டு சிரமதான முயற்சிகளையும் செய்ய வேண்டும்.

- குப்பைகளைக் குறைக்க 5ள ளுலளவநஅ போன்றவற்றைக் கடைப் பிடிக்கலாம். திண்மக் கழிவுகள் காரணமாகவே கூடுதலாக சூழல் மாசடைகின்றது. இயற்கை முழுவதிலும் 60 - 65 வீதமான கழிவுகளே உள்ளுராட்சி மாற்றங்களால் சேகரிக்கப்படுகின்றது. 35மூ கழிவுகள் வீட்டுத் தோட்டங்களிலும், வீதியோரங்களிலுமே சிதரிக் காணப்படுகின்றன. கழிவுகளை முகாமை செய்வதற்குரிய சிறந்த முறையே 5ள ளலளவநஅ ஆகும்.

1. Reduce - உக்காத பொருட்களின் பாவனையைக் குறைத்தல்.

2. Reuse - மீள் பயன்பாட்டிற்குப் பழகுதல்

3. Recycle - மீள்சுழற்சி செயற்பாட்டிற்கு ஒத்துழைத்தல்.

4. Refuse - சூழலுக்கு ஆபத்தான பொருட்களை கொள்வனவு செய்யமறுத்தல்.

5. Rethink - விலை கொடுத்து வாங்க முன் மீள்பார்வை செய்தல்.

- கழிவுப் பொருட்களை உக்கும் கழிவு, உற்காத கழிவு என வகைபடுத்தி மீள் சுழற்சிக்கு ஒத்துலைப்பதன் மூலம் நாட்டின் பொருாதாரத்தை மேன்படுத்தவும், சுற்றர்டலின் பாதுகாப்பிற்கும் உதவலாம். சூழல் மாசடையக் காரணமாக இருப்பதும் ஒரு குற்றம். அதன் தீய விளைவுகளை ஈருளகிலும் சுவைப்போம் என்பதை நம்ப வேண்டும்.

- இயற்கை வளங்களை பாதுகாக்க வேண்டும் இயற்கை சூழல் என்றும் பசுமையாக இருப்பதையே இஸ்லாம் விரும்புகிறது. மலைகளும், மரங்களும், ஆறுகளும்,

கடல்களும், பறவைகளும், விலங்குகளும் மனித வாழ்வின் இருப்பிற்காக சேவை செய்பவை. அவற்றைக் காப்பாற்ற வேண்டியது எம் கடமை.

ஆகவே, இஸ்லாமும் சுற்றாடல் பாதுகாப்பும் என்ற இக்கட்டுரை மூலம் சமூகத்திற்கு உணர்த்த விளையும் கருத்து என்னவெனில், எமது சூழலைப் பாதுகாப்பது தொடர்பன பொது விடையங்களில் நாம் நடந்து கொள்ளும் முறையை அவதானித்துத் தான் நாம் பின்பற்றும் மார்க்கத்தை பிற சமயத்தவர்கள் எடை போடுகின்றனர். அவர்களுக்கு முனமாதிரியாக நாம் நடக்க வேண்டும். எம்மிடமுள்ள எதிர்மறையான மனப்பாங்குகளை மாற்றி இஸ்லாம் காட்டித் தந்த உன்னத வழி முறைகளை பின்பற்ற வேண்டும். எம்மில் ஒருவர் போது இடத்தில் குப்பைகளைக் கொட்டும் போது நான் மட்டும் கொட்டுவதால் ஒன்றும் நடந்துவிடுவதில்லை என எண்ண கூடாது. அடுத்த தலைமுறையினறும் பயன்பெறும் வகையில் எமது சூழலை நாம் பாதுகாத்து அமானிதமாக ஒப்படைக்க வேண்டும். இதன் மூலம் பிறர் மத்தியில் முஸ்லிம்களைப் பற்றிய நல்லெண்ணத்தை விதைப்பதுடன், ஈருலகிலும்

அல்லாஹ்வின் திருப்தியையும் , அன்பையும் பெற முயற்சிப்போம் முற்றும்.

Inter-School Essay Competition (First Place)

මුස්ලිම්වරු සාධාරණ සමාජයක් සඳහා දායකත්වය දක්වනවාද?

මුස්ලිම්වරු යන්නෙන් අදහස් කරන්නේ අල්ලාහු තඅාලා විසින් මෙලොව පහල කල ආගම් අතරින් අවසාන හෙවත් සත්‍ය වූ ෆුර්කාත් ආගම අනුගමනය කරමින් ජීවත් වන පිරිස වේ. මෙම මුස්ලිම්වරු සාධාරණ සමාජයක් සඳහා දායකත්වය දක්වනවාද යන්න පිලිබඳව විමසා බලමු. අල්ලහු තඅාලා තම නියෝජිතයා වශයෙන් මිනිසා මවා ඔහුට ඉටු කල යුතු යුතුකම් හා වගකීම් පිලිබඳව ද පහදා දීම් ලබා දී ඇත. ඒවා නිසා අයුරු තම ජීවිතයට අනුගමනය කරමින් ජීවත්වීම මුස්ලිම්වරුන් වන අපගේ අනිවාර්ය යුතුකමක් වන්නේය.

එනමුත්, වර්තමාන සමාජය වෙත අප අවධාරණය යොමු කිරීමේදී වර්තමානයේ මුස්ලිම්වරු සාධාරණ සමාජයක් ගොඩනැංවීමෙහි ලා යම් දායකත්වයක් දක්වන්නේ ද නැද්ද යන්න පිළිබඳව විමසා බැලීමේදී එයට පිළිතුරක් වශයෙන් අපට ලබාදිය හැක්කේ එය යම් සීමිත ප්‍රමාණයක් ලෙසිනි. තවත් ආකාරයකින් පැවසූ විට ඉතා අඩු ප්‍රමාණයකින් යුක්ත පිරිසක්ය. එම කුඩා පිරිසකගේ දායකත්වය මගින් සමාජ සාධාරණත්වයක් ඉටු වීම ඉතා අසීරුය. එවැනි තත්වයන් මැඩ පවත්වා ගැනීමෙහි ලා අධික පිරිසකගේ සහාය හා දායකත්වය අවශ්‍ය වන්නේය. එසේ නොමැති වූ විට යම් යම් ආකාරයේ කර්තව්‍යයන් ඉටු කිරීමට අපහසු වන්නේය.

වර්තමානයෙහි බොහෝ පවුල් වල ජනතාවන් මුහුණ දෙමින් පවතින අති මහත් ප්‍රබල ගැටළුවක් වන මත්ද්‍රව්‍ය භාවිතය අද නොයෙකුත් රටවල්වල ප්‍රචලිත වෙමින් පවතී. ඒවා කෙසේද යත් විවිධ නම්වලින් ද්‍රව්‍යවලින් යුක්තවය. මෙම මත්ද්‍රව්‍ය හේතුවෙන් වර්තමානයේ බොහෝ ජනතාවන් තමන්ගේ ජීවිතයේ අභියෝගයන් රාශියකට ගොදුරු වෙමින් පවතී. ඒ හේතුවෙන් මිනිසාට දේපල හානි, ජීවිත හානි ආදිය සිදුවීම ද සාමාන්‍ය කාරණාවක් වශයෙන් පවතින්නේය.

මෙම මත්ද්‍රව්‍ය භාවිතා කිරීම තුලින් මිනිසාගේ ශරීරයට මෙන්ම ජීවිතයට ද බොහෝ බලපෑම් ඇති කරවනු ලබන්නේය. සමාජයේ වෙසෙන ජනතාවන් අතරින් මත්ද්‍රව්‍ය බෙදා හරින පුද්ගලයන් සොයාගෙන ඔවුන් පිළිබඳව දැනුවත් වී ඔවුන්ව පොලීසියට භාරදීමේ මුළු මහත් අයිතිය සමාජයට ඇත. එයට හේතුව නම් ඔහු එක් පුද්ගලයෙකු වශයෙන් සිට මත් ද්‍රව්‍ය විකුණමින් අන් අයගේ ජීවිතවලට ද බලපෑම් ඇති කිරීම ඉතාමත් පාපී ක්‍රියාවකි. මත්ද්‍රව්‍ය ජාවාරම්කරු හෝ විකුණුම්කරුවන්ගේ ප්‍රධාන අරමුණු වන්නේ ලාභ උපයා ගැනීමයි. ඔවුන් එහිදී ප්‍රධාන වශයෙන් බලාපොරොත්තු වන්නේ හරාම්, හලාල් පිළිබඳව නොව කෙසේ හෝ මුදල් උපයා ගැනීමෙන් තමන් හා තම පවුල ආරක්ෂා කිරීමය. එනමුත් එවැනි දේවල් කිරීමෙන් මුදල් ඉපැයීම හරාම් වල ලෙසද අප දනිමු.

අල්ලාහු තඅාලා මිනිසාට හරාම් හා හලාල් පිළිබඳව ඉතා පැහැදිලි ලෙස පෙන්වා දී ඇත . හරාම් යනු ඉස්ලාම් තහනම් කල දේවල් වන අතර හලාල් යනු ඉස්ලාමය අනුමත කල දේවල්ය. "හරාම් දෑ අනුභව කල පුද්ගලයාගේ සිරුර අයිති වන්නේ නිරයටය" යන වැකිය මගින් බලපෑම හා දඩුවම වඩාත් ප්‍රබල වෙයි. වෙළඳාම් කිරීමේදී ද අප ඉටු කල යුතු පිළිවෙත් හා සාරධර්ම ඉස්ලාම් පෙන්වා දී ඇත. වෙළඳාම් ක්‍රම අතරින් ඉස්ලාම් පෙන්වා දී ඇති යහපත් වෙළඳාම් ක්‍රමයක් සිදු කිරීමට ද අනිවාර්ය වේ . එමෙන්ම එවැනි වෙළඳාම් ක්‍රමයන්හි පොළිය නොතිබිය යුතුය.

"අල්ලාහ් වෙළඳාම හලාල් කර පොළිය හරාම් කර ඇත" මෙම වදනින් ඒ බව තවදුරටත් මනා ලෙස අවධාරණය වෙයි. එම නිසා මත්ද්‍රව්‍ය විකුණමින් අනුන්ගේ ශාපයට ලක්වෙමින් ජීවත් වන බොහෝ පිරිසක් අද සමාජයේ ජීවත් වෙමින් පවතී. වර්තමානයේ ප්‍රබල නම්වලින් යුක්ත මත්ද්‍රව්‍ය සඳහා මුලිකත්වය දරන්නේ මුස්ලිම්වරුන්ය. නායකත්වය දරා සිටින්නේද මුස්ලිම්වරුන්ය. මෙය ඉතාමත් අයහපතට කරුණකි. නබි (සල්)තුමාණන්ගේ උම්මත්වරු වශයෙන් පෙනී සිටිමින් මේ ආදී ආකාරයෙන් යුක්ත පහත් ක්‍රියාවන්හි නිරතවීම අති මහත් පාපී ක්‍රියාවක් වන අතර නියත වශයෙන්ම මොවුන්ට අල්ලාහ් ඉදිරියේ දඩුවම් ඇත්තේය. මේ පිළිබඳව අල් කුර්ආනයේ මෙසේ සාක්ෂි දරා ඇත .

"කවරෙකු අංශු මාත්‍රයක තරම් යහපත් කර ඇත්ද එදින ඔහු එය දැකගනී. කවරෙකු අංශු මාත්‍රයක තරම් අයහපත් කර ඇත්ද එදින ඔහු එය දැකගනී." (කුර්ආන්).

මේ කුර්ආන් වදන මගින් පහර දෙන්නේද ඒ බවයි. මෙලොව ජීවත් වන සියලු මිනිසුන්ගේ යහපත් කුසල් ධර්මයන් සඳහාද පරලොව ප්‍රතිඵල ඇති අතර අයහපත් ක්‍රියාකලාපයන් නිසා ද දඩුවම්වලට පාත්‍රවීමේ අවකාශය උදාවනු ඇත. එම නිසා අප යහපත් මුස්ලිම් බැතිමතුන් වශයෙන් මෙවැනි සමාජක් තුල සිදුවන්නා වූ දුෂිත ක්‍රියාකාරකම්වලින් මිනිසුන්ව මුදවා ගැනීම සඳහා ප්‍රයත්නයක් දැරිය යුතු බව පැහැදිලි වේ.පවුලේ දී හෝ මහාමාර්ගයේදී හෝ සමාජයේ කොතැන හෝ තැනකදී මේ ආදි ආකාරයන්ගෙන් වෙළඳාම් කරන පුද්ගලයන් පිලිබඳ තොරතුරු දැනගෙන නීතියට පෙන්වා දිය යුතුය. එසේ නොමැති නම් මුලු සමුහයම එක් වී ඔවුන්ට දඩුවම් කල යුතුය. එම ප්‍රදේශයෙන් හෝ පවුල් වලින් පන්නා හැරිය යුතුය. එය තමන්ගේ ඥාති කෙනෙකු වුවද එසේ කිරීමට අප දෙවැනි නොවුයේ නම් අපගේ වර්තමාන පරම්පරාව කුඩා දරුවන්ට මෙම මත්ද්‍රව්‍ය උවදුරෙන් බේරාගත හැක.

මන්දයත්, යම් පවක් සිදු වීමේදී එය ආරම්භයේදීම තුරන් කල යුතුය. එසේ නොමැතිව අනෙකා සිදු කරන තෙක් එය බලා සිටින විට එය උග්‍ර වී හමාරය. එයින් අනතුරුව විවිධ බලපෑම්වලට හා ප්‍රතිවිපාක වලට මුහුණ දීමට සිදු වන්නේ ද අපටමය. ඒ නිසා යහපත් ශ්‍රී ලාංකිකයන් වශයෙන් මෙම රට තුල පවතින මෙම ආකාරයේ ප්‍රශ්න වලට පිළිතුරු සෙවීම සඳහා මුලු මහත් සමාජයම දායකත්වය දැක්විය යුතුය. කෙනෙකු අදහසක් දැක්වීමේදී අප එම අදහසට සවන් දී අප ද ඔවුන්ට එයට සහාය විය යුතුය. සමාජය යහපත් අතට ගැනීමේ අභිලාෂයෙන් කෙනෙකු කථා කිරීමේදී අප අත්වැල් බැද බලා නොසිටිය යුතු බව මෙයින් අනාවරණය කර පෙන්වා දෙයි. එම නිසා අප ද රට තුළ පැන නගින අයහපත් ක්‍රියා කලාපයක් හමුවේ පෙනී සිටිමින් ඒවාට විරුද්ධ වී ක්‍රියා කල යුත්තෝ වෙමු.

රටක අනාගතය කුඩා දරුවන්ය. එම කුඩා දරුවන්ගේ යහපත් හීන සුන්බුන් වී යාමට අප ඉඩ නොහැරිය යුතුය. ඔවුන්ට තර්ජන එල්ල කරන යම් යම් ප්‍රශ්න හමුවේ නිසි අයුරු නිරාකරණය කිරීම සඳහා අප දායකත්වය සැපයිය යුතුය. සාධාරණ සමාජයක් නඩත්තු වීමෙහි ලා දක්වන දායකත්වය සඳහා මෙය නිදසුනකි. එම නිසා රට තුල ජීවත්වන මුස්ලිම්වරු සිටි විට ඔවුන්ට මුල්දී අවවාද කර බැලිය යුතුය. එසේ අවවාද කිරීමෙන් අනතුරුව ද ඔවුන් පිලිබඳව ද කිසිදු තැකීමකින් තොරව ක්‍රියා කලේ නම් අප ඔවුන්ට එරෙහි විය යුතුය. එවිට අප හට රට තුල සිදුවන මතභේදාත්මක තත්වයන් මෙන්ම නොයෙකුත් ගැටලු හමුවේද නොසැලි ක්‍රියා කල හැක.

අල්ලාහු තආලා මිනිසාට ජීවත් වීමේදී කෙසේ ජීවත් විය යුතුද? කෙසේ අවනත විය යුතුද,යන්න කරුණු කාරණා පෙන්වා දී ඇත. අප සමාජමය වශයෙන් ජීවත් වීමේදී එකමුතු කමින් හා සහයෝග

යෙන් ජීවත් විය යුතු ලෙස ද නැමදුම් කටයුතුවලදී අල්ලාට පමණක් නමස්කාර කරන ලෙස ද අන් අයට උදව් කිරීමේදී අල්ලාහ් වෙනුවෙන් ය යන චේතනාවෙන් උදව් කල යුතු බවට ඉස්ලාම් අප හට පෙන්වා දී තිබේ. සාධාරණත්වය අද සමාජය තුල බොහෝ සේ දැකගත නොහැකි අංගයක් බවට පත් වී තිබේ. එයට හේතුව වන්නේ මිනිසාගේ ආත්මාර්ථකාමී බවයි. තමන් කා බී ඇඳපැළඳගෙන හොඳින් සිටිය යුතුය යන්න පමණක් සිතමින් ක්‍රියා කරයි. අනුන් පිළිබඳව කිසිදු හැඟීමකින් හෝ අනුකම්පාවකින් තොරව ක්‍රියා කරයි. මෙය නියත වශයෙන්ම වැරදි අදහසක්ය. හැකි සෑම අවස්ථාවකදීම අප අන් අය සුහද සැලකිල්ලෙන් පසුවිය යුතුය. අප අන් අය සමග යහපත් අයුරු ක්‍රියා කල යුතුය. පරාර්ථකාමී විය යුතුය. නබි (සල්) තුමාණන්ගේ අතට ඉස්ලාම් දහම පත්වීම හා වර්ධනය වීමෙහි ලා ප්‍රධානතම හේතු සාධකය වුයේ නබි (සල්)තුමාණන්ගේ පරාර්ථකාමී බව, පරිත්‍යාගශීලිතාවය හා අන් අය පිළිබඳව සුහද සිතුවිල්ලකින් පසු වීමයි.

නබි(සල්) තුමාණන්ගේ දක්වා කාල පරිච්ඡේදය තුල දී බොහෝ මිනිසුන්ව ඉස්ලාමය දෙසට නැඹුරු කර ගැනීමට හැකි වුයේද මෙම යහගුණයෙන්ය. සාධාරණ සමාජයක් ගොඩනැංවීමට නම් පහත සඳහන් වූ ගුණාංගයන් පැවතීම ද අනිවාර්ය වන බව මෙයින් පැහැදිලි වේ.

එසේම පසුගිය දිනවල් වලදී අප රට තුල සිදු වූ බෝම්බ ප්‍රහාර හේතුවෙන් රට තුල පැන නැගූ ප්‍රශ්ණ ද බොහෝය. එක් සුලු කණ්ඩායමක් කල වරද හේතුවෙන් හෝ අඥාන ක්‍රියා කලාපයන් නිසා විවිධාකාර ප්‍රශ්නවලට අප රටේ මුස්ලිම්වරුන්ට මුහුණ දීමට සිදු ව තිබේ. පාස්කු ඉරිදා දිනයේ ක්‍රිස්තියානි පල්ලි කිහිපයකට සිදු කල මිලේච්ඡ ක්‍රියාවලිය නිසා බොහෝ ජීවිතයන් ද අහිමි වීමට සිදුවිය.

තවුහිද් නම් ඒකදේවවාදි සංකල්පය පෙරදැරි කර ගිනිමින් මරාගෙන මැරෙන බෝම්බ යොදා ගනිමින් තමන් ද තම දිවිය අහිමි කර ගනිමින් අන් අයගේ ජීවිත වලට ද බලපෑම් ඇති කිරීම කිසි විටකම සාධාරණ නොවන්නේය.

ඉස්ලාම් දිවිය හානි කර ගැනීම තරයේ හෙලා දකියි. එසේ සිදු කිරීම මහා පාප කර්මයක් බවට ද අනතුරු හගවා දෙන්නේය. අල්ලාහ් විසින් මිනිසාට ලබාදුන් රූපය (ජීවය) අත්පත් කර ගැනීමේ අයිතිය ඇත්තේද ඔහුටමය. ඒ සඳහා තවත් සාමාජිකයෙකුට සිදු කිරීමේ අයිතිය ද ඉස්ලාම් ලබා දී නැත. එම නිසා අප කුමන හෝ ක්‍රියාදාමයක් සිදු කිරීමට ප්‍රථම ඒ සම්බන්ධයෙන් ඉස්ලාම් අප හට පෙන්වා දී ඇත්තේ කුමක්ද යන්න පිලිබඳව පැහැදිලි හා නිරවුල් අවධානයෙන් සිටිය යුතුය. ඉස්ලාම් ධර්මය මිනිසාට පවරන ලද ප්‍රධාන මුලික වගකීම් වන ඉබාදත්, ඉමාරත්, කිලාෆත් පිලිබඳව මනා ලෙස අවධාරණය කර දෙන්නේය. මිනිසා විසින් සිදු කල යුතු යහපත් ක්‍රියාවන් ඉබද ලෙස හැඳින්වේ. එමෙන්ම පොළොව සක්‍රීයත්වයට පත් කිරීමට ඉමාරත් ලෙසහැඳින්වේ. අල්ලාහ්ගේ නියෝජිතයා වශයෙන් පෙනී සිට මෙලොව පරිපාලනය කිරීම තිලාෆත් යනුවෙන් හැඳින්වේ. මෙවැනි ප්‍රධාන වගකීම් තුන මිනිසාට අල්ලාහ් විසින් ලබා දී ඇත.

අප රට තුල ඇති වූ මෙම බෝම්බ ප්‍රහාර හේතුවෙන් අධික ලෙස බලපෑමට ලක්ව ඇත්තේ මුස්ලිම්වරුන්ය.මුස්ලිම් යන සංකල්පය තුලද වෙනත් අනුසංකල්ප වාදින් බිහි වී ඔවුන් යම් යම් මත දරමින් රට තුල ඇති කල මේ මහා ව්‍යාසනය රට තුල වෙසෙන අනෙක් සියලු මුස්ලිම්වරුන්ටද මහත් තර්ජනයක් විය. එම නිසා එම මුස්ලිම් වරුන්ට රට තුල ජීවත්වීමේ නිදහසක් ද නැත . පිට ගමන් බිමන් යාමට ද නොහැකි තත්ත්වයක් උදා විය.

බොහෝ මුස්ලිම්වරුන් තමන්ගේ ආත්ම ගරුත්වය උදෙසා හා දෙවියන් පිලිබඳ වූ සුහද සිතුවිල්ල හේතුකොට ගනිමින් පැලදිය යුතු බුර්කාව ද අද වන විට ලංකාවේ තහනම් තත්ත්වයකට පත්

කරන ලදී. එසේ එවැනි තත්ත්වයකට පත්වීමට හේතු වන්නේ ද මුස්ලිම්වරුන්ය. ඔවුන්ගේ එනම් ෂීෂී සංවිධානයට සම්බන්ධ පිරිසගේ ක්‍රියාකාරිත්වයෙන් හා සැලසුම්කරණයට අනුව උපයෝගි කරගත් එම කාන්තාවන් කිහිප දෙනෙකු යම් කඩසාප්පුවලට පිවිසෙන්නේ ද අප හට අල්ලාහ් පිවිතුරු කාන්තාවන්ට ඇඳීමට අනුමත කල එම බුර්කාව යොදා ගනිමින්ය. යහපත උදෙසා සීමාකල එම පැළඳුම් වැරදි ක්‍රියාකලාපයන් සඳහා යොදා ගැනීම ද අල්ලාහ්ගේ කෝපයට හේතු වන්නේය.

එම නිසා අද වනවිට ලංකාව තුල විවිධ අභියෝගයන් හමුවේ මුස්ලිම්වරුන් මුහුණ දෙමින් පවතී. මහාමාර්ගවල ගමන් කිරීමට ද අප කාන්තාවන්ට නොහැකි තත්ත්වයකට පත් වී ඇත. මන්දයත් එක් පිරිසක් කල ක්‍රියා හේතුවෙන් එහි බලපෑම් මුස්ලිම් ප්‍රජාවටම විඳීමට සිදුව ඇත .බහු සංස්කෘති ජන සමාජයක් වෙසෙන මෙම රට තුළ ඇති වී තිබෙන මේ මහා අර්බුධකාරී තත්ත්වයන්ගෙන් රට මුදවා ගැනීමට අප වෑයම් කල යුතුය. එකිනෙකා විශ්වාසයෙන් හා අන්‍යොන්‍යයෙන් කටයුතු කල අප රට තුළ වර්තමානය වන විට අන්‍ය ආගමිකයන් අප දෙස බලන්නේ ඉතාමත් සැකකාරී තත්ත්වයකිනි. මෙය ඉතාමත්ම කනගාටුදායක තත්ත්වයකි. එයින් ද අපගේ ජනතාව මුහුණ පාන්නේ අසිරුතාවයකටය.

බහුතර ජනතාවක් ජීවත් වන සිංහල පාසල්වල ඉගෙන ගන්නා මුස්ලිම් දරුවන්ට ද පාසල් යාමට නොහැකි අසාමාන්‍ය තත්ත්වයක් උදා වන්නට විය. මන්දහොත් පාසල තුළදි ද අනෙක් යහලු මිත්‍රයන් අප දෙස බලන්නේ වෙනත් දෘෂ්ටියකිනි.ආත්ම විශ්වාසය, අවංකකම, සත්‍ය බව ආදි යහගුණයන් ද එවිට තුරන් වි යන්නේය.

එම ත්‍රස්තවාදි කණ්ඩායම සිදු කල මේ ක්‍රියාවෙන් දුක් විඳීමට සිදු වනුයේ අහිංසක මුස්ලිම් ජනතාවටය. මුස්ලිම් යන නාමය උපයෝගි කරමින් ඉස්ලාම් නොපවසා ඇති කරුණු සඳහන් කරමින් එවැනි අය ඉදිරිපත් කරන්නා වූ මතයන් අතිශයින්ම වැරදිය. තවත් කෙනෙකු දිවි හානිකර ගනිමින් සිදු කරන ඒ ක්‍රියාවලිය අතිශයින්ම පාපී ක්‍රියාවකි. මෙයින් මුස්ලිම්වරු සාධාරණ සමාජයක් සඳහා දායකත්වය දක්වනවාද නැද්ද යන්න පිලිබඳව මනා ලෙස පැහැදිලි වේ.

අන්‍ය සංස්කෘතින් සමග සුහදශීලිභාවයෙන් හා එකමුතු කමින් ජීවත් වන ලෙසට ඉස්ලාම් අප හට අවධාරණය කරන්නේය. අන්‍ය ආගමිකයන්ගේ මතවලට ගරු කිරීමද ඉස්ලාම් අප හට පෙන්වා දෙන කරුණකි. නබි(සල්)තුමාගේ කාලයේදි පැන නැගූ බොහෝ ප්‍රශ්න හමුවේ මුස්ලිම්වරු ක්‍රියා කලේ ඉතාමත් යටහත් පහත්වය. එනම් ඉවසීම නම් යහ ගුණාංගය පාදක කොට ගනිමින්ය. ලංකාව තුල සිදු වූ මෙවැනි ක්‍රියා කලාපයන් හේතුවෙන් ජනතාවන් අතර ප්‍රචලිත වෙමින් පවතින වැරදි මතයන් මෙන්ම වැරදි ආකල්පයන් ද අප ඔවුන්ගේ හදවත්වලින් තුරන් කිරීමට උත්සුක විය යුතුය.

සමාජමය වශයෙන්, පවුල් වශයෙන් හා කණ්ඩායම් ලෙස ජීවත් වීමේදී සාධාරණත්වය උදෙසා අප කෙසේ ක්‍රියා කල යුතුද යන්න පිළිබඳව ඉස්ලාම් අප හට මනා ලෙස පෙන්වා දෙන්නේ සමානාත්මතාවයෙන් සැලකීම ඉතා අගනේය. අන් අය සමග සිටීමේදී හෝ ක්‍රියා කිරිමේදී සමානාත්මතාවය අනුගමනය කල යුතුය. එවිට ඇතිවීමට ඇති ප්‍රශ්න ද අඩුවන අතර එකිනෙකා අතර ඇති අවබෝධය දියුණු තත්වයකට පත්වනු ලබන්නේය.

අදින් පටන්ගත යුතු මෙම ක්‍රියාකලාපය නිසි අයුරු පවත්වාගෙන යා යුතුය. එය කෙසේද යත් මත්ද්‍රව්‍ය උවදුර, අපැහැදිලි වැටලීම් ආදි දේවල්වලින් අන් අයව ද මුදවා ගත යුතුය. මෙවැනි

අශෝභන ක්‍රියාවන් තුලින් අප හට එහි අවසාන ප්‍රතිපලය ලෙස දක්නට ලැබෙන්නේද විනාශයයි. කාෆිර්වරු හා ඉස්ලාමට විරුද්ධ පාර්ශවයන්ගේ ප්‍රධාන අරමුණ වී ඇත්තේ ඉස්ලාම් ධර්මය තුලට වෙනත් චින්තනයන්ගේ බලපෑම් ඇති කිරීමටය. එයට අප ඉඩ නොතබා දිරිමත් වී ක්‍රියා කල යුතුය.

මුස්ලිම්වරු වශයෙන් අප සාධාරණ සමාජයක් සඳහා දායකත්වය දැක්වීමේදී ඉස්ලාමයට පටහැනිව පවතින අංශයන් පිලිබඳව ද අවධානය යොමුකර ඒවායින් වැලකී සිටීමට අනිවර්ය වන්නේය. පිරික්,රිද්දන්, කුෆිර් වැනි අංගයන්ගෙන් මිදී සිටීම නියත වශයෙන් ම වැදගත් වන්නේය.

මුහම්මද් නබි(සල්)තුමාණන්ගේ සුන්නාන්ව අනුගමනය කරමින්, එතුමා පෙන්වා දුන් යහපත් ක්‍රියාදාමයන් අප ද පිලිපදිමින් සාධාරණ සමාජයක් ගොඩනැංවීම සඳහා සඳහා දායකත්වය සැපයිය හැකිය. එසේ දායකත්වය සැපයීමේදී හරාම් හා හලාල් පිළිබඳව පැහැදිලි අවබෝධයක් තිබීම ද අනිවාර්ය වන්නේය. මත්ද්‍රව්‍ය උවදුර අද වන විට රට තුල ව්‍යාප්ත වෙමින් පවතින අති මහත් තර්ජනයක් බවට පත් වී ඇත. ඒ සඳහා ද අප අපගේ දායකත්වය සැපයිය යුතුය. එම නිසා අප ඉස්ලාම් අප හට පෙන්වා දී ඇති මාර්ගෝපදේශයන් පිලිපදිමින් ඒවා අපගේ ජීවිතයට ද ඇතුළත් කරමින් යහපත් මුස්ලිම්වරු වශයෙන් ජීවත් වී සාධාරණ සමාජයක් ගොඩනංවා ගනිමින් පරලොව දිවිය සාර්ථක කර ගැනීමට අප සියලු දෙනා එක්වී වෙර දරමු.

තරඟකරුගේ නම : මොහොමඩ් මුෂාබ් මොහමඩ් මසාහිම්
පාසල : සහීරා විදුහල, කොළඹ 10
ශ්‍රේණිය : 13 ශ්‍රේණිය - (කලා)

History of the Majlis

1950

LSMM was formed (with a handful of students) with a view to promote Islamic Values among the student fraternity at Sri Lanka Law College.

Objectives of the Majlis were two fold at that time

- To promote Islamic principles and values within the emerging Advocates and proctors from Sri Lanka Law College
- To contribute to the need of reforming the ‘’Muslim Law” which at the time had deviated from the Shariah

1952

A grand dinner was organized under the presidency of M.R Thassim with Justice Nagalingham as the chief guest, and the participation of Muslim and Non Muslim Parlimentarians.

Dr. N.M Perera was a notable guest.

1962

This year marked a historic milestone in the history of Majlis under the presidency of A.M.M Zubair and editorship of Dassoki Mohamed; the Majlis published a law journal titled “Majlis Review” (which was devoted to reform the Muslim Law in Sri Lanka

- This was the birth of the present ‘’Meezan’’
- At the time, Mr. M. Rafeek served as the vice patron of the Majlis
- A notable guest during the year was Mr. Peter Keneman MP who delivered a talk on the political trends of the day.

1963

- A constitution for the Majlis was drafted for the first time under the presidency of U.LM Farook.
- Activities of the Majlis which were only confined to the premises of SLLC were taken beyond the 4 walls for the very first time of the year.
- The Majlis protested against the Minister of Education the use of two books, namely, “Student Visual History of Ceylon and the World” and “Archeology of Wolrd Religons” which contained facts contradictory to Islamic Principles and some which purpoted to be that of Holy Prophet Muhammad (PBUH). These books were successfully removed

- The Majlis further protested against the Minister of Cultural Affairs with regard to the South Indian Films 'Raja Desingu'' which contained parts which offended the Muslim Community.
- Following the landmark judgment of the Supreme Court *Jaaldeen v Darth Umma 64 NLR 19*, which made null and void the appointment of Quazis under the MMDA, the Majlis made a representation to the Minister of Justice to take immediate action to appoint Quazis through the JSC.
- The president of the then Majlis was elected at a conference held under the auspices of the Ceylon Muslim League to discuss the aforesaid matter.

1964

- The work of the previous Majlis was continued in this year as well with similar enthusiasm under the presidency of A.M.M Marleen (late Ambassador and PC) and the committee.
- The ''Majlis Review" was continued while A.H Mohideen and A.H.M Ismail joined as vice patrons alongside Mr. M. Rafeek
- A grand dinner was organized by the Majlis and was held at the Galle Face Hotel with Hon CJ M.C Sansoni presiding as chief guest.Many notable legal alumni and diplomats were seen to have graced the occasion.
- Many beneficial lectures were organized this year. Among them were the address by Theja Gunawardana on '' National Independence and Speech', the address by Hon late Mr. Dudley Senanayakaon ''Threats to democracy'' and the address of the Senato Doric De Souza on the '' End of the Middle Way''.
- For the first time in history, the Majlis hosted a cultural delegation from Pakistan which was headed by Prof. G. M Khan, Principal of Islamic College of Karachi. Prof Khan addressed the Majlis on ''Education in Pakistan''
- The Majlis sent representation to the all-island Muslim educational conference conducted by the All Ceylon Muslim League to discuss the educational problems confronting the Muslim community.
- The Majlis organized a united Prophet's Birthday celebration with the corporation of the Ceylon Islamic Centre.
- For the first time, a publication other than the Majlis Review was published titled ''Why Fast?'' during the month of Ramadan. The publication also featured the work of Dr. Hamidullah.

1968

- Another publication named ''political theory of Islam'' written by Mr. Maulana Mawdoodi was published.

53rd Meezan

1971

- For the first time a seminar was organized by the Majlis on the theme ‘’Reform of Muslims’’. The culminating success of this seminar was the formation of the ‘’Muslim Law Research Committee of Sri Lanka’’. Many legal luminaries and Muslim scholars were present at the event.

1975/1976

- Signified the Silver Jubilee of the Majlis.
- The ’’Majlis Review’’ which was not published the previous year was published this year styled as ‘’Meezan’’
- The objectives of the Majlis was broadened in effect which sort to cater to building leaders who will have the vision, aspiration and ambition to build a new society.
- That year too featured many beneficial lectures presented by many important persons including lecture by Prof. Abdul Rahman, a scholar in Tamil Literature from India.
- The Majlis inaugurated a scholarship program to render support to the needy students. This Scholarship was generously funded by Al Haj M.I.M Naleem and thus was named ‘’ Naleem Hajiar Scholarship”’
- The Majlis was invited by the Muslim students Association of USA and Canada to participate in their Luth (youth) Annual Convention .
- The Majlis played an active role in promoting students’ rights at SLLC. Due to the efforts of the Majlis together with other student unions, students were allowed to answer all their examination papers which was not previously granted.
- Its is noteworthy to mention that the then president M.S.M. Aflul had the honour of being called upon to present the case for the students before the council on two occasions

1977

- Justice Abdul Hakeem, High Commissioner of Bangladesh in Sri Lanka gave a lecture on the topic ‘’ Importance of Legal Profession’’.
- The Majlis widened the scholarship programme to not only provide financial assistance to needy students, but to also award two cash prizes to students who obtained first class honours in the examination.
- The Majlis for the first time organised for its members a visit trip to Beruwala with a visit to the Muslim University ‘’Naleemiah Institute’’.
- Members of the Majlis enrolled as members of the M.I.C.H. Youth Parliament (an initiative to sharpen their talents in oratory skills, make them acquainted in parliamentary procedures and train them for leadership)

- Meezan was published with Hon. Al Haj M.H. Mohamed, Minister of Transport Board and Muslim religious Affairs as chief guest.

1978

- The Majlis took the initiative to help the Muslim students at SLLC by providibg them with cash loans to pay for law books, tuition fees etc.
- The Meezan was published and the Hon Speaker of parliament AL Haj M.A Bakeer Markar graced the occasion as chief guest.

1979

- The Meezan was published with the chief guest Mr. Gamini Dissanayaka, Minister of Lands and Mahaweli Development.

1980

- The Majlis saw the successful completion of 30 years.
- The Meezan was launched with the chief guest Dr. Nissanka Wijeratna, the then Minister of Justice.

1981

- The Meezan was launched featuring for the first time the complete database of all Muslim students at SLLC and all lawyers island wide.
- A lecture was held where Justice M. Jameel, Judge of the Court of Appeal addressed the students on the topic ‘’ The Distribution of wealth in Islam”.
- For the first time Majlis was able to conduct a course of study for prospective law students covering the areas of English and Tamil Languages ang General Knowledge. This took place under the presidency of A. A .M Ismail.

1987

- Under the presidency A.H.M.D Nawaz, the position of Vice patron was reintroduced and the then State Counsel , Mr. Saleem Marsoof took up this position.
- Mr. Jauffer Hassan took the position of Senior Treasurer in order to overlook the activities of the Majlis primarily with regards to finance.

1988/1989

- The tenure of the committee commenced with the inaugural meeting in March

during which the then DSG Mr. Shibly Aziz delivered a talk on the topic '' Statutes Governing Muslim Personal Laws, is any revision needed''. Many dignitaries and legal luminaries too were presented at the event.

1989/1990

- Activities of the Majlis commenced with the inaugural meeting at which Justice A.R.B Amarasingha, Judge of the Supreme Court was the chief guest and he addressed the gathering with the topic ''Human rights and Islamic Traditions''.
- The post vice patron was then taken up by DSG Shibly Aziz.
- The Majlis for the first time organized an ''Address to the Jury'' competition in English. The trophy was named after the former AG A.C.M Ameer (PC).

1990/1991

- The committee undertook two new projects that year
- Distribution of Sahar meals to Muslim Students residing in the hostel.
- The Majlis obtained scholarships from the Ceylon Baithul Maal Fund for the needy Muslim Students.
- A speech was delivered by then BAR Association President, Desmond Fernando PC on the topic ''Problems faced by new Attorneys''.

1991/1992

- Many lectures were organized this year as well.
- The inaugural meeting was held with the participation of Hon. Justice Ameer Ismail judge of the court of appeal as the chief guest.
- The Majlis visited a refugee camp in Pulichakkulam in the Puttalm District where stationery was donated to the displaced students at the camp.
- A legal aid unit was established in Majlis for the first time.

1992/1993

- The inaugural meeting was held with justice K.M.M.B. Kulatunga, judge of the supreme court as the chief guest.
- An impromptu speech contest was organized for the first time and a trophy was donated by Mr.N.MBurhandeen in memory of late justice.T.Akbar to be awarded to the winner.
- A research paper contest on muslim law was held to enchance the knowledge of Islamic jurisprudence.

- A moot competition was organized by the majlis. The winners of the competition were awarded at the year Meezan launch at the chief guest was the then CJ Hon G.P.S De Silva.
- The Majlis ‘’Isha Athul Islam’’ orphanage in Dharga Town where necessities were donated
- Mr. Saleem Marsoof (DSG) assumed duties as vice patron that year.
- An ifthar was organized for the first time.
- Another refugee relief programme was organized for the refuges in the Puttalam District.

1994

- The Majlis with objective to educate the members on religious aspects organized a ‘’Thahlim” programme every week in which speakers from both national and international levels were invited.
- The Majlis hosted an event to felicitate Dr. Badi-ud-din Mahmud for the service rendered by him. The chief guest was the then President Her Excellency President Chandrika Bandaranayaka Kumaratunga.

1996/1997

- The Meezan was for the first time dedicated in memory of a person that year. It was dedicated in memory of Dr. Badi-ud-din Mahmud.

1998/1999

- Many previously conducted events continued this year as well.

2000/2001

- This year marked the Golden Jubilee of the Majlis.
- The Committee under the Presidency of Ahmed M. Hussain successfully convinced the administration not to hold lectures during Jummah hours.
- A t-shirt was printed which sought to foster a sense of brotherhood within college students.
- The Majlis conducted English class free of charge to assist college students to enhance their English Language.
- A board of advisors was formed which comprised many legal luminaries.

53rd Meezan

2001/2002

- Mr. A. H. G Ameen was appointed as Senior Treasurer of the Majlis.

2005

- The Best Speaker contest and Research paper contest were continued.
- The publishing of the Meezan was reviewed (it was not published for a few years)
- The Majlis pledged its support to the effort of the LSU in assisting Tsunami victims.
- The modern constitution of the Majlis was promulgated and incorporated in to the Meezan; giving it official recognition for the first time.

2006

- With the new principal, Mr.W.D.Rodrigo, being appointed to SLLC, The Majlis too witnessed a new patron.
- A symposium under the topic **'**Feedom of Expression vs Religious sensitives" was held in the college main hall.

2007-2009

- Saw a change in the number of members of LSMM.
- A copy of the transalation of the Quran was handed over to the college library.

2007

- Arrangements were made for a ladie's prayer room within the premises of college.

2008

- The scholarship programme for needy students was reintroduced.
- The Majlis organized a felicitation ceremony in honour of the then principal obtaining a Doctorate from the University of Queenland.
- The Meezan was dedicated in memory of late Mr.M.H.M.Ashroff PC,leader of the SLMC and past President and Secretary of the Majlis.
- The best speaker contest was named after him.

2010

- Commenced with the inaugural meeting where Mr. Shibly Aziz (PC)

was felicitated on his appointment as the president of the BAR Association of Sri Lanka.

- The prayer room was reinstated (after it had been required by the administration)
- The Majlis published and distributed a text book on Muslim Law in English Language.

2011

- The inaugural meeting was held with the chief guest former SC Judge, VP of the ICJ, H.E Judge Dr. C.G Weeramantry.
- The Majlis organised a dua and bayan session in lieu of the centenary celebration of Law College being situated at the current location.
- An essay competition was held in all three languages.
- The Meezan was published with the participation of Faisz Musthapha PC anf former MP Imthiaz Bakeer Markar.

2012/2013

- Many forgotten projects were revived under the presidency of Rahmathullah Riyaldeen.
- The Majlis for the first time devised an elaborate system of sub committees including information and PR, Publication, Finance Skills and Language development, welfare etc.
- For the first time in the history of the Majlis and perhaps SLLC, a Sinhala and Tamil language development class series was organized for those who were not convenient with the language.
- The majlis paid a visit to the Lady Fareed's Elders Home at Makola and spent a day with the elders.

2013

- For the first time in recent history an ''Eid Celebration'' was held in the college premises.
- The Majlis broadened its scope in providing sahar meals (due to the contribution of generous donors) to university students and those who are living around law college as well.
- The Muslim Law Book was published with an addition of Tamil translation of the content.
- A website exclusive to the Majlis (www.Ismmsllc.com) was launched at the Meezan launching ceremony.

- An e-book version of all the past "Majlis Review" and ''Meezan" including the first publication in 1962 was published.

2016

The 5oth edition of the Meezan was launched. The Attorney General of Sri Lanka, Honourable Jayantha Jayasuriya was the chief guest for the occasion.

2017

Shafeena Maharoof became the first lady to be appointed President of the Law Students' Muslim Majlis.

The 51st Edition of the Meezan was dedicated to Judge C.G Weeramantry on his passing.

A legal aid program was conducted in Marichkkady to provide legal assistance to those displaced from their homes.

2018

- The Majlis organized a ''Visit my Mosque'' programme whereby the students at Law College were given the opportunity to witness the proceedings of the Jawatta Jummah Mosque.

2018/2019

- Organized a Seminar for the candidates of the Law Entrance Examination.
- The 53rd Edition of the Meezan was dedicated to Mr. Shibly Aziz, PC on his passing.

Compiled by : A. Malik Azeez

President; Law Students' Muslim Majlis

(2013/2014)

Winners of the Essay Competition Organised by the Law Students' Muslim Majlis 2018/2019

Inter University Essay Competitions

1st Place M. L. F. Mahira

2nd Place M. T. F. Zahra
South Eastern University of Sri Lanka

3rd Place Not Awarded

Inter School Essay Competition

1st Place Mohamed Mushab
Zahira College Colombo- 10

2nd Place M. A. M. F. Nuskiya
B/ Welimada Muslim Maha Vidyalaya

3rd Place Raashib Hameed
St. Anthony's College Kandy

Past Presidents and secretaries of the Law Students' Muslim Majlis

Year	President	Secretary
1957/1958	S.H.Mohamed	M.H.M.Jalaldeen
1958/1959	M.S.M.Naseem	M.H.M.Jalaldeen
1959/1960	M.R.Thaseem	A.A.M.Alahudeen
1960/1961	Y.L.M.Mansoor	A.R.Mansoor
	Ajward Hashim	M.Dasooki Mohamed
	Nawas Dawood	
1962/1963	A.M.M.Zubair	I.L.L.M.Yahiya
1963/1964	U.L.M.Faook	A.M.Nazeer
1964/1965	A.A.M.Marleen	M.C.M.Zarook
1965/1966	M.C.M.Zarook	
1966/1967	Razick Zarook	
1967/1968	M.A.M.Faisal	
1968/1969	M.M. Deen	
1970/1971	M.M.Jiffry	Y.A.M.H.Omar
1971/1972	M.M.Zuhair	M.H.M.Ashraff
1972/1973	M.H.M.Ashraff	K.Noordeen
1973/1974	S.M.Haniffa	R.M.Imam
1974/1975	M.Y.M.Faiz	A.S.M.Abdul Razzak
1975/1976	S.A.M.Azhar Mohamed	A.W.Abdul Salam
1976/1977	M.S.M.Afulal	B.A.Niyas
1977/1978	A.J.M.Thahir	M.M.A.C.Razmara
1978/1979	M.I.M Rahmathullah	N.M.Kariyapper
1979/1980	M.C.M. Zawahir	M.A.C.S.Hameed
1980/1981	M.S.M.Samsudeen	Ms. U.S.Cader
1981/1982	A.A.M.Ismail	A.R.H.Hakeem

1982/1983	M.I.M.Abdullah	M.Nazeem Farook
1983/1984	T.H.Careem	Y.L.M.Razik
1984/1985	M.H.Segu Issadeen	A.W.M.Saleem
1985/1986	U.M.Farook	Ms. S.R.Zakaf
1986/1987	U.M.Nizar	Ms. Z.Z.Jameel
1987/1988	A.H.M.D.Nawaz	M.Farook
1988/1989	A.M.Faaiz M	Ashroff Roomy
1989/1990	M.Ashroff Rumy	Ms. Shama Ismail
1990/1991	Nadvi Bahaudeen	Ms. Rizni Musafer
1991/1992	A.M.Mohamed Rauf	M.I.M Ishar
1992/1993	M.F.M.Anoozer	M.R.M.Ramzeen
1993/1994	M.R.MFazeen	A.W.M.Fazlin
1994/1995	M.U.M.Ali Sabri	Nadvi Navavi
1995/1996	A.M.Kamarudeen	M.Ameen
1996/1997	M.Sa'adi A. Wadood	M.Farman Cassim
1997/1998	Riyas Barry	Aadil Cassim
1998/1999	A.M.M. Sahabdeen	Arshad Auf
1999/2000	Inthikad Idroos	Ms.Mubeena Faisal
2000/2001	Ahamed M Hussain	Ms. Shirazi Zavahir
2002/2003	Malik Hannan	M.F.R.Aslam
2003/2004	M.F.R.Aslam	Hejaaz Hezbullah
2004/2005	Hejaaz Hezbullah	Ms. Shahrana Maulana
2005/2006	Althaf Marsoof	Irshad Hameed
2006/2007	Irshad Hameed	Faazil Sheriff
2007/2008	M.I.M.Naleem	A.H.M.Nuhman
2008/2009	Hussain Azhar Zainoon	M.S.Zawahir
2009/2010	M.S.Zavahir	Ms. Shehana Aniff
2010/2011	Shafraz M. Hamza	Ms. Maiza Azhar
2011/2012	Hazzan Hameed	Ms. K.Mifra Banu

2012/2013	M.R.Rahmatullah	A.Malik Azeez
2013/2014	A.Malik Azeez	Ziyani Marikar Riyas
2014/2015	Shehan Musthapha	S.Mohideen
2015/2016	Shiraz Hassan	Shafeena M.M.F
2016/2017	Shafeena M.M.F	Nasreen Naushad
2017/2018	Sanjith Ahamed	Shammas Ghouse
2018/2019	Muazzam Mubarak	Haajer Azhar

PRELIMINARY YEAR

M.Abdhul Rauf
A.M.Nafees
A.Fathima Shafrina
S.T.Hasan
Jaward Fathima Sajidha
M.M.Fathima Marshadha
Firdhous Fathima Farah
Mohamed Iqbal Bishran Ahmed
Mohamed Suhaib Aashique
Mohamed Naleer Mohammed Nasleen
M.M.Arqam
M.S.Arshadha
M.A.Mohamed Rizky
S.S.Nadha
M.I.Imtiyaz
S.A.Mohamed Rizan
M.M.Fathima
M.M.Mohamed.Ashraf
H.I.Fathima Rimza
U.Huzney Mohamed
Mohamed Naufer Fathima Nifla.
R.H.Ibrahim
M.A.Mohammed Ziraj
F.Fadhly Mohamed
A.C.Mohamed Asfee
M.R.M Rasmi
Mohamed Rizvi Fathima Bushra
S.Jawahir saly
M.N.Mohamed Israth
F.S.Shanik Pakeer
Razik Fathima Shabnam

INTERMEDIATE YEAR

Ijaz Azmy
M.F.A. Majid
Minaz Izzadeen
M.F.M. Fuzly
M.T.A. Rizna
T.H.F. Hazra
T.H.F. Huzra
A.M.A. Mahees
M.R.M.S. Fahmeedha
M.K.M. Farzan
F.I.M. Sajeer
M.I. Hasanali
N.S. Muthaliff
M.A.R.M. Rakshan
M.Z. Asma
M.M.R. Ahamed
S.M. Faleel
M.I.M. Liayvudeen

FINAL YEAR

Zam Zam Ismail
A.L.A. Naseef
Haajer Azhar
Shabna Rafeek
Shimlah Usuph
Mohamed Infas
Salmanul Faris
Fathima Shafna
M.F.F. Fazmila
Dinali Raheem
M.M.S. Mahira
M.R.M. Arshad
Sulaiman Rameez
A.I.N. Kariapper
M.M. Ahamed Sanoon

APPRENTICE YEAR

Shammas Ghouse
Nasreen Naushadh
Afra Laffar
M.H.F. Asma
Fahama Abdul Latheef
A.M.A. Hassan
Iffath Sheriff
Z.K. Luthufi
F.N. Zainudeen
F.N. Marikkar
A.R. Mohamed Raizoon
Mohamed Saheel
M.M. Muazzam
M.N.F. Muzna
Zulaiha Munaf
Nifraz Nazeer
M.R.M. Razan
M.R.M. Rikaz
F.S. Anees
A.R.F. Shafna
Shahani Mackie
Shamara Firdous
Uzman Anver
C.J. Zain

Achievements of Muslim Students

Cricket

Ilham Hassanali

Mohammed Rakhshan

Liyaudeen Mohammed

Bishran Iqbal

M. M. Arqam

Football

Mohamed Rakshan

Muhammed Rizky

Rugby

Bishran Iqbal

Basketball (Men)

Ilham Nizam Kariapper (Captain)

Ilham Hassanali

Basketball (Women)

Haajer Azhar (Captain)
Arshadha Subair

Netball

Haajer Azhar

Athletics

Haajer Azhar (Vice Captain)

Hockey

Bishran Iqbal

Table Tennis

Shanik Pakeer

Carrom

Bishran Iqbal

Shanik Pakeer

Chess

Zamzam Ismail (Vice Captain)

Arshadha Subair

Sara Nada

INTERNAL AND INTERNATIONAL MOOT COMPETITIONS

Best Mooter of Intermediate Year 2018 (Sinhala) – Zamzam Ismail

GNLU International Moot Court Competition – Zamzam Ismail

Oxford International Intellectual Property Law Moot Competition – Ilham Nizam Karipper

NLIU Tankha Moot Competition - Ilham Nizam Karipper

D.M. Harish Memorial International Moot Court Competition – Haajer Azhar

ADDRESS TO JURY COMPETITIIONS

G.L.M. De Silva Memorial Gold Medalist 2019 - Haajer Azhar

Best Mooter 2019 (Sinhala)- Haajer Azhar

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