MEEZAN

ANNUAL LAW JOURNAL

54th EDITION

LAW STUDENTS' MUSLIM MAJLIS 2019/2020
SRI LANKA LAW COLLEGE

MEEZAN

AN ACADEMIC AND PROFESSIONAL JOURNAL COMPRISING
SCHOLARLY AND STUDENT ARTICLES

54th EDITION

EDITED BY

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The Law Students' Muslim Majlis
Sri Lanka Law College

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

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EVENT DETAILS

The Launch of the 54th Edition of the Annual Law Journal

MEEZAN

Chief Guest

Hon. M.U.M. Ali Sabry PC, Minister of Justice

Date

24th of February, 2021

Venue

Sri Lanka Law College, Colombo 12

The Law Students' Muslim Majlis
Of
Sri Lanka Law College
The Executive Committee 2019/2020

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The 54th Meezan Journal is dedicated to all the healthcare workers, frontline workers and members of the public who have volunteered to assist them, in appreciation of their unwavering efforts, immense sacrifice, invaluable dedication and strong commitment towards managing the COVID- 19 pandemic situation, oftentimes risking their own lives, merely for the greater good of the nation.

Law Students' Muslim Majlis

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7th January 2021

It is with great pleasure that I forward this message to the "Meezan" Law Journal, the annual publication by the Law Students Muslim Majlis. Though we are in unprecedented times, amid the spread of Covid-19 pandemic across the globe, it is indeed laudable that the Law Students Muslim Majlis is continuing with the long standing tradition by publishing the 54th edition of "Meezan" Law Journal.

The Law Students Muslim Majlis through "Meezan" Law Journal has continued to provide a forum for over half a century for the exchange of ideas, opinions and views on the subject of religion and the law, among the student population. The "Meezan" Law Journal contains articles of value and it is indeed a great benefit to law students and legal practitioners to have a publication of this nature in order to keep their knowledge abreast of recent developments in different fields of law.

I wish to congratulate the editorial board and the committee members of the Law Students Muslim Majlis for their untiring efforts for making the publication of "Meezan" a success. I extend to the Law Students Muslim Majlis my good wishes.

Jayantha Jayasuriya, P.C.

Chief Justice

Message from the Minister of Justice

I am pleased to send my wishes to the Law Students' Muslim Majlis of Sri Lanka Law College on publishing the 54th Edition of the 'Meezan' Law Journal.

In order for the law and the legal system to progress, it is vital for there to be a steady stream of high quality legal jurisprudence. Critical analysis of the existing law as well as ideas on how the law should develop play a vital role in the law moving forward.

The 'Meezan' law journal is a publication which has over the years garnered a reputation for publishing content of a high standard from a cross section of law students, lawyers from the official and unofficial bars as well as members of the judiciary. As a student publication it has held it's own amongst the legal fraternity.

I congratulate the Committee of the Law Students' Muslim Majlis on the publication of this edition of 'Meezan', and I look forward to seeing more publications well into the future.

M.U.M. Ali Sabry, PC.
Minister of Justice

Message from the Patron

It gives me much pleasure to send a message to 'Meezan 2020', the annual publication of the Law Students' Muslim Majlis of Sri Lanka Law College.

The publication of Meezan for 54 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

Troublous times or periods beset by impediments, however unyielding they may be, are no insurmountable obstacles when they confront young minds of tough character and resilience and this year's publication of Meezan, at a comparatively scaled down ceremony, is a testament to the indomitable courage, spirit and enthusiasm of the members of the Sri Lanka Law College Muslim Majlis.

At a challenging time when studies all over the world have gone virtual and the contours of legal landscape are not immune to the buffeting winds which bear down on us owing to a global pandemic, I feel proud that the President and Members of the Muslim Majlis have persevered in bringing out the Annual Publication despite the attendant obstacles and I am only aware of the indefatigable efforts of the Members and the Editor of Meezan in churning out this publication with its customary richness and luminescent articles.

While complimenting and congratulating Members of the Majlis on a splendid job well done, my earnest prayer is that the Majlis should vibrantly operate in order to spread peace and harmony at a cosmopolitan institution such as Sri Lanka Law College and I wish the law students that their bourgeoning dreams and career will flourish in times to come, given their singular determination.

It is truly spectacular watching the hard work of these students mature into some remarkable work of legal heritage. This type of commitment to serve the legal community augurs well for the future we could envision for these students.

I wish the Majlis and its members all success in their future pursuits.

Justice A.H.M.D. Nawaz
Judge of the Supreme Court

Message from the President

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

It is with immense pleasure and privilege that I pen this message for the 54th annual MEEZAN journal, as the President of the Law Students' Muslim Majlis (LSMM) for 2019/2020. I am indeed indebted to Almighty Allah for this opportunity to serve as the President of the Law Students' Muslim Majlis of Sri Lanka Law College.

The Meezan journal, with its glorious reputation and rich history, is a knowledge hub for lawyers and law students which has been continued for more than 50 years as of now.

As a matter of fact, this massive project cannot happen overnight, it requires a considerable amount of planning and a birds-eye for details. Unfortunately, in comparison to previous years, this year the Covid-19 outbreak meant the committee was faced with numerous hurdles in completing the project. Amidst various limitations and ambiguity our LSMM committee kept working hard and has been able to complete the Meezan. I take this opportunity to thank the Editor and all other members of the editorial committee who are the backbone of this project. I extend my appreciation towards each and every executive committee member, and the general members of the LSMM for their contribution throughout the year. Even though we had many projects planned for this year, unfortunately we were unable to execute all those projects due to the pandemic situation in the country. However, we still managed to Re-launch the LSMM website, & Launching the e-version of the 54th Meezan whilst also publishing hard copies.

I must take this opportunity to mention and thank our Patron Ms. Indira Samarasinghe PC for her support. Further, on behalf of the LSMM, I must express my heartfelt gratitude to the Vice Patron of the LSMM, His Lordship Justice A. H. M. D. Nawaz- Judge of the Supreme Court, for his continuous guidance & fullest support throughout this difficult year and for constantly communicating with us even amongst his busy schedule and always motivating us to deliver the best by providing us with valuable advice and feedback. I also express my sincere gratitude to our Senior Treasurer, Honorable Minister of Justice M. U. M. Ali Sabry PC for being a constant source of encouragement and for being an inspiration not only to us, but for all law students. It has indeed been a great privilege to work under professionals of such a dignified caliber.

I wish to conclude my final message for the LSMM by remembering the Almighty Allah for his countless blessings and for making the successful launch of this Meezan and, I wish the future members of the LSMM nothing but the best in everything they pursue.

Mohamed Infas
President
Law Students' Muslim Majlis 2019/2020

General Secretary's Report for 2019/2020

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

It is with a sense of deep pleasure that I submit this report for the 54th Annual Meezan Law Journal as the General Secretary of the Law Students' Muslim Majlis (LSMM) 2019/2020. It has been a great privilege to associate myself with the LSMM and whilst thanking Almighty Allah profusely for having bestowed upon me this position of great responsibility, I must also mention that I'm deeply humbled by the faith placed in me by my colleagues when entrusting me with this privileged position.

The LSMM for 2019/2020 commenced its activities with the inaugural executive committee meeting on the 10th of September 2019, during which we discussed and set out a timeline of projects and activities for the forthcoming year.

Meanwhile, the LSMM had an opportunity to address the students entering Sri Lanka Law College at the Orientation Programme held on the 21st of January 2020 at the college premises. On the part of the LSMM, files containing the syllabus content for the preliminary and intermediate years of study were distributed to the audience. Thereafter, a freshers' welcome was conducted by the LSMM on the 29th of January 2020 for the new muslim students who entered Sri Lanka Law College. The purpose of this gathering was to introduce the executive committee of the LSMM & the usual activities of the LSMM to the newcomers.

Thereafter, the LSMM was able to successfully carry out the Quazi Court visit on the 29th of February 2020 with the participation of twenty students from the preliminary and intermediate years of study. Moreover, it is noteworthy that as of today, the LSMM relaunched their website with an entirely new user interface.

Furthermore, it is mention-worthy that although the LSMM had planned a lineup of projects for the year 2020, the unfortunate and unexpected covid-19 pandemic that brought the world to a standstill, likewise impacted the activities of the LSMM and brought them to a halt temporarily. Amongst the planned events were an open mosque visit, the annual ifthar programme, legal aid and awareness programmes and a series of guest lectures, most of which were already being worked on when the aforementioned unforeseen incidents played out.

The launch of the 54th Meezan law journal marks the end of the LSMM's calendar year. We hope and believe that this journal that consists of articles from reputed members of the legal fraternity, legal luminaries, other eminent individuals and law students will be a valuable resource to the readers.

I would like to take this opportunity to extend my most sincere and heartfelt gratitude to the Patron of the LSMM, Mrs. Indira Samarasinghe PC, the Vice Patron of the LSMM, His Lordship Justice A. H. M. D. Nawaz- Judge of the Supreme Court, Honorable Minister of Justice, M. U. M. Ali Sabry PC for being a constant source of guidance and encouragement. I would also like to thank the article-writers and donors for their contributions, financial and otherwise. I must also express my appreciation towards the members of the editorial committee and the executive committee of the LSMM, without whose untiring efforts and dedication the completion and launching of the Meezan would have been a task impossible. I also thank each and every one who rendered their assistance and contribution in any form, because frankly, every little act of help towards us throughout this journey meant a lot. Thank you all!

Hence, I conclude my report whilst wishing the future majlis all the best in all their endeavors. May Allah Almighty purify our intentions and accept our actions.

Shimlah Taznim Usuph
General Secretary
Law Students' Muslim Majlis 2019/2020

Editor's Note

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

It is with immense pleasure and satisfaction that I pen down this message to the 54th edition of the "Meezan Law Journal", an annual publication of the Law Students' Muslim Majlis of Sri Lanka Law College.

The plans and time schedules that our committee was determined to fulfil this year especially with regard to the 54th edition of Meezan were shattered in response to the global outbreak. But somehow, one way or another, we got through it. As the Editor of the Law Students' Muslim Majlis, with the great pride I would say, though we had to face the challenges of frequent lockdowns, social distancing, self-isolation and travel restrictions, we could give birth to the 54th edition of the Meezan.

This 54th edition of the Meezan law journal carries a few remarkable changes while consisting of the usual scholarly articles written by esteemed legal luminaries and law students focusing on contemporary issues which need public attentions.When considering the content of the articles per se, though we have tried to streamline the topics related to Law only, certain articles have been included which do not address the law related issues. It's because of the inevitable nature of the articles as they analyse the core issues of what the world face currently especially with regard to Covid 19.

I would like to extent my sincere gratitudes to all the distinguished legal luminaries, academics and students for their valuable contributions and time. In Particular, my greetings should also go to the the Editorial Committee members who have worked extremely hard to handle the articles for this magazine in a timely manner.

My heartfelt appreciation goes to the Executive Committee of the Muslim Majlis (2019/2020) who have rendered their fullest support throughout the year at a stretch in order to maintain the high standard of integrity that has always been characteristic of the Majlis and of the magazine that represents it.

May Allah bless us all with health, happiness, patience and strength.

Inshaff M. Sajeer
Editor,
Law Students' Muslim Majlis

CONTENTS

Relevance of Convictions in Civil Proceedings

Hon. Justice A.H.M.D.Nawaz
LL.B (Col); LL.M (London); LL.M (Colombo);
LL.M (WCL, American University),
Judge of the Supreme Court

It so happens that many a practitioner and judge alike labour under a misgiving as to the effect of a guilty plea in subsequent civil proceedings. The invitation by law students to write on evidence behoves me to look at the relevancy of convictions as evidence in subsequent civil proceedings.

What is the status of an earlier criminal conviction at the subsequent civil trial relating to the same facts? The answer outlined at common law was that it had no status at all, despite the fact that the same defendant may be involved in both sets of proceedings. This was confirmed in the leading English case of **Hollington v. F. Hewthorn and Co Ltd.**[1]

This case arose following a collision between two vehicles in which the plaintiff's son sustained fatal injuries. The plaintiff brought an action under the Fatal Accidents Acts against the defendants (the owner and driver of the offending vehicle) on behalf of his son's estate. However, as his son had died, he had no evidence of the owner's negligence except the conviction of the second defendant (the driver) for careless driving. It was alleged that the first defendant (Hewthorn & Co-the owner of the car) was vicariously liable for the action of the second defendant. The plaintiff tendered as evidence of negligence, a conviction of the second defendant driver.

It was argued that the conviction was admissible as at least prima facie evidence of negligence, but this argument was rejected by the Court of Appeal. In giving judgement, Lord Goddard CJ stated that:-

> "The conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision….
>
> ……It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything he saw, he may not express any opinion on whether either or both of the parties were negligent…. On the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant."

The father's claim failed.

1 (1943) K.B. 587; (1943) 2 A.E.R.35; 112 L.J.K.B.463.

The judgment of Goddard LJ contains most of the traditional arguments against the admissibility of the criminal convictions, which may be stated in summary as follows:

(i) The modern law of evidence, unlike the earlier view, is concerned with relevant and not primarily with the competence of witnesses. Generally, relevant evidence is admissible. This evidence is not relevant, but is only the view of another court that it considered the defendant guilty of careless driving on evidence and consideration not known to the civil court;

(ii) It is *res inter alios acta*-the issues in criminal and civil proceedings are not identical;

(iii) It is open to the objection of irrelevance as opinion evidence, as the conviction is only the opinion of the criminal court;

(iv) It is hearsay:

(v) If a conviction is inadmissible, an acquittal should equally be admitted, and no one has ever suggested that an acquittal was evidence;

(vi) The authorities are against admissibility.

The rule laid down in the case has not commended itself to the American jurist Wigmore who observed that in numerous situations it is 'unreasonable and impractical' to ignore the evidential use of a judgment in another proceeding involving the same fact as in the present case.[2] Wigmore's view has distinguished support in the US, as appears from the fact that in the *Modern Code of Evidence* published by the American Law Institute in 1942, whose r 521 provides that evidence of a subsisting judgment adjudging a person guilty of a crime or misdemeanor is admissible as tending to prove the facts recited therein, and every fact essential to sustain the judgment. It has to be noted that Goddard LJ's use of relevance in the case is identical with Stephen's use of the term in his *Digest of Evidence*. In ***Hollington v. F. Hewthorn and Co. Ltd*** *(supra),* Goddard LJ explained that:

> "*nowadays it is relevance….that is the main consideration, and generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded*."

There, the word 'relevant' is used interchangeably with admissible.[3] Even Rule 402 of the American Federal Rules of Evidence is to the same effect.

> *"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible*."

2 John Henry Wigmore, *Treatise on Evidence in Trials at Common Law*, Vol. 5, Third edn., 1940, ss 1671, 1688.

3 See CA Wright in (1934) 21 Canadian Bar Review 653, p.656. .

But the meaning of 'relevant' in the law of evidence today is 'logically probative'. This conception of relevance modifies the reference to probability. In the words of r 401 of the Federal Rules of Evidence;

> *"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without evide*nce."

In ***DPP v. Kilbourne***, Lord Simon of Glaisdale expressed the view that;

> *"Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. .....It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable."*[4]

It is as plain as a pikestaff that the evidence of the conviction is logically probative of the facts in issue in the civil proceedings namely negligence if the conviction is for an offence based on negligence. But Hollington put paid to the adduction of the evidence of conviction. J.A. Coutts considers the case law and the principles on which the holding in the Hollington case was reached, and demonstrates that, apart from some problem cases, the rule excluding the conviction was not based on authority and that there was certainly authority to the contrary, which was decisively rejected.[5] But the Hollington rule has not been applied in divorce suits where desertion or cruelty is in issue.[6] The case of Ingram v. Ingram contains an interesting application by way of distinguishing the rule of evidence in the Hollington case as to the admissibility and relevance of a criminal conviction for the purposes of establishing a matrimonial offence.[7]

Criticism of the Hollington Rule by Lord Denning, M.R.

In 1966, in ***Goody v. Odhama Press Ltd***,[8] Lord Denning, M.R. criticized the judgment in the ***Hollington*** case. He made a critique of it again in ***Barclays Bank Ltd v. Coke***[9] and stated that the rule in the case that a conviction in a criminal court cannot be used as evidence in a civil case was ripe for reexamination.[10] In ***Mclikenny v. Chief Constable of West Midlands***[11] Lord Denning, M.R. described ***Hollington v F. Hewthorn & Co. Ltd*** as wrongly decided and per incuriam, but this robust view was linked to Lord Denning's radical theory of the doctrine of issue estoppel. When the House of Lords heard the appeal in ***Mclikenny*** they did not find it necessary to decide the point.

4 DPP v Kilbourne (1973) A.C. 729 at 756 HL.

5 See the article "the effect of a criminal judgment on a civil action" (1955) 18 Mod.L.Rev.231-243.

6 Ingram v Ingram (1956) 1 All ER 785-see note by Blom-Cooper in (1956) 19 Mod.L.Rev.546.

7 See (1956) 19 Mod.L.Rev. at 546: See also a note by A.H.Hudson, "A plea of guilty in later civil proceedings"-on the Canadian case of Cromarty v Montieth (1957) 8.D.L.R (2d) 112-(1959) 22 Mod.L.Rev 543.

8 (1967) 1 Q.B. 333 at 339; (1996) 3 A.E.R 369: (1966) 3 W.L.R 460; See (1967) 83 L.Q.R 167.

9 (1967) 2 W.L.R. 166; (1966) 3 A.E.R. 948; (1967) 2 Q.B. 738 at 743.

10 (1967) 2 W.L.R 166 at 169. Diplock, L.J also agreed with this view-*ibid* at 171.

11 (1980) Q.B. 283 at 319.

Be that as it may, few would regard the ***Hollington*** case as anything other than a particularly offensive example of legal formalism. The issue in the two sets of proceedings was identical, and the criminal court had to be satisfied to the highest standard of proof beyond reasonable doubt. Even if the conviction represented an opinion, it was absurd to suggest that the opinion was irrelevant. Nevertheless, the decision is generally taken to have established a rule at common law that previous judgments and verdicts are inadmissible as evidence of the facts on which they were based, when the same issues arise in civil cases.

Law Reform Committee of England

Even the Law Reform Committee of England expressed doubts as to the fairness of the ***Hollington*** rule , and these were reflected in the 15th Report of Committee on the subject of what had come to be known as 'the rule in ***Hollington v. Hewthorn'***-*see* Law Reform Committee, Cmnd 3391, 1967. In their report, the Committee stated:-

> *"Rationalise it how one will, the decision in the case offends one's sense of justice. The defendant driver had been found guilty of careless driving by a court of competent jurisdiction. The onus of proof of culpability in criminal cases is higher than in civil; the degree of carelessness to sustain a conviction for careless driving is, if anything, greater than that required to sustain a civil cause of action in negligence. Yet the fact that the defendant driver had been convicted of careless driving at the time and place of the accident was held not to amount even to prima facie evidence of negligent driving at that time and place. It is not easy to escape the implication in the rule in Hollington v Hewthorn that, in the estimation of lawyers, a conviction by a criminal court is as likely to be wrong as right. It is not, of course, spelt out in those terms in the judgement of the Court of Appeal, although, in so far as their decision was based mainly upon the ground that the opinion of the criminal court as to the defendant driver's guilt was as irrelevant as that of a bystander who witnessed the accident, the gap between the implicit and the explicit was a narrow one."*

Civil Evidence Act, 1968

The criticisms voiced by the Committee were followed by the enactment of Sections 11-13 of the Civil Evidence Act 1968. So this decision of ***Hollington v. Hewthorn*** *(supra)* remained firm authority from 1943 to 1968 for the proposition that a certificate of a conviction cannot be tendered in evidence in civil proceedings until the principle was abolished by Section 11 of the Civil Evidence Act 1968. Section 11 should be sharply distinguished from Section 13 of the Act, the latter making a conviction conclusive evidence of guilt in defamation cases. For the sake of comparison, let me cite Section 11 substantially.

1. In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere is admissible in evidence for the purpose of proving, where to do so is relevant, that he committed that offence, whether he was convicted on a plea of guilty or otherwise, and whether or not he is a party to the civil proceedings, but no conviction, other than a subsisting one shall be admissible in evidence by virtue of this section.

2. But the effect of proving the conviction is only that the person convicted is to be taken to have committed the offence, **unless the contrary is proved**. It is open to the convicted person to disprove his guilt by evidence led in this regard to displace the presumption raised by the statute.

Stupple v. Royal Insurance Co Ltd.[12] was the first case in England to deal extensively with the effect of Section 11 of the English Civil Evidence Act, 1968. Lord Denning Master of the Rolls held that Section 11 has a twofold effect. First, *"it shifts the legal burden of proof (or the burden of persuasion) on the party who disputes the conviction which is offered in evidence."* Secondly, he stated, *".....the conviction does not merely shift the burden of proof. It is a weighty piece of evidence of itself."*

He accepted that a distinction could be made. He was of the view that the weight to be given to a conviction would depend on the circumstances, and that a plea of guilty may have less weight than a conviction after a full trial because often defendants pleaded guilty in error, or to save time and expense where the offence was minor, or to avoid some embarrassing fact being made public. The Law Reform Committee took the same view. The Committee stated in its 15th Report that a conviction after a contested trial, a conviction on a plea of guilty, and an acquittal did not have the same probative value in relation to the question in issue in a civil action. Later, when dealing with the defendant's burden of proof, they made a distinction between convictions after a contested trial and convictions on a plea of guilty. In the former case, they said that the burden was unlikely to be discharged by the testimony of the convicted person alone; in the latter case they suggested that it could be, if he produced a convincing explanation for his plea.

Sri Lankan cases

The Civil Evidence Act of 1968 that abolished the rule in ***Hollington v. Hewthorn*** was not drawn to the attention of the Supreme Court and our Court followed the English decision in ***Sinniah Nadarajah v. Ceylon Transport Board*** [13] Wimalaratne, J. referred to ***Hollington v. Hewthorn*** *(supra)* and said:-

> "Where the driver of a vehicle is sued along with his employer for the recovery of damages resulting from an accident in which the Plaintiff suffered injuries by being knocked down, a plea of guilt tendered by the driver when charged in the Magistrate's Court in respect of the same accident is relevant as an admission made by him and ought to be taken into consideration by the trial judge in the civil suit".

Wimalaratne, J. also made reference to another passage in ***Hollington v. Hewthorn*** *(supra)* and stated at page 52 of the judgment.

> "In ***Hollington v Hewthorn & Co., Ltd***., a conviction of one of the defendants for careless driving was held to be inadmissible as evidence of his negligence in proceedings for damages on that ground against him and his employer. But, "had the

12 (1971) 1 QB 50.

13 (1978) 79 (II) N.L.R 48.

> defendant before the Magistrate pleaded guilt" or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved but not the result of the trial."

So ***Sinniah Nadarajah's*** case followed ***Hollington v. Hewthorn*** *(supra)* in placing an embargo on convictions after a contested trial but allowed the adduction of a conviction after a guilty plea in the subsequent civil pleadings.

Even if the Civil Evidence Act of 1968 had been brought home to the attention of the Supreme Court in ***Sinniah Nadarajah,*** Wimalaratne, J. could not have sanctioned the admissibility of convictions after a contested criminal trial in civil proceedings because Section 43 of the Evidence Ordinance as it stood then would have prohibited the reception of such convictions after a contested trial.

Exceptions against the rule against judgments

The exceptions to the exclusionary rule against judgments were firmly engrafted into Sections 40, 41 and 42 of our Evidence Ordinance following their enactment by Sir James Fitszjames Stephen in the Indian Evidence Act and Section 43 of our Ordinance specifically declared that any other judgment other than those mentioned in Sections 40, 41 and 42 are irrelevant unless the existence of the judgment is a fact in issue, or is relevant under some other provision of the Evidence Ordinance. It is for this reason that the judgment of Wimalaratne, J. in ***Sinniah Nadarajah*** *(supra)* is also justifiable because the guilty plea in the Magistrate's Court could be admitted in the civil proceedings as an admission.

If at all a conviction after a contested trial were to become relevant, specific provisions had to be enacted into the Evidence Ordinance like in England and it is common knowledge that this did not happen in Sri Lanka until 1998 when the Evidence (Amendment) Act No.33 of 1998 was legislated to bring in the necessary changes by way of Sections 41A, 41B, and 41C. I will return to this presently after having looked at our cases since ***Sinniah Nadarajah***.

In ***De Mel and Another v. Rev. Somaloka***[14] the original charge sheet against the driver (the 2nd Defendant in the civil proceedings) had been causing death by a rash and negligent act not amounting to murder in terms of Section 298 of the Penal Code. Later it was converted to Section 151(3) -negligent driving and Section 149(1)- failure to avoid an accident under the Motor Traffic Act.

Weerasuriya, J. stated at p 27-*"one cannot ascertain with certainty as to the items which formed the charge if it was reduced to Section 149(1). There was also no reference in the charge sheet to items that formed the basis for negligent driving in terms of Section 151(3) of the Motor Traffic Act."*

The driver (the 2nd defendant) had pleaded guilty to these charges whose ingredients were unclear. The admission of guilt in the Magistrate's Court was produced in the District Court trial.

14 (2002) 2 Sri.L.R 23.

The plaint in the District Court had itemized the following acts:-

a) failure to take a proper look out of the road

b) using the road without consideration

c) failure to have a proper control

d) driving ay an excessive speed

The learned District Judge held in this case that the admission of guilt was not sufficient to establish negligence as itemized in the plaint.

The Court of Appeal held that the admission in the Magistrate's Court must specifically relate to the items of negligence as set out in the plaint. The importance of this judgment is that the admission of guilt in the Magistrate's Court cannot be used in the District Court as relevant evidence if the guilty plea does not coincide with what is averred in the plaint. One cannot apply the ratio of ***Sinniah Nadarajah*** *(supra)* in such a situation.

In this case under revision, the items of negligence in the Magistrate's Court could not be ascertained since the MC record was not before the learned District Judge of *Homagama.* So how the learned District Judge could relate the items of negligence to the charges in the MC is inexplicable and she could not have concluded negligence in the civil trial as she was quite unaware of what charge that the 1st defendant had admitted.

Therefore one has to read the ratio of ***Sinniah Nadarajah*** *(supra)* subject to what has been quite correctly stated in ***De Mel and Another v. Rev. Somaloka*** *(supra)*. The principles of ***Sinniah Nadarajah*** will not apply in a civil case where the plaint alleges items of negligence but the plea tendered in the MC does not have any reference to these items of negligence.

Marsoof, J. followed ***Sinniah Nadarajah*** in ***Delungala Kotuwe Jain Nona v. Lalith Gamage.***[15]

I would now refer to an earlier case of ***Ranbarana v. Kusumalatha***[16], because this case quite significantly reiterated the need to bring in legislative changes to our Evidence Ordinance on the lines of the Civil Evidence Act of 1968. Wijeyaratne, J. (with Wijetunge, J. agreeing) emphasized the following.

1. The Civil Court must independently of the decision of the Criminal Court investigate facts and come to its own findings.

2. *A plea of guilty in a criminal case may, but a verdict of a conviction cannot be considered as evidence in a civil case*.

3. Section 43 of the Evidence Ordinance would render the judgment of a Criminal Court irrelevant.

15 CA Appeal 467/2003 writ (CA Minutes of 04.11.2004).

16 (1989) Sriskantha's Law Reports vol-VII - part-1 at p.01.

Having said the above, Wijeyaratne, J. next referred to the English case of ***Hollington v. Hewthorn*** *(supra)* and observed:-

> *"In an action for damages arising out of a collision between two motor cars the judgment of the criminal court convicting the defendant driver of negligent driving is not relevant. However, the case was decided in England in 1943 prior to the Civil Evidence Act of 1968 which changed the position."*

The learned judge was quite alive to the necessity to enact an identical legislation on the same lines as the Civil Evidence Act of England and quite poignantly pointed out thus:-

> "In *our country it should be seriously considered whether such an enactment is desirable as it would save a lot of time in cases and inquiries in courts of law, tribunals and other bodies exer*cising judicial and / or administrative functions."

All the cases-***Hollington v. Hewthorn; Sinniah Nadarasa v. Ceylon Transport Board; Ranbarana v. Kusumalatha; De Mel and Another v. Rev. Somaloka*** and ***Delungala Kotuwe Jain Nona v. Lalith Gamage*** took the view that a previous conviction after a plea of guilt in a Magistrate's Court is relevant in subsequent civil proceedings. It was convictions after a full trial that were tabooed. But for a conviction after a contested trial to become relevant in civil proceedings an amendment to the Evidence Ordinance was long overdue.

After all, our Evidence Ordinance proceeds on the basis that it is inclusionary-*see* Section 5 of the Evidence Ordinance. All evidence, whether it be in a trial or in an inquiry, becomes relevant unless it is expressly excluded by a rule of evidence. A judge cannot shut out relevant evidence unless and until it is excluded by an exclusionary rule of evidence. Exceptions to these exclusionary rules of evidence are diffusely scattered in the Evidence Ordinance. One such exclusionary rule is the rule against judgments in other courts when in subsequent proceedings those judgments are sought to be made use of.

The exclusionary rule against judgments of other courts is a rule of evidence and exceptions to this rule were found only in Sections 40, 41, 42 and 43 of our Evidence Ordinance as originally enacted and Section 43 in particular prohibited the reception of a conviction after a contested trial (a judgment in a criminal court) in subsequent civil proceedings.

Evidence (Amendment) Act No 33 of 1998.

This prohibition against bringing in previous judgments was repealed when the legislature enacted further exceptions to the rule against judgments in 1998 with the passage of Evidence (Amendment) Act No.33 of 1998.

Sections 41A(1) and (2) that were inserted into the Evidence Ordinance as further exceptions to the exclusionary rule against judgments go as follows:-

1. Where in an action for defamation, the question whether any person committed a criminal offence is a fact in issue, a judgment of any court in Sri Lanka recording a conviction of that person for that criminal offence, being a judgment against which no appeal has been

preferred within the appealable period or which has been finally affirmed on appeal, shall be relevant for the purpose of proving that such person committed such offence, and shall be conclusive proof of that Fact.

2. Without prejudice to the provisions of subsection (1), where in any civil proceedings, the question whether any person, whether such person is a party to such civil proceedings or not, has been convicted of any offence by any court or court martial in Sri Lanka, or has committed the acts constituting an offence, is a fact in issue, a judgment or order of such court or court martial recording a conviction of such person for such offence, being a judgment or order against which no appeal has been preferred within the appealable period, or which has been finally affirmed in appeal, shall be relevant for the purposes of proving that such person committed such offence or committed the acts constituting such offence.

Illustration (a) referred to therein is as follows:

(a) B injures C while driving A's car in the course of B's employment with A. B is convicted for careless driving. In an action for damages instituted by C against A and B, B's conviction is irrelevant.

So the law on relevancy of previous convictions in subsequent civil proceedings boils down to this-Section 41A (2) of the Evidence Ordinance which reflects the spirit of Section 11 of the Civil Evidence Act of 1968 renders a conviction, regardless of whether it was entered after a contested trial or upon a guilty plea, relevant to prove the fact in issue in subsequent civil proceedings.

The fact in issue in the subsequent civil trial should be whether the Defendant in the civil case committed such offence or committed the acts constituting such offence. If it is a case of negligence, the criminal conviction becomes relevant only if the acts constituting the offence are facts in issue in the civil trial.

Subsequent cases have considered Section 41A (2)- *see* Wimalachandra, J. in ***Mahipala v. Martin Singho***[17] and Anil Gooneratne, J. in ***Balapatabendige Piyadasa v. Don Jayantha Hemakumara***[18]. I had occasion to consider the effect of this provision in ***Hettiarachchige Dominic Marx Perera v. Kuruwita Archchige Jeramious Perera and Others***[19] and observed in the context of an application to admit a previous conviction as fresh evidence that only two types of convictions become relevant under Section 41A (2). Either it has to be an unappealed conviction or if it had been appealed, it must have been affirmed in appeal. In the above appeal before me, the 1st Defendant in the civil case who has been found guilty in a criminal case appealed against the conviction but before the appeal could be adjudicated upon, she passed away. The Plaintiff-Appellant sought to lead the conviction as fresh evidence under Section 773 of the Civil Procedure Code. This was a conviction which was appealed against but not adjudicated upon. It cannot be an unappealed conviction nor can it be said that the conviction

17 (2006) 2 Sri L.R 272.

18 (2002) 2 Galle Law Journal 296.

19 CA Case No.713/2000 (C.A minutes of 13.02.2017).

was affirmed. Therefore I proceeded to hold that this conviction which was left in limbo does not fall within Section 41A (2) of the Evidence Ordinance.

In ***Rosairo v. Basnayake***[20] Abdus Salam, J. observed,

> *"A plea of guilt is most relevant and ought to be taken into consideration in assessing the plaintiff's case and further a plea of guilt on a charge of failing to avoid an accident by the driver cannot be lightly ignored in considering as to whose negligence it was, that caused the accident."*

The learned Judge had referred to Section 41(A) (2) of Evidence Ordinance.

In ***A.W. Pushmakumara Perera v. Wickramage David and others***[21] Dehideniya, J. following the earlier cases on the point, held that:

> *"When the 1st defendant pleaded guilty to the aforesaid charges of reckless and negligent driving under the Motor Traffic Actin the Magistrate's Court, it has legal proof in the legal sense. A conviction of charge of failure to avoid an accident under Motor Traffic Act to become relevant in a civil action for compensation for negligent driving; the conviction must be on the same items as complained of by the plaintiff, which constitute the negligent driving".*

So convictions in a Magistrate's Court are entered either upon a guilty plea of the accused or after a contested trial. As the law stands now, there is no difference as to the relevancy of the conviction in subsequent civil proceedings. If the accused has pleaded guilty to the charge of negligent driving, his conviction on that charge by the criminal court becomes relevant in a subsequent civil action. Thus, our law is *in pari materia* with English Law when a conviction, irrespective of whether it is on the admission of guilt or otherwise, becomes relevant in evidence in a subsequent civil suit.

It has to be borne in mind that this relevant evidence of conviction can be repelled or rebutted by proof of contrary evidence by the defendant. The defendant against whom the previous conviction is tendered in evidence can lead contrary evidence in the civil trial to show that he did not commit the acts that constituted the offence. The defendant could lead rebutting evidence to establish on a preponderance of evidence that there was no negligence on his part though the criminal court had found him guilty in the criminal trial- for several examples of contrary evidence see an interesting article titled *Previous Conviction as Evidence of Guilt by A. Zuckerman*[22]. This proceeds on the basis that any relevant evidence can be rebutted by evidence that emerges at the subsequent civil trial.

None of the above principles had been borne in mind by the District Court of *Homagama* and this came to the fore when one of its judgments came up in appeal-see **Yasaratne v**

20 2011 (1) Sri L.R 34.

21 CA 977/1998 (CA minutes of 27.05.2015).

22 1971 L.Q.R 21.

Jayasekara and Another[23]. The learned District Judge had automatically adopted as evidence the ipse dixit of the Plaintiff in the ex parte trial that the 1st Defendant had pleaded guilty in the Magistrate's Court. There was no other evidence before the learned District Judge that the 1st Defendant had been convicted at all. But she proceeded to infer negligence from the mere testimony of the Plaintiff which was at the most hearsay. An ex parte judgment cannot rest on hearsay evidence-***Sheila Seneviratne v. Shereen Seneviratne***[24]

It was axiomatic that the liability of the 2nd Defendant-Petitioner in this case *qua* a master would have arisen only on proof of a master and servant relationship and the fact that the driver-the 1st Defendant was acting in the course of his employment and not on a frolic of his own. The *ex parte* judgment dated 23.01.2009 was patently devoid of any evidence showing this ingredient, apart from the absence of proof on evidence that the offending 1st Defendant himself was negligent.

The Court of Appeal found that the imposition of vicarious liability on the 2nd Defendant-Petitioner in the case was without any foundation. There had been no discussion by the learned District Judge on the tortious liability of duty of care, breach and quantum. These were manifest errors in the judgment that satisfied the threshold of revisionary jurisdiction and shocked the conscience of court. It was in those circumstances that the Court of Appeal proceeded to set aside the *ex parte* judgment dated 23.01.2009 and in consequence the judgment dated 30.09.2010 refusing to set aside the *ex parte* judgment and decree was also set aside.

The corollary of all this was that the case was remanded to the District Court of *Homagama* to notice the parties and conduct an *inter partes* trial *de novo*. The case manifested a misappreciation among other things of relevance of a criminal judgment in a subsequent civil case but on top of it the irregular reception of that evidence also surfaced to the fore in the case.

Our Law of Evidence in regard to the reception of relevant evidence of a conviction in subsequent civil proceedings has today been placed on a clear and unambiguous footing. We owe it to the progression of statutory and common law developments.

23 CA/RI/343/2015 decided on 11.12.2018.

24 (1997) 1 Sri L.R 76 (SC).

Actus Curia Neminem Gravabit

Dr. U. L. Abdul Majeed
Former Judge of the High Court

The maxim *ACTUS CURIA NEMINEM GRAVABIT,* which means 'an act of the Court shall prejudice no man', is based on the powers of a Court to rectify its own errors and mistakes when determining the rights of parties in a case. A litigation starts in the Court of first instance and ends up in the Appellate Courts, if there are appeals. Hence, if the action is commenced in a Court which has no jurisdiction or if that Court though had jurisdiction made an order in excess of its jurisdiction, it has inherent power to correct it when the error is brought to its attention; if not corrected there itself, it has to be corrected by the Higher Court. It is, therefore, the duty of the Higher Court to grant relief to the affected party if the error is brought to its notice, because no suitor is prejudiced by an act of the Court.

In this connection the views expressed by Lord Cairns in the case of ***Roger and Others vs. The Comptoir D' Escompte de Paris*** (1871) L.R. 3 P.C. 465, is most relevant.

The facts of the case are as follows:

"By the Order in Council made on an appeal to the Privy Council, it was ordered that the judgment of the Supreme Court of Hong Kong on 3rd June, 1867, should be set aside and that a judgment of a non-suit should be entered in lieu of the judgment granted for the plaintiff. Before the decision of the Privy Council, however, the amount granted by the judgment had been paid at the plaintiff's demand by the defendant-appellants. After the decision of the Privy Council had reached the Supreme Court of Hong Kong, a motion was made by the defendants in the Supreme Court for a rule for repayment of the amount of the judgment paid by them to the plaintiff-respondents on their demand to be made, with interest on the sum so paid. The Chief Justice of the Supreme Court of Hong Kong, however, while making the order for the repayment of the amount actually paid, refused to order interest as asked for, expressing his opinion that no powers vested in the Supreme Court to give interest in this manner. The Appellants applied to the Supreme Court for leave to appeal against the order refusing to make a rule for payment of interest and such leave was granted. The appellants, however, afterwards presented a petition to Her Majesty in Council, setting out the facts and praying that Her Majesty in Council refers the appellants-petitioners' petition to the Judicial Committee to hear and determine the matter and order the payment of interest.

The Privy Council, thereafter, taking the view that there was a miscarriage of justice committed by the Supreme Court of Hong Kong in carrying out the Order in Council, took up the position in the form of a supplementary appeal. Lord Cairns in disposing of the appeal expressed the view of the Privy Council that, it was in the power and it became the duty of the Supreme Court of Hong Kong to do everything and to make every order which was fairly and properly consequential upon the reversal of the original judgment by the Privy Council. Lord Cairns said thus:

"Now their Lordships are of opinion, that one of the first and highest duties of all Courts is to

take care that the acts of the Court do no injury to any of the suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the Primary Court, of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter to the highest Court which finally disposes of the case. It is the duty of the aggregate of these tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole proceedings does an injury to the suitors in the Court."

In the case of ***Moosajees Ltd. vs. Fernando,*** (1966) 68 N.L.R. 414, H.N.G. Fernando SPJ stated: "This Court has also exercised an inherent power to correct error in a judgment which has occurred *per incuriam*. I doubt whether this power is exercisable only by the Judge who has pronounced the judgment; for if so, there would be no means of correcting even a manifest clerical error discovered in a judgment after the death or retirement of the Judge who pronounced it".

In the case of ***Gunasena vs. Bandarathilaka,*** 2002 (1) Sri L.R. 292, it was held that, "the Court of Appeal had inherent power to set aside the judgment dated 25.05.1998 and to repair the injury caused to the plaintiff by its own mistake, notwithstanding the fact that the said judgment had passed the decree of court. This could not have been done otherwise than by writing a fresh judgment."

Per Wijetunga, J.

"The authorities...clearly indicate that a court has inherent power to repair an injury caused to a party by its own mistake. Once it is recognized that a court would not allow a party to suffer by reason of its own mistake, it must follow that corrective action should be taken as expeditiously as possible, within the framework of the law, to remedy the injury caused thereby. The modalities are best left to such court, and would depend on the nature of the error."

WRIT ISSUED WRONGLY

The foundation of a writ of possession is a decree for possession, and a writ of possession which is not founded on such a decree is a nullity, because in issuing it the Court acted in excess of its jurisdiction.

In the case of ***Srinivasa Thero vs. Sudassi Thero,*** (1960) 63 N.L.R. 31, where the District Court acted without jurisdiction in issuing a writ which dispossessed a person of property. It was held that the person dispossessed was entitled to be restored to possession by that Court which has an inherent power and the duty to repair the injury done by this act. It is a rule that a Court of Justice will not permit a suitor to suffer by reason of its own wrongful act and that it is under a duty to use its inherent powers to repair the injury done to a party by its act.

"Where a Court makes an order without jurisdiction, as in this case, it has inherent power to set it aside; and the person affected by the order is entitled *ex debito justitiae* to have it set aside. It is not necessary to appeal from such an order, which is a nullity. See the judgment of the Privy Council in ***Kofi Forfie vs. Seifah*** (1958) A.C. 59. The failure of the present plaintiff to take the objection that the Court had no jurisdiction, which he could have taken

at an earlier stage of this action, does not prevent him from taking it now, for an objection to the jurisdiction of the Court is one which we must entertain when our attention is called to it, since we are dealing with an absence of jurisdiction which is apparent when one looks at the decree." *Per* Sansoni J.

In the above case, a distinction was drawn between 'absence of jurisdiction' and 'wrong or irregular exercise of jurisdiction.' In ***Jayalath vs. Abdul Razak,*** (1954) 56 N.L.R. 145, where the Court exercised its jurisdiction on a misconception of law. However, Rose C.J. held (Sansoni J. agreeing) that, "Even assuming that the judgment was based on a misconception of the true legal position, it was not open to C, (a tenant of the premises), to impeach the judgment for errors of law or irregularity in procedure." The learned Chief Justice quoted a passage from ***Marjan vs. Burah,*** (1948) 51 N.L.R. 34 where Nagalingam J. said:"After a Court has acquired jurisdiction as well as a right to decide every question arising in the case, and however erroneous its decision may be, it is binding on the parties until reversed or annulled." In this case, the Supreme Court took the view that a Court has jurisdiction even to deliver a wrong order, but that order is valid if not reversed in appeal.

In ***Salim vs. Santhiya***, (1965) 69 N.L.R. 490, T.S. Fernando J. also took the view as in *Sirinivasa Th*ero's case (*supra*). In this case after the termination of an appeal, the judgment of the Supreme Court was pronounced on a date which was not notified to the parties in compliance with the requirement of section 774(1) of the Civil Procedure Code. In the present application for conditional leave to appeal to the Privy Council against the judgment, the petitioner, who came to know of the judgment about 4 weeks after it was pronounced, was consequently unable to give the opposite parties notice, within the time prescribed by Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance, about his intention to appeal to the Privy Council.

It was held that the petitioner should be granted relief. In such a case, the Court has inherent powers to repair the injury done to a party by its own act. In these circumstances it is plain that our duty is to grant conditional leave to appeal, and that leave is hereby granted on the usual terms.

In ***Wickramanayake vs. Simon Appu***, (1972) 76 N.L.R.166, the plaintiff was placed in possession of the land on the judgment of the District Court, but subsequently in appeal, the Supreme Court set aside the judgment of the District Court and entered judgment in favour of the defendant. H.N.G. Fernando C.J. held that "Justice, therefore, requires that the plaintiff, who had been placed in possession in execution of a decree which had turned out to be invalid, should no longer be allowed to continue in possession of the land."

The case of ***Silva vs. Amarasinghe*** (1975) 78 N.L.R. 537, is a case where a writ of possession was issued wrongly on the strength of a decree entered, based upon a settlement effected before a Conciliation Board between the parties. The Respondent-Petitioner objected to the issue of Writ on the ground that he did not consent to deliver vacant possession as stated by the Petitioner-Respondent. The trial Judge rejected the objection and directed that writ be issued. In appeal, Vythialingam J. said: "When an application for execution of a decree is made, it has been the inveterate practice of our courts to permit the judgment-debtor to come in and object to the issue of the writ or to have it recalled if it has already been issued and to

inquire into any such objections, although he would not be permitted to challenge the decree itself. When an application is made to execute a writ on a settlement alleged to have been entered into between the parties, before a Conciliation Board, it is the duty of the Court (a) to notice the party affected by the settlement sought to be enforced; (b) to inquire into any objections which such party is by law permitted to take." In this case the case of ***Barnes de Silva vs. Galkissa Wattarapola Co-op Stores Society,*** (1953) 54 N.L.R. 326, at page 328 was referred to.

In ***Barnes de Silva vs. Galkissa Wattarapola Co-op Stores Society*** (*supra*), at page 328, Gratiaen J. pointed out, "Even where no procedure is laid down in regard to applications to execute settlements or awards made by some other tribunals,...it is the clear duty of a court of law whose machinery as a court of execution is invoked to satisfy itself, before allowing the writ to issue that the purported decision or award is *prima facie* a valid decision or award made by a person duly authorized under the Ordinance to determine a dispute which has properly arisen for the decision of an extrajudicial tribunal under the Ordinance. In that event alone, would the court be justified in holding that the decision or award is entitled to recognition and capable, under the appropriate rule of enforcement, as if it were a decree of a court. To achieve that end, a person seeking to enforce an award should be required to apply either in a regular action or at least by a petition and affidavit (in proceedings by way of summary procedure) , setting out facts which prove the purported award is *prima facie* entitled to such recognition."

Restoration of Possession

If a party is dispossessed by an injunction or a writ of possession, and if this wrong is brought to the notice of the Court, the Court should rectify the error and grant relief to the affected party. In the case of ***Batuwatta Piyaratne Tissa vs. Liyanage Noris Jayasinghe*** SC 39/73, SC Minutes of 6.2. 1976, the respondent on 06.04.1976, filed a motion inviting the Court to rectify an error that has arisen in the judgment. Upon that application Pathirana J. held thus:

"It is not always that this court is confronted with a situation like in the present case where there is a manifest error committed by this Court which had been brought to its notice in respect of a judgment of this court...Weeramantry J. in ***Petman vs. Inspector of Police, Dodangoda*** 74 N.L.R. 115, has observed that:

"This court would no doubt be extremely hesitant and cautious before it makes any order in revision which is contrary to an order which this court itself has made upon appeal, but there would appear to be precedent for orders of this court where the original order is based upon a manifest error."

Sharvananda C.J. in the case of ***Mowjood vs. Pussadeniya*** (1987) 2 Sri L.R. 287, said:

"In as much as the Court acted without jurisdiction in issuing the writ, the appellant who was dispossessed of the premises in the suit in consequence of the execution of the writ is entitled to be restored to possession."

In the recent case of ***Central Finance Company PLC vs. Sappani Chandrasekera and Another,*** SC Appeal No. SC/CHC/37/2013 decided on 30.05.2019, the Commercial High Court dismissed the plaintiff's action on the sole ground that the affidavit filed by the

plaintiff's principal witness was not in the case record when the judgment was being prepared and therefore Judge of the High Court held that the plaintiff had failed to prove his case. As a matter of fact, the said affidavit was filed but in a wrong case. On appeal to the Supreme Court, Prasanna Jayawardene PC. J. observed, "It is a matter of regret that, the learned judge who delivered the judgment did not think it fit to first have this case called in open court in the presence of the parties and ascertain why the affidavit dated 2nd September, 2011 was not in the case record. It appears that the learned Judge did not even make inquiries in the Court Registry to find out the reason why that affidavit was not in the case record. To my mind, these were elementary steps, which common sense dictated, should be taken by the learned judge when he discovered that an affidavit containing evidence (which his predecessor and the parties thought was in the case record) was not in the case record. Since in the present case, the High Court has failed to correct its own errors and thereby, caused prejudice to the plaintiff, the maxim *actus curia neminem gravabit* requires this Court to step in and ensure that the plaintiff is not prejudiced by the error of the High Court. For these reasons, it is incumbent on this court to set aside the judgment of the Commercial High Court and return this case to that court for trial *de novo."*

Where there is a manifest and obvious error of fact based on an important item of evidence, not having been brought to the notice of Court at the hearing of the appeal, relief would be granted in such a case. In ***Ehambaram and Another vs. Rajasuriya*** 34 CLW 65, Nagalingam A.J., although in the particular case he refused to interfere by way of revision, made the following observations; "It is true that this Court has, acting in revision, modified or even vacated judgments pronounced by it on appeal when appraised of the circumstances that the Court had erred in regard to an obvious question of fact or law; and one may go so far as to say that those are cases where an error being pointed out, the Court without wanting to hear arguments would *ex mero motu* proceed to set the error right."

In ***Wimalawathie vs Jayawardene,*** 2004 (3) Sri L.R. 11, Wijayaratne J. held that:

"Though the application did not fall within the specific grounds or instances enumerated in section 48 (4) , the application is to remedy a situation resulting in injustice to the appellant... it is a grave injustice to let several Lots not determined as parts of the corpus to be included in the final plan resulting it failure of justice and injury to the appellant"

A court whose act has caused injury to a suitor has an inherent power to make restitution. This power is exercisable by a court of original jurisdiction as well as by the Supreme Court.

In the result, the Court of Appeal allowed the appeal of the 25th defendant-appellant, set aside and vacated the order of the District Court confirming the final partition plan and to enter final decree, and to amend the judgment and the interlocutory decree and directed the reissue of commission under section 32 of the Partition Law on the amended interlocutory decree.

A Divisional Bench of the Supreme Court in ***Somawathie vs. Madawala,*** 1983 (2) Sri L.R. 15, referred to the extra-ordinary power of revision and *restitutio in integram* to set aside partition decrees when it is found that the proceedings are tainted with what is known as fundamental vice. In this case Justice Soza said: "The immunity given to partition decrees from being assailed on the grounds of omissions and defects of procedure as now broadly defined, and

of the failure to make persons concerned parties to the action should not be interpreted as a license to pollute the provisions of the Partition Law."

Dispossession by Injunction

An Injunction is an incidental relief or order issued by a Court of competent jurisdiction in the judicial process restraining a person from committing or continuing any wrongful act or nuisance or compelling restitution to an injured party. It is, thus, to be borne in mind that injunction should not be used as a means to place in possession of the plaintiff by ousting the person, who is in possession of a land or property. Even if the defendant is prevented from entering a land in dispute by an interim injunction, the plaintiff cannot take possession of such land and do any act therein, until the final determination of the action.

In the case of ***Thamotharam Pillai vs. Arumogam***,[1] Schneider A.C.J observed that, "Injunctions (referring to interim injunctions) are not granted directing something to be done, but that something should not be done."

The above principle was affirmed by Koch J. in the case of ***Pounds vs. Ganegama***,[2] where the learned Judge held that, "A Court has no power under section 87 of the Courts Ordinance to remove a defendant who is in possession of the subject matter of the action and to place the plaintiff in possession pending the result of the action." The reason is that the law will not permit such proceeding and if this is so in such a flagrant type of case, could it be expected that the law will enable a party who was not in actual occupation to enter the property by injunction and take possession thereof as against a person who, having been in occupation as a licensee, has repudiated that position and claims to be in possession in his own rights.

Interim injunction cannot be used to oust a person already in possession of the land in dispute. This principle is applicable to cases where if a person is placed in possession of a land or premises by an order of the Primary Court under section 68 of the Primary Courts Procedure Act, the District Court has no jurisdiction to issue an interim injunction against that order to dispossess that person placed in possession of the order of the Primary Court.

In ***Kanagasabai vs. Mylvaganam***,[3] Sharvananda J. observed at page 285, that "A Court has no power (by way of interim injunction) to remove a defendant who is already in possession of the subject matter of the action on the strength of an order made by a Magistrate under section 63 (of the Administration of Justice Law No. 44 of 1973) and to place the plaintiff in possession pending the result of the action." Section 68 of the Primary Courts Procedure Act is the replica of section 63 of the Administration of Justice Law, which contained similar provisions.

The above case has been followed as a guideline in several other cases decided thereafter, when applying for interim injunction against a defendant who has been placed in possession in a case filed under section 66 of the Primary Courts Procedure Act No. 44 of 1979, by the Magistrate. The District Court has no jurisdiction to issue an interim injunction to dispossess a

1 (1926) 28 N.L.R. 406 at pages 409 & 410

2 (1938) 40. N.L.R. 73

3 (1976) 78 N.L.R. 280

person, who has been placed in possession of the subject matter by an order of the Magistrate's Court under section 68 of the Primary Courts Procedure Act No. 44 of 1979, until the final determination of the civil action.

In ***Sivapathalingham vs. Sivasubramaniam*** (1990) 1 Sri L.R. 378, on an application of the petitioner, the Court of Appeal issued an injunction on 26.5.1988 under Article 143 of the Constitution, valid until the petitioner is able to file an action in the D.C., Jaffna, restraining the respondent from preventing the petitioner from entering the land in dispute. Subsequently, the Court of Appeal stayed the operation of the injunction granted by it upon an *ex parte* application by the respondent. The respondent claimed that he was in lawful possession of the land on an indenture of the lease, but the petitioner had him ejected upon obtaining the injunction and on entering into possession demolished the parapet wall and gate on the East which had been in existence prior to August, 1988. Upon the suspension of the injunction, the petitioner filed papers complaining against the suspension without notice to him. The Court Appeal heard the application and discharged and dissolved the injunction. It was the injunction issued by the Court of Appeal that brought about the dispossession of the respondent and placing the appellant in possession. On appeal to the Supreme Court, it was held,

1. A Superior Court has jurisdiction in the exercise of its inherent power to direct a Court inferior to it to remedy an injury done by its act.

2. Therefore, when the injunction issued by the Court of Appeal on 26.5.1988 was dissolved it was competent for the Court to direct that the petitioner who had obtained possession of the property on the strength of the injunction by displacing respondent, be in turn displaced and possession handed back to the respondent.

3. This power, an aspect of the Court's inherent power, could have been exercised on the day on which judgment was delivered on 5.9.1989 or as was done in this case on 27.10.1989.

4. A Court whose act has caused injury to a suitor has an inherent power to make restitution. This power is exercisable by a Court of original jurisdiction as well as by a Superior Court.

Per S.B. Goonewardene J. "It is interesting to note that the Superior Courts have sometimes taken the view that they have an inherent power even to correct errors in their judgments. If these Courts have that jurisdiction, I find it difficult to say that they have no jurisdiction to set things right where their acts have caused injury to suitors."

Judgement and Orders *Per incuriam*

When a judgment or order is given by a Court of law in ignorance of or by an oversight of the provisions of the law or of the previous judgment of a Superior Court on the point in issue, that judgment or order becomes *per incuriam.*

Halsbury says: "A decision will be regarded as given *per incuriam* if it was given in ignorance of some inconsistent statute or binding decision; but not simply because the Court had not the benefit of the best argument." [4]

4 Halsbury's Laws of England, 4th Ed. Volume 26, para 578.

In ***Morelle Ltd. vs. Wakeling*** (1955) 1 All E.R. 708 at p.718, Sir Raymond Evershed MR said:

"As a general rule the only cases in which decisions should be held to have been taken, given *per incuriam*, are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provisions or of some authority binding on the court concerned on which it is based is found, on that account, to be demonstrably wrong. This definition is not exhaustive, but cases are not strictly within it, which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be, in the language of Lord Greene M.R. of the rarest occurrence. In the present case, it is not shown that any statutory provision or binding authority was overlooked, and while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been *per incuriam* on other grounds, we cannot regard this as such a case."

In ***Young vs. Bristol Aeroplane Co. Ltd.***,[5] Greene M.R. pointed particularly to two classes of decisions *per incuriam,* namely;

a decision in ignorance of a previous decision of its own Court or of a Court of co-ordinate jurisdiction covering the case, and

a decision in ignorance of a decision of a higher Court covering the case which binds the lower Court.

Lord Denning, M.R. has added another category of decisions – i.e., "where a long standing rule of the common law has been disregarded because the Court did not have the benefit of a full argument before it rejected the common law." ***Broome vs. Cassell & Co. Ltd***.[6]

If a Court makes an order *per incuriam*, it is competent for another Bench of the same Court to set aside that order. But the general practice in our Courts is for the parties or their Counsel to bring the error to the notice of the same Judge or Judges who made the order so that he or they can correct the impugned order.

In the case of ***Alasupillai vs. Yavetipillai and Another***,[7] Basnayake J. (as he was then) following the decision in the case of ***Huddersfield Police Authority vs. Watson***,[8] stated that, "A decision *per incuriam* is one given when a case or a statute has not been brought to the attention for the Court and it has given the decision in ignorance or forgetfulness of the existence of that case or statute."

"As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not

5 (1944) 2 All E.R. 293, at p.300

6 (1971) 2 All E.R. 187

7 39 C.L.W.107

8 (1947) 2 All E.R.193

strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be in the language of Lord Greene M.R., of the rarest occurrence." Samarakoon C.J. in ***Billimoria vs. Minister of Lands and Land Development & Mahaweli Development and Others***.[9]

The majority decision of the Privy Council in the case of ***Dullewe vs. Dulleva,***[10] created controversy and the dissenting judgment of Lord Donovan gathered momentum. Subsequently, in the case of ***P.B. Ratnayake vs. M.S.B.J. Bandara***,[11] when a similar question came up, the Court of Appeal held that, although a donation by a Kandyan is expressed in the deed to be absolute and irrevocable under section 5 (1)(d) of the Kandyan Law Declaration and Amendment Ordinance No.39 of 1938, the gift can be revoked by the donor. Seneviratne J. opined that, "after due consideration I agree with the dissenting judgment of Lord Donovan and it is mainly to express this view that I have written a supplementary judgment. However, this Court is bound by the majority judgment of the Privy Council in Dullewe's case as it was at that time the supreme and final Court of Appeal."

However, leave was granted in this case by the Court of Appeal to appeal to the Supreme Court on the substantial point of law, namely; *whether the deed No.8247 (P1) was revocable*. When this case (*Vide* ***P.B. Ratnayake vs. M.S.B.J. Bandara)*** [12] came up in appeal to the Supreme Court, a Bench of nine Judges was constituted to look into the correctness of the decision in Dullewe's case. The Supreme Court (by a majority decision) held that, "the Privy Council judgment in ***Dullewe vs. Dullewe*** is not binding on the Supreme Court. Though that judgment is of great value the question decided there is open to review, and the dissenting judgment of Lord Donovan was the correct view on the subject.".

In ***Banduhamy vs. Senanayake***[13] Basnayake C.J. observed: "We have in this country over the years developed a *curses curiae* of our own which may be summarized thus:-"that, however representative a bench may be, its decision is not regarded as binding if there has been a mistake in the decision, or relevant decisions or statutes have not been considered".

It is a established rule that no party should suffer due to an act of Court. It is set out in the case of ***Rodger vs. The Comptoir D' Escompte de Paris*** (1871) L.R. 3 PC 465, that-

"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors".

9 1979-80 (1) Sri L.R.10- S.C. Appeal No. 1/79 decided on 20.4.1979

10 (1968) 71 N.L.R. 289,

11 1986 (1) Sri L.R. 245

12 1990 (1) Sri L.R. 156

13 (1960) 62 N.L.R. 313 at p. 344, 345

Desirability of Minimal Court Interference in Commercial Arbitration

A Case Note on: *Perera v. China National Technical Imports & Export Corp.*[1]

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Introduction

Commercial Arbitration has undoubtedly become one of the most successful methods of dispute resolution mechanisms. According to the International Arbitration Survey conducted by Queen Mary University of London, ninety percent of the respondents preferred commercial arbitration as their dispute resolution mechanism.[2]

One of the main secrets behind the success of commercial arbitration is the principle minimal interference by Court. This study briefly analyses how this principle had been adopted by Commercial High Court of Sri Lanka, in the light of the case *Perera v. China National Technical Imports & Export Corporation.*[3]

The Principle Of Minimal Interference By Court

f the foremost objectives of arbitration is to settle disputes more expeditiously than the Court proceedings. The principle of minimal interference by the Court reflects that the Courts shall not interfere in arbitration proceedings, unless otherwise required by the statute. In other words, the judicial interference for challenging any ruling of the arbitral tribunal is permissible only where it is expressly provided for, in Arbitration Act No.11 of 1995 of Sri Lanka. Therefore, only a very few circumstances exist where the judicial interference is necessary in terms of arbitration matters.

Challenging The Jurisdiction Of A Tribunal

If parties concerned wish to challenge the jurisdiction of an Arbitral Tribunal, then there are two options available in terms of Section 11 of the Arbitration Act No.11 of 1995 of Sri Lanka. They could either invite the tribunal to decide its jurisdiction as a preliminary question or apply to the High Court for a determination of any such question including the validity of the arbitration agreement.[4]

The UNCITRAL Model Law describes that arbitrators have a right to determine any matters

1 HC/ ARB/ 210/ 2014, June 05, 2017.

2 The Queen Mary University of London, School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration,* (QMUL 2015) 2.

3 HC/ ARB/ 210/ 2014, June 05, 2017.

4 Arbitration Act No.11 of 1995 of Sri Lanka, s 11.

related to its own jurisdiction, including the existence of a valid arbitration agreement.[5] This right is known as the principle of 'competence-competence'. Similar provisions could be seen in domestic law as well.

In Sri Lankan arbitration law, the said principle has been embodied in Section 11 of the Arbitration Act No.11 of 1995 of Sri Lanka, whereas Section 11 (1) says: 'an Arbitral tribunal may rule on its jurisdiction including any question, with respect to the existence or validity of the arbitration agreement or as to whether such agreement is contrary to public policy or is incapable of being performed; but any party to the arbitral proceedings may apply to the High Court for a determination of any such question'.[6]

Positive And Negative Jurisdictional Decisions

There are two types of jurisdictional decisions made by the Court as the positive jurisdictional decisions and the negative jurisdictional decisions. A positive jurisdictional decision held that the tribunal has jurisdiction to hear the matter, whereas a negative one held that it has no jurisdiction.

According to the UNCITRAL Model Law, once the arbitration tribunal has given its decision regarding the jurisdiction, parties are able to request Court to decide the matter within a period of 30 days.[7] In other words, Court could intervene in the matter from a more inquisitive approach. For instance, in the case of *Insigma Technology Co Ltd v. Alsthom Technology Ltd*, it was held that an original jurisdiction rather than an appellate one, could be exercised by the Court, including a re-hearing if considered necessary against a positive jurisdictional decision.[8]

On the other hand, arbitrators have an absolute right to make negative jurisdictional decisions as well. These decisions could sometimes include subsidiary orders for cost. In *CDC v. Montague*, Court held that if there is a Terms of Reference (TOR) between parties regarding the cost, then the Arbitration Tribunal has the jurisdiction to issue an order to pay the cost and it could also be enforced in Courts.[9]

If the party, whom the subsidiary order was made against, does not pay the cost, then the other party has a right to enforce that order. However, this right does not exist where there is no TOR between parties. Although in certain jurisdictions, for instance in Japanese Arbitration Law the Tribunal has a right to issue an Award of costs with negative jurisdictional decision.[10] There is a vacuum of expressed provisions in UNCITRAL Model Law and in many other Domestic Laws regarding this.

5 UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) (UNCITRAL Model Law), art 16 (1).

6 Arbitration Act No.11 of 1995 of Sri Lanka, s 11 (1).

7 UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006), art 16 (3).

8 Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (CUP 2010) para 5.142 as cited in [2008] SGHC 134, paras [21] and [22].

9 [2000] QCA 252.

10 Greenberg, Christopher and Weeramantry (n 7) para 5.151 as cited in Japanese Arbitration Act s 23(4) (2), 49 (3), (4).

Generally, parties have a right to recourse against the positive jurisdictional decisions of the arbitrators. There is an issue in respect of the negative jurisdictional decisions, as neither Model Law nor many domestic laws have properly addressed the problems connected with such decisions.[11] Certain jurisdictions have permitted recourse against negative jurisdictional decisions. For instance, according to Section 37 (1) of the Indian Arbitration Act, it is possible to make an appeal to the Court against a negative jurisdictional decision of the arbitration tribunal.[12] However, this feature is not available in the Model Law which has been adopted by many countries.

Preliminary Objections Raised In The Court

A preliminary objection had been raised in the aforesaid case *Perera v. China National Technical Imports & Export Corporation*, to the maintainability of the application, on the grounds that the petitioner has no right in law to invoke the jurisdiction of the High Court in terms of Section 11 of the Arbitration Act No. 11 of 1995 of Sri Lanka, subsequent to both parties inviting the tribunal to decide on its jurisdiction, and the tribunal ruling that, it had no jurisdiction.[13]

Determination Of The Commercial High Court

In the aforesaid case *Perera v. China National Technical Imports & Export Corporation*, Judge Ruwan Fernando held that,

"*When the challenge to jurisdiction is rejected by the tribunal upon the invitation of the parties, there can be no further challenge by applying to the High Court against such decision and such positive ruling can only be challenged following the final award under Section 32 (1) (a) (i) of the Act*".[14]

Accordingly, any positive decision of the arbitration tribunal related to its jurisdiction is subject to challenge, only after the making of the Award in an application for setting aside an Award under Section 32 (1) (a) (i) of the Act. This reflects the minimal judicial interference in respect of a positive jurisdictional decision.

In order to confirm such a position, the following has been quoted by the Court:

"*Parties are free to apply to the High Court to determine any question relating to the jurisdiction of the tribunal (partial or total) without inviting the tribunal to rule on it. The fact that such an application has been made to the High Court does not have the effect of suspending the proceedings before the arbitral tribunal, which may continue it pending the determination of such question by the High Court. Parties must therefore either decide to invite the tribunal to rule on any jurisdictional issue or in the alternative, apply to the High Court to determine issues and request the tribunal to adjourn proceedings until the decision of the High Court-*

11 ibid para 5.152.

12 Arbitration and Conciliation Act 1996 of India (as amended in 2015), s 37 (1).

13 HC/ ARB/ 210/ 2014, June 05, 2017, para [3].

14 ibid para [35].

which it has a discretion to do or not to do having regard to all the circumstances".[15]

On the other hand, the High Court has no jurisdiction at all regarding negative jurisdictional decisions of the arbitral tribunal. There is no corresponding statutory remedy recognized in section 11 or any other Section of the Arbitration Act No.11 of 1995 of Sri Lanka, which enables a challenge from a negative jurisdictional ruling made by the tribunal, and compel the tribunal to continue with the arbitration after the tribunal had ruled that, it had no jurisdiction.

The High Court Judge further held that, "In the absence of any specific statutory provisions in the Arbitration Act, the High Court cannot make a determination under Section 11 of the Arbitration Act subsequent to the parties inviting the tribunal to rule its jurisdiction and the arbitral tribunal ruling that, it has no jurisdiction".[16]

Undesirability Of Exercising Both Options

According to the order pronounced by the Commercial High Court, the two options available in order to challenge the jurisdiction of the tribunal are only alternatives in the case of negative jurisdictional decisions. In other words, one should not try both options, especially where the Tribunal had ruled that it had no jurisdiction.

An argument could be advanced that if one could exercise both options where there is a positive jurisdictional decision, then why not the same could be exercised in the availability of a negative jurisdictional decision? However, this argument could be rebutted, because the whole purpose of arbitration is to reduce the delay in dispute resolution. Therefore, the High Court has jurisdiction to review only positive jurisdictional matters. In other words, the High Court has no appellate jurisdiction in terms of negative jurisdictional issues.

Negative jurisdictional decisions are not based mostly on the merits of the case. Therefore, if a party which was unsuccessful in contesting such a decision at the tribunal comes to the High Court, it seems a form of an appeal for which the High Court wields no jurisdiction at all.

Desirability Of Minimal Court Interference

Although there are provisions in countries like India and Singapore to seek recourse against negative jurisdictional decisions, there are no such expressed provisions embodied in Sri Lankan Arbitration Law. Does this mean that we require immediate reforms or that we are more progressive than the aforesaid countries? It is well worth the authorities addressing this salient issue.

Presumably, the Legislature may have determined to reduce the unnecessary delays in arbitration matters, and with intent drafted the Act preventing parties contesting the same case twice. The Draftsman perhaps may have presumed that permitting an opportunity to challenge negative jurisdictional rulings would negate the whole purpose of arbitration. Viewed from this perspective, one could not deny the fact that, we are remarkably progressive when it comes to this sphere.

15 Kanag-Isvaran K. and Wijeratne S.S. (eds), *Arbitration Law in Sri Lanka* (ICLP 2007) 57.

16 HC/ ARB/ 210/ 2014, June 05, 2017, para [68].

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An Overview of The Finance Business Act No. 42 Of 2011

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Background

The Finance Business Act, No. 42 of 2011 became operational on 9th of November, 2011. It took several years and a lot of effort for this Act to come into being. The process started as introducing amendments to the previous Act enacted over two decades ago, that is the Finance Companies Act, No 78 of 1988. However, with the liquidity rises in the non-banking sector in 2008/2009. The necessity to amend the existing Act was significantly increased. This is synonymous with crises all over the world. After every crisis, regulations are strengthened and more teeth added by the regulator.

The same process occurred with the Finance Companies Act as well. As the amendments increased in number, approval of the Monetary Board sought to introduce a new Act, repealing and replacing the Finance Companies Act.

Structure of the Act

Finance Business Act is structured into nine parts:

Part I covers the Licensing of Finance Companies.

Part 2 empowers the Monetary Board to issue Directions, Rules and Requirements on Finance Companies.

Part 3 lists out the examination and supervisory actions on Finance Companies.

Part 4 requires all Finance Companies to prepare financial statements and have them audited.

Part 5 stipulates a variety of regulatory and resolution actions the Monetary Board could take with respect to Finance Companies.

Part 6 covers the Insurance of Deposits.

Part 7 highlights the actions the Monetary Board could take against persons carrying on finance business or accepting deposits without authority.

Part 8 covers the offences and penalties.

Part 9 is a general part with miscellaneous sections. But importantly the definition of deposits is given in this part.

Objectives of the Act

As enunciated in the Monetary Law Act, the core objectives of the the Central Bank of Sri Lanka are:

Economic and price stability; and

Financial system stability.

With a view to encouraging and promoting the development of the productive resources of Sri Lanka.

In order to ensure the financial system stability Finance Business Act carries provisions mainly to enhance the powers of the regulator to effectively regulate and supervise licensed fiancé companies and to combat unauthorized fiancé businesses. This is spelt out in the Long Title of the Act which states that the Act provides for the regulation of finance business and to provide for matters connected therewith or incidental thereto.

Salient features of the Act

a) Enhanced Examination & supervisory powers on Licensed Finance Companies.

With respect to the licensed Finance Companies, the examination powers and the supervisory actions of the regulator have been enhanced significantly

With respect to Examination powers

Information can be called not only from the Finance Company, its holding company, subsidiary, associate company, the subsidiary or associate company of the holding company but also from any other company which has a substantial financial interest or significant management interest in the finance company.

The Act has enhanced supervisory action for the regulator when the Finance Company is following unsound practices which are considered detrimental to the interest of its depositors and stakeholders. In such instances the Monetary Board may take several actions including the following:

i. Publish the name of the Finance Company regarding which the Board has serious supervisory concerns;

ii. Appoint a Managing Agent;

iii. Restrain any Director, Manager or Controller of the Finance Company form carrying out any function in or in relation to the Finance company;

iv. Re-organize the Finance Company, by arranging for the increase of its capital or reconstituting its board of directors or both such measures;

v. Amalgamate the Finance Company with another Finance Company or any other

institution, with the consent of such other finance Company or any other institution.

vi. Review any contract entered into by a depositor with the Finance Company and vary the terms of such contract;

vii. Review any agreement or contract entered into by the Finance Company, with any person and vary the terms of such agreement or contract;

viii. Guarantee loans and other accommodation granted to a Finance Company by a credit institution.

b) Definition of deposit

Deposit taking without authority is made an offence under this Act. A broad definition for the term "deposit" is introduced in Sec. 73(1) of the Act. Accordingly, "deposit means a sum of money paid on terms under which it will be repaid, with or without interest or a premium, and either on demand or at a time or in circumstances agree to by or on behalf of the

This broad definition is limited by several exclusions as stated in 73(2) (a)-(k), including the following :

i. Loans/investments by Central Bank of Sri Lanka/Licensed banks/money lenders /the Government/foreign government or multilateral lending institutions

ii. Share subscriptions /loans to subsidiary or holding companies or when the same individual is the majority shareholder controller of both companies

iii. Money paid to an Insurer under the Regulation of Insurance Industry Act

iv. Fully secured Bonds/ debentures

v. Listed debt instruments

Since it is not feasible to give an exhaustive list of exclusions with ever changing market practices, the Monetary Board is empowered to make further exclusions by notice published in the Gazette.

Further, the Monetary Board has been given discretionary power over the following exclusions to determine whether a sum of money transacted Is a deposit or not having regard to the frequency and characteristics of those transactions . The purpose is to stop the manipulation of exclusions to carry on illegal deposit taking businesses.

i. A sum of money paid as subscription to shares.

ii. A sum of money paid by way of security for the performance of a contract or by way of security in respect of loss which may result from the non-performances of a contract.

iii. A sum of money subscribed to hybrid debt or subordinated debt, the minimum maturity period of which is not less than sixty months.

iv. A sum of money paid to a person only on particular occasions.

c) Restricting/prohibiting the use of certain words

In order to enable the public to identify the Licensed Finance Companies by their name the Act restricts the use of the words 'Finance', and 'Financial' in their name (Sec 10).

It is mandatory for Licensed Finance Companies to have one of these words in their name. The Act prohibits any other person using these words in their name or description without the prior approval of the Monetary Board. The Monetary Board may publish the names and addresses of persons who use these words in the name or description in contravention of the said provisions. The Act also exempts certain identified categories from this requirement.

There are also restrictions on the use of name, abbreviated name or acronym of a Licensed Finance Company (sec 11)

Accordingly, no entity can register with a name that contains as part of it, the abbreviated name or acronym of any Finance Company without the approval of the Director. Further, no person other than the respective Finance Company shall use its name, abbreviated name or acronym in any of its advertisements promoting its business without the prior written approval of the Director.

d) Enhanced powers to curb unauthorized finance business

Several provisions are introduced to combat unauthorized fiancé business or deposit taking:

To name the most significant ones:

i. Enhanced investigation powers.

ii. To obtain a court order to compel a person to provide information and books relating to illegal deposit taking institutions/persons.

iii. To freeze assets of persons carrying on finance business/accepting deposits, without authority.

iv. To impound passports of persons carrying on finance business/accepting deposits, without authority.

v. To call for information regarding the assets and liabilities of the directors of institutions carry on finance business/ accepting deposits without authority.

vi. Police and Divisional Secretaries to provide information on persons carrying on finance business/ accepting deposits, without authority, if the Director so requires them.

vii. Advertising soliciting deposits without authority / publication of advertisements soliciting deposits without authority are made offences.

viii. Requirement on employees of Licensed Banks and Finance Companies to inform the Director of the Department of Supervision of Non Bank Financial Institutions of the

Central Bank of any person whom they have reasonable suspicion of accepting deposits from the public without authority.

e) Special Measures to safeguard Depositors.

1. The need to maintain a "Rescue Fund"

2. A positive duty to repay the depositors.

3. Insurance of deposits.

f) Enhancing the penalties under the Finance Business Act.

Carrying on finance business or accepting deposits without authority would carry a penalty of imprisonment of either description not exceeding 5 years and / or a fiancé not exceeding Rs. 5 million. Further, these offences are made indictable offences by the Attorney-General in the High Court. Provisions to the above effect are intended to make litigation action under the Act more effective and a deterrent to those who contravene the law.

Further , abetting to commit an offence is made an offence under the Act. Accordingly, depositing money in an unauthorized deposit taking institution will also be an offence.

Conclusion

Finance business Act was brought in covering the lacunas of the previous legislation, enhancing the powers of the regulator to ensure the soundness of the Finance Company sector and to curb unauthorized deposit taking businesses with a view to overcoming the challenges to the stability of the financial sector. It is important that the business community and the public to have a broad understanding of the application of this Act in order to derive maximum use thereof.

"PROTECT YOUR HARD-EARNED MONEY BY SAYING "NO" TO PROHIBITED SCHEMES"

The Development of Islamic Law of Wakfs and Its adoption in Sri Lanka

Mr. Chandaka Jayasundara PC and Mr. Imaz Imthiyas AAL

What is Wakf ?

Islamic law is highly complex and detailed in nature. Consequently, this article is intended as a general guidance and overview of Wakfs and does not provide a definite analysis of the myriad of issues that arise in the management and operations of a Wakf.

The *Shari'ah* is the holy body of law which was designed to govern all aspects of Muslim life, so that the rules cover secular matters (such as contract law and a penal code) as well as religious aspects (such as praying and fasting).[1] The *Waqf* or *Wakf* of the *Shari'ah* has been an institution in the Arabic and Muslim countries, and among Muslim minorities elsewhere for centuries. In Arabic, *Wakf* means detention, stop or stand still[2]. Its plural is '*Awqaf'*. *Wakf* involves the passage of the management/control over property by transfer of control to one person and the right of benefit in that property to others. The Quran as the primary source of the *Shari'ah*, does not in fact expressly mention *Waqf. Wakf* is supplemented by traditions concerning the sayings and practices of Prophet Mohamed which are known collectively as the *'Sunna'*. Much was also borrowed from pre-Islamic Arabian customs and the laws of those who converted to Islam. This included Persian and Jewish law, and the waqf itself may have developed from a Byzantine model.[3]

Abu Hanifa's Islamic school of thought defines a *Waqf* as: '*The detention of the corpus from the ownership of any person, and a gift of its property or usufruct either presently or in the future to some charitable purpose*'.[4] While *Wakfs* can be used to protect private wealth, most *Waqfs* are usually charitable settlements and are often applied to mosques, schools, colleges and hospitals. Traditionally the *Waqf* is comparable to the role of a common law charitable or public trust, and to this day it is closely associated with religion and pious almsgiving.[5] During the first 300 years of Islam, Muslim scholars developed jurisprudence with respect to the creation, management, and administration of *Awqaf* progressively.

Weeramantry[6] on charitable Trusts states as follows:

> "*An owner of property may create a charitable trust (Wakf) in his lifetime by deed or by will. Once he does this, the alienation of the trust becomes irrevocable. Views*

1 M H Kamali, Principles of Islamic Jurisprudence (1991), Cambridge.

2 Fyzee, Outlines of Muhammedan Law (1974, 4th edn), p 274.

3 N Coulson, A History of Islamic Law (1964), Edinburgh, p 28.

4 Within the Sunni Muslim tradition, Hanafi is one of the four "schools of law" and considered the oldest and most liberal school of law of religious jurisprudence (fiqh) within Sunni Islam.

5 David Brownbill QC, Adam Cloherty, Edward Cumming QC, Emma Hughes, Timothy Sherwin, Daniel Warents, International Trust Laws (Jordan Publishing, 2000), Ch.13 Models of the Trust Ideas and Uses of those Models: Trusts in Islamic law, [B13.106]

6 C.G. Weeramantry Islamic Jurisdiction, An international perspective, Vishvaleka Publishers at page 73

differ between the Hanafi and the Maliki schools on the subsequent ownership of the property. The former holds it to belong to Allah and hence no living person has any rights of ownership over it. The latter hold that the founder and his heirs remain owners but without any rights to deal with it.

An important hadith on this matter, as related by Bukhari, is to the effect that the owner of a very valuable piece of land asked the Prophet for advice regarding it and the Prophet said, "If thou likest, make the property itself to remain inalienable, and give the profit from it to Charity".

Origins of Wakf as a concept

The concept of *Wakf* in the evolution of Islamic jurisprudence may have been influenced by earlier civilisations which had created charitable endowments. It is contended that civilisations in Byzantium and Mesopotamia and those countries with Jewish and Buddhist roots may have had a plausible influence on the evolution of the structure and formalities of the early *Wakf*. It is observed that Muslims were strongly urged to endow their assets in the service of mankind, and they knew how to do it from early civilisations'.[7]

The first evidence of the creation of *Wakf* lies in the early Islamic period in the seventh century. There is a record of the Prophet settling certain orchards in Medina on a *Waqf* for charitable purposes for the benefit of the poor and needy. This practice was followed by the second Caliph Umar. On the advice of the Prophet, he settled a palm orchard, with the right to enjoy the fruits of the palm orchard, so dividing the current enjoyment of its income away from the ultimate legal ownership. Following this, it is reported that some of the Prophet's companions created a Wakf providing as a condition that the fruits and revenue of their Wakf should first be given to their children and descendants. After their needs were satisfied, the property would be applied for charitable purposes for the benefit of the poor.

A *Wakf* is different to *Zakat*, in that, settling a Wakf is voluntary charitable giving unlike *Zakat* which is obligatory and one of the five pillars of Islam. *Zakat* can only be given to Muslims whereas Waqf and other charity can be given to both Muslims and Non-Muslims.[8] Waqf is a narrower concept than 'charity', which in Islamic law encompasses alms, grant, inheritance, loan, and Waqf. The consensus of Islamic scholars is that *Zakat* cannot be used to fund a *Waqf*.[9]

Although the basic principles of Wakf are similar throughout the Muslim world, there is a diversity of social practices and judicial attitudes, and material variations between the Sunni and the Shia sects, and also between different Hanafi, Hanbali, Maliki and Shafii schools of the Sunni sect, concerning the proper application of Islamic law to particular circumstances. This combined with widespread State interference in the regulation of Wakf, has led to

7 M Cizakca, 'A waqf in history and its implications for modern Islamic economics' (1998) 6 (1) Islamic Economic Studies 48.

8 Fatwa No 18148 (31 May 2011) General Authority of Islamic Affairs and Endowment: <http://www.awqaf.ae/Fatwa.aspx?Lang=EN&SectionID=18&RefID=18148>.

9 Quran, Verse 60 of Chapter 9

considerable variation between legislation introduced in different countries with respect to their regulation.[10]

Types of Waqfs

The evolution of the Islamic jurisprudence on the *Waqf*, the role of key parties to the *Waqf*, and the interplay between trusts and *Wakf* over the relevant period are of particular interest from a legal perspective. Fundamentally, there are two different forms of *waqf*: *Waqf* that are for family purposes (*Waqf ahli*), and *Wakf* that are exclusively for charitable, religious or pious purposes (*Waqf khayri*). Some *waqf* are also created for mixed family and charitable purposes.

There are four key elements to a Waqf: the founder (*waqif*); the beneficiaries; the Trustee (*mutawalli*); and the corpus or endowed capital of the Waqf.

The property in question is normally land, the continuous use of which will further the described purpose, or benefit the designated persons. The various *Shari'ah* schools of doctrinal opinion within Islam, has led to the donor transferring full ownership to the *mutawalli* (or manager) in some jurisdictions, while in others the donor retains the ownership, and the manager operates with such rights as are transferred to him in terms of the *Wakf*. In such jurisdictions the manager will also be liable for his wrongful conduct of the *Waqf*[11] and although the manager does not have ownership of the *Waqf* property, the *Waqf* provides for the independent administration of that property for both charitable purposes and personal benefit.[12]

Types of Wakfs and the English law of trust

There has been a considerable amount of research as to the origins of the concept of trust in the English law. The trust is considered to be one of England's outstanding contributions to jurisprudence, but a brief survey of the Islamic law of *Waqf* shows that trusts (as known in the English Law) are not unique to the English law but resembles several features of *Wakf*.[13] This has largely focused on whether its roots lay in the *fideicommissum* of Roman law, Salic law or Islamic law. Although there are certain features of trusts in Roman law, particularly the concept of entrusting property to an intermediary for the benefit of an intended estate beneficiary, when comparing the *Waqf* with the trust, there seems a much heavier overlap of similar institutions, structures and purposes.[14]

While certain features of an Islamic *Waqf* are similar to the English law of trust (for example the division of legal and equitable title and the nature of fiduciary duties to account to beneficiaries)

10 Waqf (endowment) and Islamic philanthropy', Islam, Land & Property Research Series 2005 (UN – Habitat): Paper 7, at para 7.2.6.

11 Donowan Waters QC, 'Trusts in Islamic law', [2006] Journal of International Tax, Trust and Corporate Planning The Future of the Trust, P1, p 179.

12 Donowan Waters QC 'The Future of the Trust from a Worldwide Perspective' [2004] Journal of International Tax, Trust and Corporate Planning, p 199

13 Scott Morrison, 'Mobilizing the trust for Islamic insurance (takaful)' Trusts & Trustees (2019) Volume 25 (Issue 4, Oxford University Press), p 450

14 Paul Stibbard (Executive Vice Chairman, Rothschild Trust UK), 'Comparison of the Waqf and the trust', [2014] Journal of International Tax, Trust and Corporate Planning, p 103.

certain other features are quite unique to Islamic law. There is a historical argument that the Waqf greatly influenced if not provided the inspiration for the English trust.[15]

The interaction between English courts and Islamic law made it clear that the trust and *Waqf* have many common features, as was observed by the Privy Council in *Riziki v Sharifa*.[1416] They are similar in that they both split the ownership of property so a donor can give the benefit to individuals or groups, and for the property to be controlled by a third party. Both systems also permit the settlement of this benefit for future generations. Each has rules to determine when such a situation will be recognised in law, and what duties fall on the person responsible for controlling the property. Islamic law also has rules equivalent to the doctrine of *cy-pres*.[17]

Even if the concept of trust in English law itself did not originate with the *Waqf*, the specific educational establishments were inspired by *Waqf* institutions. The colleges of Paris and Oxford may have been modelled on Waqf-funded madrasas, although the universities themselves (as degree awarding bodies) were distinctively European.[18] There are structural similarities between early colleges and madrasas that indicate some influence, and chains of transmission can allegedly be established as the first college in Paris was founded by John of London after returning from a pilgrimage to Jerusalem.

London's Inns of Court also offer interesting similarities with *Waqf*-funded madrasas although there is no evidence of direct influence. Like madrasas, the Inns of Court were unincorporated and physically attached to religious institutions. They adopted a teaching method of readings and moots that can be traced through Bologna to the Levant, and encouraged the development of a legal system based upon case precedent, jury witnesses and an independent judiciary.[19]

Comparing trusts and *Waqfs* will always be an academic exercise. As Weeramantry states "*It must be admitted that the similarities are remarkable, and that the developed Islamic notion long antedated the first English gropings towards such a concept*."[20]

The Law relating to *Wakfs* in Sri Lanka

The Mohammadan Code of 1806 did not contain any provision relating to Muslim Charitable Trust or Wakfs. Disputes dealing with claims to property or to civil right were entertained and resolved in the District Court under the General Law.[21] However. the court was reluctant to entertain application on religious matters and it was suggested that a religious body should

15 Monica M Gaudioisi, 'The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College' (1988) 136 University of Pennsylvania Law Review 1232

16 Riziki v Sharifa [1964] AC 12 at p 28.

17 Mulla, Principles of Muhammedan Law (1990, 19th edn), p 151.

18 George Makdisi, The Rise of Colleges, Institutions of Learning in Islam and the West (1981), EUP.

19 George Makdisi, The Rise of Humanism in Classical Islam and the Christian West (1990), EUP, pp 309–17.

20 C G Weeramantry, Islamic Jurisprudence: An International Perspective (1988, Palgrave Macmillan UK) p 73.

21 A H G Ameen, The Wakfs Law Procedure and Practice (2004, Al-Ameen Publishers) p 12

go into such matters. The Property and Trustee Ordinance No. 7 of 1871 applied to private and public trust and it provided the initial statutory framework for the resolution of dispute relating to the administration of trusts arising from death, incapacity and misconduct of a trustee or trustees.[22]

The Courts of Law have all along claimed and exercised the right to interfere with proceedings of religious bodies of all description wherever claims to property or to civil rights were involved. But where a purely religious question was involved, the court was reluctant to entertain such application. Notably in 1923, Betram C] held that the District Judge when he decided the matter was discharging a function which would have been discharged by the Judge of a religious Court .[23]

The Muslim Intestate Succession and Wakfs Ordinance No: 10 of 1931 was the first legislative attempt to deal with the Muslim charitable trust. The preamble of the statute reads as. "*An ordinance to define the law relating to Muslim intestate succession, Donation and charitable Trust or Wakf*."

Several sections in this statute were extracted from the Trusts Ordinance and the definition of "Charitable Trust" in section 6 of the statute was a reproduction of section 99 of the Trusts Ordinance. Further the Cy-pres doctrine contained "Settlement of a scheme" in section 99(3) of the Trusts Ordinance are found in section 5 of the statute.

Originally there was no exclusive central authority and the disputes relating to Mosques and Wakfs were resolved in the ordinary courts of law. A Special Committee on the recommendation of Justice M.T. Akbar was appointed to go into the inadequacies and shortcomings of the Muslim Intestate Succession and Wakfs Ordinance in 1931. 1n July 1952, the Minister of Home Affairs appointed a committee of Muslim Parliamentarians and Senators to examine the whole question afresh.[24]

Muslim Mosque and Charitable Trusts Act No. 51 of 1956 was passed and ~~it~~ came into effect on 07.11.1956. The Muslim Mosques and Charitable Trusts or Wakfs AcT No: 51 of 1956, as subsequently amended, is the law that governs all matters pertaining to Mosques and Charitable Trusts or Wakfs in Sri Lanka today. However, it must be noted that the term "*Wakf'* is not defined in the Act.

The Act provides for:

- Registration of Mosques.
- Registration of Muslim Shrines and places of religious resort
- Charitable trusts or Waqfs

22 Saleem Marsoof, 'Muslim Charitable Trusts and Religious Institution in Sri Lanka', Law and Society Trust Vol. IV No. 65, 1993).

23 Mohamed Vs Kander 24 NLR 390

24 A H G Ameen, The Wakfs Law Procedure and Practice (2004, Al-Ameen Publishers) p 16

- Power duties and Functions of Trustee of a registeret Mosque,
- Muslim Charities Fund, MC

The Tribunal has powers of the District Court to summon witnesses[25] and in any proceedings under the Act, the Tribunal shall follow the procedure of a District Court, and in the execution of its orders and judgments, shall have all the powers of a District Court and the provisions of the Civil Procedure Code relating to the procedures and powers of execution of a District Court, shall, *mutatis mutandis*, apply to and in relation to the procedures and powers of execution of the Tribunal.[26]

The Wakfs Tribunal is set up by the Minister and the Minister will decide the number of Tribunals that should be set up in the country but the members of a Tribunal (which shall consist of three members and shall be appointed by the Judicial Service Commission.[27] It is the Commission that appoints one of the three members as the Chairman. The quorum shall be two members. The decision of the majority of the members of the Tribunal who are present at the hearing of any matter shall be deemed to be the decision of the Tribunal.

The powers of the Tribunal shall include the power to hear and determine any application made in respect of a Muslim Charitable Trust or Wakfs for an order providing for all or any matters affecting the trust.[28]

The Wakf Tribunal established by the act has exclusive jurisdiction to inquire into matters relating to Muslim Charitable Trust or Wakfs[29] and Appellate Jurisdiction against decisions made by the Wakfs Board. But unlike the Board of Quazis, the Wakf Tribunal under the Act has no revisionary powers.

Other than a Wakf which is solely for the benefit of a registered mosque, the purpose for which a Charitable Trust or Wakfs could be established are:[30]

a) the relief of poverty among Muslims or any section thereof;

b) the advancement of the education of Muslims or any section thereof;

c) the advancement of Islam generally;

d) the management of any mosque or Muslim shrine or place of religious resort or the performance of religious rites or practices at such mosque, shrine or place or in any other place whatsoever;

e) any purpose beneficial to Muslim or any section thereof: and

f) any other purpose recognized by Muslim law as religious. pious or charitable,

25 Muslim Mosques and Charitable Trusts or Wakfs Act 51 of 1956 (Wakfs Act), s 9F

26 Wakfs Act, s 9F

27 Wakfs Act, s 9D

28 Wakfs Act, s 9E

29 Wakfs Act, s 95

30 Wakfs Act, s 32

While the Wakfs Tribunal has exclusive original jurisdiction over Muslim Charitable Trusts it cannot entertain any application without the certificate from the Director that application is approved by the Wakfs Board.[31] The certificate of the Director is deemed mandatory for institution of action[32] and an application without such certificate is considered fatal. A person aggrieved with the orders of the Wakfs Tribunal may appeal to the Court of Appeal.

Wakfs have proved a resilient and adaptable instrument and they continue to thrive even in the present turbulent times.

31 Wakfs Act, s 9E(3)

32 Sherifdeen v Jamaldeen (2000) 2 SLR 190

Demystification of Talaq

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Abstract

Allah in Surah al-Rum states 'Allah created mates for man from among yourselves that man may dwell in tranquility with them and He has put love and mercy between their hearts.'[1]

Love and mercy are the two qualities that have been put in the hearts by Allah, but the fact is that the marriage life of the woman is at the mercy of the husband. Throughout her life time, her marriage is at a risk because of the so called power given to husband to divorce the wife without any reason. The mystery is, who gave this power to the husband. There is a perception amongst Muslims as well as Non-Muslims that the Muslim husbands can have four wives, they can arbitrarily and capriciously divorce their wives, they have a birth right to divorce his wife according to his whims and fancies and women live in perpetual peril of divorce and remain permanently interned in their homes without any civil or legal rights.

Introduction

The concept of '*Talaq'* can be well understood only if the reader knows what the Islamic concept of marriage is. Marriage and divorce shall not be taken in isolation. One of the most oft repeated remarks made in the context of Muslim Family Law cases, by many judges as well as lawyers, is that the marriage is a 'civil contract'. This is said so without realizing its true consequences. A deeper study of the Quran and Sunnahs will reveal that the marriage is not merely a 'civil contract' but also a 'religious sacrament". Chief Justice Sir Shah Sulaiman[2] observed that 'marriage in Islam is not regarded as a mere civil contract but a religious sacrament'. Further there are ample authorities where Indian and Pakistan Judges have emphasized that the marriage in Islam is a 'religious sacrament'[3]

Chief Justice Ismail[4] giving his opinion on Muslim marriage said that, under the Muslim law marriage is a civil contract. But the rights and responsibilities consequent upon it are of such importance to the welfare of the society that a high degree of sanctity is attached to it.

1 Al Quran 30:21

2 Anis Begam v. Mohamed Istefa (1993) 55 All 743

3 Justice Amritza Fazal Ali of the Indian Supreme Court in Siraj Mohamed Khan v. Jan Mohamed, AIR 1981 SC 1972; Madya Pradesh High Court in Noor Mohamed vs. Mohammed Ziauddin AIR 1992 MP 244; Justice Khurshid Khan of the Supreme Court of Azad Jammu and Kashmir in Abdul Karim vs. Mst. Parveen Aktar PLJ 1982 SC (AJ&K) 80; Justice Saqib Nisar in Shahida Parveen vs. Samiulla Malik PLJ 2006 Lahore 1215

4 Must. Rukia Khatun vs. Abdul Khalique Laskar, (1981) 1 GLR 375

According to Quran,[5] marriage is regarded as a sacred covenant between man and woman. Allah created mates for man from among yourselves that man may dwell in tranquility with them and He has put love and mercy between their hearts,[6]that means, men and women are joined in matrimony so that they may live in love and solace. Further Quran states[7] "They are your garments and you are their garments. This beautiful verse describes that upon marriage man and wife pass into 'each other's protection'. This notion finds repetition in several verses where men and women who are married are described as having entered into the 'protective fortress of marriage". Clearly it is not the Quranic view that the marriage is a 'pure civil contract' or that the procreation of children is its sole objective. Marriage has religious sanctity. Protection of the marriage is one of the sole purpose of Quran. One of the fundamental objectives of Islam (*Maqasid-al-Shari'ah*) is the protection of 'progeny'. It is promoted through the maintenance of healthy family life and the institution of 'marriage'.

We will have to look into talaq only in this context. Then the divorce provisions will not be misunderstood or misinterpreted. Objective of this article is to clarify and demystify the concept of 'Talaq', which has been mystified by the Traditionalists for various reasons. The writer firstly classifies talaq and then give the Quranic provisions and some of the Sunnahs on Talaq with the pre-Islamic talaq practices so that the readers may get acquainted with Shari'ah concept of talaq and the changes made by the Prophet to the laws of talaq which was in practice during the Pre-Islamic era. Thereafter the writer intends to focus on the conditions and practices of talaq introduced by Traditionalists after the demise of the Prophet and then some Indian judgments where the judges have given their progressive thinking about talaq which curtails the so called discretionary power of the husband. This new vision is an eye opener. The time has come for the leaders of the society and the law makers to think out of the box and take steps to reform the Muslim Personal Law, especially law of talaq and make it more humane to achieve the purpose or the objective of Shari'a (Maqasid-al-Shari'ah).

Classification of Talaq

In legal sense Talaq is dissolution or repudiation of marriage by husband using certain words.[8] In Islam Talaq is considered very bad form of ending the relationship between the spouses. Talaq which is considered evil, must be avoided by us as much as possible. However sometime this evil option becomes better to any other moral option because whenever it is impossible to carry a married life with love and affection then the partners feels suffocation. In that case Talaq is the one and only option for that couple. The Prophet said that the divorce must be resorted only in exceptional circumstances.

There are three kinds of talak. They are talak-e-ahsan, talak-e-hasan' and talak-e-biddat. Justice Ameer Ismail[9] classifies talak into two broad categories, namely, Talak al-Raji (revocable divorce) and Talak al-Bain (irrevocable divorce). Talak al-Raji has two forms (1) Talak Ahsan,

5 Al-Quran 4:21 has beautifully said "And how could ye take it when ye have gone in unto each other and they have taken from you a solemn covenant?"

6 Al Quran 30:21

7 Al Quran 2:187

8 Hedaya, p. 72; Baillies Digest of Mohammadan Law Part I p. 204

9 Khan v. Moomin (1995) 1 SLR 107

the most approved divorce and (2) Talak Hasan, approved divorce. Talak Ahsan consists of a single pronouncement of divorce by the husband, followed by a period of abstinence known as the "tuhr" period. He must then refrain from sexual intercourse during the Iddat period of three menstrual cycle, (or, if she be beyond the age for menstruation, or if she has not menstruated, or if her periods are irregular, then three lunar months). At the end of this Iddat period the marriage is terminated; the dissolution arising directly from the unilateral talak pronounced three months earlier. This form of repudiation provides an opportunity of revocation as the husband can take back his wife during the period of this Iddat. Ahsan Talak is regarded as – 'the most proper' form of divorce.

The Hasan form of talak is also an approved method of repudiation. The procedure is as follows: the husband repudiates his wife three times; the first talak takes place during a tuhr period and he pronounces two subsequent talaks during the following two tuhr periods. As soon as the husband pronounces the third talak, the talak becomes irrevocable. The talak is raji (revocable) until the third pronouncement. In the Hasan form, the marriage does not come to an end until the pronouncement of the third talak. The wife has to observe an Iddat period after the third pronouncement and at this time the husband cannot revoke the decision to divorce his wife.

The distinction between talak ahsan and talak hasan is, that in the former there is a single pronouncement of 'talak' followed by abstinence during the period of iddat, whereas, in the latter there are three pronouncements of 'talak', interspersed with abstinence. In Talak Hasan, iddat commences after the third talak.

The third kind of 'talak' is talak-e-biddat (popularly known as triple talak). This is effected by one definitive pronouncement of 'talaq' such as, "I talak you irrevocably" or three simultaneous pronouncements, like "talak, talak, talak", uttered at the same time, simultaneously. In talak-e-biddat, divorce is effective forthwith. The instant talak, unlike the other two categories of talak is irrevocable at the very moment it is pronounced.

Talaq provisions in Al Quran

In Holy Quran, the verses (Aayahs) on Talaq are 11 in Surah 'Baqarah', 4 in Surah 'Nisa', 1 in Surah 'Ahzaab' and 2 in Surah 'Talaq'.

The Arabs had many special kinds of oaths. Some of them related to sex matters, and caused misunderstanding, alienation, division, or separation between husband and wife. Sometimes in a fit of anger or caprice a husband would take an oath by Allah not to approach his wife. This deprived her of conjugal rights, but at the same time kept her tied to him independently, so that she could not marry again. Allah in the first place disapproved the thoughtless oaths. 'And make not Allah's (name) an excuse in your oaths against doing good or acting rightly or making peace between persons……"[10]

The above verse and the subsequent verses namely 2:225, 226 and 227 are regarding oaths. Allah will not call you to account for thoughtlessness in your oaths but for the intention in

10 Al Quran 2:224

your hearts.[11] For those who take an oath for abstention from their wives a waiting for four months is ordained; if then they can return[12] or if their intention is firm for divorce they have to proceed without harassing wives.[13]

The Commandment of God is that 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.[14] If a husband divorces his wife (irrevocably) he cannot after that remarry her until after she has married another husband and he has divorced her.[15] When ye divorce women and they fulfil the term of their (`Iddat) either take them back on equitable terms or set them free on equitable terms; but do not take them back to injure them or to take undue advantage.[16]

In Surah Baqara verses 236 and 237 are regarding divorces before consummation of marriage and the right of the wife for dower.

Then there is another important verse on arbitration and reconciliation.

"If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things."[17]

The verse in Surah 'al-Ahzab' is about the marriage with those women with whom at the time of the marriage no dower was settled and before the consummation of marriage they are divorced.

"O ye who believe! When ye marry believing women, and then divorce them before ye have touched them, no period of ´Iddat have ye to count in respect of them: so give them a present. And set them free in a handsome manner."[18]

There are two verses in Surah Talaq

When ye do divorce women, divorce them at their prescribed periods, and count (accurately), their prescribed periods: And fear Allah your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness, those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation.[19]

11 Al Quran 2:225
12 Al Quran 2:226
13 Al Quran 2:227
14 Al Quran 2:229
15 Al Quran 2:230
16 Al Quran 2:231
17 Al Quran 4:35
18 Al Quran 33:49
19 Al Quran 65:1

Thus when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you, endued with justice, and establish the evidence (as) before Allah. Such is the admonition given to him who believes in Allah and the Last Day of Judgment.[20]

Some of the Sunnahs on Talaq

Sunan (plural of Sunnah) are the sayings, acts or tacit approval of the Prophet. A few of them are mentioned below. "Of all things permitted by law", said the Prophet, 'divorce is the most hateful in the sign of Allah"[21]

Mahmud ibn Labid reported: The Messenger of Allah, peace and blessings be upon him, was informed about a man who pronounced divorce to his wife three times at once. The Prophet stood in anger and he said, "Do they play with the Book of Allah while I am among you?"[22] Triple divorce was considered to be only one revocable divorce.[23]

Narrated `Abdullah bin `Umar: that he had divorced his wife while she was menstruating during the lifetime of Allah's Apostle. `Umar bin Al-Khattab asked Allah's Apostle about that. Allah's Apostle said, Order him (your son) to take her back and keep her till she is clean and then to wait till she gets her next period and becomes clean again, whereupon, if he wishes to keep her, he can do so, and if he wishes to divorce her he can divorce her before having sexual intercourse with her; and that is the prescribed period which Allah has fixed for the women meant to be divorced.[24]

Narrated Abu Hurayrah: The Prophet said: There are three things which, whether undertaken seriously or in jest, are treated as serious: Marriage, divorce and taking back a wife (after a divorce which is not final).[25]

Ibn Umar reported that the Messenger of Allah, peace and blessings be upon him, said, "Among the greatest of sins to Allah is that a man marries a woman and, when he fulfills his needs with her, he divorces her and leaves with her dowry. This is equals to of workers and animals."

The legal restraints imposed by the Prophet are the following: 1. the fixing of dower; 2. provision for revocation of talaq in some cases; and 3. restraints on re-marriage between the parties.[26]

20 Al Quran 65:2

21 Abu Dawud Sunan, 13:3

22 Sunan al-Nasā'ī 3401

23 Ṣaḥīḥ Muslim 1472

24 Shahih Al-Buhari-Book 69, Hadith 5251

25 Sunan of Abu-Dawood – Book 12 Hadith 2189

26 Sahih Al-Bukhari – Book 63, Hadith 213

Pre-Islamic talaq

The practice of talaq was most certainly not introduced by Islam; it was rampant in the Arab society of the time and Islam tried to gradually reform in a very humane way. The powers of divorce possessed by the husband were unlimited in pre-Islamic era. They could divorce their wives at any time, for any reason or no reason. They could also revoke their divorce, and divorce again as many times as they preferred. Moreover, they could, if they were so inclined, swear that they would have no intercourse with their wives, though still living with them. They could arbitrarily accuse their wives of adultery, dismiss them, and leave them with such notoriety as would deter other suitors; while they themselves would go exempt from any formal responsibility of maintenance or legal punishment.[27]

The Prophet looked upon these customs of divorce with extreme disapproval and regarded their practice as calculated to undermine the foundation of society. However, under the existing conditions of society, it was impossible to abolish the custom entirely. The Prophet had to mould the mind of an uncultured and semi-barbarous community to a higher development. Accordingly, he allowed the exercise of the power of divorce to husbands under certain conditions. He permitted to divorced parties, three distinct and separate periods within which, they might endeavor to become reconciled; but should all attempts at reconciliation prove unsuccessful, then in the third period, the final separation became effective.[28]

The above Quranic verse and the Prophetic traditions are general directions and limitations on Talaq. There is nothing in the law of Islam that suggests that the husband is free to pronounce talaq in an irrational or unreasonable manner. It allows talaq, subject to several conditions of a dissuasive nature, their purpose being to discourage the husband from exercising his right without careful consideration. These restrictions and conditions are moral and legal, which constitute some check on the husband. Talaq is not just a word, the mere utterance of which will terminate the marriage, but a procedure which must be meticulously followed. A valid dissolution can be resulted only if all the prescribed steps of this procedure have been duly performed. Unfortunately, the traditional interpreters of Muslim law give effect to a talaq pronounced by a man even in sheer violation of the true Islamic law and procedure for divorce.

Perception of the Traditionalists

As stated above the Prophet looked upon the pre-Islamic customs of divorce with extreme disapproval but under the existing conditions of society, it was impossible to abolish the custom entirely. He intended to move forward gradually to achieve the purpose of Shari'ah. Unfortunately after the demise of the Prophet, the jurists could not move or did not want to move forward due to various reasons. Their interpretations were always determined by the culture in which they live and by their own individual experiences, expectations, assumptions and beliefs. Therefore there is always the possibility that the same event will receive different interpretation according to the ideological position of the person giving

27 Ibrahim Abdel Hamid- "Dissolution of Marriage", Islamic Quarterly, 3 (1956) 166-75, 215-223; 4 (1957)3-10, 57-65, 97-113; cf: Syed Khalid Rashid- Muslim law, 4th edn. 2004, p.98, Eastern Book Co., Lucknow

28 Ameer Ali - The Spirit of Islam, 243-44 (London, 1965) cf: Syed Khalid Rashid- Muslim law, 4th edn. 2004, p.98, Eastern Book Co., Lucknow

those interpretations. A common element all possess were male dominant attitude. The other factor is the definition given to 'marriage' as 'a civil contract' or 'a religious sacrament'. Therefore the scholars argue that the Traditionalists did not move forward from the place where the Prophet stopped.

There were no specific Rules or Procedure formulated to complete a Talaq. The Prophet allowed the followers or kept it open to the followers to formulate their own Rules and Conditions within the spirit of Quran and *Sunnah*. The Traditionalists gradually filled the gap by giving their own procedures and conditions to suit their requirement and environment and to suit the definition given by them to the word 'Talaq'. Talaq is defined as the exercise of the right of pronouncing unilateral divorce on the wife by the husband, arbitrarily without any cause, at any time during the subsistence of a valid marriage including the period of iddat.[29] Muslim law does not require the existence of any fault or matrimonial offence as an excuse for talaq. The Muslim concept of divorce is that, where it is not possible for the spouses to live together, they must separate peacefully. The law gives to the husband, an absolute authority to terminate the marriage by pronouncing talaq; this right was not given to the wife because, the society is male dominated.

Muslim Jurists seem to have considered that, man is a rational being and all his acts are based on some reason or other. They do not make it a condition that the husband should state his reason for his act. Therefore Jurists are of the view that pronouncement of Talaq dissolves the marriage without any judicial proceedings. Judicial proceedings can only serve the purpose to ascertain if the husband has acted lawfully on the basis of a genuine ground, But, the Muslim husband can divorce his wife without any cause or to be more exact, without disclosing the cause for pronouncing Talaq. Wife cannot object to it. Therefore judicial proceedings can serve no purpose.

Some of the Sri Lankan Ulamas argue that during the life time of the Prophet no one pronounced Talaq before the Prophet who was the Supreme Judge at that era. In support of their argument they quote the opening words of some of the Quranic verses on Talaq such as "if you divorce women…."[30], "When you have divorced women…."[31], "When you people divorce women……"[32] coupled with Sunnah such as where `……..Abdullah bin `Umar: narrated to the Prophet that he had divorced his wife while she was menstruating……."[33] Their argument is that these verses never give any idea that the divorce has to be before a Quazi/judge. Neither these verses totally exclude adjudication before a judge. When the companions reported to Prophet about incidents of talaqs, the Prophet has given some directions as to, what to rectify and how to rectify the mistakes or errors they have committed when pronouncing talaq. Isn't this a judicial process to see whether there is 'a valid divorce.'

29 DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.183, Orient Publishing Company, Allahabad

30 Al-Quran 2:236

31 Al-Quran 2:232

32 Al-Quran 65:1

33 Hadith No. 5251 op.cit.

The Traditionalists instead of interpreting the talaq laws more humanely attempts to maintain and continue the same old male-dominant concept. The judges, specially in India, Pakistan and Sri Lanka, did not have a choice but to follow the opinion of the expert in Muslim Law. In *Moonshee Buzloor Rahim v. Laleefutoon Nisa*,[34] it was said that under Muslim law Talaq is an arbitrary act of a Muslim husband who may repudiate his wife at his own pleasure with or without cause. He can pronounce the Talaq at any time. It is not necessary for husband to take prior permission of his wife.

According to the Traditionalists the presence of the wife at the time of pronouncement of Talaq is, so far as the validity of the divorce is concerned, immaterial. Jurists, as an example, state that if a person asks a husband if he has divorced such and such wife of his and he replies 'yes' then a divorce would be effected. This establishes the fact that it is not at all necessary that the wife should be present at the time of divorce.

The Calcutta High Court held that it is not necessary for the wife to be present when the Talaq is pronounced.[35] The absence or presence of the wife does not affect the irrevocability of triple divorce.[36] It is not necessary that the talak should be pronounced in the presence of the wife or even addressed to her.[37] Non-communication to the wife of the pronouncement of Talaq by a husband does not affect the validity of a divorce if otherwise valid.[38] Talaq pronounced in the absence of the wife take effect though not communicated to her,[39] but, in 1931 the Madras High Court took another view in *Kathuyumma v. Urathel Marakkar,* [40] where the Court said that there could be a valid talaq in the absence of wife but it would come into operation only from the date on which the wife comes to know of it.

No particular formula or words have been prescribed by law for pronouncing Talaq. Any words can serve the purpose so long as they clearly denote the husband's intention to divorce his wife. The words of divorce must indicate an intention to dissolve the marriage, e.g., "Thou art divorced," "I have divorced thee," or "I divorce my wife forever and render her haram from me."[41]

It is not necessary that the repudiation should be addressed to the wife or to any person whomsoever. This finds support from a passage in *al-Fatawa al-Alamgiriyah* and a similar one in *Shara'i al-Islam*. The passage reads: "A person ask a man: Have you divorced your

34 (1867) 11 MIA 551

35 Fulchand Bibee v. Nawab Ali Chaudhary (1909) 36 Cal. 184

36 Aisha Bibi v. Qadir Abrahim (1910) 3 Mad. 22; Abdul Rahuman Mohamed Subayer vs. Samsi Lebbe Marikkasr Aynool Pathuma MMDLR (Muslim Marriage and Divorce Law Report in Sri Lanka) Vol II, p.55; Sara Bai v. Rabia Bai ILR (1905) Bom. 537; Aisha Bibi v. Qadir Abrahim (1910) 3 Mad. 22

37 Ma Mi v. Kallander Ammal, (1927) 29 BOMLR 772; Ahmad Kasim v. Khatoon Bibi (1932) 59 Cal. 833, 141 I.C. 689, ('33) A.C. 27; Fulchand v. Nazib Ali (1909) 36 Cal. 184, 1 I.C. 740; Sarabai v. Rabiabai (1905) 30 Bom. 536 (obiter)

38 Allah Pitche -vs- Kappalneiyina Ahmadu Lebbe Avvakudy (1937) MMDLR Vol II p.50

39 Seydan Ahmed vs. Ruwaida Umma (1949) II MMDLR Vol II p. 99, Board of Quazi referred Mulla, Mohammadan Law 12th edn. p.246 and cases cited therein

40 AIR (1931) Mad. 647

41 Rashid Ahmad v. Anisa Khatun (1932) 59 I.A. 21

wife?' and he answers; 'Yes'. She is divorced.[42] Divorce given unilaterally by the husband is commonest form and is peculiar to Mohammadan Law, this form of talaq has to be accepted as being legal.[43]

Justice Costello held[44] "Upon that point (divorce), there are a number of authorities and I have carefully considered this point as dealt with in the very early authorities to see whether I am in agreement with the mere recent decisions of the Courts. I regret that I have to come to the conclusion that as the law stands at present, **any Mohamedan may divorce his wife at his mere whim and caprice**." (emphasis added).

Justice Khalid, who later adorned the Supreme Court, after referring to the unbridled power of a Muslim husband to divorce his wife, asked: - "Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity."[45]

Does the husband has a discretionary power?

There are two legal principles touching the subject of Talaq. One is natural justice which includes *Nemo judex in causa sua* which means 'no-one is judge in his own cause' and *Audi Alteram Partem* which means 'listen to other side'. The other legal principle is the 'discretionary power'.

To allow a man to determine his marriage at his sweet will or pleasure, without the consent of or even communication with the woman concerned, is against natural justice. Here the man seeking to be or purporting to be a judge in his own cause and dissolve his marriage without any communication with the woman or any consent on her part affecting her rights as well as his own. Further the wife is not heard, she is not present at the time of pronouncing talaq or she was not informed her of her fate. Isn't this against the Rule of *Audi Alteram Partem*.? Erle, C.J explained the said rule in the following words: 'Even God did not pass a sentence upon Adam, before he was called upon to make his defence'.[46] If Allah has given the husband such a power with discretion, may be not without reason. 'Allah knoweth all things". "Allah hath power over all things"

The judgments cited above were decided on the guidance of the traditionalists who referred to those judges their own interpretation of Muslim laws. These judgments clearly indicate that the husband has a discretionary power to divorce his wife at his pleasure, without a cause and without assigning any reason, at any time, without notice to her even after the pronouncing talaq, and at his whims and caprice.

42 K.N.Ahmed, Muslim law of Divorce, 2006, 3rd ed. (2006), New Delhi, p.29

43 Mst. Zohara Khatoon vs Mohd. Ibrahim AIR 1981 SC 1243,

44 Ahmad Kasim Molla vs. Khatun Bibi, (1931)ILR 59 Calcutta 833,

45 Mohammed Haneefa vs. Pathummal Beevi, 1972 Ker LT 512

46 Cooper v. Wandsworth Board of Works (1863) 143 ER 414

Even if we agree that Allah has given him this power, surely, it cannot be without strict restrictions. Allah knows that man will misuse and abuse his power. When Adam was warned not to eat the forbidden fruit He knows that Adam will disobey. "Allah hath full knowledge of those who do wrongs." The discretionary power is always interwoven with its limitations. Allah expects to exercise powers reasonably, impartially, in good faith, justly, fairly, and avoiding oppression or unnecessary injury and without violating the basic principles of Shari'ah.

In this context, we see, with the dawn of the 20th century most of the Indian judges have changed their perception and started giving judgments in line with the basic principles of Shari'ah. Justices Munro and Abdul Rahim are the first two judges who opened the doors of justice to women. They set an initiative to look into the sources of Muslim laws (Holy Quran, Sunna, Ijma and Qiyas) deeply and extract the correct sense to bring about a social reforms. A Divisional Bench judgment of Justices Munro and Abdul Rahim in *Asha Beebi vs. Kadir Ibrahim Rawther*[47] held:

> "No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Quran and in the reported saying of the Prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband."

Justice S.M.Sidickk of Madras High Court in *Saleem Basha vs Mrs. Mumtaz Begam*[48] refers to the judgment of Justices Munro and Abdul Rahim emphasizing on the words "a divorce duly effected" and states as follows:

> "It may be noticed that the learned Judges Munro and Abdul Rahim, in my respectful opinion, advisedly used the expression "divorce duly effected" in the judgment. No divorce is duly effected if it is in violation of the injunction of the Quran.
>
> It will be seen that in all disputes between the husband and the wife which it is feared will lead to a breach, the Judges are to be appointed from the respective people of the two parties. These Judges are required first to try to reconcile the parties to each other failing which divorce is to be effected. Therefore though it is the husband who pronounces the divorce, he is as much bound by the decision of the Judges, as is the wife. This shows that the husband cannot repudiate the marriage at will. The case must first be referred to two Judges and their decision is binding."

The Gauhati High Court[49] has observed that the correct law of Talaq as ordained by the Holy Quran is that (i) Talaq must be for a reasonable cause; (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one from the wife's family and the other from the husband. If an attempt fails, talaq may be effected.

47 (1910) ILR 33 Madras 22,

48 1999 (1) ALD Cri 182, 1998 CriLJ 4782

49 Musst. Rebun Nessa v. Musstt. Bibi Ayesha & others AIR 201; Gauhati 36; Rukia vs. Abdul Khalique, (1981) 1 GLR 375; Zeenat Fatema Rashid vs. Md. Iqbal Anwar, 1993 (2) Crimes 853; Jiauddin ahmed vs. Anwara Begum, (1981) 1 GLR 358,

The Supreme Court of India in one of the landmark cases[50] on Talaq held that a mere pronouncement of talaq by a husband, or a mere declaration of his intention or his acts of having pronounced talaq were not sufficient and did not meet the requirement of Islamic law for a divorce. In every such exercise of right to talaq, the husband is required to satisfy the precondition of arbitration for reconciliation and reason for talaq. The Bench reiterated that the husband cannot at his free will resort to any of the modes at any time without assigning reasons. Talaq must be for a reasonable cause and preceded by attempts to reconcile. Only if these conditions are satisfied a talaq must be valid and effective. The husband does not have the unqualified prerogative right to pronounce talaq.

Conclusion

The science known as ijtihad (or reasoning and interpretation) was developed by Muslim scholars in order to understand and apply the message of the Qur'an to varying societal needs and conditions, and to respond to the changing needs of Muslim societies. This process is based not only on the Qur'an and religious tradition (Sunna), but also on reason, deduction, and prioritization. The following examples illustrate the use of ijtihad.

Fifteen years after the death of Prophet, Caliph Omar ibn-al-Khattab stopped cutting off the hands of thieves because most of them were stealing out of necessity due to hunger, poverty, and drought. While this contradicted a verse from the Qur'an, he justified his decision by stating that the principles of justice and fairness, which are the base or the purpose or the objectives of Shari'ah (Maqasid-al-Shari'ah), were supreme.

Another example is a case in which Imam Muhammad Ibn Idris al-Shafi'i, one of the founders of Islamic jurisprudence, gave a certain legal opinion in Baghdad. One year later he moved to Cairo, and in response to the same question he gave a very different opinion. Someone questioned him, "Oh Imam, last year in Baghdad you gave a different answer," and he replied, "That was in Baghdad and this is in Cairo. That was last year and this is now." When employing ijtihad, scholars considered the time, place, norms, and prevailing conditions when they rendered their religious advice and opinions.

Muneer Fareed[51] and Ingrid Mattson,[52] are of the opinion that "the Muslim world is often mired in nostalgia for past glories, and traditional approaches to ijtihad often lock Muslims into the past. An example of this is the difficulty that Muslim scholars had in the nineteenth century in condemning slavery and advocating its abolition. Traditional scholars at that time held the view that slavery had always existed and that their laws regulating it allowed for the good treatment of slaves. These scholars could not imagine a world without slavery, and this lack of imagination prevented them from moving forward."

The traditional scholar are clinging on to the past and to the interpretation that suited to eighth and ninth century and apply the same to the present problems and create unpleasant environment not only among Muslims but also among non-Muslims. The questions frequently

50 Shamim Ara vs State Of U.P. AIR 2002 SC 3551

51 An associate professor of Islamic studies at Wayne State University

52 A professor of Islamic studies and director of Islamic Chaplaincy at Hartford Seminary

asked are: Does Islam describe woman as inferior? And does the matrimonial code of Islam treat the wife as a chattel?

Justice, V.R.Krishna Iyer, an eminent and most respected non-Muslim Judge of the Supreme Court of India, commenting on Islamic Law of Divorce had once observed that "a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce." In its original unadulterated form it indeed was rational, realistic and modern but has by efflux of time been awfully distorted beyond recognition. There is nothing in the law of Islam suggesting that the husband is free to exercise the power of talaq in an arbitrary and irrational manner, but this is exactly what Muslim men in our times are doing. While the law on divorce by men is in misuse, that on divorce by women is in disuse. The very humanitarian concept of khula has been thrown into the dustbin, giving an absolutely wrong impression that putting an end to a marriage is an exclusive privilege of men. Restoration of the original unadulterated law, on both talaq and khula, is indeed a pressing need of the hour."

The sacred texts of Islam need to be interpreted in the light of contemporary realities and modern knowledge. For ijtihad to be performed successfully in a society, democracy and freedom of expression must prevail. Faithfulness to the text needs to be combined with creative imagination to produce the most enlightened reinterpretations, suitable for the twenty-first century. Muslim scholars and leaders must have opportunities as well as responsibilities to lead a revival of ijtihad. Muslim scholars in the West have the freedom to think creatively while still being faithful to the texts, and their new interpretations could stimulate new thinking among the more traditional religious establishments in Muslim countries.

One thing is very clear and that is that legal systems are always in motion, not static. They are always developing and having new influences. It is true that it is men who implement divine laws. They are either good or awful. The sad fact is that today in the Islamic world most of the executors of law are of the latter category. This is because they lack the taqwa (God fearing) which is needed in implementing Allah's will. Only people who fear Allah can establish law and justice.

Maritime Zones of Sri Lanka

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The area of the world's oceans totals to approximately 105.3 million square nautical miles, which represents 71 percent of the earth's surface. A UN Secretariat compilation of maritime claims, indicates that at the beginning of the year 2010, 137 States claimed territorial sea of 12 nautical miles, 77 States claimed contiguous zone of 24 nautical miles and 108 States claimed exclusive economic zones (EEZ) of 200 nautical miles.

Since 1702, under the customary international law, Sri Lanka had maintained a territorial sea of 3 nautical miles, but in 1957, extended the territorial sea to 6 nautical miles with jurisdiction over a 100 nautical mile contiguous zone from the outer limit of the territorial sea for protection of marine resources, and in 1971 to 12 nautical miles.

Sri Lanka expressed its consent by the signature on October 30, 1958 to the Convention on the Territorial Sea and Contiguous Zone, 1958[1]. In Sri Lanka, Article 5 of the Constitution of the Democratic Socialist Republic of Sri Lanka[2] includes the territorial waters into the territory of the Republic of Sri Lanka. Further, Sri Lanka enacted the Maritime Zones Law, No. 22 of 1976[3] to provide for the declaration of the territorial sea and other maritime zones of Sri Lanka. Subsection (1) of section 2 of the Maritime Zones Law provides that the President of the Republic of Sri Lanka may, by Proclamation published in the *Gazette,* declare the limits of the sea beyond the land territory and internal waters of Sri Lanka which shall be the territorial sea of Sri Lanka. The waters on the landward side of such base-lines shall form part of the internal waters of Sri Lanka.

In 1977, the President of the Republic of Sri Lanka issued and published in the *Gazette,*[4] a Proclamation under the Maritime Zones Law (hereinafter referred to as the "Proclamation") declaring the territorial sea, contiguous zone, exclusive economic zone, and pollution prevention zone.

Sri Lanka expressed its consent by the signature on December 10, 1982 to the United Nations Convention on the Law of the Sea[5] (UNCLOS) and ratified it on July 19, 1994. Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical

1 Adopted in Geneva, on 29 April 1958; Entry into force 10 September 1964; Signatories: 41. Parties: 52; United Nations, *Treaty Series,* vol. 516, p. 205.

2 It is adopted and enacted in 1978 as the Supreme Law of the Democratic Socialist Republic of Sri Lanka.

3 Entered into force January 15, 1977.

4 *Gazette* Extraordinary of the Republic of Sri Lanka No. 248/1 of January 15, 1977.

5 Montego Bay, 10 December 1982; Entry into force16 November 1994; No. 31363;
Status Signatories: 157. Parties: 161

miles, measured from baselines[6]. Paragraph (1) of the Proclamation provides that the territorial sea of Sri Lanka shall extend to a distance of 12 nautical miles measured from the baselines described in paragraph (2) [7], in accordance with the provisions of the UNCLOS.

The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured[8]. Section 4 of the Maritime Zone Law enables the President to declare the limits of a zone contiguous to the territorial sea and extending seawards from the outer limits of the territorial sea which shall be the contiguous zone of Sri Lanka. The Proclamation also declared that the contiguous zone of Sri Lanka extends to 24 nautical miles seaward from the baselines from which the territorial sea is measured[9].

The EEZ shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured[10]. Section 4 of the Maritime Zone Law enables the President to declare any zone of the sea adjacent to the territorial sea, as well as the sea-bed and sub-soil thereof, to be the EEZ zone of Sri Lanka. The limits of such zone shall be specified in the Proclamation. However, prior to the adoption of UNCLOS, the President of the Republic of Sri Lanka by the Proclamation declared that the Exclusive Economic Zone of Sri Lanka shall extend to the sea to a distance of 200 nautical miles from the baselines from which the territorial sea is measured.

Further, Sri Lanka expressed its consent by the signature on October 30, 1958 to the Convention on High Seas, 1958[11] and the Convention on the Continental Shelf, 1958[12]. Every coastal State has a continental shelf which exists *ipso facto* and *ab initio* and need not be claimed. However, section 6 of the Maritime Zones Law provides that the continental shelf of Sri Lanka shall comprise of the sea-bed and sub-soil of the submarine areas that extend beyond the territorial sea of Sri Lanka throughout the natural prolongation of the land territory of Sri Lanka to the outer edge of the continental margin, or to a distance of two hundred nautical miles from the base-line from which the territorial sea is measured, where the outer edge of the continental margin does not extend up to that distance. These provisions are similar to the provisions of Article 76 of the UNCLOS.

Section 7 of the Maritime Zones Law provides that the President may, by Proclamation published in the *Gazette*, declare any zone of the sea adjacent to the territorial sea, and of the sea-bed and sub-soil thereof, to be the pollution prevention zone of Sri Lanka. The limits of such zone shall be specified in the Proclamation. The President of the Republic of Sri Lanka

6 Article 3 of the UNCLOS.

7 Breadth of the territorial sea shall be measured from the low water mark of ordinary spring tides along the coast of the mainland and along the seaward edge of islands.

8 Article 33(2) of UNCLOS.

9 Paragraph (3) of the Proclamation published in the *Gazette* Extraordinary of the Republic of Sri Lanka No. 248/1 of January 15, 1977.

10 Article 57 of UNCLOS.

11 Adopted in Geneva on 29 April 1958; Entry into force: 10 June 1964; Registration: 10 June 1964, No. 7302; Status: Signatories: 43. Parties: 58; United Nations, Treaty *Series,* vol. 499, p. 311.

12 Adopted in Geneva on 29 April 1958; Entry into force: 30 September 1962; Registration: 3 January 1963, No. 6465; Status: Signatories: 46. Parties: 63; United Nations, Treaty *Series,* vol. 450, p. 11.

by the Proclamation declared that the pollution prevention zone of Sri Lanka shall extend to the sea to a distance of 200 nautical miles from the baselines from which the territorial sea is measured.

Sri Lanka expressed its consent by the signature on October 30, 1958 to the Convention on Fishing and Conservation of the Living Resources of the High Seas[13]. The provisions of the Convention on Fishing and Conservation of the Living Resources of the High Seas incorporated into the Fisheries and Aquatic Resources Act, No. 2 of 1996 which came into operation in 1996 repealed the enactment such as the fisheries ordinance (Chapter 212), the Pearl Fisheries Ordinance (Chapter 214), and Whaling Ordinance (Chapter 215).

Sri Lanka expressed its consent by the signature on July 29, 1994, to the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982, adopted by the General Assembly on July 28, 1994[14] and rectified on July 28, 1995. Further, Sri Lanka expressed its consent by the signature on October 9, 1996 to the United Nations Agreement for the Implementation of the Provisions of the UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[15] adopted by the General Assembly on August 4, 1995 and ratified on October 24, 1996.

13 Adopted in Geneva on 29 April 1958; Entry into force: 20 March 1966; Registration: 20 March 1966, No. 8164; Status: Signatories: 35. Parties: 38; United Nations, Treaty *Series,* vol. 559, p. 285.

14 Came into force July 28, 1996.

15 Came into force December 11, 2001.

Grounds for Divorce and Its Inadequacy

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Introduction

Sociological view

Marriage is identified as the Holy Communion between a man and a woman "till death do us apart" by the Common Law. The institution of a family takes root subsequent to this single act of matrimony. It is a norm in society that a family must perform certain basic functions while the spouses support each other emotionally while maintaining a companionship during the process.

In the Sri Lankan context, industrialization and urbanization has taken its toll on the social system of the country including the family unit. This could pave the way to marital instability resulting in constant arguments, aggression both physically and verbally, psychological disorders, emotional and physical separation and as a last resort '**divorce**'.[1]

Legal view

In the modern context, divorce can be fault based or non-fault based. A fault based divorce requires proof of at least one 'ground for divorce'. The Marriage Registration Ordinance (GMO) which is the general law governs the up country Sinhalese and the Tamils in relation to divorce. Thereby any spouse failing to prove adultery, malicious desertion or incurable impotency at the time of marriage fails to dissolve the marriage even though the marriage is already broken down. Further, there will be no room for mutually consented divorce if the grounds are solely based on fault.

The Sri Lankan legal system is a plural system which comprises of the general law as well as special laws. The three main ethnicities in Sri Lanka, the Sinhalese, Tamils and Muslims followed different customs prior to Western domination. Thereby the divorce was based on the concept of irreparable breakdown of marriage in accordance with the customary Laws.

English Law that emanated from England with the influence of the Christian church considered marriage to be a holy sacrament of a lifetime resulting in a system of matrimonial fault to opt out of it. Many countries over the world presently identify both fault based and non-fault based divorce. Despite Sri Lanka following a strictly fault based approach to divorce, customary laws affecting a minority deviate from it giving rise to heated arguments pertaining to "one law for all". This approach paves way to 'shell marriages' and marriages that are

1 Umoh S. H. and Adeyemi H. () *Causes Of Divorce As Perceived By Students Of Tertiary Institutions In Kwara State* Pg.1,2 available at academia.edu accessed 12.03.2020

irretrievably broken down existing for namesake. The recent case, ***Gomes vs. Gomes*** [2]gave a cognate base in this regard.

Grounds for divorce under Marriage Registration Ordinance[3]

Section 19(2) of the Marriage Registration Ordinance identifies adultery, malicious desertion and incurable impotence at the time of marriage as grounds for divorce. Cruelty though not a ground for divorce, may be a factor in determining malicious desertion. Physical ill-treatment per se is also not a ground for divorce, but a cause for legal separation.

In ***Gomes vs. Gomes*** Prasanna Jayawardena J stated that;

..[ ]..at present, are the three grounds specified in section 19 of the Marriage Registration Ordinance, which are all `fault based'. This led Sharvananda CJ to observe in ***Tennakoon vs. Tennakoon*** [1986 1 SLR 90 at p.92], citing Professor Hahlo in The South African Law of Husband and Wife, "Our common law of divorce is based on the `guilt' and not on the` marriage breakdown' principle ..... [ ] ….These solely `fault based' grounds for divorce set out in section 19 of the Marriage Registration Ordinance are derived from religious values which had prevailed in European countries and found their way into our Law with the advent of the colonialists to Sri Lanka. This was illustrated when Bertram CJ, in ***Silva vs. Missinona***, with his usual erudition, ……. which reads "*Moribus hodiernis sequimur ius divinum novi foederis, quo duetantum causae cognoscuntur, adulterium, item malitiosa desertio*." and traces the origin of the concept of `malicious desertion' to the ius divinum [`divine law'] which recognises two grounds for divorce - namely: (i) adultery and (ii) malicious desertion.

Professor Shirani Ponnambalam states in relation to adultery " […] the essential ingredient of this offence is that it involves sexual intercourse with a person out of lawful wedlock. Consequently, the adulterer must necessarily be a married person irrespective of the civil status of the other"[4]. The standard of proof required for Adultery is of the highest which is proof beyond reasonable doubt with specification of the date and place of the act. In ***Jayasinghe vs. Jayasinghe***[5], **Gratiaen J**., declared that the phrase "satisfied on the evidence" in the Civil Procedure Code (sec. 602) had to be interpreted by reference to English law, and concluded that the same standard of proof was required was as of in the case of a criminal Charge. The dictum of Lord Mac dermott in ***Preston-Jones vs. Preston-Jones***, a house of Lords decision, was that "the jurisdiction in divorce involves the status of parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry". However, the withdrawal from this attitude is reflected in the early case ***Jayasinghe vs. Jayasinghe*** is discernible in the judgment of the Supreme Court in ***Alarmalammal vs. Nadarajah***.[6] According to **Fernando J**. "An action for divorce or for a declaration of nullity of marriage is a civil proceeding. Where, under the Civil Procedure Code, the Plaintiff is entitled to a

2 S.C. Appeal No. 123/14

3 No.19 of 1907

4 Ponnambalam S., (1982) *Law and the Marriage Relationship in Sri Lanka*, Stamford Lake (PVT) LTD, Book Publishers, Pannaipitiya, Pg.312

5 1954 55 NLR 410

6 1972 76 NLR 56

decree in case the is satisfied on the evidence, it would seem that our Evidence Ordinance lays down the degree of satisfaction that must be reached. It may therefore be unnecessary to look for guidance from other jurisdictions." Having regard to the decision of the House of Lords, in ***Biyth vs. Biyth*** [(1966) 1 AllE.R.524] the court doubted the continued relevance of the decision in ***Jayasinghe vs. Jayasinghe***. Thereby the Supreme Court in ***Dharmasena vs. Navarathna***[7] once again approved of, and followed, the ruling in ***Jayasinghe vs. Jayasinghe*** and proof beyond reasonable doubt was held to be necessary to establish adultery. More recently, however, in ***Pushpakumara vs. Marmet and others***[8] the court has stated that clear and cogent evidence is sufficient for proving adultery.

Malicious desertion defined as "the deliberate and unconscientiously, definite and final repudiation of the obligations of the marriage state … and it clearly implies something in the nature of a wicked mind.[9]" requires the intent to terminate the marital relationship (*animus*) and the actual termination of cohabitation (*factum*) as necessary elements. Our law also recognizes constructive desertion, whereby the innocent spouse is forced by the other's behaviour to leave. In ***Silva vs. Misinona***[10] it was held that a party permanently giving-up the matrimonial duties and responsibilities without consent of the spouse to be malicious desertion. However, desertion is a continuing offence and can be terminated any time by proof of a change of animus or factum.

Incurable impotency at the time of marriage should be proved through medical reports. A curable disease bars the way for a divorce.

Apart from the above, the Civil Procedure Code paves way to divorce in two ways through summery procedure. A judicial separation obtained upon permission from court for a period of two years without any association between the parties make way to a decree of divorce. Further, if the parties live separately for seven years, either spouse is permitted to request the decree for dissolution of marriage from the court. It is not necessary to prove the grounds relating to matrimonial fault according to the Code of Civil Procedure. Through these provisions policy makers attempted to introduce the doctrine of breakdown of marriage rather than seek the guilt or innocence of the parties. In ***Muthurani vs. Thuraisingham***[11] Thambaiah J. held that the petitioner's adultery was not a bar for obtaining the divorce. Conversely, later judicial approaches deviate from this position. In ***Thennakoon vs. Thennakoon***[12] and ***Tennakoon vs. Somawathie Perera***[13] court declared that it is impossible to change the substantive law. Thereby strict interpretation of the law has interfered with the opportunity opened up in the ***Muthurani*** case to introduce breakdown of marriage as a ground for divorce.

7 1962 72 NLR 419

8 2003 (2) SLR 244

9 (1924) 26 NLR 113

10 ibid

11 1984 1 SLR 381

12 1984 2SLR 217

13 1986 1 SLR 90

In ***Gomes vs. Gomes*** Prasanna Jayawardena J stated that;

"..[ ] ..It seems to me that, ……. `fault based' grounds set out in Section 19 of the Marriage Registration Ordinance, is alien to our traditional laws which allowed for divorce to be granted on the ground of the breakdown of a marriage or upon consensus…Yet, it appears that, these initially alien ideas based on European theological values which were introduced by the colonial powers, have embedded themselves into the value system of this country during the time Ceylon [as Sri Lanka then was] was governed by these colonial powers and persist unchanged, to this day and, indeed, are often espoused as our very own traditional values".

Grounds for Divorce under Kandyan Law

Kandyan Marriage and Divorce Act[14] governs the marriage and divorce of up country Sinhalese. Up country Sinhalese have the option of marriage under the Marriage Registration Ordinance or the Kandyan Marriage and Divorce Act. The Act recognizes different grounds based on both matrimonial fault and irretrievable break down of marriage along with differing grounds of divorce for men and women. Divorce may be sought upon adultery coupled with incest or gross cruelty or continued and complete desertion for two years or inability to live together, of which actual separation from bed and board for one year is the test and mutual consent.

Accordingly, an application for divorce is made to the district registrar, who may use discretion in granting or refusing to grant the divorce. Thus, procedural law is flexible. Since, judicial interference is excluded from procedural law, it can be argued that this is an informal and non- inquisitorial approach which is unique to Kandyan law pertaining to divorce[15]. Another unique feature of Kandyan law is that it authorizes the parties to make a joint application in the event they seek a divorce on mutual consent.

Grounds for Divorce under Muslim Law

Under Muslim Law spouses do not have equal rights to divorce. Here both fault- and non-fault-based grounds are considered. The sect to which a Muslim belongs has a huge impact on the rights and duties of parties.

Talaq, Fasah, Mubarat and Khula are 4 main methods of divorce identified by the Muslims. Under sections 27 and 28 of Muslim Marriage and Divorce Act[16], husband shall follow the second schedule and wife shall follow the third schedule for obtaining a divorce.

'**Talaq**', is the 'dissolution of marriage effected by the husband making a pronouncement to the effect that the marriage is dissolved'. The husband here should inform his intention of dissolving the marriage to the Quazi (judge of the Quazi court) after which the Quazi attempts to reconcile the matter, failing of which, the Quazi registers the divorce as Talaq. According to the 3rd rule of the Schedule, no reason is required to register Talaq thereby giving recognition

14 No. 44 of 1952

15 Ekanayaka E. M. Y. G., (Aug. 2016) *Rethinking The Grounds For Divorce In General Law Of Sri Lanka: A Comparative Analysis*, International Journal of Business, Economics and Law, Vol. 10, Issue 4

16 No. 13 of 1951

to the concept of breakdown of marriage.

Fasah divorce is the divorce by the wife in Muslim law. The wife can submit the application for divorce indicating the ground for divorce to the Quazi under section 28. Rule 10 of the third Schedule requires the Quazi to investigate the real reasons for divorce only upon receiving the wife's consent. Failure or inability of the husband to provide support, malicious desertion, cruelty and ill-treatment, "continued dissension and quarrels", husband's leprosy, husband's insanity and impotence are recognized as grounds for divorce under some sects. Failure to maintain and desertion are the most common grounds for Fasah divorce. The Quazi must serve notice of the hearing for divorce on the husband. The wife's evidence must be corroborated by at least two witnesses, the failure of which may be incurable to the case. Maximum efforts at reconciliation should fail to grant Fasah divorce.

Khula the other form of divorce which requires the wife in need to dissolve the marriage to make an agreement to return the Mahr (Dowry given by husband at the time of marriage) and compel her husband to pronounce Talaq. Through this divorce the wife does not expect reasons for divorce.

'Mubarat' is a form of divorce based on mutual consent of the parties. If the parties cannot continue the marriage life happily and peacefully, parties are allowed to dissolve the marriage and register it as 'Mubarat'. It is not expected to prove matrimonial fault or breakdown of marriage[17].

Grounds for Divorce in other jurisdictions

Many jurisdictions have recognized and introduced marriage breakdown as a ground for divorce instead of the ancient fault based system.

a) English Law

The Divorce Reforms Act of 1969, later replaced with the Matrimonial Causes Act of 1973, introduced the concept of irretrievable breakdown of marriage as a ground for divorce. Under section 1(1), decree of divorce may be granted to either party by the court on the ground that the marriage has broken down where the petitioner has to prove that the marriage had broken down irretrievably based on the grounds which are stated in section 1(2); as *(a) The correspondent had committed adultery and the petitioner found it intolerable to live with the respondent; (b) The respondent had behaved in such a way that the petitioner could not reasonably be expected to live with the respondent; (c) The respondent had deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consented to a decree being granted.;(d) The parties to the marriage had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consented to a decree being granted; (e) The parties to the marriage had lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.*

17 Ekanayaka E. M. Y. G., (Aug. 2016) *Rethinking The Grounds For Divorce In General Law Of Sri Lanka: A Comparative Analysis*, International Journal of Business, Economics and Law, Vol. 10, Issue 4

b) South African Divorce Law

South Africa followed the 'fault based' grounds for divorce until 1979 where the decree was granted upon grounds of matrimonial fault. These grounds comprised of; adultery, malicious desertion, incurable insanity for not less than seven years and imprisonment of the defendant for at least five years after the spouse has been declared to be a habitual criminal.

According to Wille, "Severe criticism of the shortcomings of the old divorce law led to an investigation by the South African Law Commission.". The passing of the Divorce Act No.70 of 1979 was a turning point in the arena of divorce by letting go of the archaic "fault based" system and introducing the ground of irretrievable breakdown of the marriage where the Court is satisfied that, "*the marriage relationship between the parties has reached such a stage of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them*." - vide: section 4 (1) of the Act.

Thereby the 1979 Divorce Act introduces 2 grounds for divorce: Irretrievable breakdown of marriage and mental illness or the continuous unconsciousness of either spouse, as grounds for divorce.

According to Section 4(2) proof of irretrievable breakdown may include the parties not living together as husband and wife for a continuous period of at least one year immediately prior to the date of institution of the divorce action or that the defendant has committed adultery and that the plaintiff finds it irreconcilable to continue marital relationship or the defendant has been declared a habitual criminal and is undergoing imprisonment.

Irretrievable breakdown of marriage would not serve as a loophole to a party who leisurely decides to get a divorce from the Court.

Proof of an irretrievable breakdown of marriage is required by both the Divorce Act of South Africa and the Matrimonial Cause Act of England as a prerequisite for the award of a decree of divorce. Consequently, the court is the ultimate arbitrator so as to ensure that only a union which is completely and hopelessly broken down obtains judicial sanction.

South African Law dictates that "A decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfied factory or are the best that can affect in the circumstances." [Sec. 6 (1)]

Kuruger vs. Kuruger (1980 (3) S.A. 283), a South African decision, highlights the discretionary power of court in permitting a divorce to a marriage that serves no useful purpose even though one spouse objects to such termination.

It is very important to realize that both the English and South African legal systems award the decree of divorce if there is cogent proof of a total breakdown in the marital union and not for private agreements or unilateral desires of the parties.

(c) Indian Law

According to section 13 of the Hindu Marriages Act, 1995 and section 27 of the Special Marriage Act, 1954 an aggrieved spouse may obtain a non-consensual divorce upon establishing proof of adultery, cruelty, desertion exceeding 2 years and other limited and specific grounds. Sections 13B and 28 of the Hindu Marriages Act and Special Marriage Act respectively provide for a consensual divorce with no fault if the spouses had lived separately for a period exceeding 1 year and satisfy the Court that the two spouses "have not been able to live together and that they have mutually agreed that the marriage should be dissolved.."

`Irretrievable breakdown of marriage' is not a ground for granting divorce in India, but a continuation of an irretrievably broken-down marriage is akin to 'cruelty' which is statutorily recognized in India as a ground for divorce.[18]

In Jordan ***Diengdeh vs. S.S. Chopra*** [AIR 1985 SC 935 at p.940-941], the Supreme Court of India stated, "It appears to be necessary to introduce irretrievable break down of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down."

Reforms for grounds for divorce

The concept of divorce introduced in 1907 to Sri Lanka is deemed to be unsuitable in the modern context. Even though a Matrimonial Causes act was proposed by the Law Commission in 2007, it still exists as a draft and has not made its way to an Act.

Accordingly, it is believed that a no fault approach may give rise to a good relationship between the parties inspite of the breakdown of marriage which is not possible presently since the parties are compelled to point their fingers at the other on their search for a way out. Clause 3 of the abovementioned Bill reads as follows: *any party to a marriage may, on a plaint presented thereof, seek to have such marriage declared dissolved on the ground that the marriage has broken down irretrievably*.

Prasanna Jayawardena J in ***Gomes vs. Gomes*** stated that;

..[ ]..on an application of the prevailing principles of law to the facts of this case, this appeal must be dismissed. **The outcome is that the wife must be denied the divorce which she has sought for 17 years and be compelled to remain in what she believes is an unhappy and unfulfilling marriage. The husband is left only with what appears to be the pyrrhic victory of an empty marriage.**

Proving fault could lead to dire circumstances on the aspect of custody of children where the court more often than not grants the custody of the child to the innocent spouse of the divorce case even though the best interests of the child may suggest otherwise. Thereby the fault based system affects not only the spouses but also the rights of the children.

18 Bhagat vs. Bhagat AIR 1994 SC 710 and Romesh Chander vs. Savitri AIR 1995 SC 851

Conclusion

The existing divorce laws of Sri Lanka have not succeeded to remedy the situation where the marital relationship fails since it does not recognize the concept of divorce based on mutual consent or breakdown of marriage. No mechanism exists to remedy a situation in the absence of matrimonial fault unless such fault is fabricated.

Even though the Sri Lankan laws aid in keeping the divorce rate low it does not serve the real purpose of marriage or of safeguarding it. Divorce cases are taken up in the District court which functions according to adversarial judicial procedure where the parties must prove the other's matrimonial fault to get away with marriage. It is an arguable fact that if the breakdown of marriage concept is to be introduced to the law, the procedure of court should be shifted to an inquisitorial system for the expected outcome to occur.

In order to obtain specialization as well as efficiency the family Courts should also be introduced to the inquisitorial judicial system. Right to privacy should also be highly ensured in such institutions by hearing matters in private to protect the dignity of parties.

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Spiritual Solidarity – Faith Partnerships in Development Contexts

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Introduction

Incidents that have unfortunately plagued the world for decades but became more pronounced over the last 8 years or so, show an increasing 'emphasis' for political violence flavoured by faith, culture, and identity where the world is seen through a singular lens of 'good' and 'evil' and an 'us' vs. 'them' attitude. This unhealthy unipolar view, congruent to a 'Clash of Civilization' concept, has led to ambiguities and complexities with regards to the perception of current global conflicts and the pivotal role played in the popular mobilisations against the West from sections of disaffected third world opinion. In particular, one key source of transnational conflict has stemmed from the rise of political Islam as a force in international relations, the end of the cold war and the emergence of distinct tensions between western countries with a Christian heritage and countries around the world, with a distinct Muslim heritage.

Often, one of the key catalysts for these global conflicts and ethnic / faith identity violence that stems from them, is the issue of poverty and the process of allocation of resources, which perpetuates the view through this singular lens and ensures that a vicious cycle of competition is generated and maintained. Many will argue though, that in the globalising world of today, such rivalry, competition, conflict, and ultimately violence is a necessary tool to preserve the 'values of freedom'. However, the violence we have seen to date has been perpetuated from deeply delusive and divisive assumptions of single exclusive identities by sectarian activists, who want people to ignore all affiliation and loyalties in support of one specific identity. Such exclusive identities are negative, stressing difference rather than belonging and 'opposition to' rather than 'support for' something. Unfortunately, whilst faith may rarely be the original source, it often becomes the arena in which conflicts are played out. The result is that conflicts manifest themselves into rumour, hearsay, and generalization which are the first steps towards the stereotyping of people (their faith, their culture, and identity) and the denial of a diverse, lived reality, the opposite of respect, understanding, and acceptance. As a consequence, faiths (beliefs, culture, and identity) become judged by the attitudes and actions of small and aberrant minorities.

It is precisely in this scenario with the world experiencing such kind of turmoil, that there are calls for new solutions. With the collapse of socialism, and now with the global financial crisis, an apparent sign of the failure of capitalism, this search for the new solutions has intensified to look for answers outside the box that will address the turmoil and their causes.

Nobel Laureate Professor Amartya Sen's premise in his book 'Identity and Violence' is that the key to good citizenship and social cohesion is the encouragement and retention of multiple identities. People have several enriching identities: nationality, gender, age, parental

background, and religious or professional affiliation. They identify with different ethnic groups and races, towns, or villages they call home, sometimes football teams; they speak different languages, which they hope their children will retain, and love different parts of their countries. 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. The new solutions will also have to take into account the existence of multiple identities which adds a richness and variety to diversity and pluralism as part of a common wealth that needs to be celebrated in the global civil society and integrated into life as a positive force for development.

The role of faith and spirituality in particular in the search for new solutions will be very important as it offers simple and easy access to communities (strong in their spiritual and faith teachings) and a simple language to express the commonalities of existence and create the prerequisites for forgiveness, respect, understanding, and acceptance. Whilst dialogues are a beginning, it is important that engagement goes beyond this, engaging practically with faith leaders and communities, to help resolve and avoid conflict and achieve gains that makes a difference to people's lives.

This paper will examine cross faith / cultural initiatives to work together across national and religious boundaries, thereby providing a potential significant antidote to conflict and the perceptions which fuel it. I will finally examine some of the lessons learnt from the partnership amidst significant challenges and limitations before providing some suggestions.

Creating a New Environment

At the Commonwealth Peoples' Forum, held in Kampala (Uganda), November 2007, the communiqué that was issued to Heads of government called for programs to support intercultural, inter, intra, and cross faith exchange to build understanding and cooperation for joint working on development and governance. The communiqué re-emphasised the focus of the Commonwealth that was agreed in 2005 to focus on the promotion of mutual understanding and respect among all faiths and communities within it.

By issuing the communiqué, the forum recognised the need to move away from just pure interfaith dialogue and networking, to a more grass roots centred partnership of practical action between and within communities of faith, ethnicity, and culture.

In an age of mistrust and suspicion, the challenge is how can such a partnership be created and sustained? Mistrust is often based on ignorance and justified grievances and hence, there are four requirements needed to reduce this:

- Intellectual empathy
- Rationality
- Faith in oneself and others
- Spirituality

Intellectual empathy ensures that people who are in conflict with each other will have to acknowledge and understand that everyone has justified grievances. Rationality and faith in one's self and others will help us to intellectually disagree with someone's view, analysis or policy without doubting their sincerity and loyalty. Spirituality will be the glue that binds the factors together in a spirit of ethics, morals, and basic humanity so that at the very base of the argument, one agrees to disagree.

These factors will ensure that any dialogue is undertaken in a spirit of mutual tolerance, acknowledgement, forgiveness, and non-retaliation so that people move towards respecting, understanding, and accepting one another's differences in an atmosphere of justice and equality. To ignore the role that faith can play in creating this spirit is to do so at one's peril. Faith is embedded in cultures and communities whilst spirituality is part and parcel of everyday life. Indeed many people in rural parts of the world would not find the distinction between 'culture' and 'faith' meaningful and would reject any attempt to denigrate the issue of spirituality. Historically, spiritual heritage has provided humanity the capacity for personal and social transformation. What one finds is that people take a lot of heart from their spirituality and the concept of spirituality which can be defined as the higher values and ethics that concern human nature and purpose, leading to peace and harmony with one and others. Thus, this can be used as a door towards building understanding based on common features in a language understood by most people and setting the agenda for creating a new environment. Thus, creating this new environment will entail building bridges of understanding tolerance and solidarity across civilizations, cultures, and people and being resolute in the pursuit of interfaith dialogue and cooperation.

In fact, a conference held at the UN on November 13, 2008 organised by King Abdullah of Saudi Arabia, appropriately called 'Culture of Peace' looked at this very concept of creating a new environment by the promotion of Inter-Religious and Inter-Cultural Dialogue, Understanding, and Cooperation for Peace. The conference examined the need to build tolerant societies and durable peace by restoring values of compassion, solidarity and encouraging the promotion of dialogue amongst the different forums available in all cultures. The conference noted that achieving a culture of peace required effort from "the forces that hold our societies together", which also included religious beliefs, among other worldviews and focussing on the shared values of these religions and not on the differences. The final declaration of the conference emphasized the 'importance of promoting dialogue, understanding, and tolerance as well as respect for all religions, cultures, and beliefs', whilst expressing concern over 'serious instances of intolerance, discrimination, expressions of hatred, and harassment of minority religious communities of all faiths'. So faith it seems matters!!!!!

Whilst the conference was evidence of perhaps a political resolve to establish a 'culture of peace', efforts will be required at all levels within society to ensure that the resolve goes beyond the rhetoric. The question is how?

The Role of Faith

To achieve a culture of peace, will mean addressing conflict and its root causes and finding viable practical solutions. Often you will find that the root causes of conflict are intertwined with poverty and injustice. Cultural and social factors (and sometimes the absence of such factors), as well as features of the political economy are important in understanding conflict today. More direct is the relationship of poverty with inequality (particularly economic

inequality) and the direct relationship between economic inequality and violence. Poverty, inequity, and social injustice are matters of conscience and demand a systematic and vigorous response. Development is this process of establishing this response by reaching the alienated, polarised, and marginalised. It is widely recognised that civil society plays a key role within the whole development process. In whatever context of work that is undertaken by civil society be it, the promotion of dialogue and cultural exchange; or lobbying for better education or health care; or campaigning for gender equality; or demanding action related to non-violent resolution of conflict or trade justice; it is apparent that in most cases, faith seems to play an important part. This is no doubt fed by the context of a spiritual relationship between faith and development where many of the world's faiths encourage basic charity and to stand up to address the injustices of the poor and downtrodden (the first tenet of the development doctrine), as a way of spiritual purification and enlightenment.

In addition, many faith communities are tied together across national boundaries, which have appeared or crystallised long after the faith community emerged. Globalisation has been problematic, at one level challenging the concept of the very sacrosanct idea of the 'nation state border'. The flow of information and humans respects no borders. This means that the faith communities themselves often feel united by mutual concerns and values, which are sometimes at odds with national policies or even global concerns. Thus, faith organisations have been seen at the forefront of initiatives aimed at helping to achieve increased tolerance, social cohesion and understanding or via aid, relief and the delivery of social and welfare services contributing to international development. The role of spirituality in better understanding and responding to the causes of religious extremism and violence is a potentially rich terrain.

So, the questions that are being asked now are: Why is there such a need and concern in this day and age for such initiatives and directives? How does this fit in with what has been largely a faith free arena?

Faith Based Organisations (FBOs) have long been serving the poor and the downtrodden and are pillars of their communities all over the world. They are linked inextricably with reducing poverty and in their own myriad ways, have been working towards meeting the MDGs set at the Millennium Summit of the UN. They are also linked through family, worship, economic ties, and joint heritage, across the globe. FBOs are often at the heart of the most trouble plagued and war-torn arenas, working in dangerous and difficult conditions, alongside many secular organisations, but working with a higher spiritual zeal.

Many FBOs operate with a spirit of selflessness, zeal, and passion. It is this "volunteerism" that so very often gives them credibility and the capacity to demonstrate through practice, the very ideas of self-help and self-reliance. And it can be hugely effective. FBOs are generally apolitical and determined to serve the local community. They also tend to pursue policies of reconciliation, rather than engaging with the damaging politics of blame. They tend to be seen at their best when responding to the demands and pressures of a local community, where they can operate with local knowledge to address specific community problems. But they are not a panacea, and can sometimes be justly accused of parachuting in, sometimes, literally, and leaving no sustainable footprint- no link.

FBOs have traditionally been able to demonstrate that what is often required are initiatives albeit small, that will collectively change the overall global context - small steps if you like. It is these transformations that grow out of listening to the needs of a local community and forging partnerships with those communities or with other civil society agencies. In this respect, many FBOs can and have served as models for secular organisations, which are seeking to operate at a community level, whether in the provision of development assistance, in the promotion of dialogue or the facilitation of peace, and understanding.

Within the established body of literature which now explores the role of faith-based organisations in promoting international development, there is a tentative recognition of their specific roles in the provision of humanitarian assistance in the context of natural disasters or conflicts. International NGOs, for instance, channel an estimated $29 bn. in emergency or humanitarian aid, and FBOs feature prominently among their numbers (Riddell 2007: xv & 316). Six of the 15 NGOs or NGO coalitions represented on the board which oversees the SPHERE Humanitarian Charter, for instance, have an explicit faith-based ethos as do five of the 13 NGOs which constitute the UK Disasters Emergency Committee (DEC). Religious discourse has long been characterised by a concern for the immediate welfare of humankind and FBOs play an important role in mobilising the support of millions of people for whom religious values underpin their concern for their neighbours in the global village. FBOs can play a particular role where overt conflicts or less overt inter-group grievances are exacerbated by religious tensions, especially in bridging social or political divides with distinct religious dimensions.

Despite this involvement, there has been a certain reluctance to recognise and acknowledge this and subsequently engage with faith organisations on such measures, with much of the rhetoric of 'engagement with faith' being done in the realms of inter faith forums. Whilst these have their importance and role to be played, it is increasingly being felt that these forums are limited in mandate, scope and sphere of influence with very little interest in moulding the basic tenet of faith into organised development practices.

This reluctance stems from the fact that despite faith communities and FBOs being highly active in many fields such as social service, healthcare, education, human rights and youth development etc., there is a character to the religious playing field that complicates matters. The faith communities, whether they are numerous and powerful; a minority struggling for a voice; or even an influential tiny cadre, have undeniably, as strong a history of internecine strife and struggle as they do of cooperation and collaboration. Thus, it is against this framework of potential inter and intra disagreement and division, that there is a need to engage with FBOs and build and sustain links with them. In addition, there should be linking between and within faith communities-and certainly faith hub, to faith hub, rather than focussing on inter-faith networks, who to some degree are already converted.

The "Engaging With Faith" report, drawn up on behalf of The Commonwealth Foundation, by Professor Ian Linden and Andrew Firmin, recommends exactly this, that we should strive to, "support joint working between inter faith networks, by promoting North-South, South-South linking, sharing of practice and focused exchanges."

So, what is the role of Faith Communities in sustaining international links and - vice versa- what has been the role of International links in sustaining faith communities? And what can FBOs and other Faith Community representation do, to build on their record of often reactive assistance, to promote sustainable and mutually beneficial links?

The notion of partnership though is that in reality no organisation can operate in isolation in today's complex world. The partnerships are about encouraging institutions to work across traditional boundaries to enhance their core competencies.

Genuine cross cultural, inter faith partnerships, give back to both donors and recipients, who realise that cultural contacts alter fundamentally the way in which they interact, giving them the power and strength to work cooperatively.

On the whole, Faith Based Organisations which work at grass roots levels, make ideal partners for linking activity. They are self-reliant, capable of harnessing a community's manpower, skills, and resources. They serve very often as role models; variously taking a stand against corruption, developing infrastructure, delivering "sharp end" programmes and offering relief, healthcare and educational resources- where they would not otherwise be found.

The story of Tau Sen, the master musician at the court of the Mogul Emperor, Akbar is an example of partnerships. He had some fifteen musical instruments in the Emperor's chamber, which he had tuned to one frequency. Upon playing just one instrument's musical note, the other fourteen started to resonate, to the astonishment and delight of the audience. Ideally, this story can serve well as a metaphor for how communities can work in harmony to achieve an enlightened result.

Not everyone sees it that way. Certainly not every faith community is tuned to the same frequency, indeed, not every faith community has achieved harmony within itself but an opportunity exists through the promotion of linking to faith communities, to harness more cross-community collaboration, in the interests of peace, tolerance and wellbeing.

Various religions have been present in many Southern countries for thousands of years. They operate as a community within a cultural, social, and political network which is unsurpassed by any other community / network. The FBO has the opportunity to 'plug into' this network, thus providing it with an immediate entry point to communities. However, unless interfaith dialogue can produce something tangible for communities in the front line then peace and tolerance will not come from the grassroots. As has been said many a time by people "if you can't feed your hungry children or afford to buy medicines for them, statements that we should all live together mean nothing. I will be looking for someone to blame".

Thus, the key to the issue of respect and understanding as well as inter-religious co-operation and social cohesion is the question of how individuals and groups of individuals relate to each other. The way people and communities relate to one another is changing all the time.

Conclusion

Faith identities will continue to be part of the picture and faith-based organisations will continue to thrive as part of civil society. Virtually all faiths, however different they may be theologically, have a common purpose which is to serve humanity and aid the disadvantaged. Thus, faith represents a significant pillar of grassroots, relief and development which has remained side-lined due to its potentially sensitive nature. Thus, strategies to work with civil society must be inclusive and also involve faith-based organisations.

Faith-based humanitarian agencies also have an important role to play in responding to natural disasters and conflicts, in significant part because of the trust vested by local communities in local religious institutions and leaders. Second, FBOs have a significant ability to mobilise volunteers and other forms of support on the basis of their distinct values and resultant links to local communities. Third, FBOs often provide a vital response to instances of state failure during conflicts and natural disasters.

Equally however, trans-faith partnerships, for instance, inevitably provoke opposition from conservative elements of the faithful. Nevertheless, organisations must work hard to contain such opposition and to explain their policies with some care to their supporters. Conservative elements in intended beneficiary communities can be even more suspicious and also need careful treatment both during and after emergency operations. Sensitivity here, however can yield a substantial dividend, peeling back the layers of suspicion and creating the conditions for cross-community tolerance and co-operation.

From the experiences shown, linking is a powerful tool for the promotion of dialogue, tolerance, interfaith cooperation, and harmonious living. It should be enhanced through a comprehensive education strategy, both formal and informal, that breaks down the seemingly insurmountable divide of us and them. This education should begin at home, within families and small communities, where the benefit of dialogue and linking can be seen and felt. It should roll through schools, institutes of higher education and ultimately politicians, legislators, governments, and multi-lateral organisations, including those present here today.

Reassembling the Shattered Mirror

In *Cosmopolitanism: Ethics in a World of Strangers*, Kwame Anthony Appiah writes eloquently of the urgent need for 'ideas and institutions that will allow us to live together as the global tribe we have become' (2006: xiii). The roots of all global crises can be found in human denial of the eternal principle of peace. In order to fight this denial there needs to be self-critical reflection. Sir Richard Burton once wrote that *'All Faith is false, all Faith is true: Truth is the shattered mirror strown In myriad bits; while each believes his little bit the whole to own' (The Kasidah of Haji Abdu El-Yezdi),* where he meant that you will find parts of the truth everywhere and the whole truth nowhere. The shattered mirror concept enables us to see that 'each shard reflects one part of a complex truth from its own particular angle'. Our mistake in the world today is to consider 'our little shard can reflect the whole' (Ibid: 8).

This is the current problem with all spiritual and religious teachings that everyone thinks that their little truth is the whole truth. However, if we think in the grander scheme of things

(beyond theology and ideology), to unite humanity with peace, respect, and understanding, then each of us (with our faith and spiritual teachings) have a bit of that shard of broken glass. This can be pieced together on issues of commonality, as opposed to focusing on our points of difference. Then we would have made the first step towards spiritual reconciliation between communities.

Thus, all of the differences mentioned above represent small shards of glass which, in the analogy of Kwame Anthony Appiah, require careful positioning to create a compelling mosaic. The initiatives described above then offer an antidote to sectarianism, the polarisation of different faiths in multi-cultural societies, and the potentially divisive effects of selective aid flows to particular faith communities. There is a need to remain committed to engineering the software needed to work effectively in a range of situations. This will never be easy, but remains vitally important for, as Kwame Anthony Appiah illustrates, it involves creating the very 'ideas and institutions that will allow us to live together as the global tribe we have become'.

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Application of the Dictum of *mens rea* in light of the Concept of Strict Liability as Enunciated under both the Law of Sri Lanka and England

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Introduction

Every State acts as a guardian of the rights of the individual as well as the community. The definition of crime requires intent to harm the victim or actions so reckless as to suggest a willingness to harm the victim.

The general provisions of the Penal code are not limited in their application only to offences created by the Penal Code but also to cover the whole range of offences created by other statutes as well. Section 38(2) of Penal Code as amended states as follows; "the word 'offences' denotes a thing punishable in Sri Lanka under this code or any other than this code."

In Sri Lanka there are some exceptions from criminal liability. They are stated in Chapter 4 of the Penal Code. Criminal liability is imposed only if the harmful conduct which is prohibited by the law is accompanied by a blameworthy state of mind. *Actus Reus* and *mens rea* are considered as two elements of a crime. There are some exceptional crimes which are considered as strict liability crimes.

These exceptional offences also come under the common label of criminal law. But they have different characters from the conventional criminal offences. Nowadays, the modern state has the responsibility of maintenance related to public matters in the industrialized and urbanized society. These offences are known as public welfare offences. For Example, sanitation activities, quality and purity of food and drugs and other medical preparations.

The writer aims to discuss the concept of strict liability as enunciated under both of the Law of Sri Lanka and England with the reference to Perera v. Munaweera (1955) 56, NLR433.

Analysis

In England there are two types of offences either Common Law or Statutory offences. Common Law crimes liability will be applicable only if the prohibited conduct is accompanied by *mens rea*. However, there are two exceptions in Common law, they are Public Nuisance offences and Criminal Libel.

In English law, crimes of strict liability are mentioned by statutes. It is to be noted that there are two approaches under statutory offences. In some offences there should be *mens rea* and some other statutory offences which don't consider *mens rea*.

It contrasts to the English Law in Sri Lanka all crimes are statutorily enacted criminal responsibility became under either provisions of the Penal Code or other statutory enactments.

In the current, there is a question whether the doctrine of strict liability has s place or not in the Law of Sri Lanka. It is clear that reported cases on this subject would give the answer to this question.

In this particular case, the appellant was charged with having sold a loaf of bread weighing 15 ¼ ounces at a price fixed for a 16 ounce loaf. This sale was in conflict with the principle of Section 8(1) of the Control Prices Act. The appellant suggested that he had no ill intent in doing this sale. The reason is that several hundred loaves of bread were baked on this particular morning. The Learned Magistrate in his order appears that the factual position as presented by the appellant was correct but his liability in law was absolute, irrespective of '*mens rea*'.

In Sri Lanka, there are conflicting authorities when they decide strict liability of offences. Soertsz J. in Gunasekera v dias Bandaranaike (1936) 39 NLR17 held that Section 72 of the Penal Code be used by the appellant.

> "The English law drew a distinction and made the plea of absence of *mens rea* inoperative in the case of certain exceptional enactments containing prohibitions which are interpreted as unqualified. Our Law knows no such distinction."

In Perumal v.Arumugam (1939) 40 NLR532 held that in relation to a charge under Section 28 of the Poisons, Opium, and dangerous Drugs ordinance the existence of *mens rea* was not an essential element of the offence. In both cases, it is unable to get a clear idea about the application of strict liability offences in Sri Lanka.

The earlier case judgment would seem to derive support from the decision which was decided in Weerakoon v, Ranhamy (1921) 23 NLR 33. In this case, Bertram C.J. said that the absence of *mens rea* that is indicated in the defence, of mistake of fact in Section 72 of the Penal Code, is applicable not only to offences created under the Penal Code but also offences created by other statutes as well. Further stated that the mentioned facts on the basis of the definition given in Section 3892) of the Penal Code. It is to be pointed out that if the defence of mistake of fact is available against any offence, then the doctrine of strict liability has no place in Sri Lankan Law.

It is submitted, in Perumal v. Arumugam is correct when it says: Section 38 of the Penal Code makes Section 72 applicable to offences punishable under any law other than this code; but is incorrect when it says it is not an inflexible rule. In the Weerakoon case, there was a question whether ignorance is covered by the exception-ignorance implying a mistake of fact as distinguished from pure ignorance.

In this case, the evidence of the accused was accepted by the magistrate. The accused honestly believed that he could sell the loaf at the price. He did that because of the mistake of Fact regarding its weight. It is to be noted that in English law there is no general exception. Accordingly, in Woodrow (1846)153 ER907 it was held that on a charge for having sold adulterated milk. But the defendant disagreed with this fact because he had made a mistake regarding the milk's purity.

In Sherras v.De Rutzen (1895) 1QB 918 Wright J. stated as follows; there is a presumption that *mens rea*, or evil intention or knowledge of the wrongfulness of the act is an essential

ingredient in every offence. But the presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals and both must be considered.

It is to be noted that there are special provisions in the laws relating to the Sale of Bread that afford various defences. Mistake, accident, driage and acts of persons are not within the defendant's control. In this case, he did not weigh each loaf. He bona fide thought the loaf in question weighed 16 ozs. When occasionally a short weight loaf was discovered it was converted to toast. It is submitted, therefore, there can be no doubt as to the bona fides of the accused.

There is a question whether Section 72 of the penal Code allows an accused person to plead a mistake of fact in regard to absolute prohibition. In the Weerakoon case it was stated that there was a mistake of law. Section 72 applies only to offences which involve *mens rea*. In the case of an absolute prohibition, the prosecution need not prove a mental element. It is to be pointed out that in the Perumal case Soertsz, J followed the English Law.

In this case even if Section 72 applies, the accused has not established his defence of mistake. The accused should therefore have either weighed his bread before telling or double baked it. As he did neither, he cannot plead a bona fide mistake of fact. The Price Order C.299 in Gazette 10,248 of May 18, 1951, and the Bread ordinance, Cap.171 as amended by Ordinance 33 of 1944 casts a legal duty on the accused to weigh the bread before it is sold.

In England, there is a question whether in statutory crimes the requirement of *mens rea* has been placed. In Brend v.Wood (1946)175 LT 306 Goddard L.C.J stated that "It is utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

It is clear then, that if a statute includes words such as 'wilfully', 'knowingly', or 'intentionally' the *mens rea* are not used, and then strict liability can be imposed to such an offence. When the court deals with an offence, the court must consider the entire statute and other statutes related to those particular facts. Social danger offences are mostly considered as strict liability offences. (Smith)

It is to be pointed out that sometimes in English law, strict liability was applied whether or not the accused was aware that the drug was classified as a dangerous drug. In Sweety v. Parsey (1970)A.C.132 when she was charged for being concerned in the management of premises which were used for the purpose of smoking cannabis, the House of Lords stated that she was not guilty because she would never have been able to detect with certainty whether her tenants were smoking cannabis on her premises. This judgment has led to a question regarding the strict liability in English law.

Conclusion

Through analysing case laws, the writer's conclusion is that the dictum of *mens rea* has been applied in different approaches from one case to another. There is no significant application of the dictum in both the English law as well as in the Sri Lankan Law.

On the one hand, there were two different judgments made in English law related to strict liability. In Alphacell v. Woodward(1972) A.C.824 the defendants were charged under Section 2(1) (a) of the Rivers (Prevention of Pollution) Act 1951 for causing polluted water. It was stated that in Sweet case the defendant was an individual, and there are limited methods to avoid harm. But in the latter case, there are sufficient resources to avoid harm from their activity.

On the other hand, in this significant case of Sri Lanka, the learned Magistrate stated that as in England, the defence of 'bona fide mistake of fact' was not available to an accused against whom the commission of the *actus reus* had been established. It was stated that even if the decision of a collective Bench properly constituted under Section 51 of the Courts Ordinance is wrong, it cannot be overruled by even a subsequent collective Bench.

It is submitted that Gratiaen J. refused to impose strict liability in this particular case and stated as follows: "We were invited to consider the undesirability of Section 38 of the Penal Code making Section 72 inflexibly applicable to offences to which, under modern conditions, Parliament may, in the interest of justice, consider the defence of bonafide mistake to be inappropriate. This argument does not impress us. In such a contingency, it is always open to Parliament to enact that in regard to any particular criminal statute Chapter 4 of the Penal Code or any part of it shall not apply: Section 38(2) would then stand repealed or amended to the extent."

In the light of the above discussion, therefore, in Sri Lanka the only situation where a mistake will be judged objectively is where the crime concerned regards as a blameworthy state of mind.

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Blockchain Technology – The Future of Perpetual Legal Documentation in Sri Lanka

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Background

The legal system of Sri Lanka as a country with a unique and unified legal system that encompasses the legal traditions of our colonial European heritage, though with its difficulties due to being a third world country, has been a vibrant and active system. However, the current system prevalent in our country in maintaining records, ensuring proper perpetuity of deeds and property and safeguarding and adjudicating between authenticity of documents is considered to be a tedious, tiring and challenging process that in many cases when ended up in court, takes years or even decades to resolve. The recent report of the Hon. Justice Minister relating to the backlog of cases for years has made it even more alarming and unsettling[1]. It is a well-known fact that most of the delay in procedure is due to lack of digital infrastructure, lack of digitalization, lack of easy processing through digital means and lack of skilled professionals to handle such a system. The inability, unreliability or delay to maintain digital records in the court system as well as government bodies like the Land Registry and the Registrar General's Department has been rightly identified by the Ministry of Justice and being looked into as of this moment in 2020.

Lack of infrastructure to maintain court records in digital platforms, doubts in the possibility of maintaining reliable platforms as such, training the required manpower to constantly update those everyday records that pile up in the court registries and record rooms and thinking of changing the existing not-so-convenient-but-convenient-for-now system with a complete overhaul that may incur an enormous initial cost may very well be the reason for the reluctance in changing for a better and efficient system for a country like ours.

When going for digital records, documents can be tampered with, can be hacked or wiped away entirely from the existing digital domain. This has been a clear concern of those who have been reluctant for digital record keeping. This concern or fear is not entirely unfounded. The world has seen hundreds if not thousands of cyber-attacks that had crippling consequences to economies and national security of many countries. But, what if there was a system that we could maintain records where they remain in perpetuity? What if such records cannot be tampered with whatsoever and any tampering can be traced with complete precision? What if any document such as deeds can be traced back to its original source, may it be mother deeds or other related ones such as the extracts of the current system, with a few clicks of buttons than years of litigation over how one derived ownership or title of a land and which deed is forged and which one is authentic? What if, all court records, day to day registries, day books and everything in the piles and piles of case records in court record rooms of today can be

1 https://island.lk/govts-first-priority-to-clear-backlog-of-cases-in-courts-justice-minister/

comfortably condensed to be logged through a laptop by the staff with no fear of any of the records being lost or altered?

Blockchain Technology

A blockchain is a distributed software network that functions both as a digital ledger and a mechanism enabling the secure transfer of assets without an intermediary. Just as the internet is a technology that facilitates the digital flow of information, blockchain is a technology that facilitates the digital exchange of units of value. Anything from currencies to land titles to votes can be tokenized, stored, and exchanged on a blockchain network.[2]

The first application of Blockchain Technology in a public domain gained popularity when Bitcoins, a safe, secure and open currency system that is not controlled by a centralized banking system. Till date, Bitcoins remain the secure-most, accessible to all currency system invented.

Blockchain as the name stands are blocks of codes or information chain together to trace each transaction. Each block in the chain contains a specific number of transactions and each time when a new transaction happens, that particular transaction is added to the ledger of every participant or party involved. In simple terms it can be said that it is a decentralized digital database that records each and every transaction in a digital ledger that is manage by multiple participants which is known as Distributed Ledger Technology (DLT).

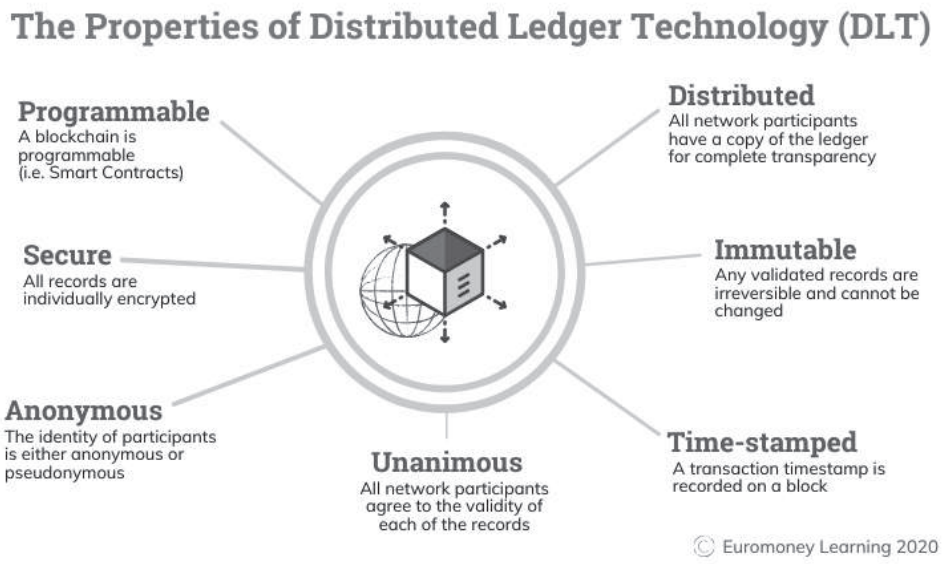

Image No -01 [3]

2 https://www.blockchainresearchinstitute.org/an-intro-to-blockchain/#:~:text=A%20blockchain%20is%20a%20distributed,of%20assets%20without%20an%20intermediary.&text=Anything%20from%20currencies%20to%20land,exchanged%20on%20a%20blockchain%20network.

3 https://www.euromoney.com/learning/blockchain-explained/what-is-blockchain#:~:text=Blockchain%20is%20a%20system%20of,hack%2C%20or%20cheat%20the%20system.&text=Each%20block%20in%20the%20chain,added%20to%20every%20participant's%20ledger.

Transactions in a Blockchain are protected with an immutable crypto-signature called 'a hash' and when altered or if one block is changed, it would become immediately apparent that the said block has been changed or tampered with. If a Blockchain system is to be hacked, the hackers will have to change every block and every hash across all the distributed chain in the DLT.

There have been several attempts to create Digital Currency. However the main issue of trust where the one who creates or controls owning or distributing major quantity of that currency to himself has been resolved by Blockchain where no one is in control and those who use it are those who control it. Information in a Blockchain can't be faked or hacked or middle with and the information contained therein is accurate, perpetual and remains in the DLT forever.

In this backdrop it can be safely concluded that the most suitable digital medium to store and maintain perpetual documentation is Blockchain Technology.

Usage of Blockchain Technology in the local context

Blockchain Technology can be used to create public documents which are permanent. It can be a transparent ledger system where data on sales can be stored, payments be securely made and unblemished and non-tampered information be stored, shared and transmitted. By understand the essence of the Blockchain system, one could very much understand that the traits of Blockchains are what we were looking for.

Let us take an example as to how Blockchains can be used in our courts. First of all, filing of cases can be done by feeding all the documents through a computer in the office of the Registrar of Courts. This is the first block in the case No. X/2021. From that block, several other blocks can be created that transmits the date of the case to be called in Court, the notices delivered immediately to the Respondents, authentication of all documents annexed in the dockets verified through different Blockchains that had maintained records of the same and all records prevalent in perpetuity to be viewed and re-verified. A judge could view the entire case record with day to day journal entries, case records from the lower courts and anything that is necessary in the LED screen before him without the need to meddle with hundreds if not thousands of pages in paper case records that are prevalent today. Forwarding of a case record from a lower court will not take more than a few seconds when one files an appeal in a higher court.

All manual records written down by hundreds of staff will go into extinction. Applying for certified copies and even the word 'certified copy' or 'true copy' will become useless due to the fact that all the documents annexed would be authentic without the need to prove any of them, which in turn will make 'subject to proof' in court language for authentication of documents filed in court ancient.

In the above circumstances, where all the court record are maintained through Blockchain, there won't be a situation where case records go missing, are altered or destroyed, may the cause of destruction be manmade or otherwise. No litigation shall be needed to determine

which deed prevails over the other, which deed gets priority, or which deed is authentic, for, the dates of making the said deeds, how the deeds were passed down to generations, how a land mentioned in such a deed was sold or disposed of shall all be preserved with utmost authenticity in Blockchains and all this information will be few clicks away for verification on a computer screen and the decades long litigations in Courts to verify the authenticity of deeds will no more be needed.

All documents which are authenticated by the Department of Government Analysts today, which take months if not years will become unknown, since all those documents can be verified through Blockchain Technology if the Technology is made available. In other words, every document issued by an authorized entity, may it be by the Government, by a private entity or an individual, shall have already been authenticated and verified at the time of its creation itself, which will save years of litigation that erupts to prove the authenticity of documents and rights or responsibilities that stem therefrom.

Conclusion

It is a well-founded fact that Countries like Sri Lanka lag years behind other developed Nations due to the fact that our procedure in documentation, preserving authenticity of such documentation and adjudicating between the rights and responsibilities arising out of the said tedious documentation is old, faulty and prone to destruction. Judicial process is delayed by years due to lack of digital infrastructure and proper system of maintaining records.

Many countries have started using Blockchain Technology at the National level. Estonia became the first country to use Blockchains at the National Level as far back as 2008, whereas many other countries such as Singapore, Malta, The United Arab Emirates, China and Switzerland are among many other countries that have chosen Blockchain Technology as their prime medium to maintain essential and perpetual records including Health Records, Tax information, Court records and personal identity.

It is at times frustrating to see that though we have a well-developed and vibrant legal system, we have to spend weeks for simple tasks such as obtaining a case record from a court registry and having to spend years to determine as to how a father’s property can be partitioned between his heirs before they get to enjoy the property, all because our record-keeping is tedious and outdated.

If Blockchain Technology could be adopted into our system, thousands of man hours could be saved, years of litigation in thousands could be averted and billions of rupees of taxpayer money could be saved. Most of all, thousands of cases relating to forged documents and delays due to manual record keeping as well as preserving those records can all be averted with a simple click of a button: thanks to Blockchain Technology.

A Précis Revisit to Sri Lankan Law of Summary Procedure on Liquid Claims

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Introduction

Law, in general, is a harmonious duet of both substantive law and adjective law, where the latter achieves its expression through the instruments of law of evidence and procedural law. Civil law of Sri Lanka is no exception to the above.

Civil law is the part of a country's set of laws which is concerned with the private affairs of citizens, for example marriage and property ownership, etc. Substantive Law as to civil matters consists of a plethora of statutes namely General Marriage Registration Ordinance, Partition Act and Rent Act, etc. and The Civil Procedure Code (hereinafter referred to as CPC) of Sri Lanka, being the procedural officialdom, enacted in 1889, is nearly a century and a half old.

Civil Procedure Code had been enacted during the colonial rule in this country as far back as 1889 ... Judicial contribution to the development through interpretation of the Code and new application of general principles have enriched the procedural law.[1]

Conceding to the above statement of Dr. Wijeyadasa Rajapakshe PC, the author endorses judicial involvement as the key ingredient of legal system's fertility. The interpretations and arguments manifested in case laws entice no less emphasis compared to documented law; the acts and statutes.

Embarking the subject matter of this piece of writing, section 8 of the CPC identifies two types of actions which are available to a litigant whose civil rights have been violated by another. Ordinarily, the most common type of action is the regular procedure actions which consume more time and energy compared to the other type namely the summary procedure. Apart from the main classification set out above, considering the importance and the underlying nature there are few other procedures adopted in connection with special matters. One of them being **summary procedure on liquid claims**.[2]

"Summary procedure is a special procedure provided by the Court. So any person recognized by law has access to such special procedure."[3]

1 Dr. Wijeyadasa Rajapakshe (President's Counsel), Case Law on Civil Procedure Code (4th ed. 2017 April) pg..vii

2 Chapter LIII (53) under Part V of Civil Procedure Code

3 *Science House (Ceylon) Ltd. V. Ipca Laboratories Private Ltd* [1987] 1 Sri.L.R 185 at pg. 200

The procedure shall not be invoked against every type of civil wrong. It is exclusively applied as to the claims in connection with debts or liquidated demands in money arising upon bills of exchange, promissory notes, cheques, instruments or contracts in writing for a quantified monetary value, or on guarantee wherefore it is apparent that the claim against the principle of such document conditioned to be liquidated.[4] Therefore any event of Court determining the value of the claim shall be known as un-liquidated claim.

With that lucid note, the author of this article aspires to give a comprehensive outline of statutory provisions followed by judicial dictum concerning summary procedure on liquid claims.

Further Laws in Application

> According to section 703 of the CPC, the special procedure is in application on matters relating to bills of exchange, cheques, promissory notes, etc. commonly known as negotiable instruments wherefore the interference of **Bills of Exchange Ordinance** is inevitable. In terms of **Section 98 (2)** of the Ordinance, rules of the common law of England shall apply in matters arising out of above-mentioned documents.[5]

Filing an Action

> Although English law accomplishes the substantive application in this regard, the legal procedure is governed by the CPC of Sri Lanka. The jurisdiction is vested with the District Court so that the action can be filed at either,

1. Court within jurisdiction the Plaintiff resided as the debtor must seek out the creditor at his residence or place of business,[6] or

2. Court within jurisdiction where the cause of action arose,[7] or

3. Court within jurisdiction as per the other requirements set out under section 9 of the CPC.

As it was earlier mentioned, section 703 gives introduction as to the application of the summary procedure on liquid claims.

> "s. 703 is the dominant and governing section in that chapter dealing with summary procedure. That section sets out the manner in which such an action can commence by the presentation of a plaint. It provides the means for an application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority. ... Thus, section 703 entitles any person whether natural or juristic to seek his remedy under Chapter 53 by filing a plaint. Thus a juristic person is recognized by the Code as competent to seek a remedy in summary procedure by filing a plaint. He would

4 Section 703 of the Civil Procedure Code

5 *De Costa V. Bank of Ceylon* 72 NLR 457 - confirmed the application of English law in negotiable instruments.

6 *Ponniah V. Kanagasabi* 35 NLR 128

7 *Haniffa V. Ocean Accident and Guarantee Corporation Limited* 35 NLR 216

> thus be the plaintiff. There was no argument to the contrary adduced at this hearing. But that plaint must be accompanied by an affidavit. Section 705 requires that both must co-exist."[8]

Section 705(1) of the Civil Procedure Code makes it mandatory for the plaintiff to make an affidavit that the sum which he claims is justly due to him from the defendant. In order to entitle a person to sue under Chapter LIII of the Civil Procedure Code, it is essential that the facts set out in the affidavit must show that the sum claimed was rightly and properly due.[9]

Such an affidavit is required to be properly stamped, not suspicious by absurd alterations or erasures or any other discrepancy and surely should not be prescribed.[10]

A company/a corporation concerned about the affidavit can be made by any principal officer.[11]

In Sivapalanthan V. Raj Gopal 12 an important principle was manifested that a claim for unjust enrichment does not come under liquid claims as a result cannot be subjected to summary procedure even if the claim arose upon cheques. It was held by the Court before proceeding any further, should have amended the plaint by striking out the claim for damages based on unjust enrichment.

Along with the plaint and affidavit, the instrument on which the Plaintiff intends to sue must be produced. As per *Ruhunu Agro Fertilizer Co. Ltd. V. Kapila*[12] it should be the original of the instrument which needs to be filed. However later it was developed into a stage that even a photocopy shall be acceptable subjected to the original being tendered subsequently under Section 708 of the CPC where the court can demand the deposit of the instrument.[13]

Under Section 708, the Court has discretion to make a further order to stay all the proceedings until the Plaintiff submits security for the costs thereof.

In addition to the said documents, summons in the form 19 of CPC[14] ought to be drafted and submitted which shall be served on the Defendant.[15] The summons should carry a date as early as it can be, considering the Defendant's convenience of attending.

However, the contentions of Justice Weerasekara in *Fernando V. Ceylon Petroleum Corporation*[16] draw our attention to a different dimension where no proper notice or summons as required by section 705 (3) could be served if section 705 (3) and Form 19 both are

8 *Science House (Ceylon) Ltd. V. Ipca Laboratories Private Ltd* [1987] 1 Sri.L.R 185 at pg. 200

9 *Wicramaratne V. Senanayake (Wimalachandra,* J.) (2005) 1 Sri L. R 222 at pg. 223, *Anamalay V. Allien* 2 NLR 251

10 Section 705(2)

11 *Science House (Ceylon) Ltd. V. Ipca Laboratories Private Ltd* [1987] 1 Sri.L.R 185

12 (2000) 2 SLR 277

13 *……..the civil procedure code was enacted in 1889, photocopying and other duplicating machines were unknown to Court. There has now arrived for courts to recognize the scientific and technological progress and assimilate such progress into archaic legislation…….Ranasinghe V. Zubair* (2002) 2 S.L.R 399

14 Such form shall be time to time prescribed by the Court of Appeal.

15 Section 703 of CPC

16 (1997) 1 SLR 141

complied to. According to the section 705 (3) , the earliest possible date should be inserted in the summons considering the Defendant's convenience. On the other hand, Form 19 refers to obtaining leave within a specified period, not a date as it is required under section 705 (3). Justice Weerasekara has opined that both provisions cannot be reconciled.

Moreover, being a special procedure when there's a second cause of action available, any Plaintiff should refrain from serving summons in form 19 mentioned under Section 704 of the CPC and such plaint should be returned for amendment.[17]

In connection with cheques, the Plaintiff has no obligation to produce any documents supporting the notice of dishonor at the time of filing the plaint. When the bank account has no adequate funds to meet the cheque at the time of drawing, it is framed as an offence under Section 25 of Act No. 2 of 1990.

Considering the fact that the procedure is in exclusive application of negotiable instruments, it is always pertinent to know that an action on any negotiable instrument is prescribed after six months from its issuance and a cheque is not invalid simply upon being post-dated. And as it has been held under *Hatton National Bank V. Whittal Boustead Ltd.*[18] when there are many causes of action followed by a number of cheques involved in one action, the Plaintiff is not expected to separately set out circumstances for each cause of action.

The remedies encapsulated in Chapter LIII are approachable to any holder of a dishonored negotiable instrument irrespective of their nature and category as Section 709 of the CPC mentions.

Defendant admitting liability

There can be situations where the Defendant admits the liability set out under the plaint. At such an event, the decision is with the court to enter into a decree allowing the Defendant to settle the due in installment basis.

In *P. & O. Banking V. Selvathurai*[19], the above determination was reached and it was stated further that such relief should not be denied to any defendant merely because the creditor is a bank.

Defending an Action

According to *Meyappa Chetty V. Usoof,*[20] any Defendant is able to have a cross claim in the case against him/her filed under summary procedure on liquid claims.

The Defendant in an action under this special procedure is mandated to obtain leave from the court prior to filing an answer and defend the action.[21] For that, the Defendant is required to

17 *Allie V. Mohideen* 1 NLR 39

18 (1978-79) 2 SLR 257

19 28 NLR 289

20 5 NLR 265

21 Section 704 of CPC

file a petition including *prima facie* triable issue and an affidavit including a defence good in law.

Justice G. P. S. Silva in *Esquire (Garments) Industry Ltd. V. Sadhwani (Japan) Ltd.*[22], commenting on triable issues held that at the stage of granting leave, the court is not called upon to adjudicate the merits of the defence wherefore the matter of how two removed directors placed signatures in the bills in dispute was treated as a triable issue.

Under the same section it is clearly stated that if at any event no such leave is obtained or appearances made and subsequently defended, Plaintiff shall be entitled to receive a decree for a sum not exceeding the claim specified in summons with the legal interest until the payment of the same and costs allowed by the court.

As per *Bank of Ceylon V. Kaleel and Others*[23], if the court grants leave to appear and defend the action, the party who should begin the case is the Plaintiff.

Section 704 (2) states that in defending the case, any Defendant need not pay the sum mentioned in the summons or satisfy any security[24], unless the Court is of view that the defence is not sustainable and/or good faith of the Defendant is questionable.

> "Where the defence set up by the defendant to an action on a promissory note appears on the face of his affidavit to be good in law and no reasonable doubt exists as to the bona fides of the defence, it is the duty of the District Court to permit him to appear and defend without security."[25]

At any event of finding reasonable grounds doubting good faith of the defense, the opportunity of defending shall only be granted upon depositing security.[26]

Section 706 of the CPC depicts that when the defendant is given an opportunity to make an application to obtain leave, either the sum mentioned in the summons has to be settled or an affidavit should satisfy the court as to the defence or any other factors that the court shall recognize sufficient should be satisfied along with the measures on security whereas framing and recording issues will be done. However, all such actions are subjected to the discretion of the court. So it is understood that Section 706 would take the litigants an extra mile in times necessary.

In *Sebastian V. Kumarajeewa*[27], it was held that in an application for leave to appear and defend even if the affidavit of the defendant is satisfactory, the Court can exercise its discretion under section 706 and order the defendant to deposit part of the sum claimed in the plaint as a condition to defend the action.

22 (1983) 2 SLR 242

23 (2004) 1 SLR 284

24 Such security should not be more than the amount mentioned in the summons.

25 *Ramasamy Chetty V. Uduma Lebbe Marikar* 5 NLR 310

26 *Supramanian Chetty V. Kristnasamy Chetty* 10 NLR 327, *Kumarappa Chetty V. Kristnasamy Chetty* 10 NLR 330

27 80 NLR 264

In granting leave the court shall only consider the defence to be prima facie sustainable and bona fide.[28] And if the Defendant successfully raises an issue/suspicion which if proved becomes a strong defence, it is regarded as a triable issue so that he must be permitted to appear and defend unconditionally.[29] However, there should not be a trace of doubt as to the good intentions and honesty of the defense.[30]

The parties are not allowed to lead evidence in an inquiry in this stage of defending the application and struggling for leave. Such evidence can be produced by way of written submissions at the discretion of the parties.

In cases following this procedure, there are several defences claimed in general by the Defendants. According to *Witham v Pitcha Muththu*[31], if the claim is shown to be one of the un-liquidated damages, then such fact would be a good defense for the defendant. Another defence is the absence of a valuable consideration which is known to be the most common defence.

Apart from them, failure to produce the original instrument with plaint[32], summons not complying with specifications and most importantly failure to adhere to the provisions of Bills of Exchange Ordinance[33] can also be found as possible defences.

As in *C.W. Mackie & Co. Ltd. V. Translanka Investments Ltd.*[34], if the Court feels a reasonable doubt exists as to the honesty of the defence, it is entitled to order a defendant to appear and defend conditionally.

All the provisions and authorities mentioned above are applicable until the leave is granted wherefore when the court reaches its decree on granting leave that shall mark nearly the end of the league. However in terms of Section 707, in *special circumstances* if the court cognizes it as reasonable, the decree entered can be set aside and leave to appeal can be granted.

In the case of *Khan V. Sally*[35], the failure of the proctor to comply with the order within the time frame was not recognized as a special circumstance to effect Section 707.

Having undergone all the above contentions on defending such a case, under Section 711 to the CPC, every court hearing such cases as to liquid claims are required to keep and maintain a special trial roll in order to have them heard in a manner promoting the ends of justice in the best possible ways. However, the parties ought to be duly notified on the dates of hearing.

28 *Esquire Garment Industry Ltd V. Sadhvani (Japan) Ltd* (1983) 2 SLR 242

29 *Ruhunu Agro Fertilizer Co. Ltd V. Kapila* (2000) 2 SLR 277, *Meyappa Chetty V. Usoof* 5 NLR 265

30 *Rengasamy V. Pakeer* 14 NLR 190

31 4 NLR 74

32 Which is less effective due to the current situation discussed earlier

33 For an instance, sending the notice of dishonor prior to the action – Section 75 of the Bills of Exchange Ordinance as in ***De Silva V. Ranasinghe*** (69 NLR 278) decided 'notice of dishonor is a condition precedent to right of action against endorser.'

34 (1995) 2 SLR 6

35 41 NLR 282

Section 710 adduces a saving clause to the Chapter by mentioning that whatever has not been dealt by Chapter LIII shall be governed in terms of the provisions set out under Chapter VII which is applicable on institutions of actions in general.

Appeal Procedure

According to *Martin V. Wijewardane*[36], the right to appeal is a statutory right and must be expressly created and granted by the statute. In this context the statute being the CPC, the respective inherent provisions can be found in setting appeal rights under Part VIII.

Having perused the provisions under Chapter LIII more fully depicted above, it's apparent that two instances exist in which orders are given so that opportunity of appealing is available which can be identified as;

- Stage of granting of leave
- Stage of final judgment[37]

When the leave is granted it shall be subjected to either conditional or unconditional supporting of defence and shall be an incidental order. Any party being dissatisfied with the order can file a Leave to Appeal application (which is also known as interlocutory appeal) against the same in terms of section 754(2) of the CPC.[38]

In connection with final determinations as per section 754(1) of the CPC, a final appeal can be instituted by any party aggrieved.

Conclusion

Ultimate purpose of such a provisional remedy is to attain justice. Compared with the general procedure, summary procedure specially formulated for liquidated claims shall reach the results expeditiously and vigilantly. Therefore, the inclusion of the same into the CPC is highly praiseworthy.

However, when it comes to actuality what needed to be observed is whether these provisions are in place as expected by the Legislature. Among all other reasons the hardship in going through the provisions could be one, preventing effective application of the same.

Wherefore this article's sole purpose is to project the underlying significance and upgrade adequate understanding as to the provisions relating to summary procedure on liquid claims along with the case law authorities in a nutshell which the author thinks has successfully been achieved.

36 (1989) 2 SLR 409

37 The distinction between a judgment and an order are defined under section 754(5) of the CPC

38 Section which mandates to obtain leave in a matter of appeal tried before Court of Appeal.

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Modern International Law and the State Sovereignty

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Introduction

"Fundamental violations of human rights always lead to people feeling less and less human."

-Aung San Suu Kyi -

International Law and *State Sovereignty* could be considered as critical issues which have many implications towards Human Rights, Individual Liberty and State Obligation in the modern era. We are living in a nation in which the constitution declares that " Sri Lanka is a Free, Sovereign, Independent and Democratic Socialist Republic and shall be known as the Democratic Socialist Republic of Sri Lanka."[1] One of the modern definitions that can be given to the international law is "the body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as international actors."[2] The simple purpose of having International Law is maintaining the peaceful, amicable relationship among the states.

However, the very dynamic nature of international law requires modification**s** of these definitions. Both subjects of international law and its content**s** have evolved with the political and social changes in world society. Thus, modern definitions of international law have required to include in them, the role of non-state actors, the category to which international organizations such as the United Nations Organization, the World Bank and the International Labour Organization belong. Further, individuals too have acquired subject status in international law with the development of human rights.

Traditionally, it was perceived that in international law, the primary subjects are not individuals but states. The individuals of international law were states and states alone. It governed relations between states and did not affect the domestic governance of states because the principle of sovereign equality of states enabled the state to internally behave as it wished.

But in the modern era even though how sovereign or an independent a state is, it cannot be isolated from the global platform for various reasons varying from financial to political. Hence both state actors and non-state actors are important in governance.

Though international law has undergone a sea change with regard to its scope and content, the rights of individuals flowing from international conventions, still remain 'ghosts elusive to the grasp' of individuals. Many international conventions or treaties have been devised for

1 'Sri Lanka (Ceylon) is a Free, Sovereign, Independent and Democratic Socialist Republic and shall be known as the Democratic Socialist Republic of Sri Lanka.', Article 01, Sri Lankan Constitution 1978.

2 Jeremy Bentham, English philosopher, (1748–1832)

the benefit of individuals and are designed to confer right on them. However, the enforcement of these rights by individuals remains a perplexing issue which courts in many jurisdictions are still grappling with.

State Sovereignty

Article 02 of Sri Lankan Constitution states that 'The Republic of Sri Lanka is a Unitary State,' and Article 3 of the Constitution further describes state sovereignty.[3] Some principles impose prohibitions on states in relation to the way they act within their territory while others impose obligations in respect of state conduct in relation to how states are supposed to conduct themselves at the global platform.

In the ***Island of palmas case*** the court observed;

" Territorial sovereignty involves the exclusive right to display the activities of a state. This right has as corollary a duty, the obligation to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and war, together with the rights which each state may claim for its nationals in foreign territory." [4]

In the ***Trail smelter case*** the Arbitral tribunal decided that Canada is liable for the damage caused to crops and trees in the states of Washington and fixed the amount of compensation to be paid. Further Canada was required to take protective measures in order to reduce the air pollution in the Columbia River valley caused by Sulphur dioxide in the Canadian – US border.

The tribunal held that;

" Under the principles of international law …….. no state has the right to use or permit the use of its territory in such a manner so as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." [5]

In 1949, in the ***Corfu Channel case*** [6] the ICJ had to consider the responsibility of Albania for mines which exploded within Albanian waters and caused the loss of human life and damage to British naval vessels. The court had also decided on whether the United Kingdom had violated Albania's Sovereignty. The court held Albania responsible for the damage and the loss of life of the British sailors and determined the amount of compensation to be paid. The Court endorsed the principle that ***'every state's obligation is not to allow knowingly its territory to be used for acts contrary to the rights of other states.'*** [7]

3 " In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.", Article 03, Sri Lankan Constitution 1978.

4 United States v. The Netherlands 2 RIAA 1928, page 829

5 United states v. Canada 35 AFIL 1941 page 716

6 United Kingdom v. Albania ICJ Reports 1949, page 22

7 Ibid

In the ***Barcelona Traction case*** [8] the ICJ pointed out ;

"…… an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis- a vis another State in the field of diplomatic protection. …. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection, they are obligation erga omnes."

This concept of ***obligatio erga omnes*** is of relevance in combating global environmental problems, such as the depletion of the ozone layer, the extinction of world's biodiversity and threats caused by climate change.

In the ***Gabcikovo – Nagymaros case***,[9] the court in their advisory opinion of ***Nuclear Weapons case*** stated that there is a ***'general obligation on states to ensure that activities within their jurisdiction and control, in respect to the environment of other states or of areas beyond national control, are now part of the corpus of international law relating to the environment.'***[10]

Emerging dynamic of International Law should not undermine the domestic Law

International law is most relevant when it has been 'nationalized' or become part of the corpus of national law through, ratification, incorporation or transposition. However, in jurisdictions where national legislation closely follows or is modeled after international norms, reference to international law may be of value in interpreting national law.

The concepts of monism and dualism are linked to the doctrines of Incorporation and Transformation.[11] Monism is based on the doctrine of incorporation where international law and municipal law in a country are seen as parts of one integrated system. The states that follow a theory of monism, the international law automatically becomes a part of the domestic legal system and if there is a clash between a rule of international law and domestic law, international law should prevail.[12]

Dualism recognizes that international law and municipal law are two distinct systems which regulate different entities. This concept is based on the doctrine of Transformation and according to this concept international law governs relations between states and municipal law deals with all internal affairs of a state under State Sovereignty.

The position of international law under the Sri Lankan Constitution.

Article 27(15) of the Constitution of the Democratic Socialist Republic of Sri Lanka postulates that the state shall endeavor to foster respect for international law and treaty obligations dealing in dealings among nations. Furthermore Article 33(f) and Article 125 of the Sri Lankan Constitution of 1978, provides relevant constitutional provisions in relation to international law that could operate in the domestic Sri Lankan context.

8 Belgium v. Spain ICJ Reports 1970, page 32

9 Hungary v. Slovakia ICJ Reports 1997, page 7

10 Ibid

11 McNair, A.D.1961. The law of Treaties, Oxford University Press, Oxford. Page 81 -97

12 Ibid.

The status of Individuals in international Law and State Sovereignty

The term International Law denotes the law regulating the relations between sovereign states. Accordingly, a state may not invoke a provision in its domestic law to excuse its violation of international law. Traditionally it was deemed to apply solely and exclusively to ***sovereign states*** which were the only subjects of international law. On the other hand, individuals were not deemed as subjects of classic international law.[13] They were considered as objects of International law. However, over the years, the nature and functions of international law have undergone tremendous changes and its perimeters have expanded so as to encompass a multitude of fields within its scope. This horizontal expansion of international law has also resulted in its vertical expansion to a plethora of modern entities other than states as subjects of international law. Many international organizations have gained recognition as subjects of international law.

Similarly, in modern international law that even individuals can be considered as subjects of international law in a limited sense as certain rules of international conventions have been designed to benefit and deemed to apply to individuals.[14]

However, such opinions notwithstanding, strong judicial dicta expressed by judges of high judicial in common law jurisdictions, have continued to deny individuals recognition as subjects of international law. The following pronouncement of Lord Denning epitomizes the approach of the courts to this issue.

'A rule of international law is only a rule between two states – It is not a rule between an individual and two states'[15]

Apart from this divergence of opinion on the status of individuals, the effective enforcement of their international law rights is seriously inhibited by the inability of the individual to have access to international judicial tribunals. Institutions such as the international Court of justice (ICJ) do not confer on individuals, the right to invoke their jurisdiction. It is in this context that national courts as fora for the enforcement by individuals of rights conferred by international conventions become pivotal. However, the possibility of invoking international law or conventions before a national court depends, to a larger extent, on the status accorded to international law and conventions within the internal legal order of the state concerned.

Protection and Promotion of Human Rights

However, with the developments of modern international law, human rights became a global concern. The Sources of International law are not merely treaties but also the general principles of law which are recognized by nations as well as customary international law. In 1945 the United Nations organization was established and one of its main functions is to promote respect for human Rights and fundamental freedoms for all without any distinction as to race,

13 Oppenheim, International law 2nd edition, page 460

14 Friedman, The changing structure of International law, page 234

15 Thakar v. Secretary of State for the Home Office 1974 QB 684

sex, language or religion.[16] Article 56 of the Charter makes it obligatory on members of the UN to take joint and separate actions to achieve the objectives set out in Article 55. UDHR was adopted by the United Nations General Assembly in 1948, but in the declaration, there was no definition of human rights. Although there were provisions in relation to human rights came with a global application, there was no enforcement mechanism as the UDHR was not a treaty. Under these circumstances UN adopted two covenants which can be enforceable, and we can identify international humanitarian law as well, which is based on the principles of human dignity and morality that the world community has accepted. This international humanitarian law is more effective as an instrument of peace all over the world and we can realize how far modern international law strayed from this humanitarian teaching, even today it can manufacture such weapons where the peace can be attacked.

The most significant contribution by courts in giving effect to international conventions have been in the field of human rights. In a landmark decision **R** v. **Secretary of state for Home *Department ex parte phanse fkar*** [17] ***Lord Scarman*** exhorted that it is now the law to have regard to the European Convention of human rights. Thus, the court was not only prepared to have recourse to a treaty which was not part of the English law but went to the extent of declaring that it was the duty of the courts and public authorities to have regard to the convention in applying and administering the law.

South Asian Judicial perspective

In the **Nallaratnam Singarasa V. Attorney General**[18]

This case raises whether a Sri Lankan citizen can rely on international human rights protections, contained in covenants or conventions that Sri Lanka has ratified but not incorporated into the domestic law. A five bench of Supreme Court stated as follows;

" ……. Hence the act of the president in 1980 in according to the Covenant is not per se inconsistent with the provisions of Constitution or Written Law of Sri Lanka. The accession to the Covenant binds the republic qua state. But no legislative or other measures were taken to give effect to the rights recognized in the convention as envisaged in Article 2. Hence the Covenant does not have internal effect and the rights under the Covenant are not rights under the law of Sri Lanka. "[19]

As stated by Noel Dias and Roger Gamble in the article of *' Nallaratnam Singarasa V. Attorney General : The Supreme Court of Sri Lanka confirms limited Human Rights Protection for Sri Lankan Citizens'* Sri Lankan Supreme Court has missed a golden opportunity to do Justice without offending accepted principles of domestic and international law. However, this case gave a green light to provide enabling legislation to give domestic effect to ICCPR and its optional protocol.

16 Article 55 of the UN Charter.

17 (1975) 2 All ER 497 at page 511

18 S.C Spl (LA) No. 182/99 Decided on 15th September 2006

19 Ibid.

In **Sepala Ekanayake** v. **Attorney General**[20] the Supreme Court discussed whether the customary international law is a part of the Sri Lankan legal system. The Accused of this case was convicted of hijacking. But this was not an offence at the time the defendant committed the act. However, after this case domestic law was drafted in accordance with international law.[21]

In **Sirisena Cooray** v. **Tissa Dias Bandaranayake**[22] **Justice Deeraratne** used Article 21 (1) United Nations Declaration on Human Rights (UDHR) to support the view that the right to take part in the governance of one's country was as important as any of the other fundamental rights.

Jadhav Case (India v. Pakistan) pending case, ICJ hearing from 18th Feb 2019

The International Court of Justice, the principal judicial organ of the United Nations, will hold public hearings in the Jadhav case (India v. Pakistan) in February 2019, at the Peace Palace in The Hague, the seat of the Court. In this pending case the one called Jadhav from India was kidnapped from Iran where he had gone for handling his businesses after superannuation from the Indian Navy. Pakistan has claimed that its security forces arrested Jadhav from its Balochistan province in March 2016 after he reportedly entered from Iran. India denies all charges and further moved this case to the ICJ in May last year against the verdict. The question is whether the accused Pakistan has violated the Vienna Convention by not giving consular access to Jadhav. The bench of the International Court of Justice stayed the execution of Indian national Jadhav by Pakistani military court until further notice,[23] while observing that prima facie the Vienna Convention will apply in the Jadhav case.

Conclusions

Modern international law is a useful aid in interpreting the extent of human rights and the state obligations in their implementation. Some could criticize that this is going beyond their state sovereignty but when it comes to individual rights modern international law provides access for remedies both domestic and international law when their rights are violated. However, the only place where an individual can enforce his rights conferred by international law are the domestic courts of his state. Therefore, a positive approach adopted by national courts towards international law would facilitate the enforcement of individual rights thereunder. Otherwise, the new status granted to the individual as a 'subject' of international law will be illusory and the rights conferred on him will remain 'elusive ghosts'.

The new trends shown by courts, particularly in some commonwealth Jurisdictions, mark the heralding of a new era in the development of modern international law, where the national

20 1988 1SLR 46

21 Offences Against Air Craft Act No: 24 of 1982

22 1999 1SLR 1

23 'The decision to stay Jadhav's execution pending ICS hearing is unanimous, It considers that the mere fact that Mr.Jadhav is under a death sentence and might therefore be executed is sufficient to demonstrate the existence of a risk of irreparable prejudice to the rights claimed by India.' Ronny Abraham, ICJ President, in September 2018

courts could serve as vehicles for the effective enforcement of international law rights. From a position of extreme dualism, where the courts said 'we take no notice of treaties', they have moved towards a more realistic position and may be considered persuasive in interpreting constitutional or statutory provisions in Sri Lanka and many other countries.

In the ***Eppawela phosphate mining case*** [24] the Supreme Court of Sri Lanka observed that even if international treaties that recognize principles such as ' Sustainable development' which is described in Rio Declaration of 1992 have not been incorporated into domestic law through Acts of Parliament, as a member of the United Nations, such principles cannot be ignored by Sri Lanka and can be made binding and becomes a part of the domestic law by adoption by the superior courts of record and by the Supreme Courts in its decisions.

In **Weerawansa** v. **Attorney General**[25] the Supreme Court observed that consideration should be given to the provisions of the ICCPR in deciding a case of illegal detention.

In ***Andra Pradesh Pollution Control Board*** v. ***Prof Nayadu***[26] the Indian Supreme Court referred to the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the Rio Declaration in interpreting *the right to life in the Indian Constitution as including a right to clear drinking water.*

One can argue that it is a good policy reason which underpin the orthodox view that ratified treaties do not become part of the law unless incorporated by statute. Doctrine such as separation of powers and the distribution of legislative competence in federations like Canada and Australia do present practical difficulties in giving direct effect to international conventions. ***But should these policy considerations be permitted to be used as a convenient cover for states to escape liability? If states could after be ratifying international treaties and thereby undertaking obligations, flout them with impunity, and then the act of ratification becomes merely platitudinous and ineffectual***.

In this context some decisions of the ECJ and most of the Asian courts invested with supra national jurisdiction, becomes relevant.[27] The court of justice has evolved the concept of **'Direct effect'** of treaties in order to enforce individual rights. This turn may inspire dualism courts to follow this approach and enforce individual rights under international law and conventions in the not too distant future.

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24 Judge C.G. Weeramantry, in his separate opinion in the Danube case (Hungary v. Slovakia), (supra), referred to the "imperative of balancing the needs of the present generation with those of posterity"…. pointed out that sustainable development had been already consciously practiced with much success for several millennia in Sri Lanka. Judge Weeramantry said; "The notion of not causing harm to others and hence sic utere tuo ut alienum non laedas was a central notion of Buddhism. It translated well into environmental attitudes. "Alienum' in this context would be extended by Buddhism to future generations as well…" Bulankulama v. Secretary of industrial development (2000)3 SLR 243-274

25 *"Should this court have regard to the provisions of the Covenant? I think I must. Article 27(15) requires the state to 'endeavour to foster respect for international law and treaty obligations in dealing among nations.' 'That implies that the state must likewise respect international law... "* (2000) 1SLR 387

26 (1999) 2 SCC 718

27 Kuperberg 1982 ECR page 664

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The Plural Legal System in Sri Lanka – Repealing the Personal Laws and Enacting a 'Uniform Marriage Law'

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Introduction

Sri Lanka is a multi-ethnic and multi-cultural country. We have different legal systems which are depending on different social values and norms. We have English law and Roman Dutch Law as two major systems of law which were given under the colonial rule. English law is applied in the areas of criminal law, commercial law, constitutional law and Family law. Roman Dutch Law is applied in the areas of Land law, Law of contracts, Delict and Family Law. In addition to that we also have personal laws which are applied to a particular group of people. **Personal law** governs issues between individuals. It consists of the law of persons, property, obligations, and delicts or torts.[1]

Marriage law is an important part of the Sri Lankan Constitution. In ancient times though marriage was not a legal concept in the Sri Lankan society there were legal necessities and procedures for contracting a marriage. Apart from the common law based on the Dutch and British legal system, the *Kandyan law*, the *Tesawalamai* and *Muslim laws* to become significant in discussing marriage systems in Sri Lanka. ***Article 16*** of the Constitution ensures the continuation of special laws already in place.

Kandyan Law applicable to Kandyan Sinhalese in present day Sri Lanka relates to marriage, divorce, and intestate succession. They have the option of choosing to marry under ***The Kandyan Marriage and Divorce Act of 1952***, or the ***GMO***. Kandyan Sinhalese who chooses to marry under the *Kandyan Act* will be governed by Kandyan law in matters relating to marriage, divorce and intestate succession by virtue of the *Kandyan Law Ordinance*, as well as the *Kandyan Matrimonial and Inheritance Ordinance.* Kandyan Sinhalese who choose to marry under the *General Marriage Ordinance* are governed by Roman-Dutch Law in matters relating to marriage, divorce, and intestate succession. ***The Jaffna Matrimonial Rights and Inheritance Ordinance No.1 of 1911*** along with ***The Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance of 1947*** and ***the Thesawalamai Pre-emption Ordinance*** govern the Jaffna Tamils on issues of marriage, divorce, inheritance and adoption. They relate to property and intestate succession resulting from marriage. The ***Muslim Special Laws*** apply to all Muslims in Sri Lanka in Family Law related issues. When a Muslim marries another Muslim, the bride and the groom do not have the option of getting married under the General Law. **The *Marriage and Divorce (Muslim) Act, no.13 of 1951***, and any related amendments are deal with marriage, divorce and other related issues of Muslims.

The plural legal system in Sri Lanka creates uncertainty, spreads confusion and permits inequality. Significant areas of family law are complex and uncertain. Applying different prin-

1 H.W.Tambiah. "Sri Lanka," in Encyclopedia of Comparative Law: National Reports. ed. Victor Knapp. Martinus Nijhoff Publishers: Dordrecht, Boston, Lancaster (1987) pp.S129-S130.

ciples of law creates a lot of problems in determining disputes among the people in Sri Lanka. It is believed that a uniform Marriage Law would be more appropriate to govern the citizens of the country and this also upholds the principle of equality. However, being a multiethnic country this transformation from a plural legal system to a uniform marriage law system imposes inevitable challenges. According to the confusions between personal laws themselves and between general law and General Law, The writer discusses the merits and demerits of repealing the personal laws and enacting a uniform marriage law on the following aspects.

Registration of marriage

Laws should try to reflect common legal values relating to the family which is an important institution in Sri Lanka. But we can identify confusion regarding marriage registration.

Registration is important for the evidence of the consent of the parties. ***The Marriage Registration Ordinance*** declares the requirements for a valid marriage in Sri Lanka. It gives exceptions to those who are married under ***The Kandyan Marriage and Divorce Act of 1952,*** and ***The MMDA No.13 of 1951.*** According to the Muslim law failure to register does not invalidate the marriage. ***KMDA*** makes registration a compulsory requirement for a valid marriage. Thus Kandyan customary marriages are invalid under that Act. *In* ***Podinona v. Herathhaamy***[2], it was held that a valid marriage between *Beatrice Ratnayake* ***and*** *Vincent Herathhamy* had not been established. But the courts have recognized the validity of marriages contracted by the performance of customary rites and practices. The court must ascertain the essentials of a valid marriage in the community and whether these rituals were in fact carried out.

Minimum age of marriage

According to General Law, Kandyan Law and Thesawalamai minimum age of Marriage is 18 years for both parties. But in ***Muslim Law*** there is no specific law to determine the minimum age of marriage. But there is a provision which says that when a marriage involving a girl under the age of 12 year takes place the consent of the Quazi of the area has to be obtained. Here we can understand that a girl under the age of 12 years can be given in a marriage with the approval of the Quazi.[3]. It must be pointed out that this provision of the Muslim law conflicts with the Section363 of the Penal Code. *Sec.363* states that a man commits the offence of rape if he has sexual intercourse with his wife who is below12 years of age. But the Muslim law allows marriages with girls below 12 years conflict with the provisions of the Penal Code which applies to all in Sri Lanka.[4] It is felt that there should be a common minimum age of marriage to all. "According to a 2004 **UN** report stated that 7 percent of Sri Lankan girls between 15 and 19 years of age were married, divorced or widowed."[5] Approaching the common age for marriage will help to reduce divorce rates and to draw the best higher educational structure for Sri Lanka.

2 1985 2 SLR 237

3 S.22 of the MMDA No:13 of 1951

4 Penal Code (Amendment) Act No:22of 1995.

5 <http:genderindex.org/country/Sri Lanka

As above discussed, having sexual intercourse with a female below the age of 16 years constitutes rape. Here we can understand that sexual intercourse with a girl over 16 years is not prohibited in the Penal Code. As a result teenagers over 16 years are allowed to have sexual relationships but they are rejected from contracting a marriage until they reach 18 years. This situation is against the morality of the people in a multi ethnic country.

It is also identified that the confusion of the mistakes have been created by the part of the legislature. The age of majority was brought down to 18 years in 1989 and also the minimum age of marriage was raised to 18 years in 1995. But the section 22 of the MRO regarding parental consent remains unchanged. Therefore the minimum age of marriage is not only problem in Muslim Law but also it creates many problems in General Law too.

Matrimonial Rights

Section 2 of *MRIO of 1876* states that whenever a man marries a man of different race or nationality from her own, she should be taken to be of the same race and nationality as her husband during the subsistence of the marriage. I think that the purpose of introducing this provision to avoid any conflicts of law. But there is no clear instructions about the mixed marriage between a Kandyan man and a Kandyan woman. For instance, in ***Manikkam v.Peter***[6] where the intestate succession rights of a low country Sinhalese husband married to a Kandyan woman was an issue. The Supreme Court held that the *section2 of MRIO* to be not relevant to that case because a low country Sinhalese is not a person of a different race or nationality. It is to be understood that in this situation the Kandyan wife retains her personal law regarding matrimonial rights and inheritance. The same legal position was followed in ***Bandaranayke v. Bandaranayke***[7].

It is also identified as another form of confusion regarding the status of a non-Kandyan woman married to a Kandyan. When a marriage takes place between a Kandyan man and a woman governed by Tesawalamai according to Section 2 of the *MRIO* a Tamil woman ceases to be governed by Tesawalamai and she becomes subject to Kandyan law. To apply different marriage laws there are so many conflicts within the procedures of personal laws. The writer believes that if marriage is the basic requirement for the creation of the legal family unit in Sri Lanka there should be some uniformity with regard to the consequences of marriage.

Bigamy

Muslim law allows polygamy. As stated by *Dr.H.W.Tambiah* in his work- Laws and Customs of the Tamils of Jaffna, "by the General Marriage Ordinance only monogamy is recognized…"[8] In ***Reid v. A.G***[9] where a man contracted a marriage according to Muslim rites. In the Privy Council it was held that since his second marriage was held between persons professing Islam it not invalid according to section18. In ***Katchi Mohamed v. Benedict***[10] "it was held that he

6 1899 4 N.L.R.243

7 1922 24 N.L.R.245

8 Natalia Abeysundere v. Christopher Abeysundere and Another 1988 1 S.L.R. 190

9 1963 65 N.L.R.97

10 63 N.L.R.505

was guilty of bigamy because the second marriage came within the definition of marriage in section 64 of the Ordinance. Therefore it was an invalid marriage under section 18."[11]

In ***Natalia Abeysundere v. Christopher Abeysundere and Another***[12] "it was held that notwithstanding respondent's conversion to Islam, his second purported marriage was void as it was contracted while the first marriage was subsisting."[13] Confusions regarding personal laws differ from one case to another in various aspects.

Equality

Equality is one of the main principles of Sri Lankan constitution. It is believed that a uniform legal system would be more appropriate to govern the citizens of the country and this also upholds the principle of equality. Article 12 of the constitution of the country guarantees that, "no person shall be discriminated on the ground of age, race, religion and sex."[14]

However special laws, especially Tesawalamai and the Muslim law, have many provisions that clearly discriminates women. In Thesawalamai married woman is in an inferior position to the unmarried woman concerning her property rights because during the marriage the husband by his marital power gets the right to administer all the property. As a result the educated Jaffna Tamil woman is subjected to the marital power of the husband.[15]

Another type of violation of equality is that some provisions in special laws discriminate one group against the other. For example, divorce is one of the forms of dissolution of marriage. Under the General Law divorce is based on a fault based system rather than irretrievable breakdown. The grounds are the same for both parties such as Adultery, Malicious Desertion and impotency. Under the Kandyan law the grounds are the same for both parties in most circumstances. But under the Kandyan law a divorce on mutual consent is available and also a divorce is granted by the Registrar of Marriages. Therefore, getting a dissolution of marriage is a simple procedure. Under the Muslim law also, a man seeking a divorce does not need to specify a ground for divorce but women must establish either ill treatment or an act or omission. These procedures are also simpler than the procedure under the General Law of Sri Lanka. It creates inequality among people.

Marriage transactions among the Sinhalese, Tamils and Muslims take the form of a **dowry.** *Chidenam* means dowry. It can be considered important among the Sri Lankan Tamils from ancient times. According to Muslim law, for a marriage to become valid it is essential for the bridegroom to give his bride a gift. It is called Mahar. Some aspects of Muslim marriage and

Divorce act is not based on pure Muslim Law. For example, *Kaikuli* is practiced and the Muslim Marriage certificate also includes a separate section to mention the *Kaikuli.*

11 Cooray, L.J.M. An Introduction to the Legal System of Sri Lanka. Lake House, 1972.p.139

12 (1998) 1 SLR 185.

13 Ibid.

14 Constitution (1978)

15 Coomaraswamy, Radhika. Ideology adn the constitution. n.d.

Cultural Diversity and Ethnic Identity

Article 14(1) guarantees freedom to promote culture and to manifest religion or belief. Therefore religious freedom is one of the important principles in a democratic country. In Sri Lanka, persons of different ethnic backgrounds profess differing religious beliefs. The writer believes that the uniform marriage law may create problems of ethnic, linguistic, and economic disadvantages among Sri Lankan communities. The reason behind that the Muslim law is very tightly connected with Islam, their religion, and Shariya law is the God's will. Therefore it is justifiable for the Muslims to feel that the introduction of a uniform marriage law would undermine their religion and would violate their right to religion which is a right protected in the Sri Lankan constitution. Jaffna Tamils also feel like Muslims. Diversity in a country is also important because it is better than a homogenous society.

Islam has very liberal and progressive opinions. In the present day those are misinterpreted and misunderstood. We can identify that Talaq divorce and polygamy allowed in Muslim law are universally criticized as discrimination against women. Under the Muslim law the husband is allowed with a unilateral divorce. As a consequence, members of the Committee on the Elimination of Discrimination against Women (CEDAW) have called for a unification of legal systems within countries. This is a very prejudiced and uninformed image of the Muslim law.

Conclusion

There is, it is submitted, an urgent need for legislative reform in this area of personal laws in order to achieve certainty, consistency and equality among all communities of the country.

It must be pointed out that, on the one hand, a plural legal system preserves solidarity between people whereas a uniform legal system would cause division between communities and a feeling of losing their cultural and ethnic identity. Polygamy is allowed in Muslim law as a solution to a social problem. During the war period a man was given the freedom to marry several women to support them and protect them. In the modern Sri Lankan context the population of the women is higher than men. In relation to the Sri Lankan context, monogamous marriage according to the General Law would be a problem in the future. Therefore the government should recognize the family planning concept and the survival of the peaceful family structure in the society.

On the other hand, uniform Marriage Law should be able to keep the peace in the society. Of Course the inevitable consequence of accepting uniform marriage law is that it may affect the free movement of individuals in society. A noteworthy feature of the marriage law should become available to achieve maximum satisfaction of human wants. It is a part of social engineering and the law ought to give legal remedy according to their needs. These are varying from people to people in the Sri Lankan community.

In the light of the current situation, therefore, the very important suggestion is that in reforming special laws to make them compatible with modern notions of justice without completely abolishing them and imposing a uniform legal system on those governed by them.

Objectives of the Industrial Disputes Act

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The Preamble to the Act speaks as follows;

AN ACT TO PROVIDE FOR THE PREVENTION, INVESTIGATION AND SETTLEMENT OF INDUSTRIAL DISPUTES, AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

Before the discussion of the objectives of the IDA it is of major importance to discuss in brief about the reasons for emergence of Labor Laws in Sri Lanka. Because of the common law labor concepts of laissez faire and freedom of contract, parties were free to form their own terms and conditions on Employer- Employee Relationship. Therefore, when a dispute arises which is to be solved in accordance with the said terms and conditions, the Master or the employer used to always stand on a strong, powerful platform when compared with the weaker bargaining power of the employee or the servant.

Also Sri Lanka as a developing country, like many other developing countries, State is the largest employer and a very large percentage of annual revenue is expended on the payment of wages and salaries to government servants.[1] Therefore, the labor relations insisted on the intervention of the government which occurred in two ways;

(i) Direct Intervention by way of Legislation

(ii) Indirect Intervention through the pronouncement of Courts/ Tribunals set up to adjudicate the labor matters.

The Industrial Disputes Act No 43 of 1950 came into effect by repealing its predecessor, Industrial disputes (Conciliation) Ordinance and the Act has been amended 14 times so far. The core objective of all labor legislation including the IDA is to place specifically recognized rights and liabilities of the industrial relations and to provide a mechanism to maintain a peaceful atmosphere between the parties and to ensure that no hindrance is going to interrupt the industrial production.

The objective of the IDA as expressed in the preamble to the Act, is the investigation and settlement of disputes which necessarily implies a power in industrial tribunals to grant reliefs necessary for bringing about harmonious relations between the employer and employees. The purpose is therefore to settle disputes that arise between the workers and the management, which if not settled would result in a lockout or strike and dislocation of business essential to the life of the community.[2]

1 S.R. De Silva, *Law and State in Industrial Relations* (H.W. Cave and Co. Company 1973) 23

2 *Law of Labour Disputes* 84

In achieving the creation of a harmonious relationship between industrial relations it is necessary to consider the connection between Equity and Labor Law. As mentioned before, because of the imbalanced strengths of the parties the need for a separate body to regulate labor on equitable principles arose. The only labor legislation of major significance in Sri Lanka which expressly contains the concept of equity is the Industrial Disputes Act.[3]

Thus, Labour tribunals, Arbitrators and Industrial Courts are required to make orders or awards which are in the nature of being "just and equitable" and the interpretation of the terms just and equitable has been subjected to many judicial views and in a very broad sense it can be stated that, the test of a just and equitable order is that those qualities would be apparent to any fair minded person which in turn implies that the fair-minded man's sense of justice is as close as one can get to some objective standard of equity.

The Act integrates and regulates a number of areas regarding the settlements of industrial disputes, such as Collective agreements, industrial arbitration, Labour Tribunals etc. in order to achieve the primary objective of enacting the IDA i.e. to maintain industrial peace between industrial relations.

An assessment of the effectiveness of the provisions of the Act to achieve the objectives.

Interpretation of the terms "industrial dispute", "workman" and the "employer"

Section 48 of the Industrial Disputes Act[4] defines the above terms. In the case of *Colombo Apothecaries Co. Ltd v Wijesuriya*[5] Thennakoon J. breaks this definition in to 3;

1. There must be a dispute or difference

2. Such dispute or reference must be between an employer/ employee or in the plural or between workmen / workmen (workmen includes a trade union of workmen)

3. The dispute or the difference must be connected to one of the following;

- Employment or non-employment
- Terms of employment
- Conditions of labour
- Termination of services
- Re-instatement of services

In the case of *Carson Cumberbatch and Co. Ltd v Nandasena*[6] Justice Thennakoon gave a lucid analysis to the 3 limb interpretation of the term Employer which is as follows;

The first limb will catch up a person who himself engages a workman and also one who engages a workman through an agent who is known to the latter to be acting as an agent.

3 S.R. De Silva, *Some Concepts of Labor Law* (Lake House Investments Limited 1977) 9

4 Industrial Disputes Act No. 43 of 1950 (Industrial Disputes Act), s 48

5 70 NLR 481

6 77 NLR 73

The second limb will apply to a principal on whose behalf an agent without disclosing the existence or identity of his principal, engages the services of a workman and in such a case the workman on discovering of the existence and identity of the principal can hold him to the contract.

The third limb would include the type of agent referred to under the second limb, because in such a case the agent is at common law regarded as having contracted personally.

In the case of *Colombo Apothecaries Co. Ltd v Wijesuriya*[7] Thennakoon J provides a 3 limb interpretation to the term "workman" which is as follows;

it falls into three parts, the 2nd and 3rd only serving to extend its ordinary meaning:

(i) any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour,

(ii) any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time,

(iii) for the purposes of any proceedings under the Act in relation to any industrial dispute, any person whose services have been terminated.

Functions Of The Commissioner Of Labour With Regard To Industrial Disputes

The Industrial Disputes Act makes it mandatory on the Commissioner who can either be the Commissioner, Deputy Commissioner, Assistant Commissioner or even a Labor Officer in terms of Section 48 of the Act to investigate into a matter involving industrial dispute by the use of word "shall".[8] Further even without a formal notice given to him with regard to the dispute if he is of the opinion that there exists an industrial dispute as defined in section 48 it's his duty to take steps to conduct an inquiry on the matter and reach a settlement.

In the case of *State of Madras V C. P. Sarathy*,[9] "it was held that Nevertheless it is sufficient for a reference that an industrial dispute is in fact apprehended and in view of the empowering of the Commissioner of Labor to make a reference in such an event, it would seem that it would be possible that contingent and future disputes could be referred for settlement."

The mechanism of utilizing the powers of the commissioner to resolve the industrial disputes is defined in section 3 of the Act.

The Commissioner has the discretion to refer to the aforementioned mechanism methods in resolving industrial disputes with the use of the term "may" in the section. However, in situations in which circumstances predicated by the statute for the exercise of the power exist,

7 *Colombo Apothecaries* (n 6)

8 Industrial Disputes Act, s 2

9 (1953) 1 LLJ 174

the court may infer a duty to exercise such power or discretion to effectuate the objects of the statute.[10]

One such method of resolving industrial dispute is, if there exists a collective agreement between the parties, the Commissioner is empowered to have the dispute resolved by the terms and conditions provided for in such agreement.[11] If arbitration has been provided for in such agreement, the arbitrator or the arbitrators to whom the Commissioner of labour refers the dispute may adopt the procedure laid down in the agreement which may incorporate the Act or in the absence thereof one that is mutually acceptable. In any event they would have to ensure procedural fairness and principles of natural justice.[12]

The Commissioner's power to refer the disputes to conciliation can be done two ways;

- Direct conciliation by the Commissioner himself
- Referring the matter to an authorized officer to settle the dispute by way of conciliation.[13]

Some of the Advantages of Conciliation can be named as follows;

1. Less time and money consuming
2. Heartens the parties to clarify their terms of settlement and makes each party responsible for being adhered by such terms.
3. Keeps the confidentiality of the matter and less written records
4. Although there may be a situation of a compromise, it is a win-win situation for the parties.

The Commissioner with the consent of the parties, has power to submit the dispute for voluntary arbitration, where he thinks that a settlement cannot be affected by way of conciliation. Arbitration, a method of alternative dispute resolution (ADR), where the parties to a dispute refer it to one or more arbitrators and this method involves a third party reviews on the dispute who can either be an arbitrator nominated jointly by such parties or representatives, or in the absence of such nomination, to an arbitrator or body of arbitrators appointed by the Commissioner or to a labour tribunal.[14]

Powers Of The Minister With Regard To An Industrial Dispute

Minister's purview of interference with industrial disputes is provided in the Act[15]. Accordingly, his exercise of powers is of two folds;

10 *Nadesan V Senanayake* [1981] 1 SLR 238

11 Industrial Disputes Act, s 3(1)

12 Nigel Hatch, *Commentary on the Industrial Disputes Act of Sri Lanka* (Friedrich-Ebert-Stiftung 1989) 100

13 Industrial Disputes Act, s 3 (1) (b) & (c)

14 Industrial Disputes Act, s 3(1) (d)

15 Industrial Disputes Act, s 4

i. If he is of the opinion that an industrial dispute is of minor nature, he can recommend by order in writing for the parties to go for compulsory arbitration.

ii. He may by order in writing refer any industrial dispute to an industrial court for settlement.

Minister's power of referring to arbitration can be viewed as "compulsory Arbitration" in which the minister has a wide discretionary power to decide whether an industrial dispute is major or minor in nature.

In the case of *Aislaby Estates v Weerasekara*[16] the Supreme Court held that Section 4(1) vests the Minister of Labour with an amplitude of power and provided that he refers an industrial dispute within the meaning of section 48 of the Act, his opinion once it has been formed and his reference thereof cannot be reviewed as he solely acts in an administrative capacity and not judicially or quasi judicially.

Ceylon Bank Employees' Union v Yatawara[17] it was further contended that it is not open to a party what was referred was not an industrial dispute within the meaning of the Act and challenged the jurisdiction of the tribunal on the basis that there was no industrial dispute.

Walker sons and Co. Ltd v Fry[18] The minister's power to refer an industrial dispute to compulsory arbitration is one of last resort, exercisable only if conciliation fails, and if the parties themselves do not agree to reference to arbitration.

Nevertheless, following can be viewed as the major differences between the powers vested in the commissioner and the minister;

- Minister's powers are confined to the two methods of compulsory arbitration and referring to industrial courts, but Commissioner's powers though not compulsory are wide enough to utilize many more mechanisms of dispute resolution.

- The Minister can only exercise his power when there exists an actual industrial dispute, whereas the Commissioner can act on his powers even where he apprehends an industrial dispute.

Industrial Courts

Every order of the Minister under section 4 referring to a dispute for settlement by an industrial court shall be accompanied by a statement prepared by the Commissioner setting out each of the matters which to his knowledge is in dispute between the parties. The industrial court shall be constituted by selecting either one person or three persons from the panel appointed by the president.[19]

16 [1973] 77 NLR 241

17 [1963] 64 NLR 49

18 [1966] 68 NLR 73

19 Industrial Disputes Act, s 22, 23

It is the duty of the industrial court constituted to adjudicate the dispute, after conducting an inquiry to reach a just and equitable award on the parties and Reference shall be made in every award of an industrial court to the parties and trade unions to which, and the employers and workmen to whom, such award relates.[20]

A dissatisfied party can refer the award of IC to be reconsidered by the minister and such request of reconsideration should be made within 12 months from the date on which the award came into force, further the minister can confirm, cancel, modify or make a new award on the said dispute.[21]

Labour Tribunals

Labour Tribunals are the most common courts established for which workmen usually go for relief against unfair termination. Provisions relating to Industrial tribunals do not apply to the public sector because usually they would go by way of a Fundamental rights Action against the arbitrary or unfair treatment by the executive or administrative authority.

In terms of section 31(B) (1) LT jurisdiction can be categorized under termination of services, claims of gratuity and terms of employment. In respect of the above matters a workman or a trade union on behalf of a workman may make an application to a LT for relief or redress of the above matters.

In the case of *United Engineering Workers' Union v Devanayagam*[22] the court held that section 31(B) (1) is the gateway through which a workman must pass to get his application before a Tribunal but it is sections 31(B) (4) and 31(C) (1) which state the powers and duties of a tribunal on an application.

Objectives Of The Indian Labour Laws

A critical analysis on efficacy of mechanism to industrial disputes resolution in India shows that Industrial Disputes Act provides for machinery for just and equitable settlement of Industrial disputes by adjudication, negotiation and conciliation. It promotes measures for securing and preserving amity and good relations between employer and workmen.[23]

Meenakshi Mills v State of Madras[24] held the purpose of labour laws (The Labour Management Relations Act) is to strengthen, rather than weaken, that corporation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise.

20 Industrial Disputes Act, s 24

21 Industrial Disputes Act, s 27

22 [1967] 69 NLR 289

23 M.J.Arputharaj and R. Gayatri, 'A critical analysis on efficacy of mechanism to industrial disputes resolution in India' (2014) <http://www.ijcrar.com/vol8/M.J.Arputharaj%20and%20R.%20Gayatri.pdf> accessed 5 December 2019

24 [1951] AIR Mad. 974

B. Naidu v Chrome Leather Co. Ltd[25] The Scheme of the Act shows that it aims at settlement of all industrial disputes arising between the capital and labor by peaceful methods and through the machinery of conciliation, arbitration and if necessary by approaching tribunals set up under the Act.

Objectives Of Labour Laws In The Uk

Without legislation and laws to govern what happens at the workplace today, employees would be left open to hostile and unfair treatments by the employers and so also, employers would be left unaided on how to control employees that take advantage of situations. Most of the laws with regards to employment are set up in order to protect and be of benefit to both employers and employees without one taking advantage of the other. With the introduction of the Employment Rights Act, Sex Discrimination Act and Race Relations Act, there is a reduced rate on racial discriminations in the work place. For example, where before the relevant laws were imposed it an employer can get rid of any employee he wants to, with such laws in place, it becomes harder for an employer to just get rid of any employee and get away with that without consequences.[26]

Recommendations

Establishment of industrial appellate courts to hear the Appeals from the Labour Courts also may contribute for the speedy disposal of labour cases. The introduction of mandatory disciplinary inquiry for disciplinary termination of employment may also contribute to the decrease of labour cases. Also an employer who makes an appeal to the High Court against an order of the Labour Tribunal has to furbish to such labour tribunal a security in cash calculated in accordance with the provisions of the Act. This mandatory requirement imposes an unreasonable burden on the employer who wishes to question on the legality of the just and equitable order made by the labour tribunal. The IDA provides guidelines as to payment of compensation as an alternative to reinstatement or in lieu of compensation. Even though the workman has the option of compensation, an employer does not have such options and it is at the discretion of the court.[27]

In terms of the new amendment brought to the Civil Procedure Code,[28] a party who appoints a registered attorney under section 27(2) shall nominate at least one not more than three in order of preference to be his legal representatives for the purpose of proceeding with the action, in the event of his death pending the final determination of the action. However, there is no such applicability of provisions in terms of an action in the Labour Tribunal. Therefore, in the event of the death of the applicant there is no room for anyone else to proceed with the action in the tribunal.

25 [1949] ILR Mad 924.

26 All Answers ltd, 'Modern Employment Law in England' (Lawteacher.net, December 2019) <https://www.lawteacher.net/free-law-essays/employment-law/modern-employment-law-in-england.php?vref=1> accessed 5 December 2019

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A Wake-Up Call beneath the Ashes of the Beirut Explosion: An Analysis on Needed Reforms in the International Trade Law on Non-Nuclear Explosive Material

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Abstract

The Beirut Explosion which is regarded as one of the largest non-nuclear explosions of recent times thrust the realities of the non-nuclear explosive material global trade sector, into the limelight. Investigations on the causes of this tragedy revealed that the mismanagement of large quantities of ammonium nitrate served as the key reason for the explosion. Non-nuclear explosive substances such as ammonium nitrate are commercially transacted for various industrial purposes along complex supply chains in the international economy. Such materials are subject to a relatively underdeveloped and relaxed system of international laws due to their economic use and non-nuclear nature. However, this has resulted in the wrongful use and mismanagement of such substances. The article explores the present realities of the international trade law on non-nuclear explosive material by utilizing ammonium nitrate as a case study. It then proposes a series of recommendations on standardizing the existing international trade law through the principle of centralization and through the establishment of suitable global entities.

Understanding the Ground Realities of the Beirut Explosion

The 04th of August 2020 dawned as any other average day for the Republic of Lebanon which is located on the Mediterranean Sea border as part of the Arabian Peninsula. The populous went about their daily lives in the midst of the COVID-19 global pandemic which had penetrated the Lebanese borders infecting over 5000 people. Towards mid-day a roaring fire erupted from Warehouse 12 of the Port of Beirut, which was located in close proximity to the Port's grain silos. Shortly after the eruption of the fire around 3.00 pm GMT, the roof of Warehouse 12 was engulfed in flames which led to the first large explosion. This explosion was followed by a series of smaller eruptions which were described by witnesses as the sounds of a firework display. In a mere 30 seconds the pale sky of Beirut was shattered by a large mushroom cloud which birthed a supersonic blast wave that radiated through the city.

According to the Governor of Beirut Marwan Abboud, 137 people have been killed and as many as 300 000 people have been made homeless by the explosion which has caused an estimated collateral damage between USD 10 to 15 million. The escalation of casualties and the sheer damage was worsened by the high density of population in the capital which is home to 2 million people.

The controversy surrounding the Beirut Explosion lies in the fact that it was not a bomb explosion which one witnesses in the news or an eruption from faulty electricity. It was as a result of mismanagement of a large stock of ammonium nitrate. The sheer gravity of the explosion attests to the fact that the Beirut Explosion is one of the largest non-nuclear blasts in recent history. The explosion destroyed the nearest dockside and created a 140 m wide crater along the shore which then immediately filled up with sea water. The warehouse in which the fire originated and a portion of the grain silos were destroyed to dust. The port side was devastated and the explosion was so powerful that a ship was blown out of water onto the concrete platform of the port. The sounds of the explosion were heard as far off as Cyprus which is located 200 km across the Mediterranean Sea.

Lebanon's President Michel Aoun stated post to preliminary investigations that the magnitude of the explosion; which was equivalent to a 3.3 magnitude earthquake as per the seismologists at the United States Geological Survey, can be attributed to the unsafe storage of 2750 tonnes of ammonium nitrate at Warehouse 12 which caught on fire. The cause of this fire is cited by the Lebanese news agency LBCI as welding work which was conducted at the door of the Warehouse. The arrival of such a large quantity of the non-nuclear explosive substance in Beirut, dates back to 2013 when a similar amount of ammonium nitrate was transported in a Moldovan cargo ship named MV Rhosus. This cargo ship docked in Beirut due to a technical problem and was later inspected and banned from leaving due to the questionable substance it was transporting. The ship was shortly after abandoned by the owners and the Beirut court structure ordered for the ammonium nitrate to be stored in Warehouse 12 until proper disposal.

Ammonium nitrate is commonly used as a nitrogen compound for agricultural fertilizer. Since the substance is inexpensive to produce as opposed to other nitrogen sources, it is used commercially for various industrial purposes ranging from the production of fertilizer to use in explosives in mining. The lethal downside of ammonium nitrate stems from its high propensity to cause damaging explosions when mixed with other substances. It belongs to a chemical class of compounds known as Oxidisers which increase the concentration of oxygen molecules in a space and thereby makes other substances more flammable.

Though it is relatively harmless as a sole compound, it is mixed with various fuels to produce bombs by militant groups. Professor of Chemistry at the University College of London, Andrea Sella argues that the substance is relatively harmless if it is stored properly. However, over time ammonium nitrate absorbs moisture in the air and solidifies into a rock. This solidification process according to Professor Sella, increases the propensity of the substance to act as an intensive explosive agent.

The Beirut Explosion highlights the inherent dangers of global under regulated trade, transportation and storage of non-nuclear explosive material such as ammonium nitrate. The diversity in national realities across trading nations of the world, necessitates urgent amendments in the international law pertaining to the trade of such substances.

An Overview on the International Trade Law Discussion Related to the Beirut Explosion

Since World War II, the focus of the world in terms of international security has been on nuclear non-proliferation. Though the use of WMDs are considered a Crime Against

Humanity under International Humanitarian Law, the regulations that exist for the trade of explosive material such as ammonium nitrate, pales in comparison to the strict guidelines on trading in nuclear technology. Symington argues that the establishment of the International Atomic Energy Agency (IAEA) in 1957 followed by the adoption of The Non-Proliferation of Nuclear Weapons Treaty (NPT) in 1968, set up a control system for the trade of nuclear technology for peaceful purposes. However, a similar system cannot be found in relation to the international trade of explosive material, considering the diverse industrial uses of such substances. For example, ammonium nitrate which is being regarded as the main cause for the Beirut Explosion, is used as a blast substance in the mining industry. Hence this tragedy must be discussed in the light of international trade in non-nuclear explosive material, considering the possibility to mismanage the storage and misuse of such substances for non-peaceful purposes.

The Current Status of International Trade Law on and Local Use of Non-Nuclear Explosive Material

The international trade law pertaining to global transactions on non-nuclear explosive material is a collection of varying regional and national laws which are tied together by model guidelines presented by The United Nations (UN). Hence what constitutes as a truly international system of regulations are model rules and regulations put forward by the UN in various recommendation Volumes. An apt example of such model guidelines is Volume I containing "Recommendations on The Transport of Dangerous Goods" put forward by The Committee of Experts on The Transport of Dangerous Goods and on The Globally Harmonized System of Classification and Labelling of Chemicals, under the purview of The United Nations Economic and Social Council. According to this Volume, ammonium nitrate which caused The Beirut Explosion, classifies as a "High Consequence Dangerous Good" falling under Division 5.1. Therefore, there are codified technical and scientific guidelines pertaining to the international trade in non-nuclear explosive material, which are suggestive and non-binding in nature. The trading countries are provided with the sovereign freedom to determine the rules governing bilateral and multilateral trade in such substances. They are merely encouraged to adhere to the model regulations so as to support the standardization of trade in dangerous goods, such as specifically identified non-nuclear explosive material. This is evident from Clause 2 in "The Nature Purpose and Significance of the Recommendations" section of the aforementioned volume: a segment of which is quoted below.

"The Model Regulations aim at presenting a basic scheme of provisions that will allow uniform development of national and international regulations governing the various modes of transport; yet they remain flexible enough to accommodate any special requirements that might have to be met. It is expected that governments, intergovernmental organizations and other international organizations, when revising or developing regulations for which they are responsible, will conform to the principles laid down in these Model Regulations, thus contributing to the worldwide harmonization in this field."

The above provision aptly captures the present reality in international trade law pertaining to non-nuclear explosive material which is the absence of a binding and regulated system of laws in this area. Voicing concern on the lack of oversight in international regulation of

trade in dangerous substances such as ammonium nitrate, Julia Meehan who is the Managing Editor of a trade publication titled "ICIS Fertilizers" told Reuters that "There's no global body that looks across it, it's country to country or regional. It can even differ from port to port." Therefore, the trade in such substances is purely at the mercy of national trade law and the experience of the countries in the trade of non-nuclear explosive material.

This reality also leads to a slow development in this area of international trade law. The Beirut Explosion is far from an isolated event in terms of the mismanagement of ammonium nitrate. There are thirty-five major disasters reported across the world due to the mismanagement of the substance since 1916. The Texas City Disaster which occurred in 1947 is one of the largest non-nuclear explosions in human history which was caused by the explosion of 2300 tonnes of the substance, imported by the United States for the production of explosives during World War II. The blast killed 581 people and injured over 7000 more. Fast forward to 2001 and an explosion of approximately 300 tonnes of ammonium nitrate in a fertilizer factory in Toulouse, France, causes the death of 31 people. France began to toughen its international trade regulations pertaining to dangerous chemicals after this disaster. Despite the occurrence of such damaging disasters, international trade law pertaining to non-nuclear explosive material has developed in a surprising slow pace and often as a reaction to an explosion.

Regulation of international trade in non-nuclear explosive material does exist but it takes place often at a national level through individual frameworks implemented by exporting and importing countries. If the trade in ammonium nitrate is taken as an example, the analyst firm IHS states that "there is continuous pressure around the world to regulate use and trade of ammonium nitrate because of its potential for misuse as an explosive in terrorism or for accidental detonation". Due to this potential for misuse certain countries such as China, Afghanistan, Colombia, and the Philippines have banned the import of ammonium nitrate based fertilizers. In Europe the use of the substance is subject to the Seveso 03 Directive, where a tier based approach is adopted to regulate the use of ammonium nitrate. An establishment using the substance is faced with stricter regulation based on the quantity of ammonium nitrate used within its production or service processes. In the USA an institution cannot store more than 2500 tonnes of the substance in a building without automatic sprinklers. Whilst recognizing the progressive steps towards regulating the trade of non-nuclear explosive material such as ammonium Nitrate, the central question is whether a nation specific approach is enough to prevent potential disasters.

Following the Beirut Explosion, the frantic search of other Countries for the improper storage of dangerous chemicals within their borders, is proof of the development of reactionary regulations for transacting in non-nuclear explosive substances. For example, officials in Dakar which is the capital city of Senegal requested for the return of almost 3000 tonnes of the ammonium nitrate from the City's port. Investigations in Romania revealed the illegal storage of 5000 tonnes of the same substance in a single warehouse. An additional 3800 tonnes of ammonium nitrate were discovered in raids across the Country. Such discoveries of illegally stored chemicals are indicative of unlawful trade in the substance and the existing global black market for trade in non-nuclear explosive material.

Another notable revelation of national level investigations conducted in various countries following the Beirut Explosion, is the storage of the hazardous substance in a single location

over a long period of time. There are approximately 28 000 tonnes of ammonium nitrate stored in Constanta which is the largest port in Romania. The Chennai Port Authorities acknowledged that it has been storing close to 800 tonnes of the substance at the Port since 2015. The concentration of the non-nuclear explosive material in one location over prolonged periods inevitably leads to a depletion of the protective levels of storage equipment. Hence the international trade law on hazardous material must encompass strict regulations for the complete cycle of use of non-nuclear explosive material such as ammonium nitrate: starting with its extraction in one country and ending with its final use in another.

The need for a comprehensive international trade law for dangerous chemical substances becomes more apparent when discussing the possibility for wrongful use of non-nuclear explosive material. The findings within Romania, post to the Beirut Explosion where 9000 tons of the compound were confiscated through 51 inspections, is suggestive of the high probability to access this material within national borders of countries producing and importing the substance. Hence rebel and terrorist groups operating within a country can purchase and utilize non-nuclear explosive material which are commercially available, to produce bombs and other destructive weapons. There are a few notable examples of misuse of ammonium nitrate by insurgent groups as a non-nuclear explosive substance. Several attacks instigated by the Irish Republican Army (IRA) such as The Bishopsgate attack of April 1993 which left 40 persons injured and the consequential bomb explosion in Manchester in 1996 which left 2000 people injured, have been a result of the explosion of bombs containing ammonium nitrate. The Oklahoma City Bombing in USA which is a domestic terrorist bombing that caused an estimated $652 million worth of collateral damage, was caused by an ANNM Fertilizer Truck Bomb. The apparent avenue for misuse is another reason for reforming the international trade law and advocating for greater regulation of transactions pertaining to non-nuclear explosive material.

A key challenge to the harmonization of international trade law and the output of timely research on this subject is the absence of consistent data pertaining to the trade, transportation and storage of non-nuclear explosive material by governmental as well as non-governmental institutions, within a national structure. Hans Reuvers who is a German Expert on ammonium nitrate and fertiliser technology, and an Executive Committee Member at the Ammonium Nitrate/Nitric Acid Producers Study Group (ANNA), in an interview for an article by Reuters on the Beirut Explosion, referred to global data on storage of the substance as being “spotty”. This lack of reliable information makes it difficult to map the various uses of non-nuclear explosive material within state borders and consequentially formulate controlling legislation.

According to the Observatory of Economic Complexity, the 2018 world trade in ammonium nitrate amounted to $ 2.18 billion in value, with Russia being the world’s largest exporter and Brazil serving as the largest importer. Though a handful of countries produce the substance it is transported along complex global supply chains to many countries utilizing the substance. Furthermore, since this ammonium nitrate is often transported by sea, there is a high likelihood that it will be stored within port warehouses for prolonged periods of time. Though there is surface level data of this nature on the global trade in ammonium nitrate, there is an absence of data on the collective value of the international trade market in key non-nuclear explosive materials that are transacted globally. It is a point of grave concern that international trade

in billion dollar industries of dangerous substances such as ammonium nitrate, is held at comparatively lax regulation as opposed to its nuclear counterparts such as Uranium and Plutonium. Hence timely reforms in the international trade law in non-nuclear explosive material, must take place which bring about international consensus and national obligation in transacting on such material.

Proposed Recommendations for Reforming International Trade Law on Non-Nuclear Explosive Material

The first step to developing standardized codes of international trade in non-nuclear explosive material is the establishment of a global regulatory body. As the IAEA was established in 1957 under the purview of the United Nations, to oversee the development of nuclear energy for peace purposes and to administer global safeguards for adherence to commitments under the NPT, an international regulatory institution must be put in place to oversee safe trade in non-nuclear explosive substances. Such a body can then form a non-exhaustive but comprehensive list of dangerous materials of this nature which are frequently transacted between Countries for various commercial purposes. It can then work with the Countries exporting and importing such substances to create a global map on movement of non-nuclear explosive materials. The collection of such international trade data will assist in the standardization of global law pertaining to the trade of such substances.

Secondly, the key producing Countries of non-nuclear explosive materials must unite to form a multilateral export control regime which is committed to following strict international trade practices developed by the aforementioned global regulatory bodies. The structure of this control regime can be adapted from the Nuclear Suppliers Group (NSG) which is a collection of nuclear supplier countries supporting the non-proliferation of nuclear weapons through the control of exports of materials and technology which can be used to manufacture deadly weapons. Hence the Member Countries of this control regime can adopt mutually agreed upon best practices to prevent the misuse of non-nuclear explosive materials and share technical expertise on the safe storage of such substances.

This global regulatory body may then develop upon the existing best practices and model regulations proposed by UN bodies for the international trade of dangerous goods and develop comprehensive international regulations specific to each key non-nuclear explosive material based on the nature of the substance and its various uses. Through diplomatic liaising and collective lobbying, the Countries exporting and importing such material who are part of the multilateral export control regime mentioned above, can be encouraged to adopt these regulations.

It is fourthly proposed as a measure of developing a codified international trade law on non-nuclear explosive materials, to condense international regulations which are cross cutting in the trade of all such substances, into a Convention or Treaty document on prevention of misuse and neglect of non-nuclear explosive materials. Such an international document will increase the binding nature of the international trade law on dangerous chemical substances for the Countries that sign this convention or treaty and also set a persuasive precedent on proper trade practices pertaining to such materials.

Furthermore, such a Convention or Treaty can include a set of repercussions on violating the regulations set out in the international document along with an appropriate legal mechanism for overseeing allegations of non-adherence. The establishment of an international tribunal which oversees accusations of international trade law violation on sale of non-nuclear explosive material, is proposed as an apt global legal body. Furthermore, the World Trade Organization dispute resolution mechanism can be strengthened to appropriately oversee trading disagreements which occur between two countries transacting in such substances.

Conclusion

In the face of apparent examples of the dangers of the misuse of non-nuclear explosive material, it is obvious that the current international trade law must be reformed to fit expansive global commercial transactions pertaining to such substances. Though Lebanon as a nation is healing from the tragic Beirut Explosion, the world must hear the wake-up call which lies beneath the ashes of the explosion and not forget what the disaster teaches. Unless standardized regulations are adopted globally for international trade in non-nuclear explosive material, misuse of such substances is inevitable due to their lethal nature. Such international standardization in the law may only be achieved through the establishment of a central oversight body and the collaboration of all key trading countries participating in the export, import, storage and utilization of non-nuclear explosive material. Otherwise the misuse and mismanagement of such potentially hazardous substances which are used in industrial processes and are commercially available, is inevitable.

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Survival of Muslim Women in the Islamophobic Aura

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Introduction

In the new millennium while everybody is celebrating the equality of women in the society, still Muslim women are being the prey of Islamophobia in the minority and majority countries. This article aims to bring the troubles faced by Muslim women in the society where they live. I do not intend to state that women from other communities are being treated well. Because I'm apologetic to mention that still news channels are telecasting at least one rape case or honor killing incident in their headlines per day. And we are living in a society where People's mindset did not reach the level to accept menstruation as a natural thing which happens in women's bodies yet they are hesitant to open up about it. Domestic abuses, voting rights, educational discriminations, child marriage and teen pregnancy; these are all common for women from all religions. No matter whatever the laws are imposed by the government to protect women or feminist voice against the anti-women predicaments, women are still being ill-treated at any part of the world. But the insight of this article is to mention the discrimination against Muslim women regardless of violence faced by women as a whole.

The Muslim women have been fighting for their basic human right which is transmogrified in the name of terrorism by many anti-Semitics. Many Muslim women are well conversant with the principles of universal modernity and values of individualism and professionalism. They actively adopt parts of these values and reflect them in their everyday lives. The hindrance is the socio cultural policies of home countries which emerges the violence against them. The cultural organizations and commissions on human rights have enforced law and order to prevent the victims from in-humanitarian activities but yet they are considered as the threatening adversaries to the multicultural society. Despite the calamities there are a number of Muslim women who have booked their names in the path of success. Many women who live either in Western countries or Muslim majority countries have come out of this stereotype.

Certainly it doesn't mean that only in Western countries Muslim women are undergoing hardship. In Muslim countries also, they are confined in the name of culture and norms. According to the Quran verse, "Oh believers, men and women are protectors, one of another: they enjoin what is just and forbid what is evil." But in existence from voting to flying the flight, women have to fight in order to attain equality. International human rights law indicates that everyone has the right to freedom of expression and freedom to manifest their religion or beliefs. The way people dress can be an important expression of their religious, cultural or personal identity or beliefs. As a general rule, the right to freedom of religion or belief and freedom of expression entail that all people should be free to choose what and what not to wear.

Islam started to spread from the year 622 A.D. Ever since Islam is considered to be a monolithic society and the Muslim women were not the target. But, after multiple terrorist attacks by number of groups who carries the Muslim name, the situation has changed upside down. Significantly, after the event of 11th September 2001 on the twin towers. Since then the attacks in London, Paris, Brussels, Barcelona and recently in Sri Lanka have increased fear and anxiety. As the consequence, the Muslim women became the spot light because of their visible attire. It developed into the rage of making Muslim women to adapt the culture of westerners by imposing several laws on their dress codes, and they also had to endure violation of basic human rights and hate speech in public places. In contrast, in Muslim countries, the human rights of Muslim women are violated by forcing them to wear the full covered veil, making them the subject of pre matured wedding, prohibitions to drive, study, participate in sports, voting rights, etc. and moreover in some Muslim countries women are not allowed to appear in public places. So the main two distinct categories are restrictions on Muslim women who live in western countries and restrictions on Muslim women who live in Muslim countries.

1. Restrictions on Muslim women who live in western countries.

a) Attire Discrimination – Woman is like a diamond

Most of the Muslim women who are in terms following the traditional Islamic culture and norms tend to wear headscarves and to the extend that they wear the veil to cover their full face. But among the westerners it is considered in two ways. 1. The attire of Muslim women distinguishes them from other women in the name of religion. 2. After post-war and terrorist attacks, Islamic attire is considered to be a threat to the westerners. So they demand Muslim women to get adapted to western culture in order to have a peaceful living space. But women who are solid about not giving up their traditional clothing for westerners face many troubles in their day to day life. So the broad vision of Islamophobia turned out to be "hijabophobia", the hostility towards the hijabs.

For example, in France, the French government maintains two bans on Muslim dress in public. In the first place it prohibits wearing headscarves in schools and second, proscribes wearing burqa (face veil) in public places under the law of "Secularity and Conspicuous Religious Symbols" (officially Law 2004-228). Prior to the law imposed, one crime case recorded in Paris was that two men assaulted one pregnant woman and tried to remove her hijab and four days later the woman suffered a miscarriage. In London, Muslim women are always threatened to "Get out of the country". Representing that in London University, two assassins aged 41 and 39 forcibly removed the face veil of a Muslim student and the students who participated in the Islamic awareness event also suffered anti-Muslim accusations and insults. In May 2015, the German government enforced the law which includes the particulars prohibiting Muslim women from wearing full face veils in schools, hospital and on public transportation. In Sweden the National education agency issued a circular in 2013 to prohibit wearing niqab or burqa in schools as to maintain equality of the sexes with respect to democratic principles.

The incidents are enormous. In Canada, a woman with her children was attacked in a mall and was yelled "leave our country" and another woman who was in religious attire was physically assaulted and told that her hijab and herself do not belong to Quebec. Aftermath of the 2017 Barcelona attack, a 38-year-old woman was attacked by two or three young men. It should be mentioned that Spain banned headscarf in 2010. In Sri Lanka one of the national school's anti-Muslim teachers, students and parents carried out a protest against three Muslim teachers for attending the classes in their cultural attire and it got the media attention.

Whether it is "Islamophobia" or "Hijabophobia", Muslim women are prohibited from representing their religion in their attire no matter where they go. It led many women to stay back from their path of achievements. For example, FIFA's "hijab ban" crisis. The female athletes were declared to be ineligible to participate in the sport event because of wearing headscarves. In 2012 Iranian women's soccer team was disqualified from the Olympics highlighting the reason all the players wore hijabs. France is one of the top countries which discriminates Muslim women by their clothing. In 2019 a famous French sportswear brand decided not to sell hijab in France. The hospitality industry is not exceptional to this Islamophobic concept. In Malaysia the hotels believe that employees who wear headdress are lacking professional looks and skills so it let Islamophobic policies to be implemented.

In this context, many incidents fall as examples which set wearing hijab or representing Islam through any form of attire was led to physical or verbal harassments in the westerner's world. To make anti-Muslim movements even stronger the other nationalists urge the government authorities to impose restrictions on Islamic identity based clothing being worn in public places. In many prominent countries girls are advised and compelled to remove their hijabs and long Punjabi trousers to hide in their bags.

b) Gender Islamophobia

A Muslim woman's life in a well-defined western country is like "war without the border". As per many researchers, Islamophobia is gender specific than gender neutral. According to research, women are the main victims who suffer from the majority of the hate crimes because of their appearance of "more visibly Muslims". Muslim women are perceived as "soft and easy targets" due to their identities as well as the fact that connotes submission, passivity and powerlessness. As the result of a survey Muslim women were found to be the most disadvantaged group and described as co fronting a triple penalty due to their ethnicity, religion and gender. In most of the countries, Muslim women are subjected to discriminatory jokes, derogatory insults and social exclusion by managers,, co-workers or customers. If we consider deeply, the root cause of gender phobia against Muslim women is due to symbolizing religion. But furthermore for a Muslim woman, her surname plays the vital role in getting a job, school admission or to obtain an achievement. Most of the time opportunities are rejected and even Muslim men who adapt to westerner's culture bullies Muslim women who adhere to the Cultural norms. There are many hate crimes against the Muslim community in Western countries. Thus, the violence against Muslim women is higher

than men due to their visibility and those governments have number of law and orders to protect women. But despite that, Muslim women are brutalized for being Muslim.

2.0 Constraints on Muslim women who live in Muslim Countries

The essence of Islam is it enshrines the rights of Muslim women beautifully and there is no concept of one gender being superior to another. According to a Quran verse man and woman are protectors of one another; they enjoin just and forbid what is evil. The thoughts of Islamophobia and anti-Islam communities argue that Muslim women are being oppressed. It's a true thing but it is not from religion. Before the advent of Islam the status of women was dismal, being viewed as embodiment of sin, misfortune, disgrace, has no rights or position in the society. But after the advent of Islam that concept was changed and rights and position of women were clearly defined.

But when the political era started with adherence to Islamic principles, the laws again started oppressing women. So the legal status of Muslim women became the subject of transitions. Islamic laws, customary laws, imported European laws and many reforms of Islamic laws have been imposed. But the status of women has not been settled in one yet. Legal issues regarding the status or rights of Middle East women are quite different from those who are in western countries. The women fail to invoke their rights in Muslim countries. So the supremacy of "family law" and "personal status codes" starts influencing reputedly based on classical Islamic law. In many of the Muslim countries, high level of restrictions exist such as prohibition to do higher studies, voting, driving, going out without a male guardian, etc.

In the Middle East, Saudi Arabia stands for oppression and hypocrisy. According to sharia, the minimum age for a girl to get married is nine. But many countries considering the mental and physical condition have set the average minimum age limit for a girl to get married between the age of 16 to 18. But Saudi Arabia is the country which has the lowest age limit of ages 10 for a girl to get married. In Muslim countries, the dress code of women is controlled by strict laws and regulations and enforced to various degrees across the country. Muslim women wear an abaya, a long cloak and a headscarf mostly in black color. Women are prohibited from taking part in sports events and women are limited from spending more time with men who are not related to them. Public places and public transportations have separate entrance segregated by sex and unlawful mixing of gender will be charged under the crime against both parties, but women typically face the harsher punishment. Even women are prohibited to change dress in trial rooms. In Middle East Muslim countries, women have the disadvantage in areas of family law and inheritance, where women are empowered with lesser rights than men and subordinated under men's authority.

Starting from the colonial ruling, Saudi Arabia, Iran and Kuwait are the main countries which have strictly imposed restrictions on women's activities. The efforts of feminism activists and other human rights activists have brought a change in law and order. As a result of that, in recent times Middle Eastern Muslim women are out of oppression.

In 2017 a cleric announced the "Nations daughters" to avoid the dresses which have decorations, slits, said opens and embellishments. Two weeks later to that announcement a video went viral showing an Arabic woman walking in the north dessert wearing a mini skirt. Reformers

applauded for her bravery while some demanded for her arrest. In 2012, Saudi sent women athletes to the Olympics for the first time and celeries denounced two of the competitors as "Prostitutes" and announced that women have to be accompanied by a male guardian and should cover their hair. After that Saudi proposed to host The Olympics without female contestants in 2015 and back in 2017, Saudi welcomed the first ever spectators. Followed by that, Saudi women were allowed to travel without a male companion and also they were allowed to wear any color of their choice and in 2019, Saudi government announced that there is no need to maintain separate entrance to the restaurants segregated by sex. After that they were allowed to obtain their personal driving license and the Iranian women are allowed to pursue their higher studies in the field they like. Kuwait women were permitted to pass their nationality to their children and their foreign husband. Now opportunities are open for Kuwait women to attend university, go to work and lead the family. Even though the concept has evolved to consider "All people are equal in human dignity", still the change is only underway. It cannot be either on culture and gender. The change has to be gradually created to make women's life better.

3.0 Muslim women in the path of success.

Even if the world supports or goes against, there are numbers of Muslim women who did not get back from perusing their dreams. "Seeking knowledge is the duty of every Muslim". The pious Muslim women like Aisha Bint Abu Bakr, the great law scholar of Medina, Bint Mu'awwad, Umm Attyah, the teacher of many male scholars and Aisha Bint Sa'ad Ibn Abi Wakkas have set a strong example for women achievements.

Fatima Al Fihari, a Muslim woman was the founder of the higher education Institution Al Qarawiyyin, a University in Morocco, which the Guinness Book of world record calls as the oldest continuously operating institution in the world. Feryal Salem, a young Muslim woman is an Assistant Professor of Islamic Scripture, Law and Co-Director of Islamic Chaplaincy Program. She is one of the growing numbers of young American Muslim women scholars and academics who including Intisar Rabb, who was recently appointed as the Professor of Law and History at Harvard. The youngest Nobel Prize laureate, Malaala Yousafzai is among the list of 100 most influential people in the world. From Pakistan's late Prime Minister Benazir Bhutto, Bangladeshi Prime ministers Khaleda Zia and Sheikh Hasina Wajed, former president of Mauritius and to the Current Singapore president Halimah Yacob have marked their name in the history of politics as prominent Muslim Leaders. Sabah Nazir is a young Muslim entrepreneur whose products have been sold in more than 20 countries under the brand name of Islamic Movements and in the field of science and aircraft. Aonusheh Ansari is the first famous private space explorer. Hayat Al is a medical scientist in Saudi Arabia. She is also the first female among the Consultative Assembly of Saudi Arabia's members. Hijab Imtiaz Ali was the first female Muslim pilot to have soared the skies ever. Not only that, she was and still continues to be one of Pakistan's most reputable authors as well. Dina Nayeri, Fatima Farhee Mirza, Ayisha Malik and Jasmine Warga are in the line of famous authors. According to ICC rankings, two of the top female cricket teams are India and Pakistan containing mostly of Muslim players. Fatima Al Ali from Abu Dhabi is the pride of Junior Women's Hockey League. Majlinda Kelmendi, Mariya Stadni, Kimia Alizadeh Zenoorin and Hedaya Malak are champions of Martial arts. Aravane Rezaï, Dinara Safina and Sania Mirza are among

the notable tennis players of sensation. Kulsoom Abdullah compiled an extensive report to the International Weightlifting Federation arguing that she should be allowed to compete while covering her head, arms and legs. With the help of Muslim activists, the US Olympic committee and a lawyer, she was successful in overturning the regulation and competed in a national championship. Teenage social activist Fahma Mohammed received honorary doctorate by the University of Bristol for her successful campaign against Female Genital Mutilation. Managing Director of Aina Khan, Aina, a Law Solicitor, is a family law specialist and a member of the International Bar Association with almost 30 years' experience and is running her own legal firm. Aina also founded a growing women's rights campaign, "Register Our Marriage", which is calling for the establishment of legal civil marriages alongside religious ceremonies. The Female Faces of Musilm Hip Hop, Muneera Rashid and Sukina Douglas are also declared as "Hip Hop Hijabis", who have created a new platform named "Poetic Pilgrimage" where Islam meets poetry, beats, music and spirituality. "Great British Bake Off, Nadiya has now become a national sensation. Since her win, she famously baked a cake for Her Majesty Queen Elizabeth's 90th birthday and was featured on the BBC News' 100 Women List. Sharing her delicious recipes through her books and variety of BBC TV series, she's also a mental health advocate. If that isn't enough, she's also raising the profile of Muslim women across UK. Linda is a Palestinian-American civil rights activist, mostly known for her part in helping to organize the 2017 Women's March on Washington, a protest movement led by women that brought millions together across the world. They all had one common goal, and that was to make it very clear that women's rights are just as important as human ones. Halima is a model known for being the first Somali-American Muslim to take part in a Minnesota, USA pageant wearing a hijab and go on to reach the semifinals. To top this, she hit the runway when she modeled for Kanye West at his Yeezy season five fashion show. Disposing of all Muslim stereotypes, she also appeared on the front cover of Allure, wearing the Nike hijab with a caption saying, "This is American Beauty." From first Muslim Khdijah (RA) the beloved wife of prophet Muhammad (SAW) many Muslim women around the world have been stepped in to all fields despite calamities and succeeded in their own field.

Conclusion

In recent times racism became headlines. Particularly the black American George Floyd's Incident made the whole world raise their voice against racism with the hashtag "Black Lives Matter". Racism does not rely only on skin color. During the COVID-19 pandemic, the governments which had imposed strict laws against covering the face have compelled their citizens to cover their face by imposing new other sets of law and order. Either a Western country or a Muslim country, the only thing which has to be changed regarding racism is the perception in viewing the other society people. From India's daughters, Nirbaya and Asifa to Sri lanka's Vithya's rape case, we can realize only one ugly truth, it is that still women are considered to be a piece of flesh covered in different attires and when it comes to Muslim women it is the same flesh with special attention because of the extra piece of cloth covering their head. Women being oppressed or assaulted is connected with domination. On the other side, other cultural norms dominate, gender dominates and their own culture dominates. Muslim women should be identified for who they are and not based on religion, cast, culture and gender. This crowded world has such a variety of people, all with different backgrounds and stories, all different races and ages. But a change in one belief can unite the entire world together.

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A Socio-Legal Analysis on the Policy Outcome of India in Combating Covid-19 across the Global Platform

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Abstract

The pandemic of COVID-19 has adversely affected every country of the world today. In the wake of this global crisis, countries across the globe have invoked and implemented various laws to effectively contain the pandemic. This paper studies various policy measures adopted by countries for efficient implementation of the lockdown amidst the ongoing pandemic. With a specific focus on India, the paper analyses various policy measures and legislations invoked to fight the pandemic and curb its spread in the country. Through this analysis, it makes an attempt to highlight the shortcomings of inconsistent, inadequate and outdated present-day legislations being used to fight COVID-19. The paper by revealing the lacunae in Central and State government policies in implementing the laws, proposes certain recommendations for formulation of new laws and improvement of the current legislations.

Introduction

The present pandemic of COVID-19 (a communicable disease caused by SARS CoV-2 or novel coronavirus), has revealed the inadequacy of current domestic laws in India to fight this national level crisis efficiently. The government of India has limited tools in the form of 123 years old Epidemic Diseases Act (EDA) of 1897, which fails to define disease, let alone a pandemic; limited section 144 of IPC which prohibits people to gather in large numbers and the Disaster Management Act (DMA) of 2005 to combat the ongoing COVID-19 crises.

The EDA is invoked when the government is satisfied that the current ordinary laws are inadequate to deal with an outbreak of an epidemic disease. Although the provisions of DMA are implemented by government directives when a "disaster" takes place, the legal framework of the act is not sound as it is an implementation of pure executive actions only.

A Public Health (Prevention, Control and Management of epidemics, bio-terrorism, and disasters) Bill[1] was drafted in 2017 by the Ministry of Health & Family Welfare to fill these lacunas. It was a conjoined effort by the Directorate General of Health Services and the National Centre for Disease Control which tried to focus on the need of empowering the government authorities at the local level, considering how every emergency situation varies in every region. Implementation of this law would have led to the repealing of the old EDA of 1897 but for some unknown reasons, the bill was never laid down in Parliament.

1 Public Health (Prevention, Control and Management of epidemics, bio-terrorism, and disasters) Bill.

Legal Framework Adopted Across The Globe To Implement Lockdown

Governments across the globe have invoked various public health laws, particular legislations or police force for implementation of quarantine. Quarantine of this scale worldwide has been implemented for the first time and was not even used in outbreaks of Spanish flu (1917) and Ebola (2014). The Government of India while announcing the 21-day lockdown in March resorted to the Epidemic Diseases Act, 1897 and the Disaster Management Act, 2005[2].

Every country has adopted a different legal framework for effective implementation of the lockdown. For instance, UK imposed the Public Health Act, 1984 for "mass quarantine." It is directed by provisions of the act, penalizing any citizen breaking the regulations of lockdown. Spain, worst hit by the pandemic, has limited the movement of people except for urgent work. The lockdown there was invoked under Royal decree which laid measures restricting the right to worship and other recreational and commercial activities. Italy and Romania have imposed a total lockdown under legal directive and military law respectively.

Canada invoked the lockdown under Quarantine Act, 2005. The provisions of the act direct the establishment of temporary quarantine accommodations, prescribe the conditions for quarantine facilities and impose reasonable restrictions on travellers. USA has ordered a mass quarantine directed under federal laws, where all the foreign nationals whose entry to the country might prove to be harmful to the public interests of the State are barred from entry under the provisions of Public Health Service Act[3]. The states in USA, in addition to the federal laws, are using their power to curb the spread and transmission of the disease.

India's Contribution To Combat Covid-19 On A Global Platform

India announced $10 million as an initial contribution towards the SAARC[4] Covid-19 Emergency Fund and has already extended assistance worth $1 million to the countries in SAARC. The contribution was voluntary and other SAARC countries have also contributed to combat the pandemic. India has so far supplied various testing equipment, medical supplies, sanitizers, etc. to Afghanistan, Maldives, Nepal, Sri Lanka, and Bangladesh. It has also vowed to support the G-20, where plans of cumulatively contributing $5 trillion into the world economy to bear the economic cost of the pandemic have been formulated.

The Limitations Of Epidemic Diseases Act, 1897

India has since colonial periods used EDA of 1987 as the only law to deal with the transmission of numerous diseases such as malaria and cholera.[5] In the current scenario, however, the colonial era EDA seems to be inadequate and insufficient to combat the ongoing COVID-19 pandemic.

The law empowers the Central and local governments to undertake "exceptional measures

2 Disaster Management Act.

3 Public Health Service Act.

4 Saarc-Sec.Org, 2020. *SAARC SECRETARIAT.* [online] Available at: < http:// www.saarc-sec.org/.> [Accessed 24 May 2020].

5 Epidemic Diseases Act.

and prescribe regulations" which the citizens are required to observe in order to curtail the transmission of the disease. The law only outlines a few fundamental elements such as restrictions on travel, examination and subsequent quarantine of suspected infected cases in hospitals and other temporary facilities and inspection of all the ships arriving or leaving a port. It also prescribes penalties for the violators which are in line with section 188 of IPC, 1860[6] which specifies punishment for disobeying the government order. Another limitation of the act is that it prioritizes more on the specific powers granted to state and central governments in a pandemic and does not clearly describe their duties to prevent and control the epidemic. It also fails to state the citizen's rights during such events of disease outbreak.

A national epidemic law should also safeguard the right of every individual to health services. The present EDA fails to do this as the medical professionals and other healthcare workers are obliged to render their services at hospitals and quarantine centers in the time of a global pandemic but at the same time, are entitled to safety standards as their right.

Shortcomings Of The Disaster Management Act, 2005

Certain sections of DMA were invoked by the National Disaster Management Authority (NDMA) after the lockdown was imposed to operate throughout the country to curb the spread of COIVD-19. However, the act was never made with an intention to deal with a health emergency.

Section 2(a) of the act defines "affected area" as "an area or part of the country affected by a disaster", clearly referring to a specific area and not initiating a healthcare emergency operation in the entire country.[7]

Section 2(d) defines "disaster" as a "catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or manmade causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area". This definition nowhere deals with a healthcare emergency of a national level and is therefore inadequate to deal with current pandemic.[8]

The Lacunae In Pradhan Mantri Garib Kalyan Package

The government on 26th March finally announced the much awaited, delayed and extremely inadequate, *Pradhan Mantri Garib Kalyan Package* of Rs 1.7 lakh crore for a population of 1.3 billion. Various monetary policy measures have been laid by the government under this scheme. Rs 2000 will be credited in the bank accounts of 8.7 crore farmers. It also provides 5kg of rice/wheat and 1kg of pulses, free of cost. The Ujjwala Yojana[9] guarantees LPG

6 India Penal Code.

7 Disaster Management Act, 2(a).

8 Disaster Management Act, 2(d).

9 Pmuy.gov.in, 2020. *Pradhan Mantri Ujjwala Yojana | PM UJJWALA YOJANA*. [online] Available at: < *https://pmuy.gov.in/*.> [Accessed 19 May 2020].

cylinders without any cost for coming 3 months. 20 crores Jan Dhan women account holders are promised Rs 500 p/m for next 3 months under the scheme.

However, the scheme does not cover all the sectors as there is nothing in the package for the unemployed and those rendered jobless, for agricultural labour and small businesses, which is the backbone of the Indian economy. This is when the USA, having a total population of 330 million announced a monetary package of $2.2 trillion and UK, a scheme of $33 billion. India, with a considerably larger population is clearly in need of a much bigger financial package.

Public Health Legislations To Combat Infectious Diseases In India

India has various laws which find its applicability during a public healthcare emergency. Legislations such as the Livestock Importation Act, 1898, Drugs and Cosmetic Act, 1940, Indian Ports Act, 1908, Aircraft Rules of 1954[10] and Drugs and Cosmetic Act, 1940, all contain certain provisions which can prove to be effective in the current situation of COVID-19. The only requirement is to compile and harmonize all these provisions into a single effective legislation.

Other statutes were also drafted in an attempt to cater to community health, one such being the Model Public Health Act, 1987 but the Union government has so far been unsuccessful in convincing the states to adopt the legislation, health being the subject of state list. [11]

The National Health Bill 2009[12] was enacted with a similar intention to provide a legal framework encompassing all the essential public healthcare services by making health a fundamental right. It also specified certain response mechanisms which could be adopted in an event of public healthcare emergencies by laying down a collaborative central framework. However, these initiatives could never be implemented as the state governments considered them as an infringement on their private domains.

State Initiatives For Public Health Legislations

Most of the states have their own public healthcare laws and most have amended the EDA according to their needs and socio-political conditions unique to their regions. The first such legislation was the Madras Public Health Act enacted in 1939. Himachal Pradesh made vaccinations compulsory in their EDA while Chandigarh, MP, Haryana and Punjab empowered specified officials to implement the provisions of EDA. Bihar empowered the state government to request transportation facilities during an epidemic. Although the priorities of the states differ according to their requirements, the platform of a common law for combating infectious disease that the states should work on should be the same. There are also instances where different laws are being followed in different parts of one state. One such example is of Kerala where the northern part of the state follows the Malabar Public Health Act, 1939

10 Aircraft Rules

11 Tewari, M., 2010. India's Fight Against Health Emergencies: In search of A Legal Architecture | *ORF*. [online] ORF. Available at: <http://www.orfonline.org/research/indias-fight-against-health-emergencies-in-search-of-a-legal-artitecture-63884/> [Accessed 23 May 2020].

12 Ministry of Health and Family Welfare (GoI), 2009. *The National Health Bill, 2009*. PRS Legislative Research, 2009.

whereas the southern part follows the Travancore - Cochin Public Health Act, 1955[13].

Municipal act of every state varies in content and the quality, where most of them are vague and unclear regarding the measures to be undertaken at the time of such an outbreak by the respective government authorities.[14] Most of these acts do not adequately deal with the scientific methods for the prevention of outbreak of epidemics as they are just "policing" acts enacted with the sole purpose of only controlling the epidemic. A few states such as the state of Karnataka and Gujarat have drafted public healthcare bills which are more promising, considering they have enacted a better structure for surveillance while at the same time safeguarding the health rights of the citizens of the country.

Recommendations For Improvement Of Legislations

As we have already seen above, all the policy legislations in force to deal with the ongoing public health crises are either outdated (EDA),[15] irrelevant, inconsistent with the current requirements and demands of the states, or cannot be implemented at the national level to reduce the desired result.

A legal framework which is relevant to the present scenario needs to be set up. A public health law should not just empower the government but also lay down provisions for it to control and prevent disease. There was no uniformity between acts followed in various states in the wake of a pandemic which needs to be changed. India requires an integrated, actionable, comprehensive, relevant and updated legal framework to control the outbreak of diseases in India. Such a legal framework should focus more on the aspects of public interests and public health.

One such legislation is the National Health Bill of 2009; whose main agenda is to collaborate and coordinate the Center and State's adequate and effective response to public healthcare emergencies. The Bill states the public healthcare obligation of the state towards its citizens. It also proposes the establishment of public health boards each at national and local levels for effective and smooth implementation and coordination. However, the implementation of the Bill should not be in any way encroached upon the domain of states as that issue has been disputed over for a long period now.

Conclusion

The Indian legal frameworks need to be strengthened to effectively control and prohibit the entry and transmission of infectious and communicable diseases in India. India's response to the current COVID-19 pandemic has been inconsistent throughout the nation. Multiple laws and regulations were invoked and implemented throughout the states and the national and local level advisory bodies participated in the government's response to combat the spread of

13 *Travancore - Cochin Public Health Act.*

14 Hazarika, S., Zodpey, S., Reddy, S. and Kakkar, M., 2010. Influenza Pandemic Preparedness and Response: A Review of Legal Frameworks in India". *Indian Journal of Public Health,* 54(1), p.11.

15 Patro, B., Trpathy, J. and Kashyap, R., 2013. Epidemic Diseases Act 1897, India: Whether Sufficient To Address The Current Challenges?. *Journal of Mahatma Gandhi Institute of Medical Sciences,* 18(2), p. 109.

virus in the nation. The provisions of EDA proved to be insufficient and inadequate to deal with COVID-19 as it mostly lays down state's duties and powers to combat deadly epidemic diseases. Due to its limited legal framework, in times of crises like the present one, it gives the government unlimited powers which can be used for coercing people if not checked properly. It has been a subject of constant debate and scrutiny.

This in-depth analysis of the shortcomings and the lacunae in the existing epidemic act and other laws in place make it very clear that India lacks a proper legal framework to effectively deal with a pandemic such as COVID-19. The lack of comprehensive and up to date health emergency laws in place, the Indian government is resorting to sec 144 Crpc[16] and other outdated and inadequate laws to contain the pandemic. As soon as this crisis gets over, the Parliament must see this as an opportunity to be done away with the colonial era laws and draft more suitable and effective laws to deal with a situation like this in future.

16 The Code of Criminal Procedure.

Assessing the Credibility of Witnesses - *A Comparative Analysis*

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A trial, regardless of its nature, revolves around evidence and the witnesses which are necessarily subject to certain qualifications due to the ultimate societal impact it may have. The interactions that are made with other fellow human beings during a trial process to retrieve bits and pieces of knowledge they may possess on the ***res gestae*** are of paramount importance in the course of meting out justice. The trial judge and the lawyers are dutifully bound to assess the credibility of such witnesses and evidence given. The legal practitioners use a double edged sword namely "Cross examination" of witnesses which is a prominent and popular feature of trials as it provides a grand opportunity for the lawyers to demonstrate their professionalism and expertise. This opportunity is used to achieve three objectives. They are:

(i) To impeach the credibility of the evidence given by the witness on behalf of the opposing party.

(ii) If the opposing witness divulge in his/her testimony any evidence that aligns more towards the benefit of the other party,

(iii) To opportunistically provide insights to the position of the opposing party, to the Court, as the case may be, through its own witness, and to express the lawyer's stance and suggestions while directing the trial judge's attention towards the evidence given by the witness of the rival party;

At the stage of cross-examining a witness, the only objective that the practitioners focus on is to impeach the credibility of a witness, which undermines the professionalism of such lawyers.

The court, as it focuses on the preparation of its case and what the final verdict should be after the conclusion of a hearing; the most important consideration is whether or not the evidence of the witnesses summoned each party can be trusted. In order to evaluate the credibility of each witness separately, the court must conduct various tests to evaluate the credibility of each witness. Some such tests are:

- Test of spontaneity
- Test of Consistency
- Test of Probability
- Test of demeanour

Examination of a witness's testimony to determine if any part of it is false, and whether the remainder of his testimony can be divided from the falsity. **(Divisibility of credibility)**

It was held in ***Hatharinge Samadasa vs the Attorney General***[1] decided on 19.02.2007 that there are number of tests that have to be applied in evaluating the credibility of a witness such as consistency, contemporaneity, spontaneity, probability and corroboration.

All legal systems require that all witnesses who come before Courts to give evidence, must provide trustworthy evidence.

The assessment of credibility is a universally acknowledged juridical exercise which resonates in the same way in almost all jurisdictions regardless of their multifarious court practices. The aforementioned tests are creations of judicial activism and have been deep rooted in the legal system for a very long period of time. But, prior to categorically defining such tests the basic criteria or rather the **traditional assurances of credibility: The Oath, Cross Examination, and Jury/Trial judge Observation of Witness Demeanour.**

The requirement that a witness testify under oath is often cited as a general safeguard that helps ensure credibility. The oath is said to be important in two respects: as a "ceremonial and religious symbol it may impress upon the witness a feeling of special obligation to speak the truth, and it may impress upon the witness the danger of criminal punishment for perjury, to which the judicial oath or an equivalent solemn affirmation would be a prerequisite condition. "Thus, a witness who will not affirm or swear to tell the truth cannot testify, and a witness who can be shown to lack an understanding of the nature of an oath would be disqualified to testify by the court, despite the fact that most psychologists agree that moral knowledge does not necessarily correspond to moral behaviour.

The perks of thorough cross-examination in ascertaining the credibility of a witness or impeaching the same were discussed before. The observation made by jury/trial judge on the demeanour has been adopted as a test which validly stands even today. A comprehensive analysis on this aspect shall be done in due course.

Each and every test that was designed by the Courts of law has its own sets of criteria and was applied in diverse situations involving multifaceted circumstances. It is of paramount importance to have a deep understanding about its application and its development over the years.

1. Test of spontaneity

When a lay person testifies in Court as to any claims that he/she had witnessed an event or is said to have received information from another person or the fact that he/she has said something to others or that he/she has perceived some information from his own senses, it will be some time since the incident occurred. Therefore, the delay gives the individual the opportunity to deviate from the truth or to reiterate on the facts of the event in question, exactly the way it occurred. Be that as it may, there are reasons which might influence the lay person to narrate a tale which does not align with the truth.

1 CA 112/2001 (decided on 19.02.2007)

For example, failing to recall the incident, the witness having some special reason to give false testimony on something that has not transpired, making a false claim due to a third party influence on a key witness and colluding with the opposing party, may be listed as some reasons for falsifying the facts.

The evidentiary value of the testimony given by a witness or a written statement immediately after an event has transpired is above par compared to the testimony given after a period of time has elapsed. Therefore, it is very imperative to evaluate the credibility of the witness as to whether the contents of the statement made so promptly match the testimony given in court by an oath or affirmation.

The application of the test of spontaneity in the ***Ajith Samarakoon vs. The Republic***[2] ***(Kobeigane murder),*** Court of Appeal ruling by Justice F.N.D Jayasuriya has provided us with a very useful and accurate guide to assess the credibility of a witness's testimony.

The focus of the court's attention was drawn to the possible ways by which the evidentiary value of the first statement made by a witness to the police would get affected with the lapse of time and also the impact on the credibility of evidence when there is a delay in disclosing the observations a witness made at the crime scene to another individual.

The essence of the court's ruling on these two points was that a belated testimony of a witness should not be denied simply because he was not prompt in making a statement about what he had supposedly seen. It is reasonable and logical to immediately cast doubt on the credibility of the evidence rendered by a witness who was belated in nature due to the delay in making a statement to the police or any other person on what they have seen.

'Just because the statement of a witness is belated the Court is not entitled to reject such testimony". In applying the Test of Spontaneity and Test of Contemporaneity and the Test of Promptness the Court ought to scrupulously proceed to examine the reasons for the delay. If the reasons for the delay adduced by the witness are justifiable and probable the trial Judge is entitled to act on the evidence of a witness who had made a "belated statement". – ***Dayananda Lokugalappaththi and Eight Others v. the State*** **(The Embilipitiya Abduction and Murder Case)**[3]

In the case of ***Dharmasiri vs. The Republic of Sri Lanka***[4], Tilakawardane, J held inter alia; "Two critical tests before considering belated evidence as reliable "evidence are: firstly reasons for delay and secondly, whether those reasons are justifiable."

In the same case in the Court of Appeal[5] Sisira de Abrew, J held inter alia; "Because the witness is a belated witness, Court ought not to reject his testimony on that score alone. Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of the belated witness."

2 2004 Sri L R 209

3 (2003) 3 Sri LR 362

4 2012 (1) SLR 268

5 2010 (2) SLR 241

The position related to a special aspect of belatedness and spontaneity related to sexual offences in the United Kingdom has been discussed by judges in a comprehensive manner.

"Where the defendant is charged with a sexual offence, and the complainant has given evidence about the alleged offence, the court can hear the terms of the original complaint, **provided it was made spontaneously and at the first reasonable opportunity**; the court may also hear evidence to explain why the alleged victim did not tell anyone, if that is an issue.[6]

"Spontaneously" was explained by Ridley J as meaning that this exception applies "only where there is a complaint not elicited by questions of a leading and inducing or intimidating character"[7]. Ridley J also said:

[T]he mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will, indeed, have that effect, and will render it inadmissible …

This dictum was later explained thus:

The court is concerned to see that in the present case the statement made by the girl was spontaneous in the sense that it was her unassisted and unvarnished statement of what happened."[8]

2. Test of Consistency

The key strategy used by lawyers to ensure or impeach the credibility of a witness is cross-examination. It is paramount that such exercise is subjected to certain qualifications.

The Evidence Ordinance outlines the various ways in which a witness's testimony may be debunked.[9] The most important of these is to point out contradictory statements. The opposing lawyer may prove the authenticity of a previous statement made by a witness which is contradicting the testimony given by the same on the stand. When proving such a contradictory statement, it is necessary to draw the witness's attention to the part of the statement that is contradictory and to give the witness an opportunity to explain the contradiction.

It is contrary to the provisions of section 110 (3) of the Act to utilize a segment of a police statement except for the instances expressly stipulated and permitted by the provisions of the Evidence Ordinance. Therefore, it is advisable that a section of a witness's police statement be read to the witness after drawing the trial judge's attention to this said part and obtaining permission to read it.

6 THE LAW COMMISSION EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS, http://www.lawcom.gov.uk/app/uploads/2015/03/lc245_Legislating_the_Criminal_Code_Evidence_in_Criminal_Proceedings.pdf (accessed on 19th June 2020)

7 Osborne [1905] 1 KB 551, 561

8 Norcott [1917] 1 KB 347, 350, per Viscount Reading CJ

9 Evidence Ordinance, Section 154

In the case of ***Attorney-General v. Viswulingam***, Justice Cannon stressed that the trial judge should direct his mind specifically to the issue what contradictions are material and what contradictions are not material before he proceeds to discredit the testimony of a witness.

In ***State of Uttar Pradesh v. Anthony*** the important principle and rule of caution was laid down that a witness should not be disbelieved on a count of trifling discrepancies and omissions.[10]

Apart from marking the contradictions, another key strategy used to evaluate the credibility of a witness is by giving due regard to the omissions. An omission is said to have been made in situations where a witness brings up some extremely important content in his testimony which was not initially mentioned in his/her statements. Unlike contradictions, omissions cannot be marked as the latter is a non-existent issue till it is brought up in a testimony whereas a contradiction could be marked due to the fact that it is in written form. Nevertheless, an omission is required to be proved in the same way as in contradictions. Another key similarity between contradictions and omissions is that both play an important role in making the credibility of a witness questionable, only if it is related to a matter which goes to the root of the case. Minor discrepancies in a witness's statement should be disregarded.[11]

It also significantly matters not to bring up bad character evidence in Court in relation to an on-going case as the accused is entitled to the presumption of innocence till proven guilty beyond reasonable doubt. **Phipson** states that under the UK law, there are certain grounds spelled as exceptions to the principle that evidence may not be called to contradict a witness on collateral terms which included *inter alia* **previous conviction.** The Lord Chief Justice recommended that no reference should be made to a spent conviction without the authority of the judge, "which authority should not be given unless the interests of justice so require."[12]

3. Test of Probability

A precise understanding on this test could be gained by perusing the judgment delivered by Justice F.N.D Jayasuriya in the case ***Wikramasuriya v. Dedoleena and others,***

"A Judge, in applying the Test of Probability and Improbability relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate."

Basically, this test deals with an objective standard where the circumstances of each case would be compared to that of a reasonable prudent man. Thus, the application of this test revolves around factual analyses.

Justice Gooneratne delved into the broader perspective of this test in the Court of Appeal Judgment ***Singharam Thiyagarajah v. Attorney general***[13]

10 Wikramasuriya v. Dedoleena and Others [1996 2 Sri L R 95]

11 Supra

12 Phipson on Evidence, The Common Law Library (2005), sweet and maxwell, London (Pg 343)

13 C.A 2016/2010 (Decided on 27.11.2014)

"I wish to observe that the realities of life and the testimony of a witness cannot always be co-related. Nothing is perfect in life and the truth does not surface so easily as a man so bias could attempt to hide the truth or distort it. The test of probability needs to be applied and recognized to grapple with normal human behaviour and problems and pave the way for likelihood of occurrence."

An illustration as to how the test of probability would get involved in determining the testimonial trustworthiness of a witness could be seen in a plethora of cases, regardless of the jurisdiction.

"The question for decision is whether the finding of such a large amount of cash is a fact which, if proved, makes it more probable that a person suspected of dealing in narcotic drugs, and who is found to be in possession of them, is in possession of them for the purpose of supplying them ... no doubt that the finding of a large quantity of cash is capable of being relevant to an issue the jury had to consider in the case, and we reject the submission that this evidence was inadmissible because it was irrelevant."[14]

The test of probability was comprehensively discussed in the case of ***Sinha Ratnatunga v. The State***.[15]

"The accused- appellant's position that he had written three paragraphs only in the gossip column without bothering to read the contents of this article that appeared before and after the three paragraphs he wrote in the gossip column is unacceptable. This is not the conduct of a reasonable person, when applying the much hallowed test of probability and improbability."

4. Test of demeanour

Sigmund Freud once noted that "[h]e that has eyes to see and ears to hear may convince himself that no mortal can keep a secret. If his lips are silent, he chatters with his fingertips; betrayal oozes out of him at every pore"

The demeanour of a witness is generally considered an important factor in assessing the credibility of a witness. The trial judge is considered to be in a much more advantageous position than the apex court judges as the former has an opportunity to observe the demeanour and the deportment of the witness. This direct observation can be as powerful as it is simplistic. In the case of ***Dharmasiri V. Republic of Sri Lanka***, it was held that,

"Credibility of a witness is mainly a matter for the trial Judge. Court of appeal will not lightly disturb the findings of trial Judge with regard to the credibility of a witness unless such findings are manifestly wrong. This is because the trial Judge has the advantage of seeing the demeanour and deportment of the witness ..."[16] Thus, it is an obligation on the part of the trial judge to make note of the behavioural patterns of the witnesses, the way they answer questions during cross-examination etc. It should also be remembered that an individual's

14 Followed in R V. Grant (1996) 1 CR.App.R 73]

15 [2001] 2 Sri L R 172

16 [2010] 2 Sri LR 241

demeanour depends on multiple factors and due to the mere nervousness exhibited on the stand; his/her credibility should be questioned.

"The demeanour is an item of information from which inferences may be drawn about the probative value of the testimony, in the same way as inferences may be drawn about the probative value of the testimony, in the same way as inferences might be drawn from proof, for example, that the witness has previous convictions for perjury. Accordingly, demeanour is rightly treated as an item of real evidence analogous to the appearance of persons and the observable qualities of an object"[17]

Coomaraswamy states that "…Few men are really good actors and a judge should be able to observe the difference between the demeanour of a witness who is describing a scene or occurrence which he actually saw and that of a witness who repeats from memory a prepared story which he has been taught."[18]

Though separate tests have been designed on various parameters, it should be remembered that all such tests are mutually inter-dependant thus, derives from one another. Hence it can be concluded that "…Personal knowledge is an essential qualification of a witness, established by the witness's opportunity to observe the event at issue. The witness's capacity to testify refers to the ability of the witness to observe and understand what was seen and to narrate it intelligently."[19]

Finally it all lands upon the Judges and juries who are expected to make credibility determinations, sometimes based on demeanour testimony. Demeanour represents the trial judges' opportunity to observe the witness and his deportment and it is traditionally relied on to give the judge's findings of fact their rare degree of inviolability[20]

Lord Loreburn in ***Kinloch v. Young***[21] observed that '...this house and other courts of appeal have always to remember that the judge of first instance has had the opportunity of watching the demeanor of witnesses – that he observes, as we cannot observe the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any court of appeal. Even the most minute study by a court of appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say'. The Sweaty palms and shifting eyes of a witness may be indicative of language and cultural differences rather than fabrication. It is equally true that skilful liars may pass all demeanour tests. Credibility is a question of fact, not of law.

The South African experience regarding this is that, Appellate judges have repeatedly stressed

17 Dennis *The Law of Evidence (3ed 2007) pg 502*

18 Coomaraswamy, E R S R - The Law of Evidence: With Special Reference to the Law of Sri Lanka, Volume 2, Book 2 (1989)

19 James P. Timony, Demeanor Credibility, 49 Cath. U. L. Rev. 903 (2000) https://scholarship.law.edu/cgi/viewcontent.cgi?article=1388&context=lawreview (accessed on 22nd of June 2020)

20 Bingham, 'The Judge as Juror' 1985 p.67

21 (1911) SC (HL)1

the importance of the trial judges' observations of the demeanour of witnesses in deciding questions of fact (Vide, ***R. v. Dhlumayo*** (1948)2 SALR 677 (A); ***Merchand v. Butler's Furniture Factory*** (1963)1 SALR 885).

5. Test of deliberate falsehood

The judgment of ***Samaraweera v The Attorney General***[22], in relation to the evaluation of proven false evidence, added that " ... all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood."

R Vs. Julis[23], deals with the question as to whether the evidence of a witness should be totally rejected if it is proved that he had given false evidence on one point.

The celebrated case on Falsehood is ***Ajit Samarakoon v The Republic (Kobaigane Murder Case)*** which comprehensively deals with this particular test.

"The question arises whether this falsehood was uttered on a material and relevant point upon this prosecution. There is no doubt that this lie was deliberately uttered on a highly material issue in this case. The next question is the consideration whether the motivating factor for the lie was a realization of guilt and the fear for the truth; if so, the utterances of the lie weakens the defence case and substantiates and advances the prosecution version narrated against him. We hold that the accused uttered this deliberate lie on this material issue because he knew that if he told the truth he would be sealing his fate as regards this legal proceeding. If such was the motive, the utterance of such a lie would corroborate the prosecution case. In the decision in ***Haramanis v Somalatha***, I stated the rationale in regard to the motive for the utterances of a deliberate lie on some material issue by a party as follows:

'The principle is that a lie on some material issue by a party may indicate a consciousness that if he tells the truth he will lose." Justice Hall in ***Popovic v Derks P***) at 433 and at 429-430 (per Justice Sholi) remarked - "Matters which otherwise might be ambiguous are rendered corroborative by reason of the false denial." I have referred in that decision to Chief Justice Lane's judgment in ***Rex v Lucas*** and the judgment of Justice ***Athukorale in Karunanayake v Karunasiri Perera*** at 33. Justice Athukorale remarked - "It seems to me that the tests which should be applied in determining whether a lie told by an accused or a defendant, whether in or outside Court, is capable of constituting corroboration or not, have been correctly set out by Lord Lane, CJ. in ***Rex v Lucas*** (supra). Under the circumstances I should adopt and apply the criteria formulated by him to local cases both criminal and civil in which the question arises for consideration."

In the ***Bharartha Lakshman Murder case***[24] a reference was made to the well-known maxim ***'Falsus in Uno Falsus in Omnibus'*** (he who speaks falsely in one point will speak falsely

22 (1990) 1 Sri L.R. 256

23 65 NLR 505 at 519

24 Vithanalage Anura Thushara De Mel et al. v. The Attorney General (sc_tab_2a_d_2017) decided on 11.10.2018

upon all). It held that "In applying this maxim it must be remembered that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment, must be distinguished from deliberate falsehood. Nor does it apply to cases of conflict of testimony on the same point between different witnesses…. "

Gardiris Appu vs. The King[25] deals with divisibility of credibility.

It was held that "when false evidence has been introduced into the case for the prosecution, it is open to the jury to say that the falsehoods are of such magnitude as to taint the whole case for the prosecution, and that they feel it would be unsafe to convict at all. On the other hand, it is equally open to them, if they think fit to do so, to separate the falsehoods from the truth and to found their verdict on the evidence which they accept to be the truth."

A well-researched analysis on the credibility of witnesses and the pragmatic approach taken by Courts to handle discrepancies shall not be complete without quoting from the celebrated case; ***Bhoginbhai Hirjibhai V State of Gujarat*** [26] which is a case very often cited in our criminal courts in dealing with contradictions and discrepancies. The relevant portion of the judgment is cited below.

Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:-

1. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

2. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

3. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

4. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person.

5. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him. Perhaps it is a sort of a psychological defence

25 52 NLR 344

26 AIR 1983 SC 753

mechanism activated on the spur of the moment.

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance.

More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses.

The majority judgment had considered the judgment in ***Bhoginbhai Hirjibhai V State of Gujarat*** and other cases. The question is whether they followed the principles enunciated in the judgments... or not. The defence submitted that the majority judgment disregarded the major contradictions, inconsistencies, omissions and other discrepancies and therefore the judgment should be set aside.

Conclusion

With the modem tendency of enlarging the realm of admissibility of evidence, most of the technical refinements of method and many of the major historic obstructions will be eliminated. Indeed, it has long been recognized by all scholars in the field as well as those engaged in the everyday practice before the courts that there is a need for a re-examination of the rules of evidence with a view of simplification and of the elimination of historical oddities so as to bring the law of evidence closer to reality in its truth finding function.

இலங்கையின் அரச பல்கலைக்கழங்களில் பகிடிவதையும் அதன் கொடிய எதிர்விளைவுகளும் சட்ட ரீதியான அணுகுமுறை

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பல்கலைக்கழக மாணவர்கள் நன்னடத்தையுள்ளவர்களாக இருக்க வேண்டும், பல்கலைக்கழக மாணவர்கள் புத்தியுள்ளவர்களாக இருக்க வேண்டும், கடமை உணர்வு மிக்கவர்களாக மிளிர்தல் வேண்டும், காத்திரமான விமர்சகர்களாகவும், ஆய்வாளர்களாகவும், ஆற்றல் மிக்கவர்களாகவும் திகழ வேண்டும், அத்துடன் பல்கலைக்கழக மாணவர்கள் எல்லை மீறாதவர்களாகவும், சமூக நீதிக்கு பயந்தவர்களாகவும் இருக்க வேண்டுமென சமூகத்தின் அனைத்து பிரஜைகளாலும் எதிர்பார்க்கப்பட்டாலும் நடைமுறையில் ஊடகங்கள் மற்றும் சமூக வலைத்தளங்களில் வெளியாகும் செய்திகள் பல்கலைக்கழக மாணவர்களை நாகரிகமற்றவர்களாகவும் பண்பாடற்ற மோசமான சிந்தனை வறட்சி உள்ள காட்டுமிராண்டிகளுக்கு ஒப்பாகவே வைத்து நோக்குமளவுக்கு நிலவரங்கள் உள்ளன. பொதுவாக பல்கலைக்கழகங்கள் எனப்படுபவை ஒரு நாட்டின் அதி உச்ச கல்விப் பீடங்களாவும், அறிவியற் கூடங்களாகவும், மறுமலர்ச்சி சிந்தனைகளை உற்பத்தி செய்யும் மாபெரும் சர்வ கலாசாலைகளாகவும் விளங்கவேண்டும். ஆயினும் பல்கலைக்கழகங்கள் பகிடிவதை எனும் பெயரில் சித்திரவதைக்கூடங்களாக மாறியிருப்பது மிகப்பெரும் துரதிஷ்டமே ஆகும்.

இலங்கைத் தீவானது உலக நாடுகளுடன் ஒப்பிட்டு பார்க்கும் போது அபிவிருத்தியில் மிகவும் பின்தங்கிய நிலையில் இருந்தாலும் உலகத்தின் வல்லரசு நாடுகளால் கூட அடைய முடியாத இருபெரும் இலக்குகளை மிகவும் வெற்றிகரமாக நிறைவேற்றிவருகிறது. அவை இலங்கையின் இலவசக் கல்வியும் இலவச சுகாதார சேவை வசதியும் ஆகும். அந்த வகையில் உயர்கல்வி வாய்ப்பென்பது மாணவர்களுக்கு கிடைக்கும் அரிய வரப்பிரசாதமே ஆகும். குறிப்பாக இந்தியாவில் நீட் எனும் தேர்வு முறையினால் எத்தனை திறமைமிக்க மாணவராயினும் பணவசதியே ஒருவரின் எதிர்கால கல்வியை தீர்மானிக்கும் நிலையில் இலங்கையில் உள்ள பல்கலைக்கழக தேர்வு முறை என்பது பாரபட்சமின்றி பாராட்டப்பட வேண்டியதொன்றாகும். அண்ணளவாக ஆண்டுதோறும் 3.25 இலட்சம் மாணவர்கள் தோற்றும் க. பொ. த உயர்தரப் பரீட்சையில் அண்ணளவாக 31,000 மாணவர்களே பல்கலைக்கழகங்களுக்கு உள்வாங்கப்படும் நிலையில் பல்கலைக்கழகங்களுக்கு தெரிவாகும் மாணவர்கள் உண்மையிலேயே மிகப்பெரும் அதிடசாலிகள். எனினும் இத்தகைய வாய்ப்பின் பெறுமதியை பெருமளவான மாணவர்கள் உணரவில்லை என்பதே உண்மை. காரணம் சமத்துவத்தையும் சகோதரத்துவத்தையும் வளர்ப்பதற்குப் பதிலாக பகிடிவதை எனும் போர்வையில் உளவியல் பிரச்சினை உடைய மனநோயாளிகளாக பகிடிவதையில் பல்கலைக்கழக மாணவர்கள் ஈடுபடுவது மிகவும் கவலைக்குரியதொன்றாகும்.

பகிடிவதையின் வரலாறு

இலங்கையில் பகிடிவதை கலாசாரம் பிரித்தானிய காலனித்துவத்தின் விளைவாகவே தோற்றம்

பெற்றது. RAGGING எனும் பதமானது இலங்கை, இந்தியா, பாகிஸ்தான், வங்காளதேசம் போன்ற நாடுகளிலேயே அதிகம் பிரசித்தம் பெற்றுள்ளது. அமெரிக்கா போன்ற மேலைத்தேச நாடுகளில் HAZING அல்லது BULLYING போன்ற பதங்களால் அழைக்கப்படுகிறது. ஒரு மாணவருக்கு Senior- Junior எனும் அடிப்படையில் உடலியல் ரீதியாக, உளவியல் ரீதியாக அல்லது பாலியல் ரீதியாக பயம், காயம் அல்லது மனவருத்தத்தை ஏற்படுத்தும் எந்தவொரு செயலும் பகிடிவதையாகும்.

இரண்டாம் உலகப்போரில் கலந்து கொண்ட இராணுவ வீரர்கள் மீண்டும் தமது பயிற்சிக் கல்லூரிகளுக்கு திரும்பிய போது சிரேஷ்ட அதிகாரிகளால் வழங்கப்பட்ட பகிடிவதை முறையே பின்னர் எமது நாட்டின் பல்கலைக்கழகத்தின் ஓர் உப கலாசாரமாக பரிணமித்தது. இலங்கை வரலாற்றில் 1974 ஆம் ஆண்டே முதலாவது பகிடிவதை விவகாரம் மிகப்பெரும் சர்ச்சையாக உருமாறியது. இப்போதைய களனிப் பல்கலைக்கழகமான அப்போதைய வித்தியாலங்கார கல்விச்சாலையில் இடம்பெற்ற பகிடிவதை சம்பவம் தொடர்பில் அப்போதைய பிரதம மந்திரி சிறிமாவோ பண்டாரநாயக்க அம்மையார் உருவாக்கிய விசேட V. W. குலரத்தின விசாரணை ஆணைக்குழுவின் மூலம் இடம்பெற்ற விசாரணைகளின் ஈற்றில் பகிடிவதையில் ஈடுபட்ட 12 சிரேஷ்ட பல்கலை மாணவர்கள் பல்கலைக்கழக கல்வி நடவடிக்கைகளில் இருந்து முழுமையாக இடைநீக்கம் செய்யப்பட்டமையும் உரிய நடவடிக்கைகளை எடுக்கத் தவறியமைக்காக 4 பல்கலைக்கழக உழியர்கள் சட்ட நடவடிக்கைக்கு உட்படுத்தப்படமையும் குறிப்பிடத்தக்கது.

அதனைத் தொடர்ந்து 1975 ஆம் ஆண்டு இலங்கை வரலாற்றில் பகிடிவதை தொடர்பிலான முதலாவது மரணச் சம்பவம் பதிவாகியது.பேராதனை பல்கலைக்கழகத்தின் 22 வயதுடைய விவசாய பீட மாணவியாகிய ரூபா ரத்னசீலி (Rupa Rathnaseeli) பகிடிவதையில் இருந்து தன்னை பாதுகாத்து கொள்ள இராமநாதன் மண்டபத்தின் மேல் மாடியில் இருந்து குதித்து தற்கொலை செய்து கொண்டார். அதனைத்தொடர்ந்து காலத்துக்கு காலம் இத்தகைய பகிடிவதையின் மூலமான மரணச் சம்பவங்கள் தொடர்ந்தும் பதிவாகிய வண்ணமே இருந்தன, அவற்றுள் குறிப்பாக 1997 ஆம் ஆண்டு பேராதனைப் பல்கலைக் கழகத்தின் பொறியியற்பீட மாணவன் S.வரப்பிரகாஷ் எனும் மாணவன் கடுமையான பகிடிவதையினால் சிறுநீரகம் பாதிக்கப்பட்ட நிலையில் மரணமடைந்தமை இலங்கையின் உயர்கல்வி சூழலிலும் தமிழ் மக்கள் மத்தியிலும் பாரிய அதிர்வலைகளை ஏற்படுத்தி இருந்தது. அதே ஆண்டில் கெலும் துஷார விஜேயதுங்க (Kelum Thushara Wijeyatunga) எனும் மாணவன் அம்பாறையில் உள்ள Hardy Techinical Institute நிலையத்தில் இடம்பெற்ற பகிடிவதை மூலம் மரணமாகியமை, 2002 ஆம் ஆண்டு சமந்த வித்தனகே எனும் ஸ்ரீ ஜெயவர்த்தனபுர பல்கலைகழகத்தின் மூன்றாம் வருட முகாமைத்துவ பீட மாணவன் பகிடிவதைக்கெதிராக பாரிய எதிர்ப்பு முயற்சிகளை மேற்கொண்டு வந்த தருணத்தில் கொலை செய்யப்பட்டமை போன்ற விடயங்கள் சோகமான வரலாற்று துன்பியல் சம்பவங்கள் ஆகும்.

பகிடிவதையின் பன்முக வடிவங்கள்.

அடிப்படையில் பகிடிவதையானது பின்வரும் 3 வடிவங்களில் இடம்பெறுகிறது.

1. உடலியல் சார்ந்த பகிடிவதை மற்றும் துன்புறுத்தல் (Physical ragging or Physical torture)

2. உளவியல் சார்ந்த மன உளைச்சல்கள் (Emotional abuses or Mental torturing)

3. பாலியல் ரீதியான துன்புறுத்தல்கள் அல்லது துஷ்பிரயோகம் (Sexual torture or Sexual abuse)

எமது நாட்டில் 1970, 1980,1990 களில் இடம்பெற்ற உடலியல் சார்ந்த பகிடிவதைகள் தற்போது ஒப்பிட்டளவில் சற்று குறைந்தாலும் உளவியல் சார்ந்த மற்றும் பாலியல் ரீதியான பகிடிவதை எனும் போர்வையில் அமைந்த துன்புறுத்தல்கள் அரச பல்கலைக்கழகங்களில் தற்போதும் தொடர்ந்த வண்ணமே உள்ளது. குறிப்பாக பல்கலைக் கழகங்களுக்குள் உள்நுழையும் மாணவர்களுக்கு அணியும் ஆடைகளில் கட்டுப்பாடு விதித்தல் மிகவும் முக்கியமானது. பெண் பிள்ளைகளாயின் பாவாடை சட்டை மட்டுமே அணிய வேண்டும், தலைமுடி நன்றாக எண்ணெய் வைத்து பின்னப்பட வேண்டும், பெரிய கறுப்பு பொட்டு வைத்தல் வேண்டும், குறித்த சில நாட்களில் புடவை அணிய வேண்டும், காலில் சாதாரண பாட்டா செருப்பு மட்டுமே அணிய வேண்டும், புத்தகப்பை கொண்டு வர முடியாது அதே போல் ஆண் மாணவர்களுக்கு தொய்வான பெரிய ஜீன்ஸ் மற்றும் சேர்ட் அணிய வேண்டும், தலை முடி மொட்டையாக வெட்டியிருக்க வேண்டும், முழுமையாக முகச்சவரம் செய்திருக்க வேண்டும், காதில் பூ அணிந்திருக்க வேண்டும், காலில் சாதாரண பாட்டா செருப்பு மட்டுமே அணிய வேண்டும், சப்பாத்து போடக் கூடாது, புத்தகப்பை கொண்டு வரக் கூடாது, மோட்டார் வாகனங்களில் பல்கலைக்கழகம் வரக் கூடாது, வேட்டி வாரம் எனும் காலப்பகுதியில் ஆண்கள் உள்ளாடை அணியாமல் வேட்டி கட்ட வேண்டும், அனைத்து கனஷ்ட மாணவர்களும் தமது காலத்தில் பல்கலைக்கழக சிற்றுண்டிச் சாலைகளில் விநியோகிக்கப்படும் விலைகுறைந்த சாதாரண உணவுகளையே உண்ண வேண்டும் போன்ற கட்டுப்பாடுகள் பெரும்பாலான பல்கலைக்கழகங்களில் தற்போதும் கடைப்பிடிக்கப்பட்டு வருகின்றது.

இவற்றுக்கு மேலதிகமாக புதுமுக மாணவர்கள் தமது சக ஆண்டு மாணவர்களின் பெயர் மற்றும் குறியீட்டு பெயர் என்பவற்றை மனப்பாடம் செய்யவும் தமது சிரேஷ்ட மாணவர்களின் பெயர், மாவட்டம் என்பனவற்றை மனப்பாடம் செய்யவும் தமது பீடத்தில் விரிவுரைகளை போதனை செய்யும் விரிவுரையாளர்களின் பட்டப் பெயர்களை மனனம் செய்யவும் திணிக்கப்படுவர். அத்துடன் பல்கலைகழகத்தில் உள்ள சிற்றுண்டிசாலைகளின் எண்ணிக்கை எவ்வளவு? விடுதிகளின் எண்ணிக்கை எவ்வளவு? பீடங்களின் எண்ணிக்கை எவ்வளவு? நூலகம் எங்கே உள்ளது? வழிபாட்டுத் தளங்கள் எங்கே உள்ளன? வங்கி எங்கே உள்ளது? போன்ற விடயங்களை மனனம் செய்யவும் திணிக்கப்படுவர்.

அத்துடன் பாலியல் ரீதியாக அருவருக்கத்தக்க சொற்களை உடைய பாடல்கள், பழமொழிகள், வாசகங்கள், திருக்குறள் என்பனவற்றை மனப்பாடம் செய்யவும் திணிக்கப்படுவார். அத்துடன் மரங்களுக்கு, கட்டிடங்களுக்கு முத்தமிட வேண்டும், எதிர்பால் இனத்தவர்களுக்கு காதலை வெளிப்படுத்துவது போல நடித்தல், ஒரே இனிப்பு பண்டத்தை அனைத்து மாணவர்களும் உண்ண வேண்டும் போன்ற அருவருக்கத்தக்க இன்னும் பல பாலியல் சேட்டைகள் பல்கலைக்கழகத்தில் பகிடிவதை எனும் போர்வையில் அரங்கேற்றப்படுகின்றன. இவற்றை செய்ய மறுக்கும் கனிஷ்ட மாணவர்களை சிரேஷ்ட மாணவர்கள் கடுமையாக தாக்குதல், அச்சுறுத்தல், ஏனையவர்களிடம் இருந்து ஒதுக்கி வைத்தல், அவர்களுக்கான அனைத்து உதவிகளையும் நிறுத்துதல், பல்கலைக்கழகத்தில் இடம்பெறும் அனைத்து விழாக்களிலும் கலந்து கொள்ள தடை விதித்தல் போன்ற பழிவாங்கல்களை மேற்கொள்வார்கள்.

பகிடிவதையை முழுமையாக இல்லாமல் செய்தில் உள்ள தடைகள் எவை? பகிடிவதையை எப்படி இல்லாமல் ஒழிக்கலாம் ?

1. பல்கலைக்கழக நிர்வாகத்தினரின் கவனயீனமும் அசமந்தப் போக்கும்-

பல்கலைக்கழக வளாகம் மற்றும் அதனை சூழவுள்ள தங்குமிட விடுதிகளிலேயே அதிகளவிலான

பகிடிவதை நிகழ்வுகள் இடம்பெறுகின்றன. எனவே அவற்றை கண்காணிக்கவென உரிய அதிகாரிகள் நியமிக்கப்பட்டுள்ள போதிலும் அவர்கள் வினைத்திறனாக செயற்பட்டாலே பெருமளவிலான பகிடிவதைகளை தவிர்க்க முடியும், ஆயினும் சிரேஷ்ட மாணவர்களுடன் ஏன் தேவை இல்லமால் பகைக்க வேண்டும் என்ற அச்ச உணர்வும் கண்டுகொள்ளாத பெருமளவிலான உத்தியோகத்தர்களின் மன நிலையுமே பகிடிவதைக்கான பிரதான காரணமாகும். பகிடிவதையில் இருந்து தம்மை பாதுகாத்து கொள்வது தொடர்பான விழிப்புணர்வு கருத்துக்களை புதுமுக மாணவர்களுக்கு விரிவுரையாளர்கள் சொல்லிக் கொடுக்க வேண்டுமென்பதுடன் பகிடிவதையினால் உண்டாகும் எதிர்மறையான விளைவுகள் மற்றும் அதற்குரிய சட்ட நடவடிக்கைகள் மற்றும் தண்டனைகள் தொடர்பில் சிரேஷ்ட மாணவர்களுக்கு விரிவுரையாளர்கள் அடிக்கடி ஞாபகப்படுத்த வேண்டும். அத்துடன் பகிடிவதையை கட்டுபடுத்த பேராசிரியர்கள், விரிவுரையாளர்கள், கல்விசாரா உத்தியோகத்தர்கள், மாணவர் ஒன்றியங்களை உள்ளடக்கிய விழிப்புணர்வு குழு ஒன்று பரந்து பட்ட அளவில் மிகுந்த அக்கறையுடன் செயற்பட வேண்டும். நள்ளிரவில் பகிடிவதை தொடர்பான செய்திகள் கிடைத்தால் கூட அவ்விடத்துக்கு உடனடியாக விரையக் கூடிய தயார் நிலையில் அக்குழு இயங்கு நிலையில் இருக்க வேண்டும்.

2. பரந்துபட்ட அரசியல் பின்புலங்களையுடைய மாணவர் ஒன்றியங்களின் ஒரு பக்கச் சார்பான செயற்பாடு-

இலங்கையில் உள்ள பல்கலைக்கழகங்களின் பல மாணவர் ஒன்றியங்கள் மிகுந்த வலுவுடையனவாகவே உள்ளன. போருக்கு பின்னரான சூழலில் அரசாங்கத்துக்கு எதிராக பாரிய எதிர்ப்பு ஆர்ப்பாட்டங்களை மேற்கொள்வதில் அரசியல் கட்சிகளை விட மாணவர் ஒன்றியங்கள் மிகுந்த வீரியத்துடன் செயற்பட்டன. அவர்களின் செயற்பாட்டு அடிப்படையில் குறிப்பிடத்தக்க சில வெற்றிகளையும் அவர்கள் பதிவு செய்தார்கள். இருப்பினும் அம் மாணவர் ஒன்றியங்கள் கடந்த காலங்களில் சில அரசியல் கட்சிகளின் தனிப்பட்ட நிகழ்ச்சி நிரலுக்கு துணை போனதையும் அவர்களின் கிள்ளுக்கீரைகளாகவும் விளங்கியமை குறிப்பிடத்தகது. வெளிப்படையாக கூறுவதாயின் களனிப் பல்கலைக்கழகம், ஸ்ரீ ஜெயவர்த்தனபுர பல்கலைக்கழகம், யாழ்ப்பாணப் பல்கலைக்கழகம் என்பனவற்றில் கடந்த காலங்களில் மாணவர் ஒன்றியங்கள் மூலமான அரசியல் கட்சிகளின் ஆக்கிரமிப்பு மிக அதிகமாக காணப்பட்டது. இம் மாணவர் ஒன்றியங்கள் அத்தகைய பின்புல செல்வாக்கின் அடிப்படையில் நாட்டில் இடம்பெறும் தேசிய இன பிரட்சினைக்கான தீர்வு, ஊழல் மோசடிகள், கல்வியை தனியார் மயமாக்கும் அரசின் திட்டங்கள், சுற்றுப்புறச் சூழல் தீங்குக்கு எதிரான ஆர்பாட்டங்கள் என பல காத்திரமான செயற்பாடுகளில் ஈடுபட்டன. இது மிகவும் போற்றுதலுக்கும் பாராட்ட வேண்டிய விடயமாகும். ஆயினும் இதே சக்தியை வைத்துக்கொண்டு பகிடிவதையில் ஈடுபட்டு தண்டனை அனுபவிக்கும் மாணவர்களை காப்பாற்றவும் அதே மாணவர் இயக்கங்களை பயன்படுத்தி போராட்டங்களை ஏற்பாடு செய்கின்றமையும் அவர்களின் கொள்கையில் உள்ள கோட்பாட்டு முரண்பாட்டை தெளிவாக காட்டுகிறது. அரசியல்வாதிகள் சரியாக இருக்க வேண்டும், மக்கள் சரியாக இருக்க வேண்டும், நிர்வாகம் சரியாக இருக்க வேண்டும் என வீதியில் இறங்கி போராடும் பல்கலைக்கழக மாணவர் ஒன்றியங்கள் பல்கலைக்கழக புதுமுக மாணவர்களின் அடிப்படை உரிமைகளை சிரேஷ்ட மாணவர்கள் முழுமையாக மீறுகின்ற போது ஏன் மௌனம் சாதிக்கின்றன? சமத்துவச் சிந்தனையும் சகோதர உணர்வும் என்கின்ற கோசங்களும் வெறுமனே மற்றையவர்களுக்கு மட்டும் தானா? ஆகவே அரசாங்கத்தின் ஒடுக்குமுறைக்கெதிராக போராடும் மாணவர் ஒன்றியங்கள் பகிடிவதை எனும் போர்வையில் அட்டூழியங்களையும் பாலியல் ரீதியான வக்கிரங்களையும் புரியும் சக மாணவர்களையும் தண்டிக்க நடவடிக்கை எடுக்க முன்வர வேண்டும்.

3. பகிடிவதையில் ஈடுபடும் சிரேஷ்ட மாணவர்கள் மீது நடவடிக்கை எடுத்தால் அவர்களின் எதிர்காலம் கேள்விக் குறியாகிவிடும் என்கிற பாகுபாட்டு உணர்வு –

இலங்கையில் ஆண்டு தோறும் பல விசித்திரமான பகிடிவதைச் சம்பவங்கள் நடைபெறுவதாக குறிப்பிடப்பட்டாலும் கூட அவற்றுக்கு எதிராக எந்த அளவு துரிதமான நடவடிக்கைகள் இடம்பெறுகின்றன என்பதும் அவ்விசாரணை நிறைவில் உண்மையிலேயே குற்றம் இழைத்தோர் தண்டிக்கப்படுகின்றனரா என்ற கேள்விக்கும் பதில் பெருமளவில் கிடைப்பதில்லை. இதற்கு மிக முக்கிய காரணம் அம்மாணவர்கள் மீது பல்கலைக்கழக நிர்வாகம் காட்டுகின்ற பரிதாபமும், பாவம் பிழைத்துப் போகட்டும் என்ற அசட்டைத்தனமுமே ஆகும். இதனால் நாம் எது செய்தாலும் நிர்வாகமும் சட்டமும் எம்மை தண்டிக்க மாட்டாது என்கிற அசட்டுத் துணிவே தொடர்ந்தும் மாணவர்களை குற்றமிழைக்க துண்டுகிறது. ஒரு சிலருக்கு கடுமையான நீண்ட கால வகுப்புத் தடை, பகிடிவதையில் ஈடுபடுவோருக்கு உதவித் தொகைகளான மகாபொல மற்றும் பேர்சரி போன்ற நிதி உதவிகளை முற்றாக நீக்குதல், குற்றமிழைத்த மாணவர்களை பல்கலைக்கழகத்தை விட்டு இடைநீக்கம் செய்தல் போன்ற கடுமையான தண்டனைகளை வழங்கினால் ஏனைய பல ஆயிரக்கணக்கான மாணவர்கள் பகிடிவதையில் ஈடுபடவே மாட்டார்கள்.

4. தலைமுறை தலைமுறையாக பல்கலைக் கழகத்தில் ஊடுகடத்தபடும் உப பண்பாடு –

இலங்கை பல்கலைக்கழகங்களில் கல்வி போதிக்கும் பேராசிரியர்கள் மற்றும் விரிவுரையாளர்கள் அதே பல்கலைக்கழகத்தின் பழைய மாணவர்களாக விளங்கும் சந்தர்பங்கள் மிக அதிகம். அவர்கள் கூட பல்கலைக் கழகத்தின் மாணவர்களாக இருக்கும் போது அதே கலாசாரத்தில் ஊறித்திளைத்தவர்களாகவே இருக்கும் வாய்ப்புகள் மிக அதிகம், எனவே பல விரிவுரையாளர்களிடம் இக்கலாசாரத்தை முழுமையாக இல்லாதொழிக்கும் மனப்பாங்கு இருப்பதில்லை. பகிடிவதைக் கலாசாரமானது தலைமுறை தலைமுறையாக இலங்கை பல்கலைக்கழகங்களில் பின்னிப்பிணைந்துள்ள சூழலில் அதனை இல்லாதொழிக்க பல்கலைக்கழக விரிவுரையாளர்கள் திடசங்கற்பம் பூணுதல் அவசியம்.

5. பல்கலைக்கழக மாணவர்களுக்கு கிடைக்கும் ஓய்வு நேரம் மிக அதிகமாக இருத்தல்

பாடசாலைக் காலத்தில் தனியார் வகுப்புகள், பிரத்தியோக வகுப்புகள், பாடசாலை என மாறி மாறி ஓடி ஓடிப் படித்த மாணவர்களுக்கு பல்கலைக்கழக சூழலில் கிடைக்கும் அதிக ஓய்வுப் பொழுதுகள் அவர்களை பகிடிவதை, போதைப் பொருள் பாவனை போன்ற தவறான வழிகளுக்கு இட்டுச்செல்லும் வாய்ப்பை அதிகரிக்கின்றன. உண்மையில் பாடசாலைக் கல்விக்கும் பல்கலைக்கழக கல்விக்கும் இடையில் பாரிய வேறுபாடு உள்ளதென்பதை மாணவர்கள் உணரவேண்டும். பாடசாலையில் ஆசிரியரினால் வழங்கப்படும் குறிப்புகள் மாத்திரம் பரீட்சைக்கு போதுமானவை ஆயினும் விரிவுரை மண்டபங்கள் அவற்றில் இருந்து முற்றிலும் வேறுபட்டவை. அங்கு பரீட்சைக்கு தேவையான அடிப்படை விடயங்கள் மாத்திரமே கற்றுக் கொடுக்கப்படும், பூரணத்துவமான அறிவை பெற நூலகங்களில் சுய தேடல் மற்றும் ஆராய்சிகளில் ஈடுபடுவது மிகவும் அவசியமாகும். துரதிஷ்டவசமாக எமது மாணவர்கள் பலர் மழைக்கும் கூட பல்கலைக்கழக நூல் நிலையங்களுக்கு செல்வதில்லை என்பதே வருத்தமான உண்மையாகும். எனவே மாணவர்களை வேலைப்பளு மிக்கவர்களாக மாற்றுவதன் மூலமாகவும் பகிடிவதையில் ஈடுபடுவதில் இருந்து தவிர்க்கச் செய்யலாம்.

மாணவர்களை கலை இலக்கியத் துறைச் செயற்பாடுகளில் ஈடுபடுத்தல், ஆக்கபூர்வமான மாணவர் ஒன்றியச் செயற்பாடுகளுக்கு இணைத்தல், நூல் வெளியீடு, கண்காட்சி ஏற்பாடு, விை-

ளயாட்டு போட்டிகள் நடத்தும் பொறுப்பு, நிகழ்ச்சி ஒருங்கமைப்பு, நிதி சேகரிப்பு , சங்கங்கள் கழகங்களுக்கு தலைமைத்துவம் வகிக்கச்செய்தல் போன்ற பணிகளை கொடுத்தால் அவர்களின் நேரம் பகிடிவதைச் செயற்பாடுகளில் ஈடுபடாமல் சமூகத்துக்கு பயன்தரக்கூடிய விதத்தில் பெறுமதியாக மாற்றப்படும். அத்துடன் பகிடிவதையில் ஈடுபடுவோரை காட்டுமிராண்டிகள் போல சித்தரித்தும் பல்கலைக்கழக நேரத்தை பெறுமதியாக செலவிடுவோரை பரிசில்கள், விருதுகள் வழங்கி கௌரவித்து நாயகர்களாக சித்தரித்தால் அடுத்துவரும் கனிஷ்ட மாணவர்களும் நல்ல முன்னுதாரனமான மாணவர்களை அடியொற்றி நடப்பார்கள்.

சட்ட ரீதியான பாதுகாப்பு ஏற்பாடுகள்

பல ஆண்டுகளாக பகிடிவதையில் ஈடுபடுவோர் இலங்கையின் தண்டனைச் சட்டக் கோவை (Penal Code) மற்றும் Criminal Procedure Code என்பனவற்றினால் நீதி விசாரணைகளுக்கு உட்படுத்தப்பட்டு வந்த நிலையில் 1997 ஆம் இடம்பெற்ற வரப்பிரகாஷ் மற்றும் கெலும் துஷார விஜேயதுங்க ஆகியோரின் மரணங்கள் நாடு முழுவதும் ஏற்படுத்திய அதிர்வலைகளின் காரணமாக இலங்கைப் பாராளுமன்றம் 1998 ஆம் ஆண்டு சித்திரை மாதம் 29 ஆம் திகதி பகிடிவதை தடுப்புச் சட்டத்தை ஏகமனதாக நிறைவேற்றியது.

இச்சட்டத்தின் பிரிவு 2(1) பல்கலைக்கழக வளாகத்தினுள் அல்லது வேறு பிரதேசத்தில் பகிடிவதையில் ஈடுபட்டால் அல்லது அச்செயற்பாடுகளுக்கு உறுதுணையாக இருந்தால் சுருக்க முறையிலான விசாரணை நீதவான் நீதிமன்றத்தில் மேற்கொள்ளப்பட்டு 2 வருடங்களுக்கு மேற்படாத கடுழிய சிறைத்தண்டனை வழங்கப்படும் என்பதுடன் பாதிக்கப்பட்ட மாணவருக்கு நீதிமன்றத்தினால் தீர்மானிக்கப்படும் இழப்பீட்டு தொகையை குற்றவாளி செலுத்த வேண்டும்.

பகிடிவதை தடுப்புச் சட்டத்தின் பிரிவு 2 (2) இல் குறிப்பிடப்பட்ட குற்றங்களாகிய பகிடிவதை எனும் பேரில் பாலியல் ரீதியான துன்புறுத்தல்களை மேற்கொள்ளல், மாணவர்களை அடித்து காயப்படுத்தல் போன்ற குற்றங்களை இழைத்தால் சுருக்கமான விசாரணையின் முடிவில் குற்றவாளி என நிருபிக்கபட்டால் 10 ஆண்டுகளுக்கு மேற்படாத சிறைத்தண்டனை அனுபவிக்க வேண்டுமென்பதுடன் பாதிக்கப்பட்ட மாணவருக்கு நட்ட ஈட்டுத் தொகையும் வழங்க வேண்டும்.

அதேவேளை குறித்த சட்டத்தின் பிரிவு 3, பல்கலைக்கழக வளாகத்தினுள் அல்லது வெளியிலோ மாணவர்களின் சொத்துக்களுக்கோ உடமைகளுக்கோ தீங்கு விளைவித்தால் நீதாவான் நீதிமன்றின் விசாரணை நிறைவில் 5 வருடத்துக்கு மேற்படாத கடுழிய சிறைத்தண்டனை அனுபவிக்க வேண்டும்.

அதேவேளை பிரிவு 4 இல் மாணவர்களின் நடமாடும் சுதந்திரத்தை கட்டுப்படுத்தும் விதத்தில் மாணவர்களை அடைத்து வைத்து துன்பம் விளைவித்தல் போன்ற குற்றச்செயல்களில் ஈடுபட்டால் 7 வருடத்துக்கும் மேற்படாத கடுழிய சிறைத்தண்டனையை குற்றமிழைத்த மாணவர்கள் அனுபவிக்க வேண்டும்.

1998 ஆம் ஆண்டு பகிடிவதை தடுப்புச் சட்டத்தின் பிரிவு 9 பிணை தொடர்பாக குறிப்பிடப்பட்டுள்ளது. மேலே குறிப்பிடப்பட்ட பிரிவு 2(2)மற்றும் பிரிவு 4 இல் குறிப்பிடப்பட்ட குற்றங்களை புரியும் மாணவர்களுக்கு நீதவான் நீதிமன்றம் மூலமாக பிணை வழங்கும் அதிகாரம் இல்லை என்பதுடன் மேல் நீதிமன்றத்துக்கே அவ்வதிகாரம் உண்டு. அத்துடன் பிரிவு 11 இன் படி இது ஒரு Cognizable Offence என்பதால் பிடியாணை இன்றி குற்றமிழைத்தவர்களை கைது செய்யமுடியும்.

பகிடிவதை செய்வோருக்கு எதிராக எப்படி முறைப்பாடு செய்ய முடியும் ?

1. பல்கலைக்கழக மாணியங்கள் ஆணைக்குழுவில் முறைப்பாடு செய்யமுடியும்.

பல்கலைக்கழக மாணியங்கள் ஆணைக்குழுவுக்கு நேரடியாக தான் சென்று முறைப்பாடு வழங்க வேண்டுமென எவ்வித கட்டுப்பாடுகளும் இல்லை. https://eugc.ac.lk/rag/ எனும் இணையத்-தளத்தின் மூலமாகவும் 0112123700 எனும் தொலைபேசி இலக்கம் மூலமாகவும் முறைப்பாட்-டினை மேற்கொள்ளமுடியும். தவிர google play store இல் உள்ள UGC Emergency Safety App மூலமாகவும் முறைப்பாடுகளை பதிவு செய்யமுடியும்.

2. பல்கலைக்கழகத்தில் உள்ள மாணவ ஒழுக்க அதிகாரி (Marshal), மாணவர் ஆலோசகர் (Student Counselor) , சிரேஷ்ட மாணவ ஆலோசகர் (Senoir Student Counselor) ஆகியோருக்கு உடனடியாக அறிவிக்கலாம், அது தவிர விரிவுரையாளர்கள், பீடாதிபதி, துணைவேந்தர் போன்றோருக்கும் அறிவிக்கலாம்.

3. நிலைமை மிகவும் மோசமாக போனால் பொலிசாரின் உடனடி இலக்கமாகிய 119 என்ற இலக்கத்துக்கும் உடனடியாக அறிவிக்கலாம்.

முடிவுரை

பல்கலைக்கழகங்கள் சுயாதீனமான உன்னத புலமைத் தேடலுக்கான சுவர்க்க பூமியாகும், ஆயினும் துரதிஷ்டவசமாக பல்கலைக்கழகத்தில் உள்ள மாணவர்களில் பெரும்பாலோனோர் பகிடிவதையை ஒரு சாதாரண உப பண்பாடாக கருதுகின்றனர். புலமைத்துவ கல்வி பீடங்க-ளில் **Senior- Junior** என்ற பேதம் சரியானது என்கிற கருத்துருவாக்கம் இருந்தால் நாட்டில் பெரும்பான்மையானோர் சிறுபான்மையினரை அடக்குவது கூட சரியானதாகவே தென்படும், உயர் சாதியினர் என்று தம்மை தாமே அடையாளப்படுத்திக் கொள்வோர் ஒடுக்கப்பட்ட சாதி மக்களுக்கெதிராக அடக்குமுறைகளை பிரயோகிப்பதும் சரியாகவே தென்படும். ஆகவே ஒடுக்குமுறைகளுக்கு எதிராக குரல் கொடுப்போர் பகிடிவதைக்கெதிராகவும் தொடர்ச்சியான போராட்டங்களை முன்னெடுக்க வேண்டும். இன்று பல்கலைக்கழகத்தில் பகிடிவதை செய்வோர் தான் நாளை இந்த நாட்டின் அரச, தனியார் மற்றும் மிக முக்கிய நிர்வாக ஆட்சி செயற்பாடுகளின் பிரதான பங்காளிகளாக இருக்கப்போகிறார்கள் ஆகவே அங்கும் இதே பலாத்கார சிந்தனைகளுடன் தான் பணியாற்ற போகின்றார்களா? நாட்டை ஆள இருக்கும் படித்த இளையவர்கள் மனநோயாளிகள் போல பகிடிவதையில் ஈடுபட்டால் நாட்டின் நாளைய எதிர்காலம் எப்படி இருக்கும்? இந்த பகிடிவதையில் ஈடுபடும் மனநோயாளிகளுக்கு மருந்து, மாத்திரை கொடுத்து இனி பயனில்லை, கடுமையான அறுவை சிகிச்சைகளே தேவைப்படுகி-ன்றன. ஒரு சிலருக்கு கொடுக்கப்படும் தண்டனைகள் முழு மாணவர் சமூகத்தையும் திருத்தும் என்பதில் ஐயமில்லை, ஆனால் துணிச்சலோடு எவ்வித அழுத்தங்களுக்கும் அடி பணியாமல் இந்த பூனைகளுக்கு மணி கட்டப்போவது யார் என்பது தான் நம்மிடம் இருக்கும் பிரதானமான கேள்வி.

Implementation of International Intellectual Property Law via Bio Piracy and Commercialization of Ethno Botanical Knowledge

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The intellectual property rights[1] and Bio piracy including commercialization of Bio Botanical Knowledge, which has featured very often as very controversial issues between developed and developing countries, leading to long-drawn legal battles. Many wealthy nations amass riches, through the biotechnology they have developed, using biological resources obtained from developing nations virtually free of charge by virtue of their bargaining power. Intellectual property rights on such developments by the industrialized nations disregard property-holding regimes found in developing countries. Bio-piracy, which is the commercial exploitation of naturally occurring biochemical or genetic material, and obtaining of patents that restrict its future use of such material by the source nation, and also failing to pay fair compensation to the community from which it originates.

Intellectual property simply refers to intangible property created by the creativity of a human uniqueness and value. Academically it is defined as "creations of the mind, such as inventions, literary and artistic works, designs, symbols, names and images used in commerce and engineering."[2] The rights holder obtains exclusive right over the use of such work for stated length of time. Such rights fall into Industrial Property[3] and Copyrights[4].[5]

All nations have come up with their own statutory provisions known as intellectual property laws in order to protect moral and economic rights of the creator and the rights awarded to the public to gain access to the same. This is further followed by the second most profound need for the protection of intellectual property wherein the laws sculpted is used by the government as a tool to encourage more creativity whilst enhancing fair-trading which will tremendously contribute towards the economic and social development of a country[6]. World Intellectual Property Organization[7] was instrumental in drafting the main international provisions for protection of unique human intellects, during Berne and Paris conventions in the 1970s, which was accepted by all *WIPO* member countries.

1 Hereafter referred to as IPR

2 (Wipo.int, 2018) <http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf> accessed 10 January 2018.

3 Patent or trademarks for inventions

4 protection for literary work

5 (Wipo.int, 2018) <http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf> accessed 10 January 2018.

6 'Why You Need To Protect Your Intellectual Property' (The British Library, 2018) <https://www.bl.uk/business-and-ip-centre/articles/why-you-need-to-protect-your-intellectual-property> accessed 10 January 2018.

7 Hereafter referred to as WIPO

Along with *WIPO,* the World Trade Organization[8] geared towards achieving the same goal; in that they have taken up major roles in the functioning of a stabilized international trade. However, *WIPO's* mission is to balance the mission and objectives of both these two bodies and to "lead the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all"[9] in the same manner, an independent body would solely deal with IP. *WTO's* mission is stated to "deal with the global rules of trade between nations and its main function is to ensure that trade flows smoothly, predictably and freely as much as possible."[10]

WIPO is a corporation which is striving hard to implement at least the minimum standards introduced by the Trade Related Aspects of Intellectual Property Rights Agreement, well known as *TRIPS. TRIPS* is an all-inclusive detailed multilateral agreement of intellectual property. It focuses on three main features, the main and most fundamental of them being the setting up of 'standards.' "The *TRIPS* sets the minimum standards agreement, but expects and allows members to provide more extensive protection of intellectual property according to their wishes."[11] The rationale behind setting up of this agreement is that, while intellectual property rights are limited to individual nations; they have a bearing on transnational trade.

While strict enforceability of intellectual property is essential for both developed and developing members of *WIPO*, it is no secret that implementation of them within the developing countries has been frustratingly ineffective. The superior bargaining power of the developed nations which has more protections than agreed during the *TRIPS* negotiation have not made things easy for developing countries[12]. One of the major issues the developing nations face is the Bio Piracy and Commercialization of Ethno Botanical Knowledge, by the developed economies. While these important issues have not been addressed to the level expected by the developing countries, it is essential for them to deal with the situation to the best they could under the difficult and unfavorable international background.

Bio Piracy is the "commercial development of naturally occurring biological materials, such as plant substance or genetic cell lines, by a technologically advanced country or organization without fair compensation to the people or nations in whose territory the material was originally discovered".[13] As means of remedying this issue, two international forums; the Convention of Biological Diversity[14], a multilateral treaty addressing all aspects of biological diversity[15] and the *TRIPS* agreement have been set up. The exponential technological developments in the recent decade have made it possible, both to discover new natural resources and to turn them

8 Hereafter referred to as WTO

9 (Wipo.int, 2018) <http://www.wipo.int/about-wipo/en/> accessed 10 January 2018.

10 'WTO | The WTO In Brief' (Wto.org, 2018) <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm> accessed 10 January 2018.

11 'WTO | Intellectual Property - Overview Of TRIPS Agreement' (Wto.org, 2018) <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> accessed 10 January 2018.

12 Peter K. Yu, ' The Objectives and Principles of The Trips Agreement' 1, 1

13 J Ragnar, ' Biopiracy the CBD and TRIPS- The prevention of biopiracy' [2004] 1, 1

14 Hereafter referred to as CBD

15 'CBD Home' (Cbd.int, 2018) <https://www.cbd.int/> accessed 10 January 2018.

into high substances of high economic value. But the downside of this ability is when the developed nations who possess such technological knowhow misuse the resources in various ways at the expense of the developing countries, which own most of these unique resources.

Diamond v Chakrabarty[16], a case adjudged in South African courts, has been a well-known case in reference. In this case the claim was made on the provision of Title 35 United States code, *Section 101*,"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter , or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title."[17] The court held that "anything under the sun that is made by man" was included. This observation made it difficult to draw a fine line between intellectual property manufactured and discovered. However, this landmark judgment invited more subject matters that involved the bio piracy issues.

A case study used to review the ineffectiveness of the implementation of intellectual rights of developing countries has been done in Africa. The study done in 2010, it was clearly evident that the African countries have been suffering the most from bio piracy. These nations have lost the patent rights over many indigenous plants due to the lack of sufficient knowledge on patent right mechanism, which the developed countries have been quick to cash in on.[18]

The Pelargonium is one such plant, which is an important herb in South Africa, which the country's various tribes use as medicine for respiratory ailments. However, its African originality has been lost to a developed country which obtained the patent over the medication it produced using the herb. Yet to date it has not been established which ingredients in this plant contribute towards its antibacterial properties".[19] In short, it is a medicinal plant used to cure respiratory infections and diseases.

This plant was patented by a German company, 'Schwabe'. The aforementioned company, which obtained the knowledge possessed by the South African Tribes, manufactured a syrup using the roots of the plant for which it sought patent rights. The use of this traditional community knowledge to reinvent the invention can also be seen as a misuse of the Indigenous Peoples Rights. It was a known fact that the Alice community in South Africa was the first to discover the resource and its usefulness, "The community wants to stop [companies] from saying they were the first to know that this medicine is important, because we grew up knowing that … they are like thieves, just stealing the indigenous knowledge."[20]

16 447 U.S. 303 (1980)

17 Manzoor Elahi, 'Diamond V. Chakraborty; 447 U.S. 303 (1980) - Case Analysis' (Academia.edu, 2018) <http://www.academia.edu/4096903/Diamond_v._Chakraborty_447_U.S._303_1980_-_Case_Analysis> accessed 10 January 2018.

18 'Biopiracy, The Intellectual Property Regime and Livelihoods in Africa' (Base.d-p-h.info, 2018) <http://base.d-p-h.info/fr/fiches/dph/fiche-dph-8699.html> accessed 10 January 2018.

19 'Pelargonium' (Herbalafrica.co.za, 2018) <http://www.herbalafrica.co.za/pelargonium.html> accessed 10 January 2018.

20 Nomthunzi Sizani, spokesperson for the Alice community

This statement shows that both bio piracy and indigenous rights or traditional knowledge overlap and seem to work hand in hand. Traditional Knowledge is "a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity".[21] By this it was evident that both the right ethnobiological knowledge and the rights of the indigenous people have been violated and misused.

This case involving the *Pelargonium* plant has showcased how the developed nations could make the most out of the intellectual property they have reinvented at the expense of an underdeveloped community. Schwabe Company made merry with the selling of the product, "reaping huge profits, which during 2006 alone, was a staggering 80 million Euro in sale".[22]

The patent of an invention is referred to in Article 27 of the *TRIPS* Agreement, which says that "patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application".[23] Schwabe has successfully concluded two patents, one for the method of gaining the resources and the other for the use of the resource as a cure for AIDS.[24] While the protection of bio piracy is provided in both the *CBD* and the *TRIPS*, it is unfortunate that the "Traditional Knowledge" concept and the ethnobotanical knowledge have not been recognized in them. This absence invariably allows the developed countries to take advantage over the developing countries in those aspects. This absence of protection for traditional knowledge and ethnobotanical knowledge has gravely affected many developing countries that have been given no right to their traditional knowledge and original applications, genuinely discovered and hitherto by them for ages. The reason for them to suffer the most is evidently convincing by the fact that most traditional knowledge is born and originated in developing countries, which still house many indigenous knowledge.

Article 27 (3) (b) of the *TRIPS* focuses on protecting plant varieties which could be done through either patents or an effective mode of *sui generis* (the only one in its own kind)[25]. South Africa was also one of the main and few countries to formulate a *sui generis*, the implementation of the International Union for the Protection of New Varieties of Plants initiated by the Plant Breeders Rights Act No. 15 of 1976. The above-mentioned provision can be considered as an important one as it outweighs the lack of provision included in *Article 27 (1)*. This provision[26] reflects that regardless of the subject matter, the company can seek the patent, and is impossible for a third party to know what exactly is patentable. However, in recent times it was concluded that this was an ineffective system as it was similar to the existing systems in place anyway.

21 (Wipo.int, 2018) <http://www.wipo.int/pressroom/en/briefs/tk_ip.html> accessed 10 January 2018.

22 Financial Times Deutschland (17.02.2007)

23 Article 27

24 (2018) <https://www.grain.org/article/entries/2237-rural-community-of-south-africa-stands-up-against-pelargonium-patents-and-biopiracy> accessed 10 January 2018.

25 'Sui Generis Definition' (Duhaime.org, 2018) <http://www.duhaime.org/LegalDictionary/S/SuiGeneris.aspx> accessed 10 January 2018.

26 Article 27 (1)

These clear lack of protection in the international agreements for the developing countries have compelled them to draft their own laws to protect the unique resources they possess. African states such as Zimbabwe have taken measures to protect traditional knowledge through constitutional means. Article 33 of the Zimbabwe Constitution focuses on the need for preservation of traditional knowledge, where it reads that "The State must take measures to preserve, protect and promote indigenous knowledge systems, including knowledge of the medicinal and other properties of the animal and plant life possessed by local communities and people."[27]In the Asian region, Sri Lanka, in 2009 drafted the legal framework for protection of traditional knowledge. The statement policy of the draft purely communicates the need for "the necessity to promote the protection, development, conservation and preservation of traditional knowledge."[28]

It was raised in the case study, if South Africa has sculpted its legal framework providing provisions for bio piracy and traditional knowledge on home soil. The South African officials in 1978 drafted its first intellectual property statute; The Patents Act No. 57 of 1978. Initially, it was found that the answer to if South Africa had formulated laws for traditional knowledge was in the negative. The patents act discussed above excludes the necessity for traditional knowledge to be identified within their legal framework. However, the South African officials, in 2005, on highlighting this lacking area of law paved its way to identify traditional knowledge with an amendment, which came into force in 2007. The amendment read that "every applicant for a South African patent must now lodge a declaration stating whether or not the invention is based on, or derived from, any traditional knowledge or any indigenous (South African) biological or genetic resource."[29]

This principle was also recognized in the South African Biodiversity Act 2004, which states that compensation for misuse of traditional knowledge will be awarded to communities. Section 82 (2) (b) (ii) of the National Environmental Management: Biodiversity Act 10 of 2004 specifically codifies the need for compensation in means of benefit sharing procedures be given to communities for using their intellectual property if at all any company patents it. " (2) If a stakeholder has an interest as set out in subsection (1)(a)[30], an issuing authority may issue a permit only if (b) the applicant and the stakeholder have entered into (ii) a benefit-

27 Victor Nzomo and View », 'Zimbabwe: Constitutional Protection Of Traditional Knowledge And The Robert Mugabe Fashion Brand | CIPIT Blog' (Blog.cipit.org, 2018) <http://blog.cipit.org/2013/03/26/zimbabwe-constitutional-protection-of-traditional-knowledge-robert-mugabes-trademark-and-copyright-success/> accessed 10 January 2018.

28 'Sri Lanka: A Legal Framework For The Protection Of Traditional Knowledge In Sri Lanka' (Wipo.int, 2018) <http://www.wipo.int/wipolex/en/text.jsp?file_id=191824#LinkTarget_645> accessed 10 January 2018.

29 'Patents And Traditional Knowledge - Intellectual Property - South Africa' (Mondaq.com, 2018) <http://www.mondaq.com/southafrica/x/197484/Patent/patents+and+traditional+knowledge> accessed 10 January 2018.

30 Before a permit referred to in section 81(1)(a) or (b) is issued, the issuing authority considering the application for the permit must in accordance with this section protect any interests any of the following stakeholders may have in the proposed bioprospecting project;

(a)A person, including any organ of state or community, providing or giving access to the indigenous biological resources to which the application relates; and

(b)an indigenous community or a specific individual-

sharing agreement that provides for sharing by the stakeholder in any future benefits that may be derived from the relevant bio-prospecting."[31] This is clear evidence that South African officials have drafted the legislation with the mindset of the lost suffered when they lost a very important patent to a developed country. Whereas South Africa lacks the advanced knowledge, put this unique traditional knowledge and ethnobiological knowledge to modern use by themselves, they have gained reasonable monetary advantage by the inclusion of this clause, which is fair and reasonable in my opinion. Another good example is the Indian "Jeevani" medicine. In this case they were able to compensate for the loss of the right of intellectual property by means of royalties on the sales.[32]

In the case under discussion, it is an eye opening fact that the German company, Schwabe was not successful in getting the patent over the medication they produced using the South African herbal plant. This was due to the fact that it was proved that Schwabe had failed to make any reasonable endeavor to seek prior consent from the relevant community which held this unique intellectual property. This was deemed as the German company has violated the relevant section, which is included for the purpose of protecting the community's rights. The judgment stated that, "There is no evidence that 'Schwabe' sought out and obtained the prior informed consent on mutually agreed terms (MAT), from holders of the traditional knowledge in South Africa."[33] This resulted in the application for patent by Schwabe from the South African Patent Office being rejected.

Furthermore, another important piece of legislation that needs to be discussed is the Convention of Biological Diversity, which is specifically drafted to deal with biological resources. The South African government ratified the convention on domestic soil in the year 1996. Article 15(4) of the CBD requires access to resources on mutually agreed terms. This convention is an important convention, as its Article 15(5) requires the prior informed consent of the community. The Article 8(j) provides that the knowledge, innovations and practices of indigenous and local communities relevant to biodiversity conservation and utilization should be respected, preserved and maintained, Whilst Article 15(6) , 15(7) , 16 , 19(1) , and 19(2) , advocate fair and equitable benefit-sharing arrangements between the providers and users of relevant resources.[34]

The South African government practices the dualist theory, where the customary laws should not only be ratified but also be implemented through national legislations. This is where the National Environment Management: Biodiversity Act No 10 of 2004 has its effect. This was introduced in order to implement the truest ideology interpreted in the *CBD*.

This Biodiversity Act introduced different ways to protect bio piracy and commercialization of ethnobotanical knowledge. One important provision that is codified to this effect is the disapproval of bio-prospecting, if the relevant community does not grant its consent to

31 Section 82 of the National Environmental Management: Biodiversity Act 10 of 2004

32 About Us and others, 'The Realities Of Traditional Knowledge And Patents In India - Intellectual Property Watch' (Intellectual Property Watch, 2018) <https://www.ip-watch.org/2010/09/27/the-realities-of-traditional-knowledge-and-patents/> accessed 10 January 2018.

33 ' KNOWLEDGE NOT FOR SALE' [2008] 2, 3

34 Convention on Biological Diversity 1992.

such prospecting. This is included within the provision of Section 87 (c) which states that in accordance to *Section 81 (1) (a) and (b)* which states that "No person may, without a permit issued in terms of Chapter 7 engage in the commercialization phase of bio-prospecting involving any indigenous biological resources; or export from the Republic any indigenous biological resources for the purpose of bio-prospecting or any other king of research."[35] This provision in my opinion blocks all potential international forces from misusing the knowledge kept for themselves by the indigenous communities of South Africa.

Even after this success, still the South African officials had the presence of mind to notice that the primary legislations were not fully adequate in coping with all potential loopholes of this rapidly changing and challenging area of law and went ahead in introducing secondary laws. These secondary laws were structured as regulations. For example, Regulation 8 (10) states that "bio-prospectors are required to disclose all pertinent information to all stakeholders, obtain the necessary prior informed consent and Material Transfer Agreements from those giving access to the resources and traditional knowledge and enter into a benefit sharing agreement with such stakeholders."[36] It is evident that these secondary regulations introduced anticipate a range of "monetary and non-monetary compensatory measures to be agreed upon between the parties, including, training, conservation, co-ownership of intellectual property rights, co-authorship, inclusion in research, milestone and/or upfront payment."[37]

The facts of the case and the analysis of behavior of Schwabe, it can reasonably conclude that Schwabe has clearly not adhered to the procedures formulated in the relevant South African regulations with regard to patenting a botanical plant worth of economic value. They have specifically failed to comply with the need to obtain prior informed consent. It would be required for Schwabe to compensate for the loss suffered by the Alice community. In the aftermath, the South African government can route the compensation received to the local indigenous people and encourage them to harvest and use their traditional knowledge as a tool to uplift their economic status. It is also advisable for the government to take steps to include these IP provisions into the South African constitution, for bio piracy and commercialization of ethnobotanical knowledge, as the constitution will always prevail and be supreme. This case is an example that a developing country could benefit from the implementation of the IPL. However, while it is also worth noting that *TRIPS* and *CBD* provide for the protection of interests of developing countries, it is very clear that these provisions are not adequate to provide foolproof protection to the developing countries, which always would be the underdogs in trade negotiations, involving resources of immense economic value. However, incorporating these provisions into the legal structure of individual countries, ideally to the constitution itself, could be a much more effective way of making sure the proper implementation.

35 Section 81 (1) (a) (b) Biodiversity Act 10 of 2004

36 ' KNOWLEDGE NOT FOR SALE' [2008] 2, 8

37 ' KNOWLEDGE NOT FOR SALE' [2008] 2, 8

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ශ්‍රී ලංකාවේ මත්ද්‍රව්‍ය භාවිතයේ ව්‍යාප්තිය, ආශ්‍රිත ප්‍රවණතා හා මත්ද්‍රව්‍ය වැරදි සම්බන්ධ නීතිය

සමිල්ක ප්‍රභාස්වර රණසිංහ මහතා
ශ්‍රී ලංකා නීති විද්‍යාලය (තෙවන වසර)

ශ්‍රී ලංකාවේ මත්ද්‍රව්‍ය ව්‍යාප්තිය

මත්පැන් හා මත්ද්‍රව්‍ය නිෂ්පාදනයෙහි ආරම්භය මානව ශිෂ්ටාචාරයේ ආරම්භක අවධීන් වෙතම දිව යන කරුණකි. ඊජිප්තු හා චීන ශිෂ්ටාචාර පලතුරු යුෂ, පැණි ආදිය භාවිතා කොට මැත්පැන් නිපදවා ඇති බවට තොරතුරු හමුවන අතර ක්‍රිස්තු පූර්ව 3000 - 2000 අතර කාලයේ දී ඉන්දියාවේ සුරා නමින් හැඳින්වූ සහල් වලින් නිපදවූ මත්පැන් භාවිතා කොට තිබේ. ශ්‍රී ලංකාවේ මත්පැන් හා මත්ද්‍රව්‍ය භාවිතය සම්බන්ධයෙන් වූ ගැටළුව පිළිබඳ බැලීමේදී එය මෑතකාලීනව මතුවූ සංසිද්ධියක් නොවේ. කන්ද උඩරට රාජධානිය ඉංග්‍රීසින් විසින් ක්‍රි.ව 1815 දී යටත් කරගැනීමේදී එවකට උඩරට රජු වූ ශ්‍රී වික්‍රම රාජසිංහ රජු අසිහියට පත්කිරීමට ජෝන් ඩොයිලි විසින් උපායමාර්ගිකව යොදා ගනු ලැබුවේද මත්පැන් ය. ඊට ප්‍රථම ක්‍රි.ව 1505 දී ලංකාව ආක්‍රමණය කල පෘතුගීසි ජාතිකයින් විසින් අබිං කෑම ලංකාවට හඳුන්වා දෙන ලද අතර ක්‍රි.ව 1829 දී එවකට සිටි ඉංග්‍රීසී ආණ්ඩුකාර විසින් ලංකාවේ අබිං වගාව සංවර්ධනය කිරීම සඳහා ගොවීන් දිරිමත් කිරීමට අනුබල දෙන ලදී. මෙයට හේතු වුයේ වතුකරයේ සේවය කල ද්‍රවිඩ ජනතාවගේ අවශ්‍යතාව සඳහා අබිං ලංකාවේදීම වගා කිරීමට උනන්දු කිරීමයි. එමඟින් රජයට විශාල බදු ආදායමක් ලැබුණු නමුත් ක්‍රමයෙන් ශ්‍රී ලාංකික සමාජය තුළ අබිං කෑම සමාජ ප්‍රශ්නයක් ලෙසින් ගැටලූ මතු වීමට පටන් ගත් නිසා මේ සම්බන්ධයෙන් 1867 අංක 19 දරන අබිං සහ කංසා ආඥා පනත පනවන ලදී. 1930 වන විට ශ්‍රී ලංකාවේ වැඩියෙන්ම භාවිතා කළ මත්ද්‍රව්‍යයන් වූයේ අබිං සහ ගංජාය. 1970 දශකයට පෙර ශ්‍රී ලංකාව තුළ හෙරොයින් භාවිත කරන්නන් වාර්තා වී නොමැති අතර 70 දශකය අවසානයේදී හෙරොයින් මත්ද්‍රව්‍ය භාවිතය මෙරට ආරම්භ වීමට මුල් වූ ප්‍රධාන හේතුව වූයේ සංචාරක ව්‍යාපාරයේ වර්ධනයයි.

මත්ද්‍රව්‍ය හැඳින්වීම

මත්ද්‍රව්‍යයක් යනු මිනිසාගේ හෝ යම් සත්වයෙකුගේ මොළයේ ජෛව රසායන ක්‍රියාවලිය වෙනස් කිරීමට සමත් ස්වාභාවික, අර්ධ කෘතිම හෝ කෘතිම සම්භවයක් ඇති ද්‍රව්‍යයක් ලෙස සරලව හැඳින්විය හැක. මත්ද්‍රව්‍ය මගින් මනසට සිදුකරන බලපෑම (Psychoactive effect) මත මූලික වශයෙන් ප්‍රධාන කාණ්ඩ 5 කට බෙදා දැක්විය හැකිය. එනම් මාදක/Narcotics (හෙරොයින්, මෙතඩෝන්), අවපීඩක/Depressants (ඩයිසපාම්, ඊතයිල් ඇල්කොහොල්), උත්තේජක/Stimulants (කොකේන්, කැෆෙන්), භ්‍රාන්තිකාරක/Hallucinogens (Lysergic Acid Diethylamide එල්.එස්.ඩී, Phencyclidin) සහ වෙනත් වශයෙනි. මෙරට තුළ වැඩි වශයෙන් භාවිතා වන හෙරොයින් (විද්‍යාත්මක නාමය) Diacetyle morphene) යනු ලොව බහුලම භාවිතා කරන මත්ද්‍රව්‍යයයි. හෙරොයින් පොපි ශාකයේ මල්වල සාරයේ අඩංගු මෝර්ෆීන් නැමැති ඇල්කලොයිඩය ඇසිටලීකරණයට භාජනය කිරීමෙන් නිපදවන රසායනික සංයෝගයකි. සාමාන්‍යයෙන් හෙරොයින් සුදු හෝ දුඹුරු පැහැති කුඩු වර්ගයක් ලෙස මත්කුඩු වෙළඳපොල තුළ විකිණේ. රත්කල හෙරොයින් කුඩු වලින් පැන නගින හුමාලය ආශ්වාස කිරීමෙන් හෝ ද්‍රව තත්වයෙන් නිපදවා ඇති හෙරොයින් ශිරාවලට එන්නත් කිරීම (intravenous) මගින් ශරීරගත කල හැක. හෙරොයින් ශරීරගත වී සුළු කාලයකදී මානසික

සැහැල්ලූ භාවයක් අත්විඳිය හැක. හෙරොයින් ශරීරය තුළ දී නැවත මෝර්ෆීන් බවට පරිවර්තනය වී මධ්‍යම ස්නායු පද්ධතියේ සෛලවල පිහිටා ඇති ඩොපැමීන් සංවේදී ප්‍රෝටීන ග්‍රාහක (Dopamine receptors) හා බැඳීමෙන් මෙම ආචරණය ඇතිවන බව තහවුරු වී ඇත. හෙරොයින් භාවිතා කරන පුද්ගලයන් වැඩිදෙනෙකු ඉතා කෙටි කලකදී එයට මානසිකව මෙන්ම කායිකවද ඇබ්බැහි වේ. අධික හෙරොයින් මාත්‍රාවක් ශරීරගත වීමකදී මොලදණ්ඩේ (Brain stem) ස්ථානගතව ඇති ශ්වසන කේන්ද්‍රය අකර්මනය වීමෙන් (Respiratory centre paralysis) මරණය පවා සිදුවිය හැක.

ශ්‍රී ලංකාවට මත්ද්‍රව්‍ය ලැබෙන ආකාර

අතීතයේ පටන් පෙරදිග සමුද්‍ර වෙළෙඳ මාර්ගයේ කේන්ද්‍රස්ථානයක් බවට පත්වීමට හේතු වූ වැදගත් කරුණක් වන්නේ ඉන්දියන් සාගරයේ ශ්‍රී ලංකාවේ වූ සුවිශේෂී පිහිටීමය. කෙසේ වෙතත් අද වන විට භාණ්ඩ හුවමාරුව සහ සැපයුම් සේවා වැනි වෙළෙඳ කටයුතුවලට අමතරව ශ්‍රී ලංකාව සහ ඒ අවට මුහුදු කලාපය නීතිවිරෝධී, මහාපරිමාණ මත්ද්‍රව්‍ය ජාවාරම් සඳහා බහුල වශයෙන් යොදා ගනී. මෙතෙක් ශ්‍රී ලංකාව තුළ ඉතිහාසගත වන මත්ද්‍රව්‍ය වැටලීම් පිළිබඳව සලකා බැලීම මගින් ඒ බව තහවුරු වේ. 2020 වසරේ ජනවාරි මස සිට අප්‍රේල් මස දක්වා ශ්‍රී ලංකා නාවික හමුදාව විසින් දියත් කල මත්ද්‍රව්‍ය විරෝධී මෙහෙයුම් මගින් හෙරොයින් කිලෝග්‍රෑම් 718ක්, අයිස් (Crystal Methamphetamine) කිලෝග්‍රෑම් 797 ක් සහ මෙතෙක් ශ්‍රී ලංකාවෙන් සොයාගෙන නොතිබූ කෙටමින් (ketamine) නමැති මත්ද්‍රව්‍ය කිලෝග්‍රෑම් 581 ක් සහ කේරළ ගංජා කිලෝග්‍රෑම් 2,475 ක් සොයාගන්නා ලද අතර මෙම මත්ද්‍රව්‍ය තොග වල වටිනාකම රුපියල් බිලියන 21කට (කෝටි 2,100) ආසන්න ය. 2016 වසරේ දෙසැම්බර් 09 වෙනිදා කන්ටේනරයක සඟවා තිබූ කොකේන් කිලෝ 928 ග්‍රෑම් 229ක් පොලිස් මත්ද්‍රව්‍ය නාශක කාර්යාංශය විසින් සොයා ගනු ලැබීය. එම කොකේන් තොගය අත්අඩංගුවට ගනු ලැබුවේ කොළඹ වරායට පැමිණි නෞකාවක තිබියදී වූ අතර එම නෞකාව ඉක්වදෝරයේ සිට බෙල්ජියම හරහා ඉන්දියාවේ මුන්ද්‍රා වරාය වෙත යාත්‍රා කිරීමට නියමිතව තිබූ අතර මෙය ශ්‍රී ලංකා ඉතිහාසයේ මෙතෙක් අත්අඩංගුවට ගත් වැඩිම කොකේන් තොගය වේ. මත්වීම සඳහා භාවිත කරන ටැමඩොල් පෙති මිලියන 16ක් 2018 වසරේ ජූනි 28 වෙනිදා පොලිස් මත්ද්‍රව්‍ය නාශක කාර්යාංශය විසින් සොයා ගනු ලැබූ අතර එය වැටලීමකදී සොයාගත් වැඩිම මත්පෙති තොගය වේ. එමෙන්ම 2019 පෙබරවාරි 23 වන දින පොලිස් මත්ද්‍රව්‍ය නාශක කාර්යාංශය සහ පොලිස් විශේෂ කාර්ය බලකාය එක්ව කොළඹ, කොල්ලූපිටිය ප්‍රදේශයේ සුපිරි වෙළඳ සංකීරණයක රථ ගාලේදී රුපියල් මිලියන 2,945කට අධික වටිනාකමකින් යුත් හෙරොයින් කිලෝග්‍රෑම් 294 ග්‍රෑම් 490ක් සොයාගත් අතර එය මෙතෙක් ශ්‍රී ලංකාව තුළින් සොයාගත් විශාලතම හෙරොයින් තොගය වේ.

ඉන්දියන් සාගරය හරහා මහා පරිමාණයෙන් හෙරොයින් බෙදාහරින මාර්ගය දක්ෂිණ මාර්ගය ලෙස හඳුන්වන අතර මුළු ලෝකයටම මත්ද්‍රව්‍ය නිපදවන ප්‍රධාන කලාපයන් ද්විත්වයක් වන ශ්‍රී ලංකාවට නැගෙනහිර දෙසින් වූ ස්වර්ණමය ත්‍රිකෝණය ලෙස හැඳින්වෙන (ලාඕසය, තායිලන්තය, බුරුමය) කලාපය හා බටහිරින් ස්වර්ණ චන්ද්‍රවංකය ලෙස හැඳින්වෙන (ඇෆ්ගනිස්ථානය, ඉරානය, පකිස්ථානය) කලාප දෙකට මැදින් පිහිටා තිබීමද මත්ද්‍රව්‍ය ශ්‍රී ලංකාව තුළ ව්‍යාප්ත වීමට ප්‍රධාන හේතුවක්ව පවතී. කෙසේ වෙතත් ශ්‍රී ලංකාවට ලැබෙන බොහෝ මත්ද්‍රව්‍ය මෙරටදී භාවිතයට නොගන්නා අතර, ශ්‍රී ලංකාව හුවමාරු මධ්‍යස්ථානයක් ලෙස යොදා ගනිමින් මෙරටට පහළින් පිහිටා ඇති ඉන්දුනීසියාව, ඔස්ට්‍රේලියාව වැනි රටවල් ගණනාවක භාවිතය සඳහා මත්ද්‍රව්‍ය ප්‍රවාහනය කිරීමට යොදාගනී. පොලිස් මත්ද්‍රව්‍ය නාශක කාර්යාංශ වාර්තා අනුව වර්තමානයේ ශ්‍රී ලංකාව වෙත හෙරොයින් ගෙනෙන ප්‍රධානතම රට වනුයේ ඇෆ්ගනිස්තානය වන අතර වැඩිම කොකේන් ප්‍රමාණයක් ගෙන එන රට බ්‍රසීලය වේ. ගංජා රැගෙන එනුයේ ඉන්දියාවෙනි.

තවද අත්අඩංගුවට ගනු ලබන මත්ද්‍රව්‍ය අදාල විමර්ශන හා අධිකරණ කටයුතු නිම වීමෙන් පසු අධිකරණයේ නියෝග පරිදි විශේෂ ක්‍රියාපටිපාටියක් මගින් විනාශ කරනු ලබයි. එය බාහිර සමාජයට විවෘත නොවන හෙයින් අත්අඩංගුවට ගන්නා මත්ද්‍රව්‍ය සම්බන්ධව සිදුවනුයේ කුමක්ද පිළිබඳව සමාජය තුළ කුතුහලයක් පවතී.

ශ්‍රී ලංකාවේ මත්ද්‍රව්‍ය භාවිතය සම්බන්ධ මෑතකාලීන දත්ත

මෙරට පොලිස් සිරභාරයේ සහ රක්ෂිත බන්ධනාගාර තුළත් සිරගෙවල් තුළත් රඳවා සිටින පුද්ගලයන් අතරින් සියයට හැටකට වඩා වැඩි ප්‍රමාණයක් මත්ද්‍රව්‍ය ආශ්‍රිත වැරදි සහ චෝදනාවන්ට ලක්වූවන්ය. ඒ අතරින් මත්ද්‍රව්‍ය භාවිත කර හෝ ළඟ තබාගෙන සිට අසු වූ පුද්ගලයින්ගේ ප්‍රතිශතය වැඩි අතර සෙසු පිරිස් මත්ද්‍රව්‍ය අලෙවිය, ප්‍රවාහනය, නිෂ්පාදනය ආදී චෝදනා මත සිටින්නන්ය. 2018 වසරේදී ශ්‍රී ලංකාව තුළ මත්ද්‍රව්‍ය වැරදි සඳහා අත්අඩංගුවට ගනු ලැබූ මුළු පුද්ගලයින් සංඛ්‍යාව 98,754 කි. එය 2019 වසරේදී 89,321ක් දක්වා අඩුවී ඇත. 2019 වසරේ මත්ද්‍රව්‍ය වැරදි සඳහා අත්අඩංගුවට පත් පුද්ගල සංඛ්‍යාවෙන් 45,923 (51.41%) දෙනෙකු ගංජා ආශ්‍රිත වැරදි සඳහා ද, හෙරොයින් ආශ්‍රිත වැරදි සඳහා 40,954 (45.87%) දෙනෙකුද අත්අඩංගුවට පත්වී තිබේ. ඊට අමතරව මෙතම්පිටමින් සඳහා පුද්ගලයින් 2073 දෙනෙකු, ගංජා ආශ්‍රිත නිෂ්පාදනයක් වන හෂීස් සම්බන්ධ සිද්ධීන් සඳහා පුද්ගලයින් 121 දෙනෙකු සහ කොකේන් සම්බන්ධයෙන් 63 දෙනෙකු 2019 වසරේ අත්අඩංගුවට ගෙන තිබේ. 2019 වසරේ අත්අඩංගුවට පත් මුළු සංඛ්‍යාවෙන් 30,809 (34.49%) දෙනෙකු කොළඹ දිස්ත්‍රික්කයෙන්ද, 14738 (16.50%) දෙනෙකු ගම්පහ දිස්ත්‍රික්කයෙන්ද, 6780 (7.59%) දෙනෙකු කුරුණෑගල දිස්ත්‍රික්කයෙන්ද වාර්තා වී තිබේ. 2018 වසරේදී මෙරටින් හෙරොයින් කිලෝග්‍රෑම් 739 ක් සොයාගෙන ඇති අතර 2019 වසරේදී එය කිලෝග්‍රෑම් 1741 දක්වා වැඩි වී තිබේ. 2019 වසරේදී මෙරටින් සොයාගත් ගංජා කිලෝග්‍රෑම් ප්‍රමාණය 7071 කි. 2019 වසරේදී ගංජා ආශ්‍රිත වැරදි සඳහා අත්අඩංගුවට ගනු ලැබුණු පුද්ගලයින් 45,923 න් 21213 (46.19%) දෙනෙකු බස්නාහිර පළාතින්ද, 4903 (10.68%) දෙනෙකු උතුරු මැද පළාතින් හා 4577 (9.97%) දෙනෙකු දකුණු පළාතින්ද අත්අඩංගුවට ගෙන තිබේ. 2018 වසරේදී හෙරොයින් (දුඹුරු) කිලෝග්‍රෑම් 1ක වීථි මිලෙහි සාමාන්‍ය අගය රුපියල් මිලියන 6 (ඇමරිකානු ඩොලර් 32093) කි. 2018 වසරේදී ගංජා කිලෝග්‍රෑම් 1ක වීථි මිලෙහි සාමාන්‍ය අගය රුපියල් 30,000 (ඇමරිකානු ඩොලර් 160) ක් හා කොකේන් කිලෝග්‍රෑම් 1ක වීථි මිලෙහි සාමාන්‍ය අගය රුපියල් මිලියන 13 (ඇමරිකානු ඩොලර් 69536) කි.

මීට අමතරව මෙරට මත්පැන් හා දුම්කොළ ආශ්‍රිත නිෂ්පාදන සලකා බැලීමේදී 2018 වසරේදී මෙරට තුළ නිෂ්පාදනය කරනු ලැබූ මුළු පොල් අරක්කු ලීටර් ප්‍රමාණය ලීටර් 2,127,720.710 කි. එය 2017 වසරේදී ලීටර් 4,931,642.788 ක්ද 2015 වසරේදී ලීටර් 5,405,248.510 ක්ද විය. 2018 වසරේදී නිෂ්පාදනය කල මුළු විශේෂ අරක්කු ප්‍රමාණය ලීටර් 19,896,118.290 කි. එය 2017 වසරේදී ලීටර් 35,969,185.02 කි. මෙරට ප්‍රධානතම මත්පැන් නිෂ්පාදන සමාගම් දෙස බැලීමේදී 2016 වසරේදී Distilleries Co. of Sri Lanka Ltd (DCSL) නොහොත් ශ්‍රී ලංකා ස්කාගාර සංස්ථාව විසින් නිෂ්පාදනය කල මුළු විශේෂ අරක්කු (සාමාන්‍ය ව්‍යවහාරයේදී ගල් නමින් හඳුන්වන) ලීටර් ප්‍රමාණය 31,208,454.839 කි. එය 2018 වසර වන විට 15,954,072.800 ක් දක්වා අඩු වී තිබේ. එමෙන්ම ඩබ්ලිව් එම් මෙන්ඩිස් සහ සමාගම (W.M Mendis & Co. Ltd) විසින් 2016 වසරේදී නිෂ්පාදනය කල මුළු විශේෂ අරක්කු ප්‍රමාණය ලීටර් 1,360,161.576 ක් වන අතර 2018 වසරේදී එම සමාගමේ නිෂ්පාදනය ලීටර් 224,434.425 ක් දක්වා අඩුවී තිබේ. රොක්ලන්ඩ් සමාගම (Rockland Distilleries Ltd) 2016 වසරේදී විශේෂ අරක්කු ලීටර් 237,607.020 නිෂ්පාදනය තිබෙන අතර 2018 වසරේදී එය ලීටර් 219,612.092 දක්වා අඩුවී තිබේ. මෙරටදී බෝතල් කල රා මුළු නිෂ්පාදනය 2016 වසරේදී ලීටර් 10,465,070.875 ක් වූ අතර 2018 වසරේදී එය ලීටර් 5,158,933.300 දක්වා අඩුවී

තිබේ. මීට අමතරව 2016 වසරේදී මධ්‍යසාර අගය 5% ට වැඩි මෝල්ට් මත්පැන් නොහොත් බියර් (Malt liquor) මුළු නිෂ්පාදනය ලීටර් 43,456,691.625 ක් වූ අතර එම අගය 2018 වසර වන විට 9,728,349.102 දක්වා අඩු වී තිබේ. 2018 වසරේ රජයේ සමස්ථ සුරාබදු ආදායම රුපියල් මිලියන 113,936 කි. දුම්කොළ ආශ්‍රිත නිෂ්පාදන දෙස බැලීමේදී 2016 වසරේදී මෙරටදී භාවිතා කල මුළු දුම්වැටි ප්‍රමාණය (එසජනි) 3,789,524,960 කි. එය 2018 වසර වන විට 3,150,148,960 ක් දක්වා අඩු වී තිබෙන අතර එමගින් රජය ඉපැයූ මුළු බදු ආදායම රු 92,939,432,945.00 කි. 2018 වසරේ දී දිගින් මිලිමීටර් 84ට වඩා අඩු දුම්වැටි කාණ්ඩයේ මෙරට තුළ වැඩිම බදු ආදායම ලැබී තිබෙන්නේ John Player Gold leaf 20s KSFT HL ය. එය ප්‍රමාණයෙන් දුම්වැටි 2,038,544,000 ක් වන අතර එමගින් රජයට ලැබී ඇති බදු ආදායම රු 64,628,742,990.00 කි. මිලිමීටර් 72ට වඩා අඩු දුම්වැටි කාණ්ඩයේ වැඩිම බදු ආදායම ලැබී තිබෙනුයේ Bristol Gold මගිනි. එය ප්‍රමාණයෙන් දුම්වැටි 192,759,800 ක් සඳහා රු 3,951,575,900.00 වශයෙනි. ඒ අනුව මෙරට තුළ මත්පැන් හා දුම්වැටි නිෂ්පාදනයේ කැපී පෙනෙන අඩුවීමක් පැහැදිලි ලෙස දැකගත හැකි වේ.

ශ්‍රී ලංකාවේ ඖෂධ දුර්භාවිතය ආශ්‍රිත ප්‍රවණතාව

අන්තරායකර ඖෂධ පාලක ජාතික මණ්ඩලය විසින් 2017 වසරේ දී මෙරට තුළ දිස්ත්‍රික්ක 10 ක් පදනම් කරගනිමින් පුද්ගලයින් 1000ක නියැදියක් භාවිතා කරමින් සිදුකරන ලද අධ්‍යයනයක දී අනාවරණය වී ඇත්තේ ශ්‍රී ලංකාවේ මෑත කාලීනව මනෝවර්ථක ගණයේ (Psychotropic Drugs) සහ මනෝකාරක (Psychoactive) මෙන්ම මාදක ගණයේ ඖෂධ (Narcotic Drugs) දුර්භාවිතයෙහි ප්‍රවණතාවක් දැකගත හැකි බවය. එහිදී ප්‍රථම වරට මාදක සහ මනෝවර්ථක ඖෂධ භාවිතා කළ පුද්ගලයින්ගේ වයස් මට්ටම හඳුනා ගැනීමේ දී පුද්ගලයින් 584 (58%) දෙනෙකු වයස අවුරුදු 16 - 20 අතර වයස් මට්ටමක දී ප්‍රථම වතාවට භාවිතා කර ඇති බවට අනාවරණය වී ඇත. එම පුද්ගලයින් ප්‍රථම වතාවට භාවිතා කළ මාදක සහ මනෝවර්ථක ඖෂධ අතර Tramadol, Pregabalin, Corex D, Diazepam, Benzhexol, Morphine සහ Rohypnol ප්‍රධාන විය. වෛද්‍යමය නිර්දේශයකින් තොරව පුද්ගලයින් 731 (73%) දෙනෙක් ගර්භනී කාන්තාවන්ගේ ප්‍රසව වේදනා සඳහා, අක්මාව හා වකුගඩු ආශ්‍රිත ආබාධ, පිළිකා සඳහා වේදනා නාශකයක් ලෙස භාවිතා කරන Tramadol ඖෂධය අවභාවිතා කර ඇති බවට අනාවරණය වූ අතර පුද්ගලයින් 499 (50%) දෙනෙක් අපස්මාරය, ඉරුවාරදය සඳහා භාවිතා කරන Pregabalin ඖෂධ වර්ගය ද අවභාවිතා කර ඇති බවට අනාවරණය විය. සාමාන්‍ය ව්‍යවහාරයේදී ඇපල් සහ ගැබා යන අනවර්ථ නාමවලින් මෙම ඖෂධ හඳුන්වනු ලැබේ. එමෙන්ම පුද්ගලයින් 313 (31%) දෙනෙක් කැස්ස සඳහා භාවිතා කරන Corex D සිරප් වර්ගය අවභාවිත කර ඇති අතර මනෝකාරක ගණයට අයත් ද්‍රව්‍යයක් වන MDMA (Ecstasy) 192 (19%) දෙනෙක් භාවිතා කර ඇති බව අධ්‍යනය තුළින් අනාවරණය වී තිබේ. මේ අනුව පෙනී යන්නේ මෙරට තරුණ පරපුර අතර ශීඝ්‍රයෙන් ඖෂධ අවභාවිතා කිරීමක් දැක ගත හැකි බවයි. තවද 2008 වර්ෂයේ අවිස්සාවේල්ල කොස්ගම ප්‍රදේශයේ නීති විරෝධීව පවත්වාගෙන ගිය මනෝවර්ථක ගණයේ ද්‍රව්‍ය නිෂ්පාදනය කරන රසායනාගාරයක් වටලන ලද අතර ඉන්පසු 2008 අංක 01 දරණ මාදක ඖෂධ හා මනෝවර්ථක ද්‍රව්‍ය නීති විරෝධීව ජාවාරම් කිරීමට එරෙහි සම්මුති පනත ක්‍රියාත්මක වීම තුළ එමගින් මෙරට තුළ මනෝවර්ථක ද්‍රව්‍ය නිෂ්පාදනය, ජාවාරම සහ බෙදාහැරීම පාලනය කිරීම සම්බන්ධයෙන් නෛතික ක්‍රියාමර්ග ගනු ලබයි.

මත්ද්‍රව්‍ය වැරදි හා සම්බන්ධ නීතිය

1948 වන විට ශ්‍රී ලංකාවට නිදහස ලබා දී තිබුනද මත් ද්‍රව්‍ය පාලනය සම්බන්ධයෙන් කටයුතු කිරීමට විෂ වර්ග අබිං සහ අන්තරායදායක ඖෂධ ආඥා පනත මෙරට තුළ ස්ථාපිත වන්නේ 1955 වසරේදීය. 1955 වර්ෂයෙන් පසු කිසිදු සංශෝධනයක් කර නොතිබුණු විෂ වර්ග අබිං

සහ අන්තරායදායක ඖෂධ ආඥා පනත 1984 අප්‍රේල් මස 14 වන දින ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රික සමාජවාදී ජනරජයේ පාර්ලිමේන්තුවේ නියමය පරිදි ගැසට් නිවේදනයකින් 1984 අංක 13 දරන විෂ වර්ග අබිං හා අන්තරායදායක ඖෂධ වර්ග පනත මඟින් සංශෝධනය කරන ලදී. මෙම පනත 1984 අංක 13 දරන විෂවර්ග අබිං සහ අන්තරායදායක ඖෂධ වර්ග (සංශෝධන) පනත යනුවෙන් හඳුන්වනු ලබන අතර මෙරට තුළ මත්ද්‍රව්‍ය සම්බන්ධ වැරදි සඳහා ක්‍රියා කළ යුතු ආකාරය, ලබාදිය යුතු දඬුවම් සම්බන්ධයෙන් සවිස්තරව වගන්ති වශයෙන් මෙහි සඳහන් වෙයි.

මෙම පනතේ 28 වන වගන්තියට අනුව කිසිම පොපි පැළෑටියක්, කෝකා පැළෑටියක් හෝ කංසා පැළෑටියක් හෝ එවැනි යම් පැළෑටියක ඇට කරල් කොළ මල් හෝ යම් කොටසක් හෝ ඒවායේ යම් සැකසුමක් ශ්‍රී ලංකාවට ආනයනය කිරීම හෝ ගෙන ඒම හෝ ශ්‍රී ලංකාවෙන් අපනයනය කිරීම නොකළ යුතුය. 29 වන වගන්තියට අනුව කංසා පැළෑටියෙන් පොපි පැළෑටියෙන් හෝ කෝකා පැළෑටියෙන් පිළියෙළ කර ගත් දේ ආදිය සන්තකයේ තබා ගැනීම ප්‍රයෝජනයට ගැනීම ආදිය තහනම් කර ඇත.

පනතේ 54 (අ) උපවගන්තිය අනුව හෙරොයින් කොකේන් මෝෆීන් හෝ අබිං නිෂ්පාදනය කරන අයෙකු මහාධිකරණයෙන් ඊට වරදකරු කරනු ලැබුවහොත් මරදය දණ්ඩනයට හෝ ජීවිතාන්තය දක්වා සිරදඬුවමකට යටත් විය යුතුය. එසේම පනතේ 54 (ආ) වගන්තිය අනුව මත්ද්‍රව්‍ය ජාවාරමද 54 (ඇ) වගන්තිය අනුව එකී මත්ද්‍රව්‍ය ආනයනය හෝ අපනයනය බරපතල වැරදි ගණයේ ලා සැලකෙයි. ජාවාරම් කිරීම යන්නෙන් එකී මත්ද්‍රව්‍ය විකිණීම, දීම, සපයා ගැනීම, ගබඩා කිරීම, යැවීම භාරදීම හෝ බෙදා හැරීම යන ක්‍රියා සියල්ල අර්ථකථනය වේ. පනතේ 77 වගන්තිය (අ-1) අනුව 1979 අංක 15 දරණ අපරාධ නඩු විධාන සංග්‍රහය පනතේ 116 වන වගන්තියේ පටහැනිව කුමක් සඳහන් වුවද මෙම ආඥාපනතේ 3 වන පරිච්ඡේදයේ හෝ 5 වන පරිච්ඡේදය යටතේ සිදුකරන ලද වරදක් සම්බන්ධයෙන් පොලිස් නිලධාරියෙකු විසින් තහනමට ගන්නා ලද යම් ඖෂධයක් සැකසුමක් හෝ ඔහු විසින් ගන්නා ලද යම් සාම්පලයක් පරීක්ෂණය සඳහා ආණ්ඩුවේ රසපරීක්ෂකවරයා වෙත ඉදිරිපත් කළ හැකිය. (අ-2) අනුව එසේ ඉදිරිපත් කරන ලද යම් ඖෂධයක රස පරීක්ෂකයාගේ වාර්තාවේ පිටපත් ඉදිරිපත් කළ පොලිස් නිලධාරියාටත් පොලිස් මත්ද්‍රව්‍ය කාර්යාංශයටත් ඉදිරිපත් කළ යුතු අතර (අ-3) අනුව ඉහත වගන්තිය යටතේ පොලිස් නිලධාරියා වෙත ඉදිරිපත් කරන ලද වාර්තාවක් මේ ආඥා පනත යටතේ වූ යම් නඩු විභාගයකදී සාක්ෂි වශයෙන් භාරගනු ලැබිය යුතු වේ.

පනතේ 83 වගන්තිය අනුව විශේෂ අවස්ථාවලදී හැර 54 (අ) හෝ 54 (ආ) වන වගන්ති යටතේ වූ වරදක් සම්බන්ධයෙන් ඇප නොදිය යුතු බව සඳහන් වේ. මෙම වගන්ති යටතේ චෝදනා පත්‍ර ගොනු කළ යුතු වැරදි සඳහා මහාධිකරණයෙන් ඇප නියම කළ යුතුවෙයි. එසේම හෙරොයින් ග්‍රෑම් 1කට හෝ ඊට වැඩි ප්‍රමාණයක් හෝ ගංජා ග්‍රෑම් 5000 කට හෝ ඊට වැඩි ප්‍රමාණයක් හෝ සන්තකයේ තබා ගැනීමට චෝදනා ලැබීමට හැකි සැකකරුවන්ද මහාධිකරණයෙන් ඇප අයැදුම් කළ යුතුය.

හෙරොයින් ජාවාරම් කිරීම, සන්තකයේ තබා ගැනීම, ආනයනය හෝ අපනයනය කිරීමට වැරදිකරු වුවහොත් හිමි වන දඬුවම් ලෙස, ග්‍රෑම් 1 කට අඩු නම් රු 15,000 කට නොඅඩු සහ රු 50,000 කට නොවැඩි දඩයකට හා අවුරුදු තුනකට නොඅඩු සහ අවුරුදු හතකට නොවැඩි කාලයක් දෙයාකාරයෙන් එක් ආකාරයක බන්ධනාගාර ගත කිරීම හා ග්‍රෑම් 1 සිට 2 දක්වා රුපියල් එක් ලක්ෂයකට නොඅඩු සහ රුපියල් පන් ලක්ෂයකට නොවැඩි දඩයකට හා අවුරුදු හතකට නොඅඩු සහ අවුරුදු විස්සකට නොවැඩි කාලයක් දෙයාකාරයෙන් එක් ආකාරයක බන්ධනාගාර ගත කිරීම හා ග්‍රෑම් 2ක් හෝ ඊට වැඩි නම් මරණය දණ්ඩනය හෝ ජීවිතාන්තය දක්වා බන්ධනාගාර ගත කිරීම සිදුකරයි.

හෙරොයින් සම්බන්ධ වැරදිවලට දඬුවම් දීම සහ ක්‍රියාත්මක වීම සම්බන්ධව විමසීමේදී පුද්ගලයෙකු හෙරොයින් භාවිතා කරද්දී හෝ සුළු ප්‍රමාණයක් ළඟ තබාගෙන සිටියදී පොලිස් නිලධාරීන්ට අසුවුවහොත් එම පුද්ගලයා වහාම අත්අඩංගුවට ගෙන පොලිස් ස්ථානයට ගෙන එනු ලබන අතර ඔහුගෙන් හෙරොයින් ලබා ගත් පුද්ගලයන් ගැන සහ ස්ථාන ගැන කරුණු ලබා ගැනීමට කටයුතු කරයි. ඉන්පසු අදාල පුද්ගලයා සන්තකයේ තිබූ නඩු භාණ්ඩ එනම් හෙරොයින් කුඩු භාවිතා කිරීමට ගන්නා ඊයම් කොළ සහ බට ගිනි කුරු ආදිය ලියුම් කවරයකට දමා උණු ලාකඩ මත චූදිතයාගේම ඇඟිලි සලකුණු තබා මුද්‍රා තබයි. පවත්නා නීතිය අනුව පැය 24ක් ඇතුළත චූදිතයාව ආසන්නම නිසි අධිකරණය වෙත ඉදිරිපත් කල යුතු අතර අත්අඩංගුවට ගනු ලැබූයේ රජයේ නිවාඩු දිනක නම් චූදිතයාව අදාල මහේස්ත්‍රාත්තුමන්ගේ නිවසට රැගෙන ගොස් දින 14ක් හෝ ආසන්න කාලයක් රක්ෂිත බන්ධනාගාර ගත කිරීම සඳහා නියෝගයක් ලබා ගනී. නීතිඥයින් මාර්ගයෙන් සාධාරණ හේතූන් මත ඉල්ලීමක් කළහොත් දඩයකට යටත්ව හෝ ඇප මත චූදිතයාව නිදහස් කිරීමට ගරු මහේස්ත්‍රාත්වරුන්හට බලය ඇත. රක්ෂිත නියෝග ලද චූදිත තැනැත්තා මහේස්ත්‍රාත් අධිකරණයෙන් ඊළඟට රැගෙන යනුයේ අදාළ රක්ෂිත බන්ධනාගාරය වෙත අතර එහි නියමිත දින ගණන සිටින රැඳවියාව නියමිත දිනට බන්ධනාගාර නිලධාරීන් විසින් යළිත් අධිකරණයට ගෙන එනු ලබයි. එහිදී පොලිසිය මගින් චූදිතයාව අදාළ නඩු භාණ්ඩ හා බී වාර්තාව සමගින් මහේස්ත්‍රාත්වරයා වෙත ඉදිරිපත් කරන අතර ඔහු වරද පිළිගන්නේ නම් දඬුවම් නියම කරයි. බොහෝ විට මෙය මුදල්මය දඩයක් වන අතර එය තීරණය වන්නේ ඔහු සන්තකව තිබූ හෙරොයින් ප්‍රමාණය මතය. චූදිතයා සතුව පෙර වැරදි ඇත්නම් දඬුවමට අමතරව අනිවාර්ය සිර දඬුවමක් නියම කළ හැක.

යමෙක් හෙරොයින් වැඩි ප්‍රමාණයක් අලෙවි කරද්දී හෝ සන්තකයේ තබා ගෙන සිටියදී පොලීසියට හසු වුවහොත් ඔහුව අත්අඩංගුවට පෙර පරිදි මහේස්ත්‍රාත්වරයෙක් වෙත යොමු කරන අතර වැඩිදුර විමර්ශන අවශ්‍ය නම් ඔහුව රඳවාගෙන පරීක්ෂණ කටයුතු කිරීමට තවත් කාලයක් පොලිස් අත්අඩංගුවේ තබා ගැනීමට මහේස්ත්‍රාත්වරයාගෙන් නියෝගයක් ගැනීමට පොලිසියට හැකියාවක් ඇත. අදාළ දිනයට චූදිතයාව බන්ධනාගාර ගත කොට ඉන්පසු අධිකරණය වෙත ඉදිරිපත් කරන අතර අත්අඩංගුවට ගන්නා ලද හෙරොයින් ප්‍රමාණය අනුව ඔහුගේ චෝදනාව ඇසිය යුත්තේ සාමාන්‍ය මහේස්ත්‍රාත් අධිකරණයේද නැත්නම් මහාධිකරණයේද යන්න එහිදී තීරණය කරයි. තවද අත්අඩංගුවට ගන්නා හොරොයින් තොගයේ පිරිසිදුභාවය සහ සංයුතිය ආදිය මැන බලා වාර්තාවක් ගැනීම පිණිස මහේස්ත්‍රාත් නියෝග මත රජයේ රස පරීක්ෂකවරයා වෙත යොමු කරයි. මෙම රස පරීක්ෂක වාර්තාව ලැබීම සඳහා යම් කාලයක් ගතවන අතර එකී කාලය තුළ චූදිතයා රක්ෂිත බන්ධනාගාරයේ සිටිය යුතු අතර නීතිඥයන් මාර්ගයෙන් අධිකරණයට සාධාරණ හේතු පෙන්වා පොලිසියේ විරෝධතාවයක් නොමැති නම් මුදල් ඇපයක් සහ ශරීර ඇපකරුවන්ගේ මැදිහත්වීම මත ඇප ලබා ගත හැක. සැකයේ වාසියකින් තොරව චෝදනාව ඔප්පු වුවහොත් චූදිතයාට බරපතළ වැඩ සහිතව වසර දහයක්, විස්සක්, තිහක් හා ජීවිතාන්තය දක්වාම හෝ මරණ දණ්ඩනය පවා නියම විය හැක. නියමිත කාල සීමාවක් තුළ චූදිතයා හට මෝසමක් ගොනු කර අභියාචනාවක් මත තීන්දුව අභියෝගයට ලක්කොට යළි නඩුව අසන ලෙස ඉල්ලීමක් සිදු කළ හැක.

මත්ද්‍රව්‍ය ඇබ්බැහිය හා පුනරුත්ථාපන ක්‍රියාවලිය

මත්ද්‍රව්‍ය වලට ඇබ්බැහිවූවන් ඉන් මුදාගැනීම සංකීර්ණ ක්‍රියාවලියකි. මත්ද්‍රව්‍ය ගෙන්වීම හා බෙදාහැරීම යම් දුරකට වලක්වාගත හැකි නමුත් ඊට ඇබ්බැහිවූවකු ඉන් සම්පූර්ණයෙන් මුදවාගැනීම ඉතා අසීරු කාර්යයක් බව වෛද්‍ය මතය වේ. කෙසේ නමුත් යම් පුද්ගලයෙකු මත්ද්‍රව්‍ය අත්හදා බැලීමෙන් වළක්වා ගත හැකි නම් ඔහු එම මත්ද්‍රව්‍යය භාවිතා කිරීමට ඇබ්බැහි

වීමෙන්ද වළක්වා ගත හැකිය. ඇබ්බැහි වීමෙන් පසු ප්‍රතිකාර කිරීමට වඩා මත්ද්‍රව්‍ය භාවිතය සඳහා යොමුවීමට පෙර ඉන් වලක්වා ගැනීම වඩාත් ප්‍රායෝගික වූ උපක්‍රමය ලෙස දැක්විය හැකිය (ඡරුඬැබඑසදබ සි ඉැඑඑැර එය්බ ජමරු). ශ්‍රී ලංකාවේ 2007 අංක 54 දරන ඖෂධවලට ඇබ්බැහි තැනැත්තන් (ප්‍රතිකාර හා පුනරුත්ථාපනය) පිළිබඳ පනත යටතේ මත්ද්‍රව්‍යයට ඇබ්බැහිවූවන් සඳහා අනිවාර්ය ප්‍රතිකාර පහසුකම් හඳුන්වා දී ඇත. මෙම ප්‍රතිකාර පහසුකම් අතර පුද්ගලික හා පවුල් උපදේශණය, විෂ හරණ ප්‍රතිකාර, ශාරීරික ක්‍රියාකාරකම්, මනෝ චිකිත්සක ප්‍රතිකාර, අධ්‍යාපනික, වෘත්තීය පුහුණු හා කුසලතා සංවර්ධන වැඩසටහන් අන්තර්ගත වේ. 2019 වසරේදී මත්ද්‍රව්‍යයට ඇබ්බැහි වූ සේවාලාභීන් 3585 දෙනෙක් ප්‍රතිකාර සේවාවන් ලබාගෙන ඇත. එම සේවාලාභීන්ගෙන් 1067 (29.76%) දෙනෙක් අන්තරායකර ඖෂධ පාලක ජාතික මණ්ඩලයේ ප්‍රතිකාර මධ්‍යස්ථාන වලින්ද, 1036 (28.90%) පුනරුත්ථාපන කොමසාරිස් ජනරාල් කාර්යංශයට අයත් කන්දකාඩු ප්‍රතිකාර හා පුනරුත්ථාපන මධ්‍යස්ථානයෙන්ද, 735 (20.50%) පුද්ගලික ආයතන වලින්ද, 576 (16.07%) බන්ධනාගාර ප්‍රතිකාර වැඩසටහනින්ද, 171 (4.77%) රාජ්‍ය නොවන සංවිධාන වලින්ද ප්‍රතිකාර හා පුනරුත්ථාපන සේවාවන් ලබාගෙන තිබේ.

යෝජනා

ශ්‍රී ලංකාව තුළ මත්ද්‍රව්‍ය වැරදි පිළිබඳව වූ නීතිරීති ඉතා දැඩි බව පෙනී ගියත් මෙම නීතිරීති ක්‍රියාත්මක කිරීමේ යාන්ත්‍රණයේ යම් මන්දගාමී තත්වයක් තිබෙන බව පෙනී යන කරුණකි. එබැවින් අපරාධ විමර්ශන කාර්ය පටිපාටිය නිසි ආකාරව සිදුවන්නේද යන්න පිළිබඳ සොයා බැලීමේ අධිකාර බලයක් ඇති ආයතනයක් පිහිටුවීම, මත්ද්‍රව්‍ය නඩු කටයුතු කඩිනම් කිරීමේ යාන්ත්‍රණයක් සැකසීම වැදගත් වේ. එමෙන්ම මත්ද්‍රව්‍ය වැරදි සම්බන්ධයෙන් චෝදනා ලැබ බන්ධනාගාර ගතවූවන් බන්ධනාගාරය තුළ දී ඇතැම් දූෂිත නිලධාරීන්ගේ සහය ලබාගනිමින් සිය මත්ද්‍රව්‍ය ව්‍යාපාර හා විවිධ අපරාධ කටයුතු මෙහෙයවීම බරපතල ගැටළුවකි. උදාහරණ වශයෙන් 2020 ජුනි 09 වන දින බන්ධනාගාර බුද්ධි අංශය විසින් මීගමුව බන්ධනාගාරයේ සිදුකරන ලද හදිසි සෝදිසි කිරීමක දී ජංගම දුරකතන 61, සිම් කාඩ් 51, බැටරි 71ක්, චාජර් 30ක් හා හෙරොයින් ග්‍රෑම් 16 ක් සොයාගන්නා ලද අතර එහිදී මත්කුඩු කිලෝ 30ක් සමග අත්අඩංගුවට පත් සැකකරුවකුගේ සිරමැදිරියක් තුලින් ශීතකරණයක්, ආහාර පාන තොගයක්, සැපපහසු ඇඳක් සහ නවීන පන්නයේ විදුලි පංකාවක් සොයාගනු ලැබුණි. එමනිසා මෙවැනි දූෂිත ක්‍රියාවන්ට සම්බන්ධ නිලධාරීන් නිවැරදිව හඳුනාගෙන ඔවුන් සේවයෙන් පහකොට දැඩි දඬුවම් ලබා දිය යුතුය. තවද මෙරටට මත්ද්‍රව්‍ය ලැබෙන ප්‍රධාන මාර්ගයක් වන මුහුදු මාර්ග ඔස්සේ මත්ද්‍රව්‍ය පැමිඳම වැලැක්වීමට ශ්‍රී ලංකා මුහුදු තීරයේ නාවික ආරක්ෂාව තව දුරටත් ශක්තිමත් කිරීම හා මත්ද්‍රව්‍ය ජාවාරම් මැඩලීම සම්බන්ධයෙන් මෙරට තුළ පවතින බුද්ධි සේවාවන්, රාජ්‍ය ඔත්තු සේවය හා අනෙකුත් නීතිය ක්‍රියාත්මක කිරීමේ ආයතන ඒකාබද්ධව කටයුතු කිරීම වැදගත් වේ. එමෙන්ම වෛද්‍ය නිර්දේශ නොමැතිව ඖෂධ අලෙවි කරන්නන්ගේ බලපත්‍ර අවලංගු කිරීම වැනි දැඩි නීතිමය ක්‍රියාමාර්ග ගැනීම සිදුකල යුතුය.

අවසාන වශයෙන් කොලොම්බියාවේ විසූ ලෝකයේ කුඩු රජා ලෙස හැඳින්වූ පබ්ලෝ එස්කෝබාර් (ඡ්ඉකදෑජදඉ්ර) පිළිබඳව යමක් සඳහන් කිරීම අත්‍යවශ්‍යය. කොලොම්බියාව ප්‍රමුඛ ලතින් ඇමරිකානු කලාපයේ රටවල බොහෝ දේශපාලකයින්ට බලය ලබාගැනීම සඳහා ඔහු විසින් විශාල වශයෙන් මුදල් ආධාර ලබාදුන්නේ ඔහුගේ කොකේන් ප්‍රමුඛ මත්ද්‍රව්‍ය වලින් ලැබූ ආදායමෙනි. තමාට එරෙහිව නඩු විභාග කළ ශ්‍රේෂ්ඨාධිකරණ විනිසුරුවරුන් 19 දෙනෙකු ඝාතනය කළත් පාලකයින් ඔහු රැක ගත්තේ නින්දා සහගත අයුරිනි. ඔහු විසින් 1989 වසරේදී කොලොම්බියාවේ ජනාධිපතිවරණයට ඉදිරිපත් වූ ලූවිස් කාර්ලෝස් ගැලන් ඝාතනය කළේය. එම ජනාධිපති අපේක්ෂකයා රටේ මත්ද්‍රව්‍ය උවදුර සහමුලින්ම තුරන් කරන බවට ජනතාවට පොරොන්දු වීම ඊට මූලික හේතුව විය. මෙම කෙටි විස්තරය මෙහි සඳහන් කළේ ලෝකයේ විවිධ රටවල දේශපාලනය සහ කුඩු ජාවාරම එකට බැඳී ඇති අයුරු පෙන්වා දීමටය.

මූලාශ්‍ර

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අන්තරායකර ඖෂධ පාලක ජාතික මණ්ඩලය, පාසැල් සිසුන්ගේ මත්ද්‍රව්‍ය භාවිතයේ ප්‍රවණතා හා එහි උපනතීන්

අන්තරායකර ඖෂධ පාලක ජාතික මණ්ඩලය, මාදක සහ මනෝවර්ථක ඖෂධ භාවිතය ආශ්‍රිත ප්‍රවණතා

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நீரும் நிலமும் எமது உரிமை
Chunnakam Power Plant வழக்கு மீதான தீங்கியல் சட்ட ரீதியான பார்வை

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சட்ட பீடம் - கொழும்பு பல்கலைக்கழகம்

தீங்கியல் சட்டம் தொடர்பில் அமைந்த அடிப்படை உரிமை மீறல் வழக்கான **Chunnakam Power Plant - *Ravindra Gunawardena Kariyawasam Vs. Central Environment Authority & Others* (SC FR Application) No.** 141/2015 வழக்கினை பரீட்சிப்பதாக எனது இச்சிறிய கட்டுரை அமையும். அதனூடாக குறித்த தீங்கியல் விடயப்பரப்பில் குடிமக்களின் நலனை பாதுகாப்பதிலும், பொதுநல நோக்கில் செயற்படும் பொது அதிகாரிகளின் திறன்களை பாதுகாப்பதிலும் எவ்வாறு சமநிலை பேணப்படுகின்றது என்பது இவ்வழக்கினை பரீட்சிப்பதன் மூலம் அறிந்து கொள்ள முடியும் என நம்புகின்றேன். இக்கட்டுரையில் முதற்கட்டமாக குறித்த வழக்கில் குடிமக்களின் நலனை பாதுகாப்பது எவ்வாறு உறுதிப்படுத்தப்பட்டுள்ளது என்பதனை பரீட்சித்து, இரண்டாம் கட்டமாக வழக்கில் பொதுநல நோக்கில் செயற்படும் பொது அதிகாரிகளின் திறன்களை பாதுகாப்பது தொடர்பில் கையாண்ட விதத்தினையும் பரீட்சித்து இவ்வுரிமைசார் தீங்கியல் விடயப்பரப்பினை ஆராயவுள்ளேன்.

தீங்கியல் சட்டம் சாதாரணமாக மனிதனுக்கு ஊறு ஏற்படும் போது அதற்கான நிவாரணத்தை பெற்றுத்தரும் வழிகள் தொடர்பில் அமையும் விடயப்பரப்பாகும். உரிமைகள் என்பது மனிதன் மனிதனாக பிறந்தமையினால் கிடைக்க வேண்டிய சலுகைகள் பற்றி அமையும் விடயப்பரப்பாகும். அடிப்படை உரிமைகள் என்பது நிர்வாக மற்றும் நிறைவேற்றுத்துறையில் உள்ள போது அதிகாரிகளினால் அரசியலமைப்பின் மூலம் வழங்கபட்டுள்ள மனித உரிமைகள் மீறப்படும் போது அதைப் பாதுகாக்கும் வழிமுறையாகும்.

சாதாரணமாக தீங்கியல் வழக்கினை மாவட்ட நீதிமன்றில் வழக்கிட முடியும். அதன் மூலம் வழங்கப்படும் தீர்ப்பில் திருப்தியுறாத போது வழமையான நீதிமன்ற மேன்முறையீட்டினையும் செய்யலாம். அடிப்படை உரிமை வழக்கினை உயர்நீதிமன்றில் வழக்கு தாக்கல் செய்ய வேண்டும். அதன் மூலம் கிடைக்கும் தீர்ப்பில் திருப்தியுறாத போது மேன்முறையீடு செய்யவும் முடியாது. இங்கு குடிமகன் ஒருவரின் அடிப்படை உரிமை மீறல் ஒன்று பொது அதிகாரியினால் தீங்கியல் சார்ந்து மீறப்படும் போது அது தொடர்பில் அவர் இரண்டு வழிமுறைகளில் எவ்வழிமுறை பொருத்தமானது என்பதை தெரிவு செய்வது கடினமான விடயமாக உள்ளது. ஆகவே இங்கு அடிப்படை உரிமை மீறல் வழக்கு ஒன்றுடன் தீங்கியலுக்கான பரிகாரத்தையும் இணைந்த வகையில் பெறுதல் தொடர்பில் இவ்வழக்கினை மையமாக கொண்டு ஆராயவுள்ளேன்.

குடிமக்களின் நலன் பாதுகாப்பு

குறித்த சுண்ணாகம் பகுதியானது பொதுமக்கள் அதிகளவில் வாழும் பிரதேசம் என்பதுடன் விவசாயத்திற்கும் பிரபல்யமான பிரதேசமாகும். யாழ்.குடாநாட்டின் மின்சாரத் தேவையை பூர்த்தி செய்வதற்காக சுண்ணாகத்தில் Thermal Power House அமைத்த வேளையில், அதன் மூலம் உருவான எண்ணெய் கழிவுகள் மக்கள் அன்றாடம் பாவிக்கும் கிணற்று நிலத்தடி நீரில் கலந்தமையினால் நிலத்தடி நீரானது மாசடைந்தது.

அடிப்படை உரிமை மீறல் வழக்கின் தீர்ப்பில் உயர்நீதிமன்றம் Northern Power Company 20 Million ரூபாவை Thermal Power Station அமைந்துள்ள இடத்தில் இருந்து 1.5 K.M தூரத்தினுள் வாழும் பாதிக்கப்பட்ட மக்களுக்கு நட்டஈடாக வழங்க வேண்டும் என்றது. CEA & BOI வழக்காளியின் Right of Equality ஐ மீறியுள்ளதாக கூறியது.[1]

இந்த வழக்கில் குடிமக்களின் உரிமைகளை பாதுகாப்பதில் அதீத கவனத்தை செலுத்தி இருப்பதை காணலாம். இலங்கை குடிமக்களுக்கு நிறைவேற்று அல்லது நிர்வாகத்துறையின் சட்டவிரோதமான நியாயமற்ற செயல் அல்லது செய்யாமை மூலம் சுற்றாடல் மாசுபடுவதில் இருந்து விடுபடுவதற்கான அடிப்படை உரிமை உள்ளதாக கூறியது.

இலங்கை அரசியலமைப்பில் Environmental Right வெளிப்படையாக குறிப்பிடப்படாத போதும் இலங்கையின் உயர்நீதிமன்றம் இவ்வழக்கில் அடிப்படை உரிமை என கூறப்பட்டமை குடிமக்களின் உரிமை பாதுகாப்பதை உறுதிப்படுத்துகின்றது. மேலும் உறுப்புரை 12(1), 14(1)(g), 14(1)(h) இல் Environmental Right மறைமுகமாக உள்வாங்கப்பட்டிருப்பதையும் நீதிமன்றம் எடுத்துக்காட்டியது. வழக்கில் Public Trust Doctrine மீறப்பட்டுள்ளமையினையும் நீதிமன்றம் ஏற்றுக்கொண்டது. உறுப்புரை 27(2)(c) கீழ் State Policy கீழ் அனைத்து குடிமக்களுக்கும் போதுமான வாழ்க்கை தரத்தை உறுதிப்படுத்தவேண்டிய கடமை அரசுக்கு உள்ளது எனவும் உறுப்புரை 27(14) கீழாக சமூக நன்மைக்காக அரசு சுழலைப் பாதுகாத்தலும், பேணிக்காத்தலும், சீராக்குதலும் வேண்டும் என குறிப்பிடப்பட்டது.[2] அதன் அடிப்படையில் இவ்வழக்கில் முதன் முதலில் நீதிமன்றம் Access to Clean Water க்கான தெளிவான விளக்கத்தினை கொடுத்ததுடன் குடிமக்களின் அக்கறையையும் பாதுகாத்து உள்ளது.

பாதிக்கப்பட்ட மக்கள் தமது கிணறுகளை சுத்தம் செய்து புனர்வாழ்வடைய வேண்டும். அதற்காக Compensation அதிகபட்ச தொகையாக 40,000 ரூபா 500 குடும்பங்களுக்கு வழங்கப்பட வேண்டும் என கூறியது. இங்கு Polluter Pays Principle பயன்படுத்தப்பட்டது.

நீதிமன்றம் அபிவிருத்திதிட்டத்திற்கு Approval வழங்க முன்னர் பொதுமக்களுடன் கலந்தாலோசிக்க வேண்டிய Duty அரசுக்கு உள்ளது என்றும், அதை அரசு செய்ய தவறிவிட்டது என கூறியது. அத்துடன் நிலத்தடி நீரின் பாதிப்பு பற்றி பொதுமக்களிடம் கலந்தாலோசிக்க வேண்டும் என நீதிமன்றம் குடிமக்களின் கருத்திற்கு முக்கியத்துவம் வழங்கியுள்ளது. நீதிமன்றம் அதன் மூலம் புதிய Doctrine ஒன்றை தழுவி அதனை விரிவாக்கம் செய்து வலுவான நியாயப்பாட்டினை செய்துள்ளது.

நீதிமன்றம் தனது தீர்ப்பிற்காக Precautionary Principles, The Polluter Pays Principle, Public Trust Doctrine, Sustainable Development ஆகிய கோட்பாடுகளை பயன்படுத்தியுள்ளது. கூடுதலாக கிணறு மாசடைந்து பாதிக்கப்பட்டவர்களுக்கு நட்டஈடு வழங்குவதில் முன்னுரிமை வழங்க வேண்டும் எனவும், அடுத்த இரண்டு வருடத்திற்கு Power Plant ஆனது BOI & CEA இன் தீவிர கண்காணிப்பிற்குள் உள்ளாக்க வேண்டும் என்றும் கூறியது. இவ்வாறாக நீதிமன்றம் இவ்வழக்கில் குடிமக்களின் நலனை பாதுகாத்திருப்பதை காணக்கூடியதாக உள்ளது.

1 *Ravindra Gunawardena Kariyawasam Vs. Central Environment Authority & Others* (SC FR Application) No. 141/2015

2 The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Article-12 ,14 &27

பொதுநல நோக்கில் செயற்படும் பொது அதிகாரிகளின் திறன் பாதுகாப்பு

நிலத்தடிநீர் மண் மாசுபாட்டிற்கு குறித்த மின் உற்பத்தி நிலையம் காரணமாக உள்ளது என நீதிமன்றம் இனங்கண்டுள்ள போதும் அவை நிரந்தரமாக மூடப்படுதல் சரியானது அல்ல என கருதியது. யாழ்.குடாநாட்டின் மேலதிக மின்சார தேவையின் நிமிர்த்தம் இவ்வாறான செயற்றிட்டம் இருப்பது அவசியமானது எனவும் கூறப்பட்டது.

இச்செயற்றிட்டமானது ஒரு வெளிநாட்டு முதலீட்டு திட்டமாகும். உயர்நீதிமன்றின் அடிப்படை உரிமைகள் அதிகார எல்லையினுள் முதலீட்டாளர் உட்படுவதை அவர்கள் எதிர்பார்க்கவில்லை என்பது தெளிவாகின்றது. அதாவது தனது இச்செயற்றிட்டம் மூலம் சாதாரண மக்களின் அடிப்படை உரிமைகள் மீறப்படும் என அவர்கள் எதிர்பார்க்கவில்லை என நீதிமன்றம் கூறி சமநிலையை பேணியுள்ளது.[3]

இரண்டையும் சமநிலை படுத்த கையாண்ட விதம்

அனைத்து விடயங்களுக்கும் அப்பால் குறித்த செயற்றிட்டத்தை செய்யும் போது கவனயீனத்தினால் கடமையை செய்யத்தவறியமை தெளிவாகின்றது. அத்துடன் Statutory Authorities உம் தமது Statutory Duty ஐ செய்யத் தவறிவிட்டன. அதாவது செயற்றிட்ட செயற்பாடுகளை கவனிக்க தவறிவிட்டது. ஆகவே நீதிமன்றம் செயற்றிட்டத்தின் செயற்பாடுகளை இடைநிறுத்தியது. அதே வேளையில் எதிர்காலத்தில் இவ்வாறாக நிலத்தடி நீரிலும் மண்ணிலும் மாசுபடியாது என உறுதிப்படுத்தி, தேவையான ஏற்பாடுகளை செய்தபின்னர் புதிய அனுமதிபத்திரத்திற்கு விண்ணப்பிக்க முடியும் என கூறப்பட்டது. அதன் பின்னர் மின் உற்பத்தி நிலையம் அமைக்க நீதிமன்றம் உத்தரவிடலாம் என கூறியது.

வழக்காளியினால் செயற்றிட்டம் முற்றுமுழுதாக Cease செய்ய வேண்டும் என Remedy கோரப்பட்ட போதும் நீதிமன்றம் அதனை வழங்கவில்லை. ஏனெனில் இங்கு சிறிய தொகை மக்கள்தான் பாதிக்கப்பட்டுள்ளனர், ஆனால் பல்லாயிரக்கணக்கான மக்கள் பயனடையும் செயற்றிட்டத்தை தடை செய்வது Natural Justice & Equity இன் கீழ் முரணானது என நீதிமன்றம் கூறியது.

உறுப்புரை 126 இன் கீழ் அடிப்படை உரிமை மீறல் வழக்கினை உரிமை மீறப்பட்டு 30 நாட்களுக்குள் File செய்ய வேண்டும்,[4] இங்கு Petitioner வழக்கு தாக்கல் செய்ய கால தாமதமானது. இருப்பினும் இவ் வழக்கில் அடிப்படை உரிமை மீறலானது தொடர்ந்தும் இடம்பெறுவதாக (Continuing) நீதிமன்றம் கருதி வழக்கினை ஏற்றுக்கொண்டது.

அடிப்படை உரிமை மீறல் வழக்கினை Public Interest Litigation ஊடாக File செய்யலாமா? என கேள்வி எழுந்த போது நீதிமன்றம், பெரும்தொகையான மக்களுக்கு அடிப்படை உரிமையை அர்த்தமுள்ளதாக்குவதற்காக தாராளமான பொருள்கோடலுக்கு செல்லலாம் என்றது.[5]

இவ்வாறாக இரண்டு தரப்பிலும் உள்ள நியாயங்கள் நீதிமன்றத்தால் கவனத்தில் எடுக்கப்பட்டு குடிமக்களின் நலனை பாதுகாத்தல் மற்றும் பொதுநல நோக்கில் செயற்படும் பொது அதிகாரிகளின் திறனை பாதுகாத்தல் என்பவற்றுக்கிடையே சமநிலையை பேணி இருப்பதைக் காணலாம்.

3 *Supra* 1

4 *Supra* 3, Article-126

5 *Supra* 1

இவ்வழக்கில் Constitutional Delict பிரயோகிக்கப்பட்ட விதம்

ஒரு அடிப்படை உரிமை மீறலுக்கு ஒரு தனியார் நிறுவனத்தை எவ்வாறு நட்டஈடு வழங்க கேட்கலாம்? என்று வருகையில், ***Captain Abeygunewardena Vs. Sri Lanka Ports Authority*** வழக்கானது ஆதாரம் காட்டப்பட்டது.[6] அதில் Public Function Test க்கு விளக்கம் அளிக்கபட்டுள்ளது.

Private Actor ஒன்று அரசுடன் நெருக்கமாக அல்லது அரசு சார்பாக ஒரு Function or Project செய்யும் போது அத்தகைய Private Actor 'In Truth or Fact' இன் அடிப்படையில் அரசின் முகவர் அல்லது கருவி என நீதிமன்றம் கருதி வழக்கினை ஏற்கலாம் என கூறப்பட்டது. இதில் Constitutional Delict மறைமுகமாக ஏற்கப்பட்டுள்ளது. அதே போலவே இவ்வழக்கிலும் Power Plant க்கு எதிராக அடிப்படை உரிமை மீறல் குற்றம் சாட்டப்பட்டது.

South Africa நியாயாதிக்கம் மீதான ஒப்பீடு

தென் ஆபிரிக்காவில் அரசியலமைப்பிலேயே Constitutional Delict க்கு அங்கீகாரம் வழங்கபட்டுள்ளது.[7] Sec 19(2) கீழ் Common Law ஐ அபிவிருத்தி செய்யும் போது ஒவ்வொரு நீதிமன்றமும் கட்டாயமாக Bill of Rights ஐ கவனத்தில் கொள்ள வேண்டும். இவ்வாறாக தீங்கியலுக்கு அரசியலமைப்பு அங்கீகாரம் பல வழங்கப்பட்டுள்ளது.[8]

Van Duivenboden வழக்கில் தகுதியற்றவர் துப்பாக்கி வைத்திருப்பின் அதை பறிப்பதற்கு அதிகாரம் காவல் துறை அதிகாரிகளுக்கு வழங்கப்பட்டுள்ளது. இங்கு காவல் துறை அதிகாரி தனது கடமையை செய்ய தவறி விட்டார். இதனால் ஒருவர் துப்பாக்கி மூலம் தனது மனைவி மகளை கொலை செய்ததுடன், இன்னொருவரையும் காயப்படுத்தினார். இங்கு அரசியலமைப்பின் உறுப்புரை 7 மற்றும் 41(1) என்பன எடுத்துக்காட்டப்பட்டு, Bill of Rights ஐ பாதுகாப்பதற்கான அரசியலமைப்பு ரீதியான கடமையை செய்யாத போது அங்கு அரசு பொறுப்பாக்கப்படும். ஏனெனில் காவல் துறை அதிகாரிகள் அரசின் சார்பாகவே தமது கடமைகளை செய்கின்றனர். ஆகவே இங்கு ஏற்பட்ட கவலையீனத்திற்கு அரசு Vicarious Liable க்கு பொறுப்பாக்கப்பட வேண்டும் எனக் கூறியது.[9]

இலங்கையில் State (Liability In Delict) Act ல் Sec 2 அரசினுடைய தீங்கியல் பொறுப்புகளை பற்றி குறிப்பிடுகின்றது. அதில் அரச அதிகாரி மூலம் எவ்வாறு தீங்கியல் பொறுப்பானது உருவாகின்றது என்பது பற்றியும் அதன் மூலம் அரசு எவ்வாறு பொறுப்பாகின்றது என்பதும் குறிப்பிடப்பட்டுள்ளது.[10]

Saman Vs. Leeladasa வழக்கில் தீங்கியல் தொடர்பில் அதுவரை காலமும் இருந்த தனியார் சட்ட பரிகாரத்திற்கு மேலதிகமாக அரசியலமைப்பு ரீதியான பரிகாரம் வழங்கப்பட்டது.[11] இது இலங்கையில் உறுப்புரை 126 இன் கீழ் Constitutional Delict தொடர்பில் புதிய ஒரு அத்தியாயத்தினையும் உருவாக்கியது. இவ்வாறாக இலங்கை மற்றும் தென் ஆப்பிரிக்காவில் அரசு மீது தீங்கியல் பொறுப்பு சுமத்தப்படும் விதம் அமைந்துள்ளது.

6 *Captain Abeygunewardena Vs. Sri Lanka Ports Authority* [SC(FR)57/2016]

7 *J. In Minister of Safety & Security Vs. Van Duivenboden* 2002 6 SA 431(SCA)

8 *The Constitution of the Republic of South Africa*, 1996, Section:19(2)

9 *In Minister of Safety & Security Vs Van Duivenboden* 2002 6 SA 431(SCA)

10 State (Liability in Delict) Act, No-22 of 1969

11 *Saman Vs Leeladasa and Another* 1989 1 SLR 1

முடிவுரை

ஒரு நாட்டின் பொருளாதாரம் மற்றும் மக்களின் வாழ்வாதாரத்தை முன்னேற்றும் நோக்குடன் அரசு திட்டங்களை வகுக்கின்றது. அத்திட்டங்களை செயற்படுத்துகையில் பல வேளைகளில் அரசு தனியாருடன் இணைந்து பயணிக்க வேண்டிய சுழ்நிலைகளும் உருவாகின்றன. அவ்வாறு திட்டங்களை நடைமுறைப்படுத்தப்படும் பொழுது பொதுமக்களுக்கு ஊறு ஏற்படும் சந்தர்பங்களும் உருவாகின்றன. இங்கு மக்களின் உரிமைசார்ந்து அவர்களுக்கு தீங்கியல் பரிகாரம் வழங்குவதுடன் நாட்டின் வளர்ச்சிக்குரிய திட்டத்தை நடைமுறைப்படுத்துவதனை சமநிலைப்படுத்துவதில் நீதிமன்றம் இவ்வழக்கில் தனது தெளிவான பார்வையை வைத்துள்ளமையை இச்சிறிய கட்டுரையில் சுண்ணாகம் மின் உற்பத்தி நிலைய வழக்கினை ஆராய்ந்தமை மூலம் அறிய முடிகின்றது.

அத்தருணத்தில் பாதிக்கப்பட்ட பொதுமக்கள் தமக்கு வேண்டிய தீங்கியல் பரிகாரத்தை அரசியலமைப்பின் அடிப்படை உரிமைகளின் கீழ் பெறுவதா? அல்லது சாதாரணமான தீங்கியல் பரிகாரத்தை நோக்கி செல்வதா? என்ற கேள்விகளுக்கு பொருத்தமான பதிலை பெறுவதாக எனது இக்கட்டுரை அமைகின்றது.

சாதாரண தீங்கியல் பரிகாரத்தை பெற்ற பின்னர் அத்தீர்ப்பானது மேன்முறையீடு செய்யப்படலாம். அத்துடன் அடிப்படை உரிமை மீறல் வழக்குடன் ஒப்பிடுகையில் இதன் மூலம் பரிகாரத்தை பெறுவதற்கு நீண்ட காலதாமதம் ஏற்படலாம். ஆனால் அரசியலமைப்பினூடாக தீங்கியல் நிவாரணம் கோரும் போது அதற்கு குறுகிய காலத்தில் வினைத்திறனான தீர்வினை பெற்றுக்கொள்ளலாம்[12]. ஆனால் அடிப்படை உரிமை வழக்கினை 30 நாட்களுள் தாக்கல் செய்தல் மற்றும் உயர் நீதிமன்றத்தை அனைவரும் அணுகமுடியாமையில் உள்ள நடைமுறைச் சிக்கல் போன்றன சவாலாக உள்ளன. ஆகவே, Constitutional Delict வழக்கினை தென்னாபிரிக்காவை போல இலங்கையிலும் கீழ் நிலை நீதிமன்றுகளில் தாக்கல் செய்து பரிகாரத்தை பெற்றுக்கொள்ளும் வகையில் அமைய பெற்றால், அதன் மூலம் அரசியலமைப்பின் மூலம் தீங்கியல் நிவாரணத்தை மக்கள் இலகுவாக பெற்றுக்கொள்ள முடியும் என நம்புகின்றேன்.

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Lex Natura

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The year 2020 is very chaotic and tragic due to the pandemic which has impacted the entire globe. Every living creature on the planet has had a tremendous impact on its life may be positively or negatively. Life has become very unforeseeable to people of all colour, religion, ethnicity and class. The COVID-19 virus affects everybody irrespective of who you are in the human society. Nature is boundless and has its own rules. Who controls the rules of nature? This is a prominent question lingering in everyone's mind. People are so confused why all these technological and scientific developments cannot stop this invisible virus from causing havoc to the human civilization. Humans were very proud of themselves for their unbelievable achievements in microbiology. We as a society had eradicated many serious illnesses such as malaria, smallpox and polio from the world, but this new strain of corona virus has caused us to doubt our capabilities.

At present we are fighting an unknown enemy which is unpredictable. People have started to look for answers not only from scientists but also from the Almighty. The pandemic has affected our lives drastically where the weak are compelled to perish and the rest struggling for survival. This doesn't mean merely strong immunity but also other economic and mental conditions which play a huge role. As usual whenever a global crisis occurs the wealthy are somehow protected and the rest of humanity faces immense hardships. But this pandemic has crossed boundaries of income inequality and impacted everyone equally. Some consider this as the law of nature. Presently, all our man-made preventive measures have not proven to be successful in controlling the spread of the virus, because we are facing new waves of the pandemic.

Similarly, the man-made laws have not always withheld justice although we expect it to do so. Human laws have flaws and loopholes which have paved paths for injustice to layman. Man-made legal system is criticized all throughout the world for being very expensive and unfair to the common man from the working-class. The modern Capitalist society has an impact on our legal system and the time taken by Courts to serve justice is too long. At present, only the wealthy who have ample spare time and cash at disposal are willing to seek justice through the Courts. Then where do the rest of the working-class people go to seek justice? Is justice being denied to the proletariat or are the proletariat afraid of the economic expenditures in the process of achieving justice. The Almighty God is the only answer to their problems. They believe that a higher law than the man-made law would serve justice to their problems in afterlife. Many proponents of the natural law also search for that Higher Law.

Natural Law is the idea of achieving justice through higher law when man-made laws fails to do so. Natural Law and morality are intertwined with each other. Natural Law is categorized into three, first are those who think that by observing the conduct of natural phenomena and human nature, we would be able to perceive Higher Law governing human behaviour. Second are those who believe in studying Holy Scriptures revealed to man by Almighty God. These

texts contain the laws regulating human conduct. Third are those secular, free thinkers who have proposed various other methods to find the Higher Law. Natural law is being explored for many centuries by ancient Indians, Greeks and Romans. Ancient Indians coined the term "Dharma" to the Higher Law concept. It is not easy to verify this concept although it existed in human minds for long. Discovering Natural Law is a tiring process but it is believed to serve fairness and an innate sense of justice to all. According to Natural Law, the Holy Scriptures of the Abrahamic faiths such as the Holy Bible, Hebrew Bible and the Holy Quran play a vital role in shaping the lives of billions of people who are its ardent followers. These texts are considered the Divine Law or *lex divina*. When studying these Holy texts using reasoning, one would discover Natural Law or *lex natura*.

When exploring Natural Law we would always come across St.Thomas Aquinas who was one of the leading Christian theorist who formulated Natural Law in a unique way. During his time there were two opposing factions conflicting each other. They were the Latin Averroists who argued that reason could discover truths which might not be approved by the Christian faith and the traditional theologians of blind faith in the scriptures. But St. Thomas Aquinas chose to tread in between these two factions. He believed truth can be discovered by reason as espoused by Aristotelian philosophy and God's law was considered to be the reason of divine wisdom. Aquinas said that we humans differed from the rest of the creatures on earth because of our unique ability to think, reflect and reason. He believed that we progressed because of a certain divine plan or order by the super intelligent God. Similarly, we all think that all laws are made in accordance to justice. But Aquinas never considered all laws to be just. He considered that laws that opposed the common good and the "divine good" as unjust laws. The maxim "unjust laws are not laws" clearly resonates his thought and was famously quoted by late Dr. Martin Luther King during his fight for equal rights on behalf of black people in America. In order to understand the unjust laws, we have to go back to Dr. Martin Luther King's period. Before the rise of the civil rights movement, America and especially the Southern states were plagued by the notorious "Jim Crow Laws". These laws mandated racial segregation in all public facilities and transportation. This meant racial segregation was implemented in public schools, public places, restrooms, restaurants and even in drinking fountains. These discriminatory practices against minority black communities were enacted by state and local governments legally. Such laws which violate the common good of an inclusive society were described as unjust laws and according to Natural Law principles they need not be obeyed at all. In the Holy Bible it is stated "There is neither Jew nor Greek, there is neither slave nor free, there is no male or female, for you are all one in Christ Jesus", but unfortunately in America people of the same faith were blinded by racism which led to disenfranchising of black communities.

Not only in America but all throughout the world minorities are prejudiced due to their race, faith, caste and sexual orientation by unjust laws with hidden bigoted agendas in disguise of national security, protectionism and patriotism. At present, immigrants and refugees from war torn Middle-Eastern countries are being discriminated in the Western countries due to 'Xenophobia' and 'Islamophobia' cultivated by bigots. Unjust laws are being enacted to limit and control their inflow into Europe which are totally against basic Human Rights. Hitler's Nazi Germany enacted Enabling Act which gave Hitler plenary powers, so that the

government could start isolating Jews from civil society and boycotting Jewish businesses. In the end, the "Nuremberg laws" was the last nail in the coffin for staging the holocaust which costed the lives of six million people. Hitler's laws were also unjust laws because it opposed divine good. Usually most laws enacted by tyrants are unjust laws according to natural law.

Apartheid in South Africa is a unique case where the majority of the black communities were segregated by the minority white government. The American Jim Crow laws and Apartheid government's laws were akin. Unfortunately, even in Sri Lanka the Official Language Act No. 33 of 1956 which is well known as the "Sinhala Only Act" is very controversial because it discriminated minorities which in the end resulted in the destruction of peace and unity of our country for thirty years. All the above laws which were enacted in the past have adversely affected the common good of the society but what are the laws that oppose divine good? The laws that do not bind the moral code of scriptures and faith are condemned to be unjust according to St. Thomas Aquinas.

Now a lot of questions would arise to a rational mind whether we allow the Church and its interpretation of the scriptures or any religious institution to pry on us. What authority do these institutions and clergy have to intervene in our way of life? In this modern technological era should we allow our laws to be influenced by morality preached by faith? Most of the modern democracies are secular states so are all laws unjust as they do not comply to divine law? Morality plays a vital influence in Natural Law. The way the faith interprets scriptures changes with time, similarly morality too changes with time. Recently the Catholic Church and especially the current Pope is endorsing LGBT civil unions which was unimaginable during the period of Aquinas. Morality is very vague and subjective at times. At certain points in life we would be compelled to abide unjust laws that are not morally binding, for the sake of good order in the society. But Aquinas was very specific that unjust laws should never be obeyed because we ought to obey God rather than men. In the end Aquinas succeeded in adapting rational teachings of Aristotle in a way accepted by the Catholic Church of his time.

Similarly, Natural Law is also prominent in Islam. According to Holy Quranic teachings religion is essentially the comprehension of the Natural Law and living in obedience to that Law, for only thereby shall one be true to himself, and only be being true to himself shall he be true to his God and just to the rest of his creatures and his creation. Therefore, Natural Law and religions go hand in hand. During the French revolution, Natural Law ideas were adapted to justify totalitarianism and the mass murders committed by 'Kangaroo Courts. Alf Ross stated "Like a harlot, Natural Law is at the disposal of everyone". Natural Law was heavily criticized for being very vague and elusive. This resulted in the downfall of Natural Law and the rise of positivism.

Positivism is in itself a general term because it includes a number of shades of views. There are many proponents for legal positivism such as H. L. A. Hart, John Austin, Jerome Bentham and many more. All of them had their own versions of positivism and could not agree on certain aspects of those versions. Basically, positivism states that laws are commands of human being. It emphasizes that there is no necessary connection between law and morals. The legal system is a closed logical system in which correct decisions can be deduced from predetermined legal rules by logical means only. Further moral judgements cannot be established and statements

of fact can be established by rational argument, evidence or proof. Positivism appeared to be more modern and rational but it also had its own issues. Although positivism was about to dominate legal theory, surprisingly the so-called Nazis relied on it as their defence during the "Nuremberg Trials". After the end of the war, the Nazi leaders who were caught alive were prosecuted for their atrocious, gross human right violations towards the Jews and Roma people. Jurists who were defending the Nazis and their collaborators argued that these officers were simply carrying out the orders and acting in accordance with the "Nuremberg Laws" which were made by the legislature irrespective of their moral content. They complied with the laws of their land and they have not done anything legally wrong. These arguments were rebutted on the basis of natural law theory. A significant question arises whether these unjust laws should be abided irrespective of being immoral. Unfortunately, these unjust laws have led to catastrophic and tragic consequences so it is better to break these unjust, inhumane laws if you had inner conscience. The revival of Natural Law thinking and quest for moral values resulted in Universal Declaration of Human Rights by the United Nations and a number of conventions and covenants on human rights and civil liberties.

In Sri Lanka there is a well-known case called *Wijesuriya and Another v The State [77 NLR 25]*. This is good case study where the accused relied on positivism and the judgement resonated Natural Law theory, although it was not mentioned explicitly. The case revolves around the issue that they were just carrying out their superior's orders. The first accused was a lieutenant and the second accused a soldier of the volunteer force. They had appealed against the decision of the trial Court which had already found them guilty of attempted murder of a young woman named Premawathi Manamperi who was a former beauty queen [Avurudu Kumari] in Kataragama. At the time of time of this regrettable incident, there was an armed revolution by rural neglected youth against the economic disparities and failure of the state as a whole. Certain police stations were attacked and civilians were killed in the rebellion. As the state feared the spread of revolution all throughout the island, a state of emergency was called and armed forces were ordered to crush the uprising of youth and restore normalcy. The two accused were among the troops sent to Kataragama for this purpose. The young woman was taken into custody as a suspected revolutionist. The first accused started questioning her and then demanded her to strip naked. She was bewildered and staunchly opposed to remove her clothes and she begged to be shot if he wanted. He proudly said that shooting was his business and she should carry out his orders. The helpless girl had to reluctantly remove her clothes. She was ordered to put her hands up and march along the highway. The first accused and the other followed her. Then the first accused brutally kicked and pushed her down after which he opened fire with a sub machine gun. The girl dropped down on the ground and the two accused went back to their army camp. A soldier who went by the highway saw that the girl was still alive and informed the first accused. The lieutenant ordered the second accused to go and shoot her. So, the second accused followed his orders and shot her again, but still the poor girl did not give up on her life easily. Again, she was found to be alive and an unidentified soldier went to shoot through her head. I am heart broken by what just happened to that girl and do not want to describe the tyrannies she might have gone through her slow painful demise. But it is important to understand how the accused behaved immorally and lacked inner conscience while performing these hideous acts and gruesome murder.

Their defense arguments were pretty blunt. They were just following their superior's orders. The first accused [lieutenant] was following a Colonel's orders to "bump off" prisoners. The second accused shot the girl in accordance to the orders of the first accused. Section 100 of the Army Act clearly states that every person subject to military law, who disobeys any lawful command given by a superior officer commits an offence. The accused raised another defence pursuant to Section 69 of the Penal Code which states "nothing is an offence…. who in good faith believes himself to be bound by law to do it". How does the court resolve the problem of what is a lawful command? Honourable Justice Thamotheram states in his judgement 'the discussion of law is centered on to what extent a person is subject to military law is bound to obey the command of his superior officer. Three different positions emerged; the first being a soldier must obey the command of his superior whether it was lawful or not. The second was that a soldier must obey the command of his superior only if it was lawful, but this view contradicts with the requirement that a soldier must give his unquestioning obedience to his / her superior's orders. Usually there is less time to think of lawfulness. The third view is that the soldier is only bound to obey orders which are not manifestly and obviously illegal. If such orders are obeyed then the law will presume that he has the knowledge of its illegality. Although Natural Law principles were not mentioned, it is submitted that the learned judges' reasoning depicted that it was an instance where human values and morals are invoked.

Today John Finnis's theory of Natural Law is more authoritative. Finnis restates Natural Law and Natural Rights based on Aristotle and Aquinas. He describes Natural Law as 'the set of principles of practical reasonableness in ordering human life and community. Accordingly, there are two propositions, first he states that there are certain basic human values of existence which he coined the term 'human goods'. Secondly that these 'human goods' are self-evident and can be achieved through 'practical reasonableness'. You might wonder why we need these 'Human Goods'? Finnis states that it is required for 'human flourishing'. This is a list setting out conditions required by individuals if they are to attain their full potential. This includes life, knowledge, play, aesthetic experience, sociability, religion and practical reasonableness. Practical reasonableness is the method of achieving the above mentioned 'human flourishing'. It has set principles that help to distinguish between what is morally right from morally wrong.

Natural Law has an incredible impact on all of us. It has inspired the formation of democratic constitutions such as those of United States of America and France, which incorporated chapters on Human Rights. It also plays a vital role in the creation of International Law. International relations are guided by certain moral principles such as "pactu sunt servanda" that agreements should be honoured, States and sovereigns are equal and States shouldn't interfere in affairs of each other. Natural Law led to the development of fundamental human rights which resulted in the creation of Universal Declaration of Human Rights. It has influenced principles of equity and development of administrative law. At present, Natural Law thinking is used as a yardstick for examining the existing law for its moral values and to effect on law reforms where existing laws conflict with moral values and beliefs. In the end whether we like it or not Natural Law and morals heavily influence the laws that we are supposed to follow in our society.

Death and Human Dignity: An Islamic Perspective

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In many civilizations, traditions and religions, both ancient and modern, death is a mere transitional phase between one stage of life to another. Burying the dead is one way to ensure that the dead are accorded with dignity, respect and the feelings of their living loved ones are considered. Throughout history, religions, traditions, and cultural practices have influenced the ways in which the dead are managed both in times of peace and conflict. In Islam, human dignity is a right given by God to all humans, who are referred to in the Qur'an as God's vicegerents on earth. Islam grants certain rights to humans even before they were born and others after their death. Whether dead or alive, the human body, created by God in perfect shape must be given dignity and respect. The importance of the human body is illustrated in the Holy Qur'an. There, it is stated that when Cain was unsure of how to deal with the body of his dead brother Abel, God sent a message in the form of a raven. God used the raven to dig into the ground to bury another raven, thus indirectly showing Cain how to bury his brother's body (5:31). Faced with the difficulties of ensuring the dignified burial of the dead in the context of armed conflicts and other situations of violence and natural disasters, classical Muslim jurists developed Islamic laws to deal with the challenge. These laws aim to respect the dignity of the dead and respect the feelings of their loved ones to any degree possible.

Islamic law at times, combines purely legal rules with religious and ethical matters. This is the case with the management of the dead as well. For instance, burial and grave regulations are deliberated in the Islamic legal literature along with the etiquette of visiting graves. Combining legal and ethical elements is an important characteristic of Islamic law that helps to keep it alive. It helps ensure that Muslims voluntarily impose such rules upon themselves and that they keep practicing it even in regard to aspects that are not codified in Muslim States' legal systems and over which courts have no jurisdiction. This nature of Islamic law points to the impact Islamic law can have in influencing societal behavior. Understanding these Islamic rules can help guide humanitarian forensic specialists to overcome challenges they face by respecting the religious needs of Muslim societies when they work in Islamic contexts. It is a way to show that respecting the dead is the common overriding concern of both their forensic work and Islamic law.

Respecting the mortal remains of the deceased necessitated decently burying them in order to prevent their bodies from being preyed upon by wild animals. Decent burial was also necessary to allow their families and loved ones to visit their graves. Such concerns remain relevant even today. The burial of the deceased is a collective obligation (fard kifayah) on the Muslim community. Because it is a collective obligation, the entire Muslim community will be guilty if a Muslim body is not buried, unless the burial was beyond their knowledge or capacity. The rule put forth by Islamic law is that every dead body should be buried in an individual grave. However, in cases of necessity, two, three or more bodies if needed can be buried in the same grave. Today, collective graves, usually made for the members of the same

family are common in many countries simply because of the shortage of space for graveyards in villages or because the cost of individual graves is too high. It should be noted that in the case of multiple burials, bodies must be placed respectively side by side with suitable space between each body. This is also the practice followed by forensic specialists when they carry out their investigations. It is important to point out that the classical Muslim jurists developed a separate set of rules for the disposal of the body of a shahid (martyr). The battles of Badr and Uhud in the Islamic history provide the precedents upon which the rules for handling dead bodies of non-Muslims and Muslims were derived. Their significance stems from the fact that they witnessed the highest number of fatalities during the lifetime of Prophet Muhammed (peace and blessings be upon him).

Most Muslim jurists, two main exceptions being Safid ibn al-Musayyab (d.712-3) and al-Hasan al-Basri (d.728), agree that the following three rules should be observed exclusively in the case of martyrs. First, there should be no ritual washing for the body of the martyr. This majority understanding has been the norm and practice throughout history and remains so today. The different interpretations arose because of conflicting reports attributed to the Prophet. Ibn al-Musayyab and al-Basri based their opinion mainly on logistical considerations. They argued that the martyrs of the battle of Uhud were buried without the ritual purification because it was not practically possible to bring water from Medina to the battlefield in the desert for such a number of dead bodies. However, the majority based their ruling on various theological rationales including that burying the martyrs in their blood is a testimony of their great status and the sacrifices they made in the Islamic just war.

Second, there should be no shrouding of the martyrs and they should be buried in the same clothes in which they were killed. Third, no funeral prayer should be performed on the body of the martyrs. As in the case of ritual washing, some jurists explain this rule by following the precedent set by Prophet Muhammed (peace and blessings be upon him) in the battle of Uhud. Others give theological rationales to the rule. These rationales relate to the special status of the martyrs and the view that they are alive in the presence of their God as well as the view that their sins are already forgiven and therefore no funeral prayer is needed for them (Qur'an 3:169).

Because of the prominent place that martyrs occupy under Islamic law and in Muslim cultures and traditions, it is important that those who handle the bodies of Muslims take these three specific rules as well as any other relevant rules into consideration. In addition to its detailed rules pertaining to martyrs, Islamic law also contains rules on the burial of both Muslim and non-Muslim enemies. Specifically, there is a duty to bury dead bodies of the adverse party. If for any reason the non-Muslim adverse party does not bury its dead, then it becomes the obligation of the Muslims to do so. The Andalusian jurist Ibn Hazm (d.1064) justifies this obligation by arguing that if Muslims do not bury the dead bodies of their enemy, the bodies will decompose or be eaten by beasts or birds. Such an outcome would be tantamount to mutilation, which is prohibited under Islamic law. The rationale behind the obligation to bury the enemy's dead is that if the adverse party does not bury their own dead, it is to protect the human dignity of the dead. Such protection, although not mentioned in the classical Islamic law texts also contributes to respecting the feelings of the adverse parties' families. In addition some jurists also argued that burying the bodies of the enemy serves the public

interest by preventing health risks to the passersby and thus, also plays a public health role. In addition a common misunderstanding exists that the dead spread disease and therefore pose public health risks. However, there are exceptions to this misconception such as in the case of Ebola, Covid-19, etc. The nature and the sheer scale of the current coronavirus (COVID-19) pandemic, however has created a number of questions, challenges and even rumors in Muslim-majority states as well as for Muslim communities around the globe. Respect for dead bodies manifests itself in diverse ways in different cultures around the world. In Islamic law and Muslim cultures, burying the dead in the ground is the correct way to respect the dead, while cremation is prohibited under Islamic law because unlike in some cultures, it is considered a violation of the dignity of the human body. Cremation of the remains of individuals that have died from COVID-19 has therefore been a great concern for Muslim communities in some non-Muslim majority states.

Based on reports attributed to Prophet Muhammed (peace and blessings be upon him), it is mustahab (preferred) to bury the dead bodies quickly. The reports however do not give specific indications on how quickly burial should be undertaken. In some particular cases like that of al-mat'un (a plague-ridden person), al-mafluj (a hemiplegic person) and al-masbut (a comatose person), certain jurists advocate that it is preferred to wait for yaum wa laylah (a day and a night) until the death of such persons is confirmed. The reason for waiting in these three cases is simply because there is a possibility that the individuals in question are not yet dead and they could be in a coma state. Therefore, the jurists preferred that the burial should be delayed until death is confirmed. Another exception to quick burial is if there is a suspicion that death is due to a criminal action. In that case, burial is to be postponed until the body is examined. Finally, few jurists consider that another reason to postpone the burial of a dead body unless it would mean the body would decay, is to wait for the arrival of the deceased's relatives. However, this timeframe for burial does not change if the dead body is unclaimed or unidentified. The humanitarian concern of respecting dead bodies prompts Muslims to quickly bury unclaimed or unidentified bodies.

In conclusion, death and human dignity from an Islamic perspective is necessary for any forensic specialist working with Muslim communities to ensure respect for the dead. In order to be able to make more informed decisions and to communicate more effectively, it is recommended that forensic specialists familiarize themselves with both the Islamic regulations on the management of the dead and how far the cultural practices in these communities correspond with Islamic law. Some practices such as quick burial may constitute challenges to the forensic specialists' work. In such cases, engaging with Islamic institutions, scholars and community leaders becomes inevitable. Furthermore, the specialized forensic expertise that is developed from institutions such as the ICRC are indispensable for achieving the protection of dead bodies in contemporary armed conflicts. Nonetheless, the cooperation between humanitarian forensic specialists and Islamic jurists in addressing such challenges are essential for ensuring the proper and dignified treatment of dead bodies in Islamic contexts.

Euthanasia; Right to Die will It be Legalized in Srilanka?

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The right to die is a concept based on the opinion that human beings are entitled to end their life or undergo voluntary euthanasia. Possession of this right is often understood that a person with a terminal illness, or without the will to continue living, should be allowed to end their own life, use assisted suicide, or to decline life-prolonging treatment. The question of whom, if anyone, should be empowered to make this decision is often central to the debate.[1] The term euthanasia has its origin from the Greek language. It can be simply described as an 'easy and happy death'. From the moment of birth, an individual is dressed with various essential human rights, of which the Right to Life is the most significant basic right without which different rights cannot be appreciated. In any case, the inquiry emerges, if an individual has a privilege to live, regardless of whether he has likewise an option to finish his life when his life becomes horrendous in light of terminal illness and chronic disease.

Euthanasia can categorized in to different ways;

(i) Voluntary euthanasia

(ii) Involuntary euthanasia

(iii) Non voluntary euthanasia

Voluntary Euthanasia.

Voluntary euthanasia is conducted with the consent of the patient. Active voluntary euthanasia is legal in Belgium, Luxembourg and the Netherlands. Passive voluntary euthanasia is legal throughout the US per *Cruzan* v *Director, Missouri Department of Health*. When the patient brings about their own death with the assistance of a physician, the term assisted suicide is often used instead. Assisted suicide is legal in Switzerland and the U.S. states of California, Oregon, Washington, Montana and Vermont. [2]

Non Voluntary Euthanasia.

Non voluntary euthanasia is conducted when the consent of the patient is unavailable. Examples include child euthanasia, which is illegal worldwide but decriminalized under certain specific circumstances in the Netherlands under the Groningen Protocol.[3]

1 Right to die.[online]Wikipedia. Available at: https://en.wikipedia.org/wiki/Right_to_die [accessed 28th April 2020]

2 Euthanasia. [online] Wikipedia. Available at: https://en.wikipedia.org/wiki/Euthanasia [accessed 28 th April 2020]

3 ibid

Involuntary Euthanasia _

This is conducted without the consent of the patient.

Passive and Active Euthanasia _

Voluntary, non-voluntary and involuntary sorts can be additionally partitioned into passive or active variations. Passive euthanasia involves the retention treatment vital for the duration of life. Active euthanasia involves the utilization of deadly substances or powers, (for example, directing a deadly infusion), and is the more disputable. While a few creators believe these terms to be deceiving and unhelpful, they are in any case generally utilized. At times, for example, the organization of progressively essential, however poisonous doses of painkillers, there is a discussion whether to view the training as active or passive.

Understanding 'Right to Die' Law

Right-to-Die legislation, also known as physician-assisted death or aid in dying, gives mentally competent adult patients with a terminal illness and a prognosis of six months or less to have the ability to request and receive a prescription medication to bring about their death. Most statutes under consideration at the state level are modeled after Oregon's Death with Dignity Act, which requires two physicians to confirm the patient's residence, diagnosis, prognosis, mental competence, and voluntariness of the request to die. In addition, two waiting periods are required[4].

Pros and Cons of Right to Die Law

Cons.

1. It can prompt a tricky incline; in the event that we permit patients this right, it can grow and have critical outcomes.

2. Give ascent in compelling those to take their lives or the lives of others; morally corrupt in human and clinical gauges.

3. "Throwing endlessly" patients who are regarded not, at this point competent to be a piece of society.

4. Decrease in palliative finish of life care because of the desire for terminal licenses to practice their entitlement to the right to die.

Pros.

(a) A patient's death brings him or her the end of pain and suffering.

(b) Patients have an opportunity to die with dignity, without fear that they will lose their physical or mental capacities.

4 Trisha Torrey, 2020, *Arguments in right to die legislation,* very well health,28th April 2020 <https://www.verywellhealth.com/arguments-in-favor-of-death-with-dignity-2614852>

(c) The overall healthcare financial burden on the family is reduced.

(d) Patients can arrange for final goodbyes with loved ones.

(e) If planned for in advance, organs can be harvested and donated.

(f). With physician assistance, patients have a better chance of experiencing a painless and less traumatic death (death with dignity).

(g) Patients can end pain and suffering when there is no hope for relief.

(h) Some say assisted death with dignity is against the Hippocratic Oath; however, the statement "first does no harm" can also apply to helping a patient find the ultimate relief from pain through death.

(i) Medical advances have enabled life beyond what nature might have allowed, but that is not always in the best interest of the suffering patient with no hope of recovery.

(j) A living will, considered as a guiding document for a patient's healthcare wishes, can provide clear evidence of a patient's decisions regarding end-of-life care.

Euthanasia and Perspective of The Religions

Euthanasia has a major negative effect from almost all the religions other than Hinduism. In Asia, religions play a major role in people's attitude, belief, and behavior.

Buddhist perspective.

Buddhists are not consistent in their perspective on Euthanasia and the lessons of the Buddha don't expressly manage it. Most Buddhists (like nearly every other person) are against euthanasia. The most well-known position is that euthanasia isn't right since it exhibits that one's brain is in an awful state and that one has permitted physical enduring to cause mental anguish. Meditation and proper use of pain killing drugs should empower an individual to achieve a state where they are not in mental torment, thus no longer think about euthanasia or self-destruction.

Buddhism places incredible weight on non-hurt and on maintaining a strategic distance from the completion of life. The reference is to life - any life - so the deliberate completion of life appears against Buddhist educating and willful killing ought to be prohibited. Certain codes of Buddhist monastic law unequivocally prohibit it. Lay people don't have a code of Buddhist law, so the most grounded that can be said of a layman who participates in Euthanasia is that they have made an error of judgment.

Buddhists view passing as a change. The perished individual will be reawakened to another life, whose quality will be the aftereffect of their karma. This produces two issues. We don't have the foggiest idea what the next life will resemble. In the event that the next life will be much more dreadful than the existence that the wiped out individual is by and by suffering it would obviously not be right on a utilitarian premise to allow killing, as that abbreviates

the current terrible situation for a surprisingly more dreadful one. The subsequent issue is that shortening life meddles with the working out of karma, and adjusts the karmic balance coming about because of the abbreviated life[5].

Euthanasia as suicide.

Another difficulty comes if we look at voluntary euthanasia as a form of suicide. The Buddha himself demonstrated resistance of suicide by priests in two cases. The Japanese Buddhist custom incorporates numerous accounts of suicide by priests and suicide was utilized as a political weapon by Buddhist priests during the Vietnam war. In any case, these were priests and that has any kind of effect. In Buddhism, the manner in which life closes profoundly affects the manner in which the new life will start. So an individual's perspective at the hour of death is significant - their contemplations should be magnanimous and illuminated, liberated from outrage, despise or dread. This recommends suicide (thus killing) is just endorsed for individuals who have accomplished illumination and that all of us ought to maintain a strategic distance from it.[6]

Hindu perspective.

There are two Hindu views on euthanasia[7]:

1. By helping to end a painful life, a person is performing a good deed and so fulfilling their moral obligations.

2. By helping to end a life, even one filled with suffering, a person is disturbing the timing of the cycle of death and rebirth. This is a bad thing to do, and those involved in the euthanasia will take on the remaining karma of the patient.

    a The same argument suggests that keeping a person artificially alive on a life-support machine would also be a bad thing to do.

    b) However, the use of a life-support machine as part of a temporary attempt at healing would not be a bad thing

Prayopavesa, or fasting to death is a worthy path for a Hindu to take their life in specific conditions. Prayopavesa is altogether different from what the vast majority mean by self-destruction: it's peaceful and utilizations normal methods; it's possibly utilized when it's the opportune time for this life to end - when this body has filled its need and become a weight; in contrast to the suddenness of self-destruction, prayopavesa is a continuous procedure, giving adequate time for the patient to get ready himself and people around him for his passing;

5 BBC,2009,*Buddhism,Euthenasia and suicide,*[online](updated 11th November 2009) Available at;< https;//www.bbc.co.uk/religion/religions/Buddhism/buddhistethics/euthanasiasuicide.shtml> [accessed on 2nd may 2020]

6 Ibid

7 BBC,2009,*euthanasia,assisted dying and suicide*,[online] (updated 25th August 2009) Available at; <https://www.bbc.co.uk/religion/religions/hinduism/hinduethics/euthanasia.shtml> [accessed on 2nd may 2020]

while self destruction is regularly connected with sentiments of dissatisfaction, wretchedness, or outrage. Prayopavesa is related with sentiments of quietness.

Satguru Sivaya Subramuniyaswami, a Hindu chief conceived in California, ended his own life by prayopavesa in November 2001. In the wake of finding that he had untreatable intestinal malignant growth, the Satguru contemplated for a few days and afterward declared that he would acknowledge torment killing treatment just and would embrace prayopavesa - taking water, however no nourishment. He passed on the 32nd day of his deliberate quick.[8]

Catholic perspective.

"Euthanasia is a grave violation of the law of God, since it is the deliberate and morally unacceptable killing of a human person"[9].

Pope John Paul II, Evangelium Vitae, 1995

Christians are generally against euthanasia. The contentions are normally founded on the convictions that life is given by God. The Roman Catholic church views killing as ethically wrong. It has consistently shown the outright and perpetual estimation of the decree "You shall not kill". The Roman Catholic Church doesn't acknowledge that individuals reserve the right to die.

Islamic perspective.

Muslims are against euthanasia. They accept that all lives are sacrosanct on the grounds that it is given by Allah, and that Allah picks to what extent every individual will live. People ought not meddle in this. Islam considers clinical morals equivalent to morals in different everyday issues. Islamic clinical morals is repeating general moral standards utilizing clinical phrasing and with clinical applications. Modern medicine has made some moral difficulties in connecting end-of-life choices and what is or isn't killing.

Euthanasia and Violation of Ethical Principles

Euthanasia itself violates 3 major ethical principles ; namely Competence, Autonomy, and Beneficence.

Skill in bioethics implies the psychological capacity to separate right from wrong and to deal with one's own issues. The utilitarian definition, notwithstanding, is that the patient is able until ineptitude is illustrated. Upon the patient's solicitation for euthanasia, the doctor must choose whether the patient is lawfully skillful, that is, having sound thinking. This, be that as it may, is insignificant to whether the patient's solicitation is sensible.

This inconsistency in a general sense misshapes the consistency of the evaluation on the grounds that the "sensibility" of the solicitation is definitely dependent upon the doctor's social and virtues. In one investigation, discouragement happened in 45% of in critical condition

8 ibid

9 BBC,2009,euthanasia and assisted dying,[online] (updated on 3rd August 2009),Available at;<https://www.bbc.co.uk/religion/religions/christianity/christianethics/euthanasia_1.shtml> [accessed on 7th may 2020]

patients, while in another, 64% of at death's door patients who wanted early passing were experiencing different degrees of clinical depression. No measures, notwithstanding have been set up with regards to what level of wretchedness prompts inadequacy.

Except if all patients who want demise are dealt with psychiatrically, the side effects that emulate the maniacal issue brought about by neurochemical factors puzzle the normalization of ineptitude and subsequently, the assurance of fitness.

As indicated by Gomez, who directed broad meetings with doctors in the Netherlands in regards to euthanasia, the genuine check against misuse lies in the integrity of the medical professionals. Be that as it may, regardless of whether such significant trust can be put in any gathering of experts is another inquiry.

Consequently, regardless of whether the euthanasia solicitation ought to be "well considered" by the physician who is eventually answerable for the choice to euthanize somebody.

Principle of Autonomy

Euthanasia also violates the principle of Autonomy or self-determination and in this manner negates the case of Euthanasia advocates, who states, we as a whole reserve the " right to die" .Permitting euthanasia doesn't imply that the patient is permitted to die at their own picking; it implies that the physician is permitted to cause the demise of the patient.

For instance, the doctor's assertion that no desire exists for improving the patient's pain management, the executives will figure out what occurs whether or not the chance of help with discomfort exists obscure to them . In the Nancy B case, a female patient hospitalized in Quebec was forsaken, subordinate, and mentioned that her respirator be expelled.

The Coalition of Provincial Organizations of the Handicapped (COPOH) addressed whether Nancy B. was really offered or given away from attainable personal satisfaction experienced by individuals living in the network with mechanical ventilation.

For this situation, her self-rule was undermined by her scholarly accommodation to the profession of medicine represented by physicians. All the more inconspicuously, euthanasia is naturally an open go about as it includes the option to enroll the guide of a physician; each time a patient is euthanized, the person puts the physician, another person, in a place of committing suicide. Since the demonstration is irreversible, the social and good duty lays on the physician, notwithstanding the lawful obligation of answering to the coroner and being examined for conceivable injustice.

Beneficence

Euthanasia isn't an act of beneficence, regardless of whether it might have benefits. Notwithstanding the degree of palliative consideration gauges, some enduring will keep on being intolerable for people who have less ability to adapt to the experience than others, particularly those in socially vulnerable positions.

One British study for instance, uncovers that family members, companions, neighbors, and human services authorities were more interested on Euthanasia than the patient. Additionally, instead of fearing pain, patients normally feared being reliant and being a weight to family

members and this is bound to be the purpose behind requesting euthanasia.

In the Netherlands, euthanasia has become permitted in one case after another in light of the fact that there is no legitimate differentiation between insufferable sufferings from physical agony and from a mental issue, or between the situation of an adult and of a kid.

Nonetheless, euthanasia is characteristically not an option to be worked out. In addition to the fact that euthanasia violates the principles of competence, autonomy and beneficence, it likewise changes what we see as socially reasonable.

Countries that accepted Euthanasia as a Law

Australia. The Australian state of Victoria has a law allowing physician-assisted suicide which came into effect in June 2019[10]

India. Passive euthanasia is legal in India.[11] On 7 March 2018 the Supreme Court of India legalized passive euthanasia by means of the withdrawal of life support to patients in a permanent vegetative state[12] . Forms of active euthanasia, including the administration of lethal compounds are illegal.

Canada. Voluntary active euthanasia, called "physician assisted dying" is legal in Canada for all individuals beyond 18 years old. Having a terminal sickness that has advanced to where common demise is "sensibly predictable" on 6 February 2015, the Supreme Court of Canada consistently governed in *Carter* v *Canada (AG),* that Canadian grown-ups who are intellectually skillful and enduring heinously and for all time reserve right to a doctor's help in dying[13].

United Kingdom. Passive euthanasia is lawful, by method for advance choices giving patients the option to decline life sparing treatment. Nourishment and fluid can likewise be pulled back from somebody in a perpetual vegetative state without the requirement for court approval[14].

Medical ethics with its four major principles, beneficence (Do good to the patient), non maleficence (Do no harm to the patient), patient autonomy (allow patient to take decision on his health), and justice (always make available resources fairly distributed among needy patients). Practicing Euthanasia always causes ethical dilemma between these four principles.

10 Edwards J,(2017),Euthanasia: Victoria becomes the first Australian state to legalize voluntary assisted dying, *ABC news,* [online], 29th Nov, Available at; <https://www.abc.net.au/news/2017-11-29/euthanasia-passes-parliament-in-victoria/9205472> [accessed on 8th may 2020].

11 PTI (2011),India joins select nations in legalizing "passive euthanasia" ,*The Hindu,*[online],Available at;<https://www.thehindu.com/news/national/India-joins-select-nations-in-legalising-quotpassive-euthanasiaquot/article14938022.ece> accessed on 8th may 2020.

12 Venkatasen J,(2011),Supreme Court disallows friend's plea for mercy killing of vegetative Aruna, *The Hindu,* [online] Available at; <https://www.thehindu.com/news/national/Supreme-Court-disallows-friends-plea-for-mercy-killing-of-vegetative-Aruna/article14939164.ece> accessed on 8th may 2020.

13 Sean fine,2015, Supreme Court rules Canadians have right to doctor assisted suicide, *The globe and mail,*[online] 6 Feb. Available at; <https://www.theglobeandmail.com/news/national/supreme-court-rules-on-doctor-assisted-suicide/article22828437/> [accessed on 9th may 2020]

14 BBC, 2018, supreme court backs agreed end of life decisions, [online], Available at; <https://www.bbc.com/news/uk-45003947> [accessed on 9th may 2020]

In Practice of Medicine both Hippocratic Oath and Nightingale's pledge are concerned with these ethical values.

Sri Lanka is a country with multiple religions and cultures. They practice different religions. But as mentioned earlier in the article, all euthanasia, or killing one's own life is not acceptable to all religions. In Sri Lankan culture, people are willing to care for elders (not only their parents). If they are terminally ill even after knowing that those loved ones' lives cannot be saved, people want to look after them as they can afford.

Why Euthanasia should be Legalized in Sri Lanka?

It is to uphold the rights of the terminally ill patients to die with dignity. Otherwise, physicians misuse euthanasia and perform illegal and unethical malpractices such as DNR orders misusing medical paternalism. It is a type of involuntary passive euthanasia and the physician orders not to resuscitate if the patient goes into cardiac arrest. Since it is involuntary, it amounts to homicide.[15]

Furthermore Sri Lanka is a middle-income country with totally free health service. Country spends 4% of its GDP on Health. But with properly analyzed health data in relation to health costs, Sri Lanka is spending a major portion of its cost on unsalvageable lives. Even though the country is middle income, the literacy rate of the country is very high compared to other Southeast countries in the region. The majority of people who are suffering from terminal illnesses are expecting to experience the Physician assisted Euthanasia. The people who are financially sound, go to countries where Euthanasia is legalized to get their calm death without suffering. Therefore countries like Sri Lanka should start thinking of this process with the attention to legal, medical, and ethical aspects.

Conclusion

There is an ongoing debate with the existing law on euthanasia. There are many pros and cons, Benefits and discomforts, advantages as well as disadvantages on this controversial topic. Even with a much advanced health care system, a very little can be done to provide a calm death to a terminally ill patient.

The only human choice is to allow individuals who are suffering to choose to end their suffering. Further the discrepancies in the laws as they exit and how they are being enforced have led to uncertainty. The medical profession should continue to remain as the one of saving lives but they should not be at the expense of compassion and a terminally ill individual's right to choice to end his or her life and die with dignity. In Sri Lanka its time to initiate legalisation of Euthanasia. Prior to legalisation of voluntary euthanasia many factors should be considered. As an initiative, the real need of Euthanasia should be assessed in the society. With the correct identification of the societal need, followed by the detailed discussion should be done with multiple sectors including Medical, Legal Social, and Education Departments.

15 Vidanapathirana, M., 2017. Non-voluntary passive euthanasia should be legalized in Sri Lanka. *Medico-Legal Journal of Sri Lanka*, 5(1), pp.1–5.

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History of the Majlis

1950

LSMM was formed (with a handful of students) with a view to promotes Islamic Values among the student fraternity at Sri Lanka Law College.

Objectives of the Majlis was twofold at that time

(i) To promote Islamic principles and values within the emerging Advocates and proctors from Sri Lanka Law College.

(ii) 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 Parliamentarians.

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 protected against the Minister of Education the use of two books, namely, “Student Visual History of Ceylon and the World” and “Archeology of World Religions” which contained facts contradictory to Islamic Principles and some which purported 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 along side Mr. M. Rafeeek
- A grand dinner was organized by the Majlis and was held at the Galle Face Hotel with Hon CJ M.C. Sansoni presiding as thief 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 Senanayaka on ‘‘Threats to democracy’’ and the address of the Senator 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.

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 Hajiyar 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 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 prove financial assistant 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 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 providing 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, Tamil Languages and General Knowledge. This took place under the presidency of A. A .M Ismail.

1987

- Under the presidency A.M.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 postion of Senior Treasurer in order to overlook the activities of the the Majlis primarily with regard 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 this 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 Puttalam District where stationary 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.M. Burhanudeen in memory of late Justice T. Akbar to be awarded to the winner.
- A research paper contest on Muslim law was held to enhance the knowledge of Islamic jurisprudence.
- A moot competition was organized by the Majlis. The winners of the competition were awarded at the Meezan launch and the chief guest was the then CJ Hon. G.P.S De Silva.
- The Majlis donated the necessities to "Isha Athul Islam'' orphanage in Dharga Town.
- 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 refugees in the Puttalam District.

1994

- The Majlis with the 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 of many legal luminaries.

54th 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 "Freedom of Expression vs Religious sensitives" was held in the college main hall.

2007-2009

- A copy of the translation of the Quran was handed over to the college library.

2007

- Arrangements were made for a ladies prayer room within the premises of college.

2008

- The scholarship programme for needy student was reintroduced.
- The Majlis organized a felicitation ceremony in honour of the then principal obtaining a Doctorate from the University of Queensland.
- 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 the Muslim Law note 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 and former MP Imthiaz Bakeer Markar.

2012

- 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 were 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.lsmmsllc.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 50th edition of the Meezan was launched. The Attorney General of Sri Lanka, Honourable Jayantha Jayasuriya was the chief guest of 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 demise.

A legal aid program was conducted in Marichkkady to provide legal assistance to those displaced from their homes.

2018

- The Majlis organised a ''Visit my Mosque'' programme whereby the students at Law College were given the opportunity to witness the proceedings of the Jawatta Jummah Mosque.

2020

- The Law Students' Muslim Majlis relaunched their website lsmm.lk.
- The 54th Meezan Journal is dedicated to all the healthcare workers, front line workers and members of the public who have volunteered towards managing the COVID- 19 pandemic situation.

Past Presidents and Secretaries of the Law Students' Muslim Majlis

Year	President	Secretary
1957/1958	S.H Mohamed	M.H.M Jaladeen
1958/1959	M.S.M Naseem	M.H.M Jaladeen
1959/1960	T.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 Farook	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.Jiffry	Y.A.M.H Omar
1971/1972	M.M Zubair	M.H.M Ashraff
1972/1973	M.H.M Ashraff	
1973/1974	S.M Haniffa	R.M Imam
1974/1975	M.Y.M Faiz	A.S.M Abdul Razzak
1975/1976	S.A.M Ashar 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. Kariyappar
1979/1980	M. C. M. Zawahir	M. A. C. S. Hameed
1980/1981	M. S. M. Samsudeen	Ms. U.S. Cader
1982/1983	M. I. M. Abdullah	M. Nazeem Farook
1983/1984	T. H. Careem	Y. L. M. Razcik
1984/1985	M. H. Segu Issadeen	A. W. M. Salam
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. Faiz Mustapha	Ashroff Roomy
1989/1990	Ashroff Roomy	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. M. Fazeen	A. W. M. Fallen
1994/1995	M. U. M. Ali Sabry	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 Zawahir
2001/2002		
2002/2003	Malik Hannan	M. F. R. Aslam
2003/2004	M. F. R. Aslam	Hejaaz Hezbullah
2004/2005	Hejaaz Hezbullah	Ms. Shahrana Moulana
2005/2006	Althaf Marsoof	Irshad Hameed
2006/2007	Irshard 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. Zawahir	Ms. Shehana Aniff
2010/2011	Shafraz M. Hamza	Ms. Maiza Azhar
2011/2012	Hassan Hameed	Ms. K. Mifra Banu
2012/2013	M. R. Rahmathullah	A. Malik Azeez
2013/2014	A. Malik Azeez	Ziyani Marikkar Riyaz
2014/2015	Shehan Mustapha	S. Mohideen
2015/2016	Shiraz Hassan	Hafeena M. M. F
2016/2017	Shafeena M. M. F	Nasreen Naushad
2017/2018	Sanjith Ahamed	Shammas Ghouse
2018/2019	Muazzam Mubarak	Haajer Azhar
2019/2020	N. Mohamed Infas	Shimlah Usuph

Achievements of Muslim Students

Sports

Cricket
Ilham Hassanali
Mohammed Rakhshan
Bishran lqbal
M. M. Arqam

Rugby
Bishran lqbal
Bilaal Marikar

Basketball (Men)
lham Hassanali (Vice Captain)
Bilaal Marikar

Basketball (Women)
Anam Ismail
Farah Nawshard

Swimming
Anam Ismail

Badminton
Bishran lqbal

Chess
Sara Nada (Captain)

Football
M. H. M. Arshad
Mohamed Rakshan
Muhammed Rizky

Tag rugby
Anam Ismail
Farah Nawshard

Netball
Sara Nada (Vice Captain)

Hockey
Bishran lqbal

Carrom
Bishran lqbal

Extra Curricular Activities of Muslim Students

Mooting

Shabnam Razik

Sara Nada

Farah Firthous

Muhammed Risky

Debates

Farah Firthous

Shanik Pakeer

Inter-College Competitions

Ananda Grero Memorial Challenge Trophy (Sinhala Moot) 2019

Haajer Azhar (Best Mooter, Gold Medal)

G.L.M De silva Memorial Sinhala Address to Jury Competition 2019

Haajer Azhar (Gold Medal)

Bunty De Zoysa Memorial Moot Competition (English Moot) 2019

Haajer Azhar (Gold Medal)

Hector Jayawardene Memorial English Address to Jury 2019

Haajer Azhar (Gold Medal)

- **We would like to congratulate Ms. Haajer Azhar, our past General Secretary for making history in Sri Lanka Law College by being the first and only student to win all 4 gold medals.**

Bunty De Zoysa Memorial Moot Competition (English Moot) 2020

Zam Zam Ismail (Gold Medal)

Client Consultation Competition 2020

Azraah Nadira Mutaliph (Winner)

Bilaal Marikar (2nd Runner Up)

International Competitions

Luthra International Memorial Moot court

Sara Nada

D.M. Harish International Moot Court Competition

Shabnam Razik

Gujarat International Moot Competition

Farah Firthous

Philip C. Jessup International Law Moot Court Competition (Local Rounds)

Haajer Azhar

Muslim Students of Sri Lanka Law College

PRELIMINARY YEAR

S.J. Kaleeth
A.B.S. Dilras
A.A.H. Ismail
R.M.C. Fernando
M.Z.M. Hanafy
M.H. Abdhullah
M.A. Ajimushan
F.F. Nawshad
I.F.M. Shahmy
F.N. Hassim
M.F. Shuhadha
Rozanne M C Irshard
M.F.A. Majid
M.R.F. Sheema
B. Marikar
F.A.N. Mutaliph
M.M.W. Amhar
M.F.H.M. Adheeb
A.R.M. Nihal
M.I. Zahra
B.H.N. Hana
N. Rizwan
M.A.F. Azra
M.A.M. Aasif
M.F.M. Fuzly

INTERMEDIATE YEAR

M. Abdhul Rauf
A. Fathima Shafrina
Jaward Fathima Sajidha
Firdhous Fathima Farah
Mohamed Suhaib Aashique
M.M. Arqam
M.A. Mohamed Rizky
M.I. Imtiyaz
M.M. Fathima
H.I. Fathima Rimza
Mohamed Naufer Fathima Nifla
A.M. Nafees
S.T. Hasan
M.M. Fathima Marshadha
Mohamed Iqbal Bishran Ahmed
Mohamed Naleer Mohammed Nasleen
M.S. Arshadha
S.S. Nadha
S.A. Mohamed Rizan
M.M. Mohamed Ashraf
U. Huzney Mohamed
R.H. Ibrahim

M.A. Mohammed Ziraj
A.C. Mohamed Asfee
Mohamed Rizvi Fathima Bushra
M.N. Mohamed Israth
Razik Fathima Shabnam
M.M.R. Ahamed
Minaz Izzadeen
T.H.F. Huzra
M.T.A. Rizna
F. Fadhly Mohamed
M.R.M. Rasmi
S. Jawahir saly
F.S. Shanik Pakeer
M. Ilham Hassanali
S.M. Faleel
Ijaz Azmy
T.H.F. Hazra
M.M.S. Mahira

FINAL YEAR

A.M.A. Mahees
M.K.M. Farzan
N.S. Muthaliff
M.Z. Asma
M.F.F. Fazmila
M.R.M.S. Fahmeedha
F.I.M. Sajeer
M.A.R.M. Rakshan
M.I.M. Liayavudeen

APPRENTICE YEAR

Zam Zam Ismail
Haajer Azhar
Shimlah Usuph
M.R.M. Arshad
Shahani Mackie
Fathima Shafna
Shabna Rafeek
A.L.A. Naseef
Dinali Raheem
Ilham Kariapper
N. Mohamed Infas
Salmanul Faris

WITH BEST COMPLIMENTS FROM

Mr. Faisz Musthapha PC

Mr. Razik Zarook PC

Mr. M.M. Zuhair PC

Mr. Ilyas Admani PC

Mr. Ghazali Hussain AAL

Mr. N.M. Shahid AAL

Mr. Nadvi Bahaudeen AAL

Mr. Razmara Abdeen AAL

Mr. Rushdie Habeeb AAL

Ms. Chanakya Liyanage AAL

Mr. S.M.M. Makam AAL

Ms. M.M.F. Shanaz AAL

Mr. Abdul Latheef AAL

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