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EDITORIAL NOTE

Faculty of Law of KDU takes immense pride in presenting the Issue I of Volume 3 of KDU Law Journal (KDULJ) to provide the general public and the legal community with a pragmatic synthesis of the developments in domestic and international spheres of Law. The significance of the KDULJ is that, it is the first internationally indexed journal of KDU, which has been indexed in the HeinOnline database elevating it to a recognized scholarly publication in the world. KDULJ is a bi-annual publication, acclaimed widely in the national and international spheres for its high standards of quality.

Current issue of the KDULJ marks the commencement of the third year of its successful publication. It contains of nine research articles full of factual discussions, in-depth legal analyses and comparative studies. The initial two years of its publication convinced the members of the legal fraternity that, there is a need of researching on different areas of Law. Further, the articles for publication are selected on the basis of topical importance, content, clarity and the quality. The selection is based on the comments made by a panel of reviewers endowed with expertise in the relevant fields of Law.

The Editorial Committee of KDULJ is grateful for the support extended by the members of the Advisory Committee, Panel of Reviewers and Manuscript Editors for the successful completion of its publication. The members of the academic staff of the Faculty of Law made a tremendous contribution for releasing the KDULJ Volume 3 Issue I on time.

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Sri Lankan Law Relating to Human Smuggling: A Critical Analysis with Reference to International Legal Framework

Yasodara Kathirgamthamby*

Abstract

Human smuggling has been identified as a transnational crime. The United Nations Convention on the Transnational organized Crime (UNCTOC) and the Protocol against the smuggling of migrants (HS Protocol) are the main legal instruments in dealing with human smuggling. The UNCTOC aims to criminalize the transnational organized crimes and the HS protocol aims to penalize human smuggling and protect the rights of the smuggled migrants. Both instruments obliged the states to take appropriate measures in punishing offenders and extending their cooperation to other states to attain the objectives of the said treaties. While certain states have adopted specific laws to combat human smuggling in line with these instruments, some states do the same under the immigration laws. It is against this backdrop; the objective of the paper is to assess how far the Immigrants and Emigrants Act No 20 of 1948 of Sri Lanka (IME Act) is able to tackle human smuggling as compared with international legal instruments. This paper uses normative research. Descriptive, interpretive, analytical and comparative methodology had been adopted in this paper. The study reveals that compared with international law the IME Act does not cover some of the key components of the protocol. Therefore, the author suggests that Sri Lanka needs to adopt comprehensive legal provisions in line with international legal framework.

Keywords: *Immigrants and Emigrants Act No 20 of 1948 Sri Lanka, human smuggling, domestic legal framework, Human Smuggling protocol, UNCTOC*

* LLB(Hons) (Col)LLM (Human Rights Law) (NLSIU), PhD (NLSIU), Senior Lecturer in Legal Studies, Attorney at law Department of Legal Studies, The Open University of Sri Lanka – This article is based on some of the arguments I put forwarded in my PhD thesis submitted to National Law School of India University, Bangalore in 2019. Therefore I would like to acknowledge the guidance provided by the Supervisors and the University.

Introduction

Human smuggling is an illegal movement of people from one state to another. This movement is facilitated by organised criminal groups (OCGs). In this process, there are two concerned parties; one is smugglers (OCGs) who facilitate or organize the journey and the other being the smuggled migrant/s who obtain the paid services from the smugglers. The UNCTOC and the HS protocol denotes this movement as transnational organized crime. This transnational movement is carried out across the national boundaries of various states. Those states are indicated as 'source country', 'transit country' and 'destination country'[1].

The UNCTOC was adopted by the UN in 2000 with the aim to criminalize the transnational organized crimes and extend the international cooperation among the states to eradicate the Transnational Organized Crime (TOC) [2]. The HS protocol was adopted to penalize the human smugglers and protect the smuggled migrants[3]. As supplementary measures, legislative guides on UNCTOC and interpretative notes and model laws on human smuggling also have been developed to provide necessary guidance to states. In addition, other soft law instruments, international human rights conventions, and convention relating to status of refugees are also used to fill the gap in the UNCTOC and the HS protocol.

The UNCTOC defines the term organised group and details out the national and transnational obligations of the states in relation to various actions pertaining to eradicating TOCs. As per Article 01 of the convention, international cooperation is the fundamental element for successful implementation of the convention. The States' co-operation

[1] Source country means, the country from which the migrants originate, transit means, a country or countries through which smugglers take the migrants to the intended destination. Destination means, the desired station which the migrants want to enter.

[2] Article 1 statement of the purpose-The purpose of this convention is to promote cooperation to prevent and combat transnational organized crime more effectively and cooperation among the states with regard to identification, arrest, investigation and prosecution'

[3] Article 2 of the statement of purpose-. The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

depends on the applicability of common legal standards.

Therefore, the UNCTOC requires the States to criminalize, inter alia, participation in an organized group[4] (Article 5), the laundering of the proceeds of crime[5] (Article 6), and corruption[6] (Article 8). States parties are additionally obliged to adopt measures for the prosecution of offenders[7] (Articles 10 and 11), and for the confiscation and seizure of, inter alia, the proceeds of such crimes[8] (Articles 12 to 14). This paper however, is limited to provisions in the UNCTOC that are directly relevant to penalizing human smuggling.

The HS protocol defines human smuggling[9], lists out the connected crimes[10], and sets out several obligations of states parties. A separate section is dedicated to human smuggling by sea. The protocol also makes reference to the rights of smuggled migrants. Both UNCTOC and the HS protocol require the states parties to take appropriate legal and other measures to achieve the stated objectives of these instruments.

Sources reveals that the TOC is a threat to Sri Lankan national security and has been increasing in SL[11] Sri Lanka has been a source and transit location[12] for drug trafficking, human trafficking, human smuggling and money laundering. Sri Lanka 2020 Crime & Safety Report states that there has been an increase in organized criminal activity. Further, some sources indicate that the current laws relating to organised crimes are outdated and there is dire need for new law[13].

[4] Article 5 of the UNCTOC
[5] Article 6 of the UNCTOC
[6] Article 8 of the UNCTOC
[7] Article 10 and 11 of the UNCTOC
[8] Article 12 and 14 of the UNCTOC
[9] Article 3(a) of the HS protocol - The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'
[10] Article 6 of the HS Protocol
[11] Mitchell Sutton and Serge De Silva-Ranasingha, Transnational Crime in Sri Lanka: Future Considerations for International Cooperation' (Canberra: Australian Strategic Policy Institute, October 2016), 9.
[12] Ibid.,
[13] Ibid.,

Although few initiatives have been taken to pass a law on organised crime in 2007 and 2017, nothing had been fruitful. Sri Lanka is a party to the UNCTOC, but it is yet to ratify the smuggling protocol. Irrespective of the fact whether a state has become a party to treaty there is no harm to make laws in line with the international instruments. For instance, Pakistan is yet to ratify both UNCTOC and the Protocol. However, with the assistance of UNODC it had enacted an Anti-human smuggling Act in 2018 in line with the international law.

With this background, the primary objective of the paper is to assess to what extent the domestic law penalizes migrant smuggling as compared with the international law. The secondary objective of the article is to find out the gaps in the law and suggest suitable amendments. The researcher recognizes that it is necessary to have a clear understanding about international law to make appropriate suggestions to Sri Lanka. Therefore, the first section of the paper, outlines the international law relating to human smuggling particularly the UNCTOC and the Protocol. Section two of the paper discusses the Sri Lankan legal framework on organized crime and human smuggling and highlights the gaps in the law. Section three concludes the study with key recommendations.

Research methods and Materials

Descriptive, interpretive, analytical and comparative methodology had been adopted in this study. UNCTOC, the protocol, legislative guide on the UNCTOC had been used as primary data. Immigrants and Emigrants Act No 20 of 1948, journal articles, thesis, newspaper articles, and small-scale studies have been used as secondary data.

Section 1

International legal framework on Human Smuggling

The UNCTOC was adopted in 2000 and entered into force on 29th September, 2003. States have raised major concerns over human trafficking and human smuggling. As a result, two distinct protocols were

adopted to address human trafficking and human smuggling. Countries had to ratify the UNCTOC itself before they become parties to any of the protocols.

As per Article 37(4)[14] of the UNCTOC Provisions and the HS Protocol should be read together. This point had been further asserted by Anne T. Gallagher. According to her, the UNCTOC and the Protocols are connected treaties and the protocol and the UNCTOC should be interpreted together and the provisions of the UNCTOC that apply mutatis mutandis to the protocols[15]. Based on this point, the major provisions of the UNCTOC and the HS protocol are discussed together.

Purpose of the UNCTOC and the HS Protocol.

The objective of the UNCTOC is stated in Article 01 as "The purpose of this convention is to promote cooperation to prevent and combat transnational organized crime more effectively and cooperation among the states with regard to identification, arrest, investigation and prosecution."

The objective of the HS protocol is stated in Article 2 as "The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants." It is clear from these provisions that states' cooperation is essential in the criminal justice administration process to in order to prevent human smuggling. Moreover, the HS protocol also requires the States to extend their cooperation to protect the rights of smuggled migrants. Combined reading of both articles shows that states' cooperation is essential in combating transnational crime including human smuggling. In order to give effect to the objectives of both instruments, States have to take various legal administrative, institutional measures.

[14] Article 37(4) of the UNCTOC- any protocol to this convention shall be interpreted together with this convention taking into account the purpose of that protocol'

[15] Anne T. Gallaghar, International Law on Migrant Smuggling (Cambridge University press 2014) 35

The term Transnational crime

The UNCTOC does not give a legal definition to the term TOC. However, reference has been made in three places in the Convention.

Para 1,2,8,9 and 10, Article 01 of the UNCTOC and Article 3 para 2 refer to the term transnational. Article 3 para 2 clearly explains the transnational nature of the crime as "For the purpose of paragraph 1 of this article, an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State". Examination of these provisions asserts that despite the fact that the convention failed to define the term TOC, the major aim of the UNCTOC is to combat transnational organized crime and it requires states' cooperation in combatting the crime.

Organized Criminal Group

Article 2 defines the term OCG and other related terms. For the purposes of this convention, ''Organized Criminal Group" shall mean a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this convention, in order to obtain, directly or indirectly, a financial or other material benefit". At the negotiation of final provisions of the UNCTCOC, two distinct views were expressed by the participants. One set of States insisted on a definition to get the support of the states to rectify the convention the UNODC. They were also of the view that the absence of a definition would lead the international community to interfere in domestic matters in spite of the TOC not being an ordinary crime. Another group of states stated that there is no need for a definition. Finally, a definition was included in the convention. The definition also includes important terms such

as serious crime and structured group. these terms are also defined in the Convention. Accordingly, Art. 2 (b) of the UNCTOC defines serious crime as 'an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty'. There is no clear idea on what basis the amount of punishment is decided because in certain countries, even crimes against property are punished with four years of maximum imprisonment[16]. In Canada, serious offence means 'an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by the regulations'. Section 15 G of the Crimes Act, 1914 of Australia defines that 'a serious commonwealth offence is punishable on conviction by imprisonment for a period of 3 years or more'. Hence, States adopted their own definitions on 'serious crime'. The term 'structured group' is defined in a negative manner in the UNCTOC i.e. 'A structured group shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure'. Certain states have defined the term 'structured' but some have not.

Definition of Smuggling of Migrants

Article 3(a) of the HS protocol defines human smuggling as; 'The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'. The important elements of the definition are procurement (actus reus), financial and other material benefits. According to the Oxford dictionary procuring means "persuade or cause (someone) to do something". The actus rea is procuring in the protocol, Article 3(b) defines 'illegal entry' referred to in 3 (a) as "crossing borders without complying with the necessary requirements for legal entry into the receiving State;". According to the Protocol, financial benefit is the core element to prove the crime

[16] Section 304 of the Brazilian Penal Code

and is used in defining the criminal offences contained in article 6 of the Protocol; it is also used in Article 2 (a) of the UNCTOC as part of the definition of OCG. The inclusion of financial motivation serves two purposes.

First, it does not punish group of persons who facilitate illegal entry for humanitarian purposes, and the second is it bears the deception that all border crossings are clearly lawful or unlawful. Further Article 5 of the HS Protocol states that people who have helped on humanitarian ground will not be punished.

The interpretative notes to the UNCTOC explain the phrase 'in order to obtain, directly or indirectly, a financial or other material benefit' the notes want the states to construe it broadly to include additional benefits such as sexual gratification[17]. Some countries require the financial benefit and others not. The Immigration and Naturalization Act of the US penalizes human smuggling. Anyhow, financial benefit is not a feature in this provision. Another example is Netherlands. Example Art. 97 A, Netherlands' Penal Code criminalizes human smuggling[18] and it entails financial benefit as one of the elements to establish the crime of human smuggling. The above discussion on the definition of human smuggling demonstrates that states have freedom to define the crime as they wish.

Offences connected to human smuggling

Article 6 of the HS protocol defines the scope of criminalization, including: the smuggling of migrants; producing, procuring, providing or possessing a fraudulent travel or identity document for the purpose of smuggling

[17] UNODC, United Nations. Travex préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols (UNODC, 2006) 455 <https://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf>accessed 10 October 2022

[18] A person who, for motives of pecuniary gain, assists another person in gaining entry to the Netherlands or in remaining in the Netherlands or in gaining entry to or in remaining in any state whose obligation it is to exercise border control also on behalf of the Netherlands, or who, for motives of pecuniary gain, supplies that person with the opportunity, means or information for that purpose, where he knows or has serious reason to suspect that person's gaining entry or remaining is unlawful, is liable to a term of imprisonment of no more than four years or a fine of the fifth category."

of migrants; enabling a person to remain illegally.[19] This provision has added offences related to human smuggling. Hence, states' parties must criminalize the offence listed in Article 6 of the protocol.

Section 11

Domestic Legal Framework Governing Organized crime and Human Smuggling Sri Lanka (SL) has ratified the UNCTOC in 2006. As per the convention, the primary obligation of a State party is to take legal measures to address TOCs. It applies to SL too. According to the UNCTCO states are not required to define the TOCs but rather, oblige them to penalize various TOCs mentioned in the convention. Article 5 necessitates the state to take legislative and other measures to criminalize participation in criminal organizations. Although the transnational element is an important aspect in the convention, States are given freedom to make laws in respect of corruption, money laundering and obstruction of justice. However, this freedom is not applicable in the crime of participating in criminal organization. In Sri Lanka TOCs specified in the UNCTOC have been dealt with under various laws.[20]. Sri Lanka does not recognize them as TOCs nor recognize them as serious crimes committed by OCGs as per the UNCTOC.

Legal framework on Human Smuggling

With the aim of regulating the movement of people to and from Sri Lanka, the IME Act was enacted by the House of Representatives. This Act was later amended by Act No. 16 of 1955, Act No. 68 of 196, 16 of 1993, 42 of 1998 and 31 of 2006. The primary objective of the IME Act is regulating the unauthorized arrival and departure. This Act is not applicable to certain categories of people. Similarly, certain persons are not allowed to enter into the country. As per the Act, valid travel documents and visa endorsement are legally required for entry and departures.

[19] Article 6 of the HS Protocol
[20] Prevention of Money laundering Act 2006 and Computer Crimes Act 2007, Bribery Act

However, this pre-requisite does not apply to passengers in transit. The Act specifies approved ports of departure and entry both by sea and air. With this backdrop the following discussion will focus on to what extent the Immigrants and Emigrants Act penalizes people smuggling activities in Sri Lanka

Organizing irregular Departures and Bringing non-citizens to Sri Lanka

Section 45A and 45C were added by the legislature in 2006. Both facilitating irregular entry into the country and organizing irregular departure are administered by these two provisions. These two offences are facilitated by individuals and organized criminal groups through air and sea. Further, these two sections are read together with Section 45 of the Act. Section 45 of the Act includes a range of offences[21] that relate to facilitation of irregular entry and departure. With this brief outline the foregoing discussion will analyze these offences in detail. It will also provide a comparative analysis with the provisions of the UNCTOC and the HS Protocol.

Section 45 (C) penalizes a person who organizes the irregular departure from SL. Section 45C states that 'Any person, who-(a) organizes one or more persons to leave Sri Lanka in contravention of any of the provisions of this Act; or (b) attempts or does any act preparatory to, or aids and abets another person to, so organize under paragraph (a), shall be guilty of an offence' Any person who found guilty for this crime has to serve imprisonment for a term not less than one year and not more than five years. The term/ phrases. "any person," "organize" in 'contravention of the act' are important in this section. According to section 45C 'any person' who facilitates the journey will be guilty of offence. This section does not make any reference to OCG in the UNCTOC[22] Nevertheless, one can argue that 'any person' can include both the OCG and individuals. Hence section 45C is broader than UNCTOC and it punishes an individual

[21] 45 (1) (c) and 45 (1) (d) of the Act of the Immigrants and Emigrants Act No 20 of 1948
[22] Article 2(a) of the UNCTOC

who organizes the irregular departure. However, it is worthy to note that the UNCTOC and the HS protocol do not intend to recognize the facilitation of irregular entry into another by state by individuals[23]. Additionally, section 45C states that any person who organizes the journey contrary to the provisions of the Act is guilty of an offence. The term 'organizes' is broader and it includes a range of actions.

They include the recruitment of people for providing employment abroad, inducing people by making false promises to provide jobs overseas, soliciting pecuniary benefits from persons whether or not any such benefit was realized; the transportation of persons by sea, land or any other manner without obtaining valid travel documents and receiving and harboring persons whether in SL or in a foreign country[24]. According to this provision anyone who commits one of such acts will be punished with imprisonment for a term not less than one year and not more than five years. While section 45 C specifies various acts as actus reus, Article 3 (a) of the HS protocol only refers to the term 'procuring'[25]. Hence, in terms of actus reus Section 45 C is broader than the HS protocol. Further, as per Article 3(a) of the protocol gaining financial or other material benefit is considered as criminal intention and is an essential element in the definition of human smuggling. However, under the IME Act there is no such requirement. As per the negotiation, the reason to include financial benefit as an element is not to punish the person who helped on humanitarian grounds. It is worthy to note that absence of this element in the IME Act leads to punish any who help their relative or friends on sympathetic or humanitarian grounds.

The other important phrase in section 45 C is "in contravention of the Act".

[23] As per article 2 (a) of the UNCTOC and Article 3 (a) of the HS Protocol Irregular entry is facilitated by an OCG is called as transnational crime
[24] Section 45 C of the Immigrants and Emigrants Act no 20 of 1948
[25] "procuring" illegal entry in to another country. - According to the Oxford dictionary procuring means "persuade or cause (someone) to do something".

This means, any person who leaves the country should leave without violating the provisions of the Act. The foremost requirement to leave the country is to possess valid travel documents. Human smugglers who undertake to transport the migrants generally arrange the travel documents. When a human smuggler or smugglers enable the journey, they do so by manufacturing or altering or falsifying travel documents. According to the IME Act, these acts are punishable under Sec. 45 (1) (c) and 45 (1) (d) of the Act[26]. Further, when the smuggled migrants are deported to Sri Lanka, they will also be charged under Section 45 for acting in contravention of the IME Act to depart the country. As regards this point, Article 6 of the HS protocol defines the scope of criminalization, including: the smuggling of migrants; producing, procuring, providing or possessing a fraudulent travel document.

Bringing non-citizens to Sri Lanka

Bringing non-citizens in contravening the provisions of the IME Act is an offence under Sec.45 A (1)[27]. Further, this section penalizes the acts of concealing, harbouring, transporting and employing non-citizens contrary to the Act. In addition, for falsification of travel documents to bring in such persons will also amount to an offence under Sec. 45 (1) c of the aforesaid Act. A migrant who enters with the help of another person, will be charged under the Sec. 45(1) (a) and will be removed by the Minister after legal proceedings. As per these provisions both person or persons who facilitate the journey and the persons who enter SL with the help of such facilitation will be punished in accordance with the Act. However, the HS protocol does not intend to punish the smuggled migrants. At the same time, it does not prohibit states to punish those who violated immigration laws of those states.

[26] Any one who found guilty under these provisions will be subject to punishment of one-year imprisonment and 50,000 fine.

[27] 'any person who brings persons into SL and or conceal and harbor any other person in any place whatsoever or transport any other persons knowing that is a contravention of this Act or of any other regulation made under this Act, employs any other person knowing that such other person has entered Sri Lanka or is remaining in SL in contravention of any provision of this Act or of any order or regulation made under the Act shall be guilty of an offence and shall on conviction be liable to rigorous imprisonment for a term of not less than two years and of not more than five years'.

Hence states have freedom to make laws to punish smuggled migrants who violate the immigration laws.

The HS protocol refers to aggravated circumstances[28]. The States parties are expected to include aggravated offences in the domestic law. However, Section 45 A and 45 C do not refer to any aggravated offences. This situation may be taken into account while framing charges against the perpetrators. Further, Section 45 C and 45 A (c) are non-bailable offences and only the High court has the power to grant bail under the Bail Act 1997. Concealing and harboring are bailable offences for which the magistrate is empowered to grant bail.

Summary of the Analysis

The above discussion reveals that there is no specific legislation in SL to cover both transnational organized crime and human smuggling. Corruption, bribery, human trafficking and drug trafficking are dealt with under different laws. Human smuggling is not defined and not treated as a transnational organized serious crime. At present, the IME Act, Sections 45 A and 45 C cover the essence of the crime. As per the preamble, the objective of the IME Act is to regulate immigration and emigration and not to penalize human smuggling. Hence, theoretically, this Act does not aim to handle human smuggling. The above two provisions namely Sections 45 A and 45 C punish any person who brings in any person to SL and transports any person from SL. Hence, it does not refer to crimes that are committed by the OCG. Compared to Section 45 C section, 45 A penalizes only the acts of harboring and concealing here as, 45 C penalizes many acts. Therefore, 45C is broad enough in terms of actus reus. The motive of the crime is absent in both these provisions. Soliciting benefits by committing the offences under 45 C is one of acts that is considered to be an activity coming under the meaning of 'organize' defined in 45 C. In relation to the punishment, the Act complies with UNCTOC; i.e.

[28] threat to life, unseaworthy condition, possibility of death, inhuman degrading treatment, labour and sexual Exploitation are considered as aggravated circumstances under the protocol

The maximum punishment is five years for committing offences under Section 45 C and 45 A. In respect to the punishment for falsifying and possessing of fraudulent documents, the IME Act conforms to the Article 6 of the Protocol. Section 45 of the IME Act that punishes migrants who violate the provisions of the Section 111.

Conclusion

In conclusion the paper highlights that in comparison with HS protocol there is no definition of human smuggling irrespective of the fact that people get the support of the smugglers to enter and leave Sri Lanka. Although Amendment No. 31 of 2006 brought two important Sections namely 45A and 45C in order to punish organizing irregular migration, these Sections do not mention the terms 'human smuggling', 'organized crime' and 'serious crime'. In addition, 45C (facilitating the movement from Sri Lanka) is considered as a more severe crime than 45A (bringing people into Sri Lanka) because in relation to offences enumerated in Section 45C, only the High Court has the jurisdiction to grant bail whereas for offences committed under 45A a Magistrate is empowered to grant bail. The above amendment was made through compulsion by the destination states. Punishment for the offences under Section 45A and 45C is minimum 2 years and maximum five years which comply with the UNCTOC and the Protocol. Financial and other material benefits are not a pre-requisite as in the Protocol Article 3(a) of the Protocol. Given this point, it is clear that the person who organizes the movement of people for humanitarian purposes is also sanctioned. Based on the comparative study, the author recommends that Sri Lanka needs to think of adopting a separate law or add a separate part in the IME Act to address human smuggling. The offence should be recognized as a transnational organized serious crime under the domestic law. Further, financial and other material should be included in the definition to differentiate the facilitation of irregular departure by organized criminal group for business purpose and facilitation on humanitarian grounds. The Act also should include aggravated circumstances and the punishment should be

included for each one of the aggravated offences. Moreover, as per one of the objectives of the HS protocol the rights of the smuggled migrants are also spelt out in the Act so that the state authorities will guarantee the rights of innocent migrants.

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Coup d'état and Civilian Support: Analysis in the Light of the 2016 Turkish Coup d'état Attempt

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Abstract

Coup d'état is an unwanted truth of politics. Highly undesirable, but yet they still exist! Courts have even legalized them in many instances by applying Kelsen's theory of revolutionary legality. Being inherently faulty, such application of Kelsen's theory has failed to consider the opinion and the role of civilians in coups. Such is a paradox, as it is highly debatable if there could be any revolutions without civilians. But in the wake of 2016 Turkish coup attempt, which was heavily resisted by the civil population, there is a valid ground to question the status of a coup as a revolution in the absence of widespread citizen participation. Thus the court's existing attitude towards the questions regarding the validity of a coup regime begs to be reconsidered in the light of recent incidents of civil participation in coups. The article also considers the tacit support of civilians towards a coup and traces the situation which may allow the courts to tolerate an "unconstitutional deviation" to salvage the constitutional values. The article dwells into the existing judgments by various courts around the world regarding the validity of coups and compares them with the reality as portrayed through the Turkish coup attempt of 2016 and other recent incidents of coup and protests that involved participation of the civil population.

Keywords: *Revolution; Coup d'état; Civilians, Theory of Revolutionary legality, Tacit support.*

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Introduction

2016 Turkish coup attempt made headlines for multiple reasons. The coup attempt has contributed to various contemporary discussions ranging from post-coup mass arrest and purges to emergency. One of the essential features of this failed coup attempt was the civil resistance that played a vital role in its failure. Although the inability to neutralize premier Recep Erdogan and his loyalists and the disorganization among the ranks of the coup plotters are cited as the main reason behind the Coup's failure, people's role in dismantling the Coup cannot be underestimated. Erdoğan, who was on holiday and outside Istanbul during the first hours of the Coup, flew into Istanbul and made a televised speech from the airport and also from the Facetime app, calling the people to take to the streets. Text messages were sent and prayer calls were repeatedly made from mosques across the country, calling for the Turkish citizens to resist the coup attempt. The Coup was dismantled as crowds gathered in major squares of Istanbul and Ankara and opposed the Coup.[1] Such is an unprecedented occurrence as citizen participation in the coups is almost unheard either in support or in opposition. Due to civilians' silence, courts have often ignored their role in questions related to a coup government's legality. But in the wake of the failed Turkish Coup, civilians' role deserves reconsideration in the courts. As such, we must look into the judgments that have been delivered by courts in assessing a coup's validity and evaluate how much they correspond with reality.

Coupe as a Revolution

Historically, Coups have often been devised as a common but controversial method of changing governments. From Napolean Bonaparte's Coup of 18-19 Brumaire to 2021 coup of Myanmar, Coup d'état has stood the test of time. A coup d'état can be defined as a seizure of governmental power by violence and that violence is to be applied in surgical precision, which distinguishes it from other forms of power seizure.[2] It is usually

1 David Dolan &Gulsen Solaker , 'Turkey rounds up plot suspects after thwarting coup against Erdogan' (Reuters, 16 July, 2016) <https://www.reuters.com/article/us-turkey-security-primeminister-idUSKCN0ZV2HK> accessed 29 March 2021.

2 A. D. Harvey, 'The pre-history of the coup d'etat' [1994] 6(2) Terrorism and Political Violence 235.

carried out by the armed forces or any other armed group, who are not constitutionally designated with any executive power, either on their own or in a plot with politicians, civil servants, religious leaders etc. It may take place with or without the aid or instigation of foreign powers. On the other hand, revolutions are forced change of the political system brought about by extra-legal action of the subordinate masses.[3] Although Coup might mirror a revolution through the fact that they both involve change in the political system through mechanisms not apprehended by the constitution, the agent of such change is different and contrasting. Besides, while revolution is mostly targeted to remedy the prevailing injustice and inequality in the society, coups are usually directed towards grabbing power. The source of a coup government's power is usually the use of force and terror rather than popular support.[4] As a result, coup governments are rarely better functioning than the civilian ones[5] and constitutionality of such events has always been challenged. Courts often faced with such questions, couldn't just refrain from such controversies like the civil population. Over the years, Kelsen's theory of revolutionary legality was invoked by courts across various countries to answer questions relating to a government's legality and constitutionality that came to power through a successful coup.

Hans Kelsen, one of the most influential jurists and legal philosophers of all time, famous for his Pure Theory of Law, introduced the '*theory of revolutionary legality*' in his book "General Theory of Law and State." According to Kelsen, a successful revolution not only changes the constitution but in fact, the whole legal order and as a result, all norms of the old order are deprived of their validity.[6] Kelsen included coup under the scope of a revolution.[7] Thus, according to him, in the wake of a coup d'état, it will be presumed that old order has ceased to be valid

[3] David Beetham, The Legitimation of Power (Palgrave Macmillan 2003) 213.
[4] Adam Roberts, 'Civil Resistance to Military Coups' [1975] 12(1) Journal of Peace Research 19.
[5] Ibid.
[6] Hans Kelsen, *General Theory of Law & State* (Transaction Publishers 2005) 117-118.
[7] Ibid, 117.

as the political reality no longer corresponds to it.[8] Courts have resorted to Kelsen's theory either directly or in a tailored version of doctrines of state necessity, efficacy, public policy etc. The idea that a successful coup can bestow validity was for the very first time explored by the Supreme Court of Pakistan in the *State v. Dosso* case. In the following case, tasked with assessing the legality of Iskander Mirza's abrogation of the constitution and declaration of Martial Law, the court was of the opinion that the efficacy of a coup d'etat is the basis of its validity.[9] The Court held that the coup d'etat, being a successful one satisfied the test of efficacy and was thus, "*a basic law creating fact*."[10] According to Muhammad Munir C.J., if the persons assuming power through the revolution can successfully require the people to conform to the new regime, then the revolution itself becomes a law creating fact.[11] But there was no mention as to how such conformity is to be determined. The Court went as far as to refer Kelsen's theory as "*one of the basic doctrines of legal positivism, on which the whole science of modern jurisprudence rests*."[12] In reality, the *Dosso* case's story tells more about the Pakistani Supreme Court's attempt to legalize the Coup than the efficacy of the theory in evaluating a revolution's reality. It is often overlooked that the principal author of *Dosso* was involved in drafting the very martial law order which was contested in the *Dosso* case.[13] But however, starting from *Dosso*, success became a big determinant in holding a coup as legal. In *Madzimbamuto v. Lardner-Burke*, the court of Rhodesia (present day Zimbabwe), established again, that success alone is the determining factor.[14] The determination of such success required that coup plotters have successfully taken over the government machinery and that civil population in large, are not expressly opposing them.

[8] Ibid, 118.
[9] 1958 P.L.D. S. CL 538-539 (Pakistan).
[10] Ibid, 540.
[11] Ibid.
[12] Ibid.
[13] *Asma Jilani v. Government of Punjab* 1972 P.L.D. S. Ct. 246-247 (Pakistan).
[14] *Madzimbamuto v. Lardner-Burke* [1968] 2 S. Afr. L.R. 318 (Rhodesia App. Div.).

However, the Court of Appeals of Grenada in determining the validity and legitimacy of a revolution framed four conditions, namely:[15]

(a) The revolution will be considered as successful, if the Government is firmly established administratively, there being no other rival one;

(b) Its rule is effective, if it can be observed that the people by and large are behaving in conformity with and obeying its mandates;

(c) Such conformity and obedience are due to popular acceptance and support and is not mere tacit submission to coercion or fear of force; and

(d) The regime is not oppressive and undemocratic.

In reality, the coups have hardly been able to adhere to these conditions. The most elusive criteria to meet have always been the acceptance of the revolution by the civil population through popular support and acceptance. Because most of the time, the approval of a government formed by Coup comes from fear. Military or other armed groups, equipped with gun power, which easily brought down a government, had no problems establishing their legitimacy in the courts, on the back of Kelsen's theory.

As Kelsen's theory didn't concern itself whether the revolution was brought forward by the civil population or anyone holding government positions,[16] participation and acceptance by the civil population was never an issue. The legitimacy is bestowed, if the individual, whose behaviour was regulated by the old order, behaves in accordance with the new order.[17] No consideration is clearly given to the fact whether such compliance with the new order is out of respect and acceptance of the ideology or out of fear and compulsion. As coups usually come from the ranks of unelected officials, who are no longer accountable to any machinery and thus, have no problems in violating the citizens'

[15] *Mitchell v. Director of Public Prosecutions*, 1985 L.R.C. Const. 71-72 (Grenada High Ct).
[16] Kelsen (n6) 117.
[17] Kelsen (n6) 118.

constitutional approved rights, the reason behind the acquiescence of civil population deserved careful thought. Such loopholes in the theory of Kelsen have been exploited in the courts around the world. Irrespective of the flawed interpretation, Kelsen's theory has firmly established itself as a precedent. As observed by the High Court of Lesotho,

"[t]o deny Professor Kelsen's theory of the successful revolution is simply to turn one's back on the course of history."[18]

Though courts, in some cases, have turned their backs on Kelsen's theory, it still holds a strong authority in the discussion related to the legitimacy and constitutionality of a government established by Coup due to its invocation in the courts.

Coups and Civilians

Though addressing coups as revolution provides the implication that it was initiated by the people, rather than "*few plotters*,"[19] such is usually never the case. Although revolutions have always originated from *"small networks of agitators rather than by the masses,"*[20] their legitimacy depends on the reflection of the ideologies or grievances of the majority and also the support of the people. Civil population has largely remained neglected in discourse relating to Coups.[21] Civil population, being the majority and the portion that is most affected by the changes in legal order, deserves more attention. With the active participation of the civil population in Turkey's foiled coup attempt, the question arises as to what will be the criteria of assessing the legitimacy of a revolution in the coming days.

While, coups and revolution may be out rightly considered unconstitutional in technical terms, such stance may not relate to the

[18] *Mokotso v. King Moshoeshoe* II, 1989 L.R.C. Const. 124 (Lesotho).
[19] Edward Luttwak, *Coup d'état: A practical handbook* (The Penguin Press 1969) 9.
[20] See Yuval Noah Hariri, Long Live Revolution in *'Homo Deus: A Brief History of Tomorrow'* (Harper Collins Publishers, 2015).
[21] Drew Holland Kinney, 'Civilian Actors in the Turkish Military Drama of July 2016' [2016] (10) Eastern Mediterranean Policy Note 11.

political reality of the times we live in. Coups and revolution have not lost their relevancy a bit in the current times. Even in the midst of the Covid-19 pandemic, coups have been taking place.[22] With the rise of autocratic and despotic rulers around the world, coup and other forms of armed revolution may be a common occurrence. And, with autocrats amassing more powers and solidifying their positions through constitutional changes, uprooting them through constitutionally approved methods may become harder. Due to increasing interaction with the world, there is a growing bias towards the democratic way of governance, and greater awareness of civil and political rights. Thus, active participation and opposition of coups by civilians will not be rare. As evident from the Arab Spring and the failed Turkish coup, civil participation in the protests has been facilitated due to social media's rise. The flow of information during the initial stage of Coup can make or break any coup attempts. Coup plotters acting in defiance of public opinion is likely to be defeated by civilian resistance.[23]

In the *Asma Jilani v. Government of Punjab*, which famously overruled Dosso,[24] the court was of the opinion that even successful revolutions do not acquire any valid authority to rule or annul the previous *grundnorm* until they have themselves become a legal order by habitual obedience by the citizens of the country, i.e., legal validity of a revolution stems from the effectiveness it acquires by habitual submission of the citizens.[25]

Incidents of civil disobedience towards coup attempt, similar to the Turkish experience, although is rare, is not unheard of. Charles de Gaulle similarly reversed a coup attempt in 1961 against a group of officers, who were against the Algérie Française policy, with the help of civil population.[26]

[22] Military Coups have taken place in Mali and Myanmar in August 2020 and February 2020 respectively.
[23] Samuel E. Finer, *The Man on Horseback: The Role of the Military in Politics* (Pall Mall Press London, 1962) 98.
[24] *Asma Jilani v. Government of Punjab* (n13) 162-183.
[25] Ibid, 183.
[26] Drew Holland Kinney (n21) 7.

Irrespective of these incidents, civil participation in opposing a Coup attempt is scarce. And this lack of participation does not necessarily imply support towards the coup or opposition towards the ousted government.

Lack of civilian participation is stemmed from the fear of retribution from the coup plotters who are usually armed. Imposition of physical immobility, i.e. curfew, interruption of essential services and communication, closing public facilities etc. are also heavily deployed as means to ward off civil resistance towards coup.[27] Disinterest towards the country's political affairs is also a contributing factor in such inaction by the civil population. Again, most of the times coups are politically neutral,[28] as a result of which it is not possible for civilians to support or oppose the plotters on the basis of any ideological stand point. A coup shares a common feature with revolutions that both result in change of a political system through extra-legal action or overthrow.[29] The reason for failure of a regime, that may necessitate a revolution, is the failure of the regime to acknowledge people as the ultimate source of authority.[30] Thus, such a failed regime cannot be replaced by another regime that defies the people's authority or subdues it.

Role of the Courts

"History will impeach us should we fail to address this question in conduciveness with desire of the people…"[31]

The classification of coup as a revolution is *ab initio* flawed. Military and armed forces, who are unelected machinery of the state, should not get to decide the fate of people and elected governments, no matter how autocratic the regimes become. A revolution is always based upon a particular ideology or political agenda.

[27] Edward Luttwak (n19) 173.
[28] Ibid, 12.
[29] David Beetham (n3) 213.
[30] David Beetham (n3) 214-215.
[31] *Siddique Ahmed v. Bangladesh*, Writ Petition No. 696 of 2010, p 134.

Armed forces being the servant of the state should always be independent of ideologies, as their function is to protect and preserve the sovereignty and integrity of the state and its constitution. Basing on necessity and on the backs of Kelsen's Theory, courts have with time and again, allowed military and armed forces to form a "valid" government, by bypassing the participation of civil population. In the wake of failed Turkish coup attempt, it has become imperative to integrate the issue of participation of the civil population in a revolution. It is understandable that Hans Kelsen, who proposed the Pure Theory of Law, integrated coups into revolution in order to judge the legal consequences flowing from such events. Since Kelsen's concept of state requires existence of a legal order,[32] his understanding of revolution and inclusion of coups under it, is an attempt to cover up any legal vacuum. Kelsen, himself was of the opinion that jurisprudence cannot be a source of law.[33] But in reality, his theory of revolutionary legality has become a normative principle of adjudication. Application of Kelsen's theory in courts around the world showcases how theory is separated from reality.

In the wake of the 2016 Turkish Coup failure, the role of civil population is needed to be re-evaluated by the courts. As active participation of civil population in Turkish coup indicates their strong opposition towards the regime change, non-participation should not be prima facie considered as sign of approval. The Court of Appeals of Grenada's standard of assessing the validity of a revolution, as stated in the case of *Mitchell v. Director of Public Prosecutions* is more suited for the current political reality. According to the court, courts are to accord legitimacy to a revolutionary regime, after being satisfied that '*the regime had the people behind it and with it*.'[34] The approval may be given *ab initio* or subsequently and might be expressed or tacit.[35]

[32] Kelsen (n6) 218-221, 368-369.
[33] Ibid, xiv, 163.
[34] *Mitchell v. Director of Public Prosecutions* (n15) 72.
[35] Ibid.

A necessity or success-oriented approach, which does not account the popular acceptance, to determine the validity of a revolution is an anti-people strategy. The theory of Kelsen has been a friend for military juntas for long. It has haunted the constitutional norms and values that requires the participation of people in a country's decision-making. Civil opposition as seen in the Turkish coup attempt may not be seen in coup attempts in other parts of the world. This unprecedented event can also be interpreted by the courts to bestow validity to a coup regime citing in absence of opposition from civil population as a sign of acceptance. As a new legal order cannot function without the consent or acceptance of the people, such should be constructed strictly.

While it can also be argued that courts are often helpless during coups, as seen from the example of Nigeria, when the Nigerian Supreme Court opposed martial law in its judgment, the military government made the decision ineffective through a martial law decree.[36] It is indeed true that the courts are often powerless against regimes that have occupied power through unconstitutional means. Decisions of the courts are often invalidated through martial law decrees; the judges are often thrown out of their office and in some extreme cases, jailed, tortured and given punishment in coup backed kangaroo courts. Even in the most non-confrontational circumstances, the coup government may decide not to implement the decisions of the court, which goes against them and their vested interests. Irrespective of that, an unconstitutional coup government wrongs the constitution and citizens of the present generation and the future generations.[37] And acquiescence cannot be used as an excuse to cover up unconstitutional mechanisms to grab power.[38] In the occasion of a coup, the courts must rise up as a custodian of the constitution and even if their efforts end in futility, they are obligated to uphold the constitutional norms. According to Yaqub Ali J in the *Asma Jilani v. Government of Punjab*, a coup government can only

[36] See *Lakanmi v. Attorney-General*, 1971 U.Ife L.R. (Nigeria).
[37] M Jashim Ali Chowdhury, *An Introduction to The Constitutional Law of Bangladesh* (2nd Edition, Sun Shine Books, 2014) 126.
[38] Ibid.

acquire legitimacy within the national legal order, if the courts recognize such government as de jure.[39] To coup regimes, being equated with the words 'law' and 'legality' is considered as an honour, since it may impact the legacy of their regime.[40] Thus, it is incumbent upon the courts to interpret the constitution in the most approved and original form as possible. It's not for the courts to legitimize a coup government.[41] Judges often choose the path of saving the institutional values, which are capable of being saved, as deserting the judiciary into the hands of puppet judges appointed by the unconstitutional regime, will not help the administration of justice in any way.[42] But even such actions, in reality, are quite low. Ignoring controversies through declaring a question of validity of coup regime as a political question is also not a viable option, as upholding constitution and its norms and values can never amount to a mere political question.

Deconstructing Tacit Support and Tolerating "Unconstitutional Deviation"

Interpreting the support of civilians is indeed tricky, especially when there have been no activities in favour or against the Coup. The notion that people have consented to a regime in power if they are not protesting against it, is inadequate for legitimacy.[43] But again, in case of absence of any express support or opposition, there are no indicators for a court to scrutinize a revolution.

The court of Cyprus has put forward two tests for the legalizing of a coup d'état;

(i) Popular acceptance of the changes and the legal values invoked by such regime, even if it is a tacit one and

(ii) Legalization of the Coup government through the recognition of its actions by the next lawful government.[44]

[39] *Asma Jilani v. Government of Punjab* (n13) 220.
[40] Alf Ross, *On Law and Justice* (University of California Press 1959) 31.
[41] *Quinn v. Robinson* 783 F.2d 776 (9th Cir. 1986).
[42] Justice Mustafa Kamal, *Bangladesh Constitution Trends and Issues* (University of Dhaka, 1994) 58.
[43] Ibid, 91.
[44] *Liasi v. Attorney General*, 1975 C.L.R. 573 passim (Cyprus).

But identifying tacit support is not at all simple. Whether civilians are silent due to fear of retribution or due to tacit support, are hardly decipherable. There are arguments that legitimacy of a pre-coup civil government is critically important in determining the legitimacy of a post-coup military regime.[45] It can thus, be contended that active opposition of a pre-coup government may lead to a conclusion that a subsequent coup is tacitly supported by the public if there is no opposition towards that Coup. While such an argument makes sense, it opens a broad scope for unconstitutional power-grabbing. Military or any armed element of the state or society can utilize a simple incident of public discontent towards the government or any of its policy to overthrow such government, challenging its legitimacy and thus, legitimizing a coup. Public discontent towards a government or any specific policy is a very common occurence. Even widespread protest against a government's policy and actions cannot be translated into public desire to overthrow the government unconstitutionally. As long as a government can be replaced through a general election, the governmental actions are within the purview of the constitution and it is willing to abide by constitutional norms, without manipulating its fabric, it does not need to be overthrown through a revolutionary process. Use of constitutional power by the regime to unjustly strengthen and solidify its hold on the power and manipulating the democratic process of election for e.g. through disenfranchising any portion of the population that traditionally disapproves of the ideology of the ruling party, may at its extremity, be a valid circumstance for revolution. A regime that is *ab initio* illegitimate can surely warrant an overthrow through revolutionary method. Such '*right to revolution*' is validated by Locke's doctrine of personal consent that dictates that no one is personally obligated to support or comply with any political power unless he has personally consented to its authority over him.[46] Still the mechanism of identifying the concept of tacit support remains elusive.

[45] Paul Brooker, *Non-Democratic Regimes: Theory, Government And Politics* (Palgrave Macmillan 2000) 73.
[46] See, in general, John Locke, *Second Treatise of Government* (Jonathan Bennett 2017).

Tacit consent as a political notion is not a new one. Socrates, in Crito, argued that living in Athens as a citizen, tacitly indicates that the individual is satisfied by its laws and is obligated to abide by it and to any punishment that he may incur due to its violation.[47] Grotius,[48] Pufendorf[49] have all argued about establishment of tacit consent to legal relations. In similar line, comes Locke's doctrine of personal consent. On the basis of Locke, even abiding by the laws and orders of the coup regime, will imply tacit support towards the regime. But such argumentation does not consider the element of fear. Interpreting tacit support through conduct is indeed tricky and leaves ample opportunity of misinterpretation. It has been a common practice of coup governments to solidify their position through elections. Such elections are mostly coercive in nature, a sham to showcase its legitimacy to the international community. In such circumstances, it is best for the court to uphold the original constitutional values.

While decay of the state's legal and political mechanism may invite the necessity to make "*unconstitutional deviation*," such deviation should only be made when the regime in power itself has deviated from the constitutional path. Therefore, any coup that claims to be necessitated due to the illegitimacy and unconstitutionality of the regime overthrown must make way for constitutional path. Such coup party must abstain from placing itself in state power and take measures to return to the original constitutional process. If such is done, the subsequent legal government can confer legality to such coup on the basis of "*tacit support*" of the public, who has consented to the original constitutional setup. This concept of "tacit support" coincides with the '*principle of implied mandate*,' put forth by Lord Pearce in the *Madzimbamuto* case.[50]

[47] Plato, *Crito* (translated by Benjamin Jowett) (1871) 52d.
[48] See Hugo Grotius, *The Rights of War and Peace*, translated by A.C. Campbell (New York: M. Walter Dunne, 1901).
[49] See Samuel Pufendorf, *The Law of Nature and nations*, translated by C.H. and W.A. Oldfather (Oxford: The Clarendon Press, 1934).
[50] [1968] 3 All E.R. 561.

According to him, the acts of such government (coup government) may have a binding force, as the people, king or senate – to '*whom the sovereignty actually belongs*,' would prefer that such actions have the force of law temporarily, in order to avoid confusion.[51] This mechanism places its trust on the original constitutional values, before it has been tainted by 'anti-people' regime.

Though such coup may sound theoretical, there have been few instances of such coup. The Zimbabwean Coup of 2017, which was welcomed by both the opposition and civil activists, was followed by a swift handover of power to the elected representatives; The Egyptian Coup of 2011, which received popular support from the civilians, may also fall under this mould. Such coup must handover the reigns to a constitutionally approved government, following the constitutional mechanism, which was actually approved by the people. Such coup governments should not be inclined towards any political ambition and there should be no involvement of the persons involved in such coups in the upcoming political process. Such 'unconstitutional deviation' might be approved as a revolution. The Supreme Court of Pakistan observed in *M.K. Achakzai v. Pakistan*, that bona fide acts done in public interest by anillegal authority, should be assumed to be done by a de jure authority in order to avoid confusion and instability.[52] Although, Kelsen's theory also aims to give validity to coup regimes in order to avoid instability and to fill the legal void, there should be a clear distinction between a regime that grabs power for their own interest and that which assumes power temporarily for the greater public interests. Conferring legality to a coup regime and its acts, even for the sake of stability and filling the legal vacuum is a fraud upon the constitution and the people. Upholding rule of law and safeguarding human rights during the period of transition from 'unconstitutional deviation' to constitutional path may also be a determinant in evaluating the coup government's status.

[51] Ibid.
[52] PLD 1997 SC 426 (517).

Conclusion

No matter whoever starts a revolution, it will never be a revolution in the truest sense, unless it has support from the civilians. A constitution can only be changed in a non-constitution mandated way if a revolution embraces the people from all walks of life and not just an arm-bearing section of society; revolts against the established legal order. Since the political sovereignty belongs to the people, only they have the right to override a constitution. Every other way, is a fraud towards the state and betrayal of its people and every moral and legal principle upon which the state is founded. The Turkish failed coup attempt has showed the courts that coup without civil participation is not a revolution. The incidence should compel the courts to accommodate unconstitutional deviation only through the evidence of popular support and acceptance, and not just by silence. Failed Coup attempts are usually punished as an act of treason. But the judgment of the Special Court in Pakistan that sentenced Pervez Musharraf capital punishment for high treason due to implementing emergency rule and suspending the constitution in 2007,[53] illustrates that even 'Kelsen-approved' successful coups can be labelled as treason, if not backed by popular support. Even the theory of Kelsen and its long-lasting legacy cannot validate such fraud upon the people and its constitution. Courts should not bestow legality on such fraud on theoretical basis, neglecting the realities of the society. The supremacy of the constitution can only be nullified by the voice of the people, not through machine guns.

[53] The death sentence was later annulled by the Lahore High Court. According to the High Court, the formation of the special tribunal that handed down the sentence was unconstitutional and illegal.

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Ad hoc or Institutional Arbitration? Choose Wisely

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Abstract

Alternate dispute resolution mechanisms are now more keenly pursued by litigants mainly due to defects such as laws delays in national courts. Arbitration is one such mechanism. It is generally accepted that there are two principal forms of arbitration namely ad hoc arbitration and institutional arbitration. The choice of the form of arbitration is an important one and will be influenced by the circumstances of each case. Factors such as flexibility, selection of arbitrators, assistance, administrative matters, cost, delays, and the finality of the award ought to be considered when making this choice. This essay will include a thorough analysis of the two forms of arbitration, the distinction between the two, a discussion as to whether the distinction has become blurred especially with reference to mix and match arbitrations, and the specific circumstances under which parties may prefer one form over the other with reference to the aforementioned factors.

Keywords: *Ad hoc Arbitration, Institutional Arbitration, Choice, Distinction, Factors*

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Introduction

Lew, J.D.M., L. A. Mistelis and S. Kröll,[1] note the agreement of the parties, national law, relevant international instruments and arbitral rules may influence the choice between ad hoc and institutional arbitration. These considerations affect the amount of control that the parties have over the process, the legal regimes and the enforceability. Thus, this decision should not be taken lightly.

In general, arbitration is considered ad hoc when the parties to the dispute have not chosen an arbitration institute and the mechanism is tailored specifically for the particular dispute. Institutional arbitration on the other hand is where an arbitration is administered by a particular institution which has been agreed upon by the parties.

There is a general acceptance that institutional arbitration is now more popular than ad hoc arbitration. In the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration,[2] it was found that 79% of the respondents' arbitrations were institutional rather than ad hoc. In 2008 the percentage favoring institutional arbitration was 86% while in 2006 it was 73%. The objective of this paper is to assess what factors drive litigants to choose ad hoc arbitration over institutional arbitration and vice versa. In order to accomplish this objective a qualitative research paradigm is employed. This study considers case law and rules of arbitration institutions as primary sources. Secondary sources of this research include journal articles, research papers, books, and web resources.

Ad hoc arbitration

Ad hoc arbitration is not influenced by an institution. Ulrich G. Schroeter in his article stated 'ad hoc arbitration has primarily been defined as

[1] J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International B.V. 2003).

[2] Queen Mary, University of London and White & Case LLP, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> accessed 26 November 2022.

the opposite of institutional arbitration, as a category encompassing all arbitrations that are not institutional'.[3] The parties are free to determine the number of arbitrators, the procedure, how the arbitrators are to be appointed, the time table and a host of other factors. Thus, the parties have a high level of flexibility.

A common way of regulating ad hoc arbitration is by the selection of the arbitration rules expressly in the arbitration agreement. The United Nations Commission on International Trade Law (UNCITRAL) is a common choice and is often considered as prima facie evidence that the parties intended the arbitration to be ad hoc. However, as time has progressed institutions such as the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and the Hong Kong International Arbitration Centre (HKIAC) have adopted the UNCITRAL Rules. Thus, one may argue that one cannot make such a presumption anymore.

Institutions may provide the service of acting as an appointing authority even under ad hoc arbitrations where the parties have so agreed. This is a situation where an institution will get involved in an ad hoc arbitration.

Institutional Arbitration

Each institution is unique, and the parties should be educated on the special characteristics of each of them in order to make a well-informed decision as to which institution is to carry out their arbitration. The International Chamber of Commerce (ICC) for example is skewed towards administering the terms of reference, scrutinizing procedures and fixing times and deadlines for making an award. The London Court of International Arbitration (LCIA) on the other hand has a more restricted involvement in administration as its role is limited to collecting and paying fees and to dealing with challenges to the arbitrators.

[3] Ulrich G. Schroeter, 'Ad Hoc Or Institutional Arbitration - A Clear-Cut Distinction? A Closer Look At Borderline Cases' (2017) 10 Contemporary Asia Arbitration Journal 142, 146.

Other factors that should be considered when choosing an institution include the number of arbitrators the parties intend to have (the LCIA prefers one arbitrator if there is no agreement while the Stockholm Institute prefers three arbitrators), the degree of independence required of the arbitrators, the power of the arbitrators, how the costs and fees are to be calculated, the right to nominate arbitrators etc.

Concerning the appointment of arbitrators Article 12 of the ICC Rules provides the ICC will appoint a sole arbitrator in the absence of an agreement between the parties. Article 5 of the LCIA Rules provides that regardless of the arbitration agreement between the parties the LCIA will appoint the arbitrators.

According to Article 31 of the ICC Rules the time limit for an arbitral award is 6 months from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference, while the time limit is 3 months after the last submission of the parties according to Article 15.10 of the LCIA Rules. Thus, if the parties want to expedite the process the LCIA may be chosen as the institution over the ICC.

The ICC as per Article 34 will scrutinize the award and it states, 'No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form'. The LCIA on other hand does not include such a provision for scrutiny.

The ICC appears to be the most popular choice as evinced by the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration given that when the respondents were queried as to their three preferred institutions 68% chose the ICC while 37% chose the LCIA. The report suggests 'The ICC and LCIA respectively rank first and second as preferred institutions, just as in the 2006 and 2010 Surveys. These institutions appear to have remained leaders in their field for at least ten years'.[4]

[4] Queen Mary, University of London and White & Case LLP (n 2).

Arbitration institutions can be divided between those created under private law and those created by public international law. Private international arbitration institutions include the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the American Arbitration Association (AAA). Public international law institutions include the Permanent Court of Arbitration and the International Centre for Settlement of Investment Disputes. Further there exists industry-focused and commodity institutions as well as special purpose institutions.

The Distinction between the two forms

In the aforementioned article, Ulrich G. Schroeter stated 'the traditional ad hoc/institutional arbitration dichotomy has increasingly been challenged in recent years, and it has been pointed out that the boundaries between these established categories can become blurred'.[5]

The case of ***Insigma Technology Co. Ltd. v. Alstom Technology Ltd***,[6] concerned an arbitration clause which provided for an, 'arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce'. Such arbitrations are called 'mix and match' arbitrations where the parties have agreed to conduct the arbitration under the rules of one institution but wish to have it administered by another. Interestingly in this case the Singapore Court of Appeal considered the arbitration to be ad hoc and not institutional.

In the case of ***Exxon Neftegas Ltd. v WorleyParsons Ltd***,[7] the parties to the dispute had included a similar clause where the ICC rules were to be applied and the proceedings were to be administered by the AAA. The court did not address the issue as to whether it was an ad hoc arbitration or an institutional arbitration.

[5] Schroeter (n4) 154.
[6] *Insigma Technology Co. Ltd. v. Alstom Technology Ltd.* [2009] SGCA 24.
[7] *Exxon Neftegas Ltd. v WorleyParsons Ltd.* Case no. 654405/2013 (NY 2014).

However, if the standards of the ***Insigma*** case were to be applied it is likely that it would have been considered as an ad hoc arbitration.

These are situations where an institution has been named. If we go by the standard definition, we would consider them to be institutional arbitration. However, it appears that the matter is not so straightforward.

In ***Bovis Land Lease Pte Ltd v Jay-Tech Marine and Projects Pte Ltd***,[8] it was held that it was an ad hoc arbitration and not an institutional arbitration as the parties had merely made references to the institutions' rules and had not submitted it to the administration of an institution in particular. In this case, one institution was designated to be the default appointer while another institution was to provide procedural rules.

Nevertheless, Ulrich G. Schroeter noted, 'the discussion of borderline cases has confirmed that the traditionally prevailing approach of distinguishing between merely two categories of arbitration—ad hoc arbitration on one hand, and institutional arbitration on the other—continues to be convincing, even in the face of borderline constellations that may be difficult to qualify'.[9] Thus, it appears the traditional approach of distinguishing the two forms continues.

The factors in detail

With reference to factors such as the flexibility, selection of arbitrators, assistance, administrative matters, cost, delays, finality of the award etc. a deep dive is required to ascertain the differences of the two forms and the instances where one is recommended over the other.

Flexibility v. predictability

There is no question that ad hoc arbitration is flexible given that the parties are free to draft the procedure. Article 19 of the UNCITRAL Model Law allows the parties freedom to agree on the procedure. As Klaus Peter Berger stated, 'In institutional arbitration, the respect for the parties'

[8] *Bovis Land Lease Pte Ltd v Jay-Tech Marine and Projects Pte Ltd* [2005] SGHC 91.
[9] Schroeter (n4) 184.

autonomy is endangered by the autonomy of the arbitral institution'.[10]

However, one cannot underestimate the arduous task of providing for every contingency in an ad hoc arbitration. Forming an all-inclusive flowless procedure is complicated. When it comes to institutional arbitration there is more certainty. Arbitration institutions have a procedure set and it has been tested against many a case which has come before it.

One of the main reasons institutional arbitration is recommended is the relative ease of mind and comfort that the institution provides given that such institutions have experience in determining such issues. In 2021 the ICC International Court of Arbitration recorded a total of 853 cases and the LCIA received 387 referrals.

Ziadé, N.G. stated, 'The institution must in all respects act as the guardian of the arbitral process in order to ensure the predictability of its procedures'.[11] Namrata Shah and Niyati Gandhi put this point fittingly by stating, 'the choice boils down to be one of flexibility in ad hoc arbitration compared to predictability in institutional arbitration'.[12] Thus, the form of arbitration to be recommended will depend on the needs of the party.

Selection of arbitrators

When it comes to the matter of selection of arbitrators the parties have more freedom under ad hoc arbitration. In institutional arbitration the choice of selection of arbitrators is limited to the list of arbitrators provided. This means there is more chance of arbitrators being unbiased when it comes to institutional arbitration. Under ad hoc arbitration, as the parties have discretion to choose the arbitrator there is a greater

[10] Klaus Peter Berger, 'Institutional arbitration: harmony, disharmony and the 'Party Autonomy Paradox' (2018) 34 Arbitration International 473, 473.
[11] Nassib G. Ziade, 'Reflections on the Role of Institutional Arbitration Between the Present and the Future' (2009) 25 Arbitration International 427, 429.
[12] Namrata Shah and Niyati Gandhi, 'Arbitration: One Size Does Not Fit All: Necessity of Developing Institutional Arbitration in Developing Countries' (2011) 6 Journal of International Commercial Law and Technology 232, 235.

chance of biasness towards one party over the other. Yves Derains stated, 'Too often, the interest of the arbitrator is to favor the party that has appointed him, either by endorsing all those party's positions or, more rarely, by suggesting creative and favorable solutions when he considers that such party is poorly advised by its counsel'.[13] If the parties consider unbiasedness to be a priority, then institutional arbitration is recommended.

Assistance

There is considerable support and assistance which comes with an institution. The ICC and the LCIA have large secretariats comprising counsel who are on hand to provide advice. Such advice may not be available under ad hoc arbitration. When it comes to ad hoc arbitration the only option may be to go to national courts if there is a need for assistance. This would defeat the primary purpose of the parties turning to arbitration as the parties would have to deal with additional delays and costs. Thus, the consideration of assistance points towards institutional arbitration being preferred over ad hoc arbitration.

Administrative matters

Discussing or fixing the payment often creates an uneasiness and discomfort among parties. The costs of an arbitration institution are generally fixed. For example, this can be seen in the Schedule of Costs of the London Court of International Arbitration (LCIA). Appendix III to the ICC Rules for Expertise also provides a schedule for the expertise costs.

Further, the institutions have a method of collecting money from the parties without direct involvement with the arbitrators. The administrative secretariat will generally deal with such matters. Thus, there would be a higher degree of independence and detachment between the parties and the arbitrators.

[13] Yves Derains, 'The Arbitrator's Deliberation' (2012) 27 American University International Law Review 911, 915.

There is no questioning the fact that institutional arbitration is more consumer-friendly and would be recommended over ad hoc arbitration in light of administrative matters.

Place of arbitration

If the place of arbitration cannot be agreed upon in an ad hoc arbitration the parties may have to face delays. Generally, an institution's rules provide guidance on this issue. For example, Article 19 of the AAA International Rules provides, in a situation where the parties fail to agree on a place of arbitration the place is determined by the administrator which is subject to the power of the arbitration tribunal to determine finally. Institutional arbitration is recommended with reference to this factor.

Cost

It is argued that since the parties have more control over the proceedings under ad hoc arbitration the costs may also reduce. As the parties have to make all arrangements without the assistance of an institution excessive arbitration fees and administrative fees can be avoided. However, this would depend on each case.

An indication as to the difference in costs can be identified in the following situation. The London Court of International Arbitration (LCIA) administers arbitrations under the UNICTRAL or other ad hoc rules as well. When assessing the Schedule of Costs of the London Court of International Arbitration (LCIA) the administrative charges such as the registration fees and hourly rates for the registrar, counsel, case administrators and casework accounting functions concerning ad hoc arbitration is approximately 10% less than institutional arbitration.[14] According to the schedule the hourly rate in respect of the arbitral tribunal's fees for institutional arbitration cannot exceed £500,[15] but the

[14] The London Court of International Arbitration, 'Schedules of Costs' (2020) <https://www.lcia.org/Dispute_Resolution_Services/schedule-of-costs.aspx> accessed 30 November 2022.
[15] The London Court of International Arbitration, 'Schedule of Arbitration Costs' (2020) <https://www.lcia.org//Dispute_Resolution_Services/schedule-of-costs-lcia-arbitration-2020.aspx> accessed 30 November 2022.

rate for ad hoc arbitration cannot exceed £450.[16]

Thus, it is argued the cost is a factor that may make ad hoc arbitration more attractive, and it is recommended over institutional arbitration. However, one may argue that if the corporation between the parties fails under ad hoc arbitration this would lead to more costs being borne as the parties would be compelled to go to court to settle the issue.

Delays

Arbitration was born to circumvent laws delays in national courts. Institutions have fixed timetables and limits as to when the case must be concluded. This leads to a speedy disposal of cases. Nevertheless, procedural defects and a lack of coordination between the parties may lead to more delays under ad hoc arbitration.

Finality of the award

Awards under both ad hoc and institutional arbitrations are final in the eyes of the law. However, an arbitration award may be challenged on limited grounds in some jurisdictions on principles such as the violation of natural justice or in situations where the arbitrators have exceeded the jurisdictional authority.

Under institutional arbitration the institution makes it a point to undergo the arbitration through a thorough screening process before declaring the final award. This is to ensure that there has been no injustice that has been caused to either of the parties. Ad hoc arbitrations may not be subject to such scrutiny which may lead to lengthy delays.

On this point William K. Slate II commenting on institutional arbitration stated 'Quality control occurs in at least two ways: through process oversight by trained administrative staff, and by garnering and monitoring feedback from system users.

[16] The London Court of International Arbitration, 'Schedule of Costs (Ad Hoc Arbitration)' (2020) <https://www.lcia.org//Dispute_Resolution_Services/schedule-of-costs-ad-hoc-arbitration.aspx>accessed30 November 2022.

The AAA finds it useful to monitor the parties' reactions and comments as to the level of quality of the entire process'.[17] Such a level of control may not be available under ad hoc arbitration.

Micheal F. Hoellering commenting on the AAA pointed out that 'The AAA uses such a survey, asking the parties questions regarding the administration, fees, costs and billing practices, and the quality, demeanor and performance of the arbitrators. The feedback is often helpful to identify things that work particularly well or poorly, and to learn about problems with neutrals which parties might be reluctant to reveal during the life of the case'.[18] Thus this a circumstance where institutional arbitration is recommended over ad hoc arbitration.

Disagreement on institution

Often parties are unable to agree on an arbitration institution which may lead to delays. One party may believe that the rules of an arbitration institution is unfavorable to itself and favorable to the adverse party. In such instances ad hoc arbitration may be preferred. This is another circumstance where ad hoc arbitration is recommended.

Situations where one party is a state

Lew, J.D.M., L. A. Mistelis and S. Kröll,[19] state that a popular reason that parties prefer ad hoc arbitration are situations when one of the parties is a state. The justification is that when the state is subject to the authority of an institution it would result in the devaluation and denial of a state's sovereignty. Thus, the international law concept of sovereign supremacy is of relevance here. However, it is argued that such a conclusion is unjustified. Although there may be a truth to the concerns of partiality or non-neutrality of the institutions it is argued that such factors cannot be avoided even under ad hoc arbitration.

[17] William K. II Slate, 'International Arbitration: Do Institutions Make a Difference?' (1996) 31 Wake Forest Law Review 41, 54.
[18] Michael F. Hoellering 'The Institution's Role: Managing International Commercial Arbitration', (1994) 49 Dispute Resolution Journal 12, 17.
[19] Lew, J.D.M., L. A. Mistelis and S. Kröll (n1).

Nevertheless, in a circumstance where one of the parties is a state it appears institutional arbitration is chosen.

Government of the State of Kuwait v American Independent Oil Co. (AMINOIL),[20] ***Sapphire International Petroleum Ltd. v National Iranian Oil Company***,[21] and ***Libyan American Oil Company (LIAMCO) v Socialist People's Libyan Arab Jamahirya***[22] which concerned oil-concession agreements were conducted by way of ad hoc arbitration most likely because one of the parties was the state.

Prestige factor

The prestige and the reputation of the arbitration institution are one of the main reasons parties prefer institutional arbitration. This is all the more important in countries where the courts are not arbitration-friendly and where there is considerable political influence in the court system. In such circumstances an internationally respected institution is preferred. Ad hoc arbitration does not have such an advantage as it is not influenced by an institution.

Conclusion

Although it appears that institutional arbitration has proved to be the more popularly recommended form of arbitration the distinction between ad hoc and international arbitration has become blurred and in such a situation it would be difficult to identify which form is in reality more popular. Nevertheless, at present there is a necessity for the existence of ad hoc arbitration. Therefore, institutional arbitration should co-exist with ad hoc arbitration. In conclusion, it is submitted that a wide array of factors should be considered when making the decision as to what form of arbitration is chosen.

[20] *Government of the State of Kuwait v American Independent Oil Co. (AMINOIL)* [1984] IX YBCA 71.
[21] *Sapphire International Petroleum Ltd. v National Iranian Oil Company* [1967] 35 ILR 136.
[22] *Libyan American Oil Company (LIAMCO) v Socialist People's Libyan Arab Jamahirya* 482 F Supp 1175, 1178 (DDC 1980).

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The Collision between Public Policy and International Commercial Arbitration Regarding Recognition and Enforcement of Foreign Arbitral Awards; A Comparative Legal Analysis among USA, India and Sri Lanka.

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Abstract

*A*rbitration is acclaimed for the enforceability of arbitral awards with relative speed and convenience in the corporate world. However, this lucrative nature of arbitration tends to be unfavorable with the justifications provided for the refusal of execution of arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Amongst these set forth justifications the notion of public policy stands out as one of the most controversial justifications for rejecting the execution of an international arbitration decision. The decision in respect of whether such acceptance and execution of a foreign arbitral award collide with the public policy of the homeland is vested with the discretion of domestic judicial forums of the homeland. According the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, internal courts have formed a variety of explications to the notion of public policy causing several obstacles in the execution of such awards in the international sphere. Problems arise when the arbitration award is not accepted in countries in which the enforcement is sought due to a conflict of interests with the public policy concerns of those countries. These confrontations largely weaken the practice of international commercial arbitration. This article seeks to approach the aforesaid issue of conflict between public policy and enforcement of a foreign arbitral award in commercial arbitration in a comparative manner

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with special reference to the laws of the USA, India and Sri Lanka. The study embraces the black letter approach in law and the international and comparative legal research methodology. Further, this study encourages a legal reformation accompanied by a balanced approach to the utilization of the notion of public policy either by way of a harmonized manner or a uniform application of the public policy with due regard for the transnational commercial legal interests.

Keywords: *Public Policy, International Commercial Arbitration, Recognition and Enforcement, foreign arbitral awards, domestic judicial forums*

Introduction

International commercial arbitration is one of the alternative dispute resolution methods utilized in resolving contradictions emerging from commercial contracts between parties to business transactions[1]. The practice of commercial arbitration is prominent among private parties across national frontiers owing to its cost effectiveness, flexibility and less time consuming nature[2] compared to public trials in the internal courts. It is usually observed in the arbitration to include a clause stating that any issue which stems from the contract will be determined by a process of arbitration instead of a litigation process. Generally in arbitral proceedings, the successful party is entitled to enforce the final decision at the end of the arbitration process. Simultaneously besides the voluntary compliance with an arbitration decision by the unsuccessful party, the absoluteness of the arbitration award relies upon the enforcement by the domestic courts. The UNCITRAL Model law and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) provide unified laws for elevating arbitration as a method of international dispute resolution.

[1] International Commercial Arbitration Research guide, 'Introduction' (Georgetoen law, 25 August 2022) <https://guides.ll.georgetown.edu/InternationalCommercialArbitration accessed 29 September 2022

[2] Funke Adekoya SAN, 'The Public Policy Defence to Enforecement of Arbtral Awards: Rising Star or Setting Sun' (2015) 2 (2) BLDR International Arbitration Review < https://funkeadekoya.com/a-comparison-of-the-use-of-the-public-policy-defence-by-different-countries-to-resist-the-enforcement-of-international-arbitral-awards-a-rising-star-or-setting-sun/3/> accessed 29 September 2022

Article III of the New York Convention enshrines that, acceptance and execution of an arbitration decision at an international level are vested with the national courts and contracting realms are under the authority to acknowledge arbitral awards as irrevocable and execute those awards in compliance with the applicable mandates and directives of the respective domain as per the specified conditions. The said article declines the imposition of excessively high conditions and tariffs on the acceptance and execution of arbitral awards as opposed to what is originally agreed upon by the respective protocol.

After adhering to the set out conditions under Article IV of the New York Convention, the liability is vested with the opposing party to establish evidence that the recognition and enforcement of thenarbitration decision should not be granted based on grounds outlined under Article V(1) of the New York Convention. If any of the bases depicted in Article V (1) appears to be true the respective realms are entitled to refuse the enforcement of the foreign arbitral award. Accordingly, Article V (1) of the New York Arbitration Convention places the onus of proof on the individual who seeks the refusal of the enforcement of the decision. Similarly, Article 36 of the UNCITRAL Model Law enshrines identical bases for non-acceptance or non-execution of an arbitral decision.[3]

Under Article V (2) of the New York Convention, recognition and enforcement of an arbitral award can similarly be repudiated on two specified bases. The first ground for such refusal is when the state in which the execution of the award is applied discovers that, the focus of the attention of the difference is not competent to be resolved by a process of arbitration under the respective domestic law. The second recognized ground is formed when the recognition and execution of the arbitral award contravene the public policy of the particular country. A similar view is depicted under Article 36 (b) (ii) of the UNCITRAL

[3] G.A Pratama, 'Public Policy as a ground for refusing enforcement of foreign arbitral awards: Indonesian Notion of Public Policy' (Masters of Laws, University of Exeter 2017)

Model law which stipulates that the recognition and enforcement of an arbitral award could be relinquished if it appeared to the court that such acceptance and execution would be at variance with the public policy of the homeland in concern.

The notion of public policy is often discerned as a notion that is itself vague in the application. In the judicial ruling of ***Richardson v. Mellish***[4] the notion of public policy was referred to as an 'unruly horse'[5]. In addition, Justice Parker in the case of ***Egweton v. Brownlow***[6] identified the term public policy as an ambiguous term that leads to uncertainty and misconception owing to its manner of application specifically concerning legal rights. Further, it was held that the conception of public policy able to be perceived in distinct senses.

According to Professor Karl Heinz Bocksielfel[7], public policy is to be contingent on the judgment of the respective legal community. It has been construed that public policy varies from state to state and it is also determined by the time factor. Professor Bocksielfel construes values and standards of communities are unstable and owing to these perceptions, public policy has been expounded diversely in each legal system by their judicial forums and wordsmiths.

Hence it can be stated that, in addition to the ambiguous nature of the notion of public policy, the imposition of rigid domestic values and laws to controling the arbitration process adds more vagueness to the progress of international commercial arbitration. Further, owing to the reasons that the public policy is strictly conditional to the determination of local courts of enforcement and the lack of a specifically codified definition under an international benchmark, have led to cause more confusion.

[4] (1824) 2 Bing. 229 at 252

[5] Dharmvir Brahmbatt, 'Public Policy – The Unruly Horse' (2020) IBC Laws https://ibclaw.in/public-policy-the-unruly-horse-by-dharmvir-brahmbhatt/ accessed 3 October 2022

[6] (1853) IV House of Lords Cases (Clark's)

[7] Karl-Heinz Bockstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) IBA Journal of Dispute Resolution International2<https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012277202358270bckstiegel_public_policy...iba_unconfererence_2008.pdf accessed 4 October 2022

Methodology

The study takes the form of qualitative research including the black letter approach and international and comparative research methodology. To collect information to conduct the analysis and the discussion, browsing of textual primary and secondary sources with the content analysis method has been utilized. The primary sources which have been incorporated into this study include the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the United Nations Convention on International Trade Law (UNCITRAL) and also the judicial pronouncements are given in the considered jurisdictions. With secondary sources journals, website articles, research papers and theses were cautiously referred to originally authored and edited books to conduct a fruitful legal analysis to review comparatively the impact of the collision between public policy and enforcement of a foreign arbitral award in commercial arbitration.

Refusal of recognition and enforcement of arbitral awards and public policy notion.

Both substantive and procedural bases for confronting the execution of an award can be identified under Article V of the New York Convention. Procedural grounds for refusal of the execution of an arbitral award are enshrined under Article V (1) of the New York Arbitration Convention. Additionally, Article V (2) of the Convention discusses a ground that can be solicited by the concerned individuals and regarded by the forum to resist the execution of foreign arbitral decisions when the issue is unable to settle through arbitration or when the execution of the arbitral decision collides with the public policy of the domain where the execution is sought[8]. Nevertheless according to Article IV of the New York Convention, the application of the said Convention can only be ascertained, when several enshrined jurisdictional requisites are fulfilled[9]. Accordingly,

[8] Troy L. Harris, 'The "Public Policy" exception to Enforcement of International Arbitration Awards under the New York Convention – With Particular reference to Construction disputes' (2007) 24(1) Journal of International Arbitration <https://doi.org/10.54648/joia2007003> accessed 25 October 2022

[9] Gary, B. Born, *International Arbitration: Law and Practice* (3rd edn, Kluwer Law International) 375

the New York Arbitration Convention and the UNCITRAL Model Law on International Commercial Arbitration are demanded to have ensured these set out requirements.

Instances, where the forums have utilized the notion of public policy as a premise for repudiating the recognition and enforcement of foreign arbitral awards in the context of transnational commercial arbitration, can be ideally discerned in the case of ***Soleimany v. Soleimany***[10]and in the recent cases of ***Finants Collect v. Heino Kumpula***[11], ***Z v. Y***[12]***, and Gutnick v. Indian Farmers Fertilizer Cooperative Ltd***[13].

In the case of ***Soleimany v. Soleimany*** considering the arisen dispute the court held that parties are not entitled to by obtaining an arbitration, shield that they or preferably any concerned individual is demanding to execute an illegal contract and thus public policy would not permit it. Accordingly, the English Court in this case explicated that a foreign arbitration award will not be enforced in a case where the contractual undertaking was deemed to be contradicting the public policy and unlawful in terms of the law of English forum courts, which is ordinarily the law of the country of execution even though the contract was lawful under the applicable law of its home country.

In the case of ***Finance Collect v. Heino Kumpula***, Finance Collect sought execution in Sweden against Heino Kumpula for a non-native arbitral award delivered in Latvia. In its first verdict the Svea Court of Appeal stated that owing to the reason that Finance Collect had presented an original copy of the arbitration agreement and no cause had appeared to reveal that the arbitration agreement had not been terminated, Finants Collect would be permitted the execution of the arbitration decision. When Kumpula appealed to the Supreme Court on the basis that he had

[10] (1998) 3 NLR 811, CA
[11] Case No. Ö 7419-15
[12] (2018) HKCAI 2342
[13] (2016) VSCA 5

never entered into any undertaking with Finant Collect and his signature was forged on the agreement, the Supreme Court relied on the ground for refusal of enforcement of an arbitral award based on public policy in delivering the verdict. It was further noted by the Supreme Court in instances where execution of the award would overstep public policy, it's better not to permit the enforcement of the award.

In the case of ***Z v. Y,*** the Hong Kong court refused to enforce an arbitral award based on public policy since the tribunal had been unable to provide satisfying reasons as to why it recognized the guarantee to be legal when there were grounds to attest that the guarantee was to safeguard contracts tainted by illegality.

In the case of ***Gutnick v. Indian Farmers Fertilizer Cooperative Ltd,*** the question before the court was whether double recovery would operate as a ground for setting aside an arbitration decision upon it being in contrast with public policy. The court's opinion was that the public policy was to be defined narrowly in connection with the most cardinal principles of morality and justice. The Court of Appeal of Victoria dismissed the application for leave to appeal against the execution of an arbitral award on the basis that enforcement will be contrary to public policy as it will give regard to double recovery by the respondents.

It is noteworthy that an expansive interpretation for exclusive exceptions to enforcement under Article V and Article III of the New York Convention illustrates the pro-enforcement policy.[14] The pro-enforcement policy functions as a limitation to the abuse of local court's procedure. The prevention of the abuse of the court's procedure upholds the honor of the role of the arbitral tribunal in resolving arbitral disputes. It is believed that an increased application of the pro-enforcement policy would reaffirm the delocalization of the awards as an effect of internationalization.

[14] Richard Garnett, "International Arbitration Law: Progress towards Harmonization," (2002) 3(2) Melbourne Journal of International Law 400

It has been further identified that the progressing challenge for the state courts is to adopt a harmonious and constructive approach for the reciprocity between pro-enforcement policy and enforcement controls of arbitral awards[15].

The Approach of US courts towards enforcement of international arbitration awards

According to recent US judicial decisions, international arbitration is referred to as a progressive method for resolving international commercial disputes. US judicial forums have been rejecting the frequent attempts by the losing parties to withstand the execution of foreign arbitration decisions[16].

In the case of ***KG Schifffahrtsgesellschaft MC Pacific Winter MBH & CO v. Safesea Transport, Inc,***[17] a German Ship Owner had obtained an award against a US company for an infringement of a charter party agreement and sought enforcement in the United States. It was argued by the losing party that the award should be resisted by enforcement as it was against public policy. The court rejected this argument and held that 'Courts have rigorously applied the defences enumerated in Article V and regarded them narrowly and declared that it is not sanctioned by the Convention to second guess an interpretation of the agreement by the arbitrator since the judicial review of this sort frustrates the fundamental objective of arbitration.

The ***Scherk v. Alberto-Culver Co***[18] case involved a contract entered by an American manufacturer to purchase three enterprises along with all

[15] Fifi Junita," 'Pro Enforcement Bias' Under Article V of the New York Convention in International Commercial Arbitration: Comparative overview" (2015) 2 Indonesia Law Review <https://media.neliti.com/media/publications/26954-EN-pro-enforcement-bias-under-article-v-of-the-new-york-convention-in-international.pdf> accessed 3 September 2022

[16] Timothy G. Nelson, 'Enforcing International Arbitration Awards: US Courts Achieve Prompt & Efficient Enforcement, with safeguards'(Skaddan, 21 January 2020) <https://www.skadden.com/insights/publications/2020/01/2020-insights/enforcing-international-arbitration-awards> accessed 27 October 2022

[17] JUS MUNDI, '*KG Schifffahrtsgesellschaft MC Pacific Winter MBH & CO v. Safesea Transport, Inc'<https://jusmundi.com/en/document/decision/en-kg-schiffahrtsgesellschaft-ms-pacific-winter-v-safesea-transport-inc-final-award-thursday-15th-february-2018*>accessed 27 October 2022

[18] 417 U.S 506 (1974)

the trademark rights by a German Citizen. The contract had a condition of arbitration to take place in Paris. After reportedly finding that the trademarks were conditional to hindrances, the buyer filed a case in the United States stating that misleading depictions relating to the trademark rights breached section 10 (b) of the Securities and Exchange Act of 1934 and Rule 10b-5 under that.

A stringent anti arbitration policy had been adopted by the court in granting the enforcement of arbitration proceedings according to what the court regards as indeed international agreements leaving no room for the misappropriation of the defence of the public policy. Thus the ruling of the *Scherk* case can be identified as setting out a restricted application for the defence of the public policy. The deviation from the continuous application of the principles of 'morality and justice further depicts the court's inclination to limit the public policy notion intended by the draftsmen of the New York Convention.

Enforcement of foreign arbitral awards in India

Indian judiciary appears to be pursuing a pragmatic and open-ended arrangement towards enforcement of arbitral awards. It is discernible that, Indian courts and legislations have shifted their focus towards a 'pro-enforcement mechanism' to promote efficient enforcement of arbitral decisions while aiming to strengthen the position of India as an 'arbitration friendly' jurisdiction[19].

In the verdict of ***BALCO Employees' Union v. Union of India***[20] the initiative to pro-enforcement was followed by the Supreme Court. This case adopted a progressive approach towards a metamorphosis in the Indian judiciary in respect of its current position as an enforcement-

[19] Khaitan & Co, 'Enforcement of foreign arbitral awards and scope of judicial intervention: a minimalist approach' (2020) International LawOffice<https://www.khaitanco.com/sites/default/files/2021-10/Enforcement%20of%20foreign%20arbitral%20awards%20and%20scope%20of%20judicial%20intervention%20a%20minimalist%20approach.pdf> accessed 26 October 2022

[20] (2002) 2 SCC 333

friendly jurisdiction[21]. The ruling of ***NTT Docomo Inc. v. Tata Sons Ltd***[22] depicts that the Indian judiciary honors the irrevocability of international decisions and the country has been vested with an investment friendly status[23].

The ruling of ***Vijay Karia v. Prysmain Cavi E Sistemi SRL***[24] depicts the trend of the Indian judicial forum's approach towards a more pro-enforcement bias position. It was encouraged by the Supreme Court of India to respect the principle of non-intrusion in the enforcement of foreign awards in the domestic legal regime[25].

The verdict of ***Govt. of India v. Vedanta Ltd***[26] can be considered a landmark judgment that illustrates the positive approach of the Indian judiciary toward acknowledging the execution of foreign arbitral awards.

The factual scenario of the case relates to an agreement that was signed by Vedanta and Cairn India Ltd to distinguish oil and gas from the facility. There occurred a disagreement regarding the cost which was regained by the government from Vedanta. Later the dispute was transferred to a global arbitration platform. An arbitration award was awarded as encouragement of Vedanta by the tribunal in 2018. When the matter was taken up by the Supreme Court, it was concluded that a foreign arbitration decision would be against the public policy of the domain based on the inability of the government to establish the

[21] Yash Vardhan Garut and Akanksha Bohratt, 'Foreign Arbitral Awards in India: A critical Analysis' (SCC BLOG, 7 September 2022) <https://www.scconline.com/blog/post/2022/09/07/pro-enforcement-trend-of-foreign-arbitral-awards-in-india-a-critical-analysis/> accessed 29 October 2022

22 2017 SCC Online Del 8078

[23] Yash Vardhan Garut and Akanksha Bohratt, 'Foreign Arbitral Awards in India: A critical Analysis' (SCC BLOG, 7 September 2022) <https://www.scconline.com/blog/post/2022/09/07/pro-enforcement-trend-of-foreign-arbitral-awards-in-india-a-critical-analysis/> accessed 29 October 2022
Analysis'(SCC BLOG, 7 September 2022) <https://www.scconline.com/blog/post/2022/09/07/pro-enforcement-trend-of-foreign-arbitral-awards-in-india-a-critical-analysis/> accessed 29 October 2022

[24] (2020) 11 SCC 1

[25] Yash Vardhan Garut and Akanksha Bohratt, 'Foreign Arbitral Awards in India: A critical Analysis' (SCC BLOG, 7 September 2022<https://www.scconline.com/blog/post/2022/09/07/pro-enforcement-trend-of-foreign-arbitral-awards-in-india-a-critical-analysis/> accessed 29 October 2022

[26] (2020) 10 SCC 1

enforcement of the award[27]. In addition, it was reviewed by the judiciary that the implementation of provision 136 of the Limitation Act, 1963 was immaterial in respect of the execution. Hence the ruling of the Vedanta case could be recognized as a progressive step of the Indian judiciary to reaffirm the coherent execution of a foreign award by finding drawbacks in the present legislation and heading towards a pro-enforcement bias proposition.

In this fashion India together with the judiciary and relevant legislative framework has been able to improve its status concerning the execution of foreign arbitral decisions. In addition, the attempts of the parties to hinder the implementation of non-native arbitral decisions have been diminished to a greater degree according to the verdict of ***Vijay Karia***[28] where heavy compensation was ordered to the parties violating the said procedure. Therefore the Supreme Court of India with all these attempts has been able to reinforce the status of India as an arbitration-friendly State with a gradual bias towards pro-enforcement mechanism.

Sri Lankan judicial approach towards enforcement of foreign arbitral awards with the application of public policy notion

In the case of ***Orix Leasing Company Limited v. Weerathunga Arachchige T/A Weeratunge Textile and Others***[29] the Supreme Court ruled that in the absence of an application to disregard an arbitral decision within sixty days from the date of granting of the award, the High Court is not vested with the authority to *ex mero motu* overrule a decision on the basis that it contravenes the public policy. The court entered into a significant observation with the principle of minimal judicial intervention which construes that the intervention of the court will be limited to findings and dispositions of the tribunal unless the Arbitration Act explicitly provides otherwise.

[27] Yash Vardhan Garut and Akanksha Bohratt, 'Foreign Arbitral Awards in India: A critical Analysis' (SCC BLOG, 7 September 2022)<https://www.scconline.com/blog/post/2022/09/07/pro-enforcement-trend-of-foreign-arbitral-awards-in-india-a-critical-analysis/> accessed 29 October 2022
[28] (2020) 11 SCC 1
[29] SC Appeal No 113/2014

In addition in the case of ***Light Weight Body Armour Ltd v Sri Lanka Army***[30] the Supreme Court reversed a verdict of the High Court which repudiated an arbitral decision on the premise that the tribunal had entered into an erroneous decision on merits and that the decision was colliding with the public policy. It was reported that the litigants in this case had attempted to countermand arbitral awards on factitious premises including the extensive invocation of the notion of public policy. The Supreme Court in determining whether the execution of the decision could be rejected on the alleged premise that it contradicted the public policy, embraced a confined explication of the public policy including cases of deception, bribery and embezzlement. This could be identified as an implied affirmation that enforcement of arbitral decisions will not be disregarded for peripheral issues conflicting with public policy[31].

These judicial pronouncements depict that the Sri Lankan judiciary is heading towards a progressive destination for arbitral jurisprudence. However, there is surely further latitude for cumulative explication of transnational trade based arbitration with the readily receptive nature of the judicial forums of Sri Lanka.

Public Policy as a limitation to the development of international commercial arbitration.

The primary objective of public policy can be connoted as the ultimate gain of the parties. The attitude of national courts however makesa huge difference in satisfying the said objective. Since arbitration is mostly controlled by national laws, once an award is declared the role of the native courts emerges as highly important[32].

In local arbitration, state courts are only vested with the obligation to deal with the internal public policy since the arbitration is concerned with

[30] SC (HCA) 27A/2006

[31] Avindra Rodrigo, SriLanka'(Global Arbitration Review,07 July 2021) <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2022/article/sri-lanka#footnote-010>accessed1 November 2022

[32] Ipleaders, 'Role of public policy in international commercial arbitration' (Ipleaders, 16 October 2019)<https://blog.ipleaders.in/role-public-policy-international-commercial-arbitration/>accessed1 November 2022

one respective domain. The application of transnational public policy national courts are vested with a duty to implement the public policy accordingly by referring to the considerations of international aspects.

The application of public policy in transnational commercial arbitration is deemed to cause a significant impact on economic growth and other economic concerns in a country. This issue becomes crucial when a foreign party loses its case after being challenged by the other party on the premise of an infringement of the mandatory rules. Usually, the arguments made by the winning party in these types of cases do not seem to be rational for the foreign investing companies. Hence they refrain from engaging in any subsequent transaction with companies located in the same country. This ultimately hinders the affairs of transnational commercial arbitration and also the economic benefits that can be gained in the due process[33].

Conclusion and Recommendations

In the present context increased trade, financial funding and commercial occasions are highly probable to create an awakening in commercial disputes among states and private parties including investors. In contrast to the litigation process at courts, international commercial arbitration often acts as the integration platform for cross-border dispute settlement. In contractual undertakings in developing countries, there exists a probability such contracts are influenced by some degree of misconduct and fraud[34]. The notion of public policy is thus utilized especially in developing countries, such as Sri Lanka to preserve the integrity of the legal system and restrict parties from evading judicial scrutiny under the disguise of an arbitration clause.

Since the public policy exception is commonly recognized as an "unruly horse" owing to its nature of indefiniteness fueled by the reason that

[33] Ibid

[34] Pontian N Okoli, 'Corruption in international commercial arbitration - Domino effect in the energy industry, developing countries, and impact of English public policy' (2022) 15 (2) The Journal of World Energy Law & Business <https://doi.org/10.1093/jwelb/jwac006> accessed 1 November 2022

it has not been defined either by the New York Convention or the UNCITRAL Model Law, it provides for ambiguities in commercial reliability, efficaciousness of business and confidence of the investors under the context of international commerce. Therefore it is certain that there is a need to have legal reformation to diminish any adverse impact of the collision between public policy and the recognition and enforcement of foreign arbitral awards. Further, courts need to implement a balanced approach towards taking charge of the agreements impaired by misconduct or fraud and concurrently safeguard the interests of foreign investors. The application of a balanced approach means that the state judiciaries are expected to apply the notion of public policy with consideration being given to international public policy concerns either by implementing a more harmonized manner or a uniform application of the public policy with prioritization being given to transnational commercial law interests.

Further harmonization of the public policy exception could be stipulated as an effort that requires uniformity and consistency by the applying nations in cross-border transactions. It is equally believed that uniformity in the backdrop of public policy strengthens the confidence of the investors by cultivating certainty and more convenient access to the transnational commercial environment. It is pertinent to note that complete uniformity of the notion of public policy may take a more stringent approach than the approach of 'harmonized' public policy. Additionally agreeing on a transnational public policy consisting of fundamental principles of national laws subject to a universal application of justice and morality can also be delineated as persuasive. Ultimately the notion of public policy ought not to be mishandled by the respective national jurisdictions by the arbitrary imposition of their domestic values and laws as it is a significant tool to be utilized more productively to reaffirm the effective operation of commercial oriented arbitration systems.

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Evolution of Constitutionalism from the Colonial Era to the Modern Era: A Critical Reflection of Developments in Sri Lanka

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Abstract

Constitutionalism refers to a notion of limited government for the protection of individual rights and liberties. It has become a universal virtue in constitution making. While having a Constitution and acting according to such Constitution may provide Constitutionality of the action, Constitutionalism is a broad concept encompassing the several principles which include the rule of law, separation of powers, independence of the judiciary and the protection of fundamental rights and freedoms. The Constitutional history of Sri Lanka runs back several centuries and it could be found from the implementation of the 1833 Colebrook Constitutional Reforms. From 1833 to 1947 the Constitution of the country was commonly referred to as Constitutional Reforms and it was from 1947 that the word Constitution was properly used. At present Sri Lanka is governed by the 1978 Constitution. Throughout its Constitutional history, the idea of Constitutionalism has played a significant role whether it be due to the absence of Constitutionalism or because its presence. Most of the Constitutional reforms were unable to meet up with the core demands of Constitutionalism inclusive of Separation of Powers, Rule of Law, Independence of the Judiciary and Good Governance in real practice while some provisions were included. On the other hand, the current Constitution has to some extent complied with the broader notions of

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Constitutionalism. This essay looks at the historical development of the notion of Constitutionalism in Sri Lankan Constitutional developments from 1833 to 1978.

Keywords: *Constitutionalism, Individual Rights, Rule of Law, Seperation of Powers*

Introduction

The constitutional history in Sri Lanka dates back to the colonial period of the British rule. From 1833 to 1946 we had a number of constitutional reforms and it was only in 1972 that the dominion of Ceylon was able to implement a sui generis constitution in 1972 following the Westminster model.[1] The current constitutions, the Constitution of the Democratic Socialist Republic of Sri Lanka was implemented in 1978, only six years after the first sui generis constitution of 1972. When one looks at the constitutional history of the country it becomes evident that still the country has been unable to find a well-founded concrete model. For example, even the 1978 constitution has been amended 19 times since its inception and if one considers the frequency of amendments, the current constitution has been amended almost once in every two years in average.

A constitution is considered as the grundnorm of a legal system where all the other laws get their validation. It is the supreme law of the country which is there to limit the powers of the government and to protect and enhance the rights and freedoms of individuals. Viscount Bolingbroke[2] in the eighteenth century opined that a constitution is an assemblage of laws, institutions and customs, derived from certain fixed principles system, according to which the community hath agreed to be governed. K C Wheare opines that, having a constitution in place and acting according to it would only bring constitutionality and not

[1] L.J.M. Cooray, *Constitutional Government in Sri Lanka* (1st Edn, Stamford Lake 1984)
[2] Cited in, A. Tomkins, *Public Law* (1st Edn, Oxford University Press, 2003)

constitutionalism[3]. Constitutionality is all about doing as the constitution directs. Constitutionalism on the other hand is a normative and value coherent ideal that encompasses much more than ruling according to a constitution. It embraces several multi-layered concepts such as, separation of powers, rule of law, independence of the judiciary, accountability, fundamental rights and freedoms, equality and so much more.[4] Although commentators appear to find it difficult to define the term constitutionalism in essence it means government (or the institutions of the state) acting in accordance with the rules and principles enshrined in the constitution, thereby resulting in limited constitutional government.[5]

Constitutionalism, as political theory and practice, posits that the powers of government must be structured and limited by a binding constitution incorporating certain basic principles if the protection of values like human liberty and dignity is to be assured. This is a vision expressed in the first 'modern' constitutions, those of the United States (1789), and of France (1789, 1791), in contradistinction to the notion of the constitution-previously dominant, but still commanding some support in the United Kingdom-as merely describing how the state's functions are allocated and organized at any given time.[6] Constitutionalism is a doctrine that governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules. For example, if a constitution has made provisions for discrimination, adhering to the provision itself and acting in accordance with the constitution would comply with the constitutionality of the action since the constitution provides for such action. However, if one were to act in a discriminatory manner citing the provisions of a constitution, it would not comply with constitutionalism since constitutionalism is not only about the legality but also about the

[3] K. C. Wheare, *Modern Constitutions* (1st Edn, Oxford 1951)
[4] Maru Bazezew, 'Constitutionalism' (2009) 3 Mizan L Rev 358
[8] M. Ryan, *Unlocking Constitutional and Administrative Law* (3rd Edn, Routledge 2015)
[6] A. Le Sueur, M. Sunkin and K. Murkens, *Public Law* (2nd Edn, OUP 2012)

values and virtues of action and discrimination is neither a value nor a virtue.

Rohan Edrisinha[7] explains that, the principle of constitutionalism, sometimes referred to as liberal constitutionalism, is the most basic and important concept for the limitation of power and the protection of individual autonomy. Constitutionalism seeks to explain the objectives of a good government. Carl Friedrich[8] opines the following; 'The core objective of Constitutionalism is that of safeguarding each member of the political community as a political person possessing a sphere of genuine autonomy. The Constitution is meant to protect the self in its dignity and worth. The prime function of a constitutional political order has been and is being accomplished by means of a system of regularized restraints imposed upon those who wield political power.'

According to De Smith[9] constitutionalism in its formal sense means the principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content. The rules may be at one extreme (as in the United Kingdom) mere conventional norms and at the other directions or prohibitions set down in a basic constitutional instrument, disregard of which may be pronounced ineffectual by a court of law.

The idea of constitutionalism through universal has several varieties of itself. Some speak of a political constitutionalism[10] where they argue that constitutionalism is founded upon the sovereignty of the parliament and that it gives power to the popular sovereignty of the people. Political constitutionalism rests on the premise that parliament is the ultimate

[7] R. Edirisinha and A. Welikala, *Essays on Federalism in Sri Lanka* (1st Edn, CPA 2008)
[8] Carl Friedrich, *Transcendent justice: The religious dimension of constitutionalism* (1st Edn, Duke University Press 1964)
[9] S A de Smith, 'Constitutionalism in the Commonwealth Today' (1962) 4 Malaya L Rev 205
[10] Marco Goldoni, 'Political Constitutionalism and the Question of Constitution-Making' (2014) 27 Ratio Juris 387

controller of the government where the parliament is able to control the government through its voting powers on either approving or disapproving governmental behaviour. According to political constitutionalism the judiciary is required to refrain from impugning the legislative branch since the judiciary is not part of the representative democracy.

On the other hand, those who speak of legal constitutionalism are sceptical about the possibility of parliament controlling the government and they see it the other way around where the parliament is always under the dictation of the government. They argue that, democracy is not only about counting votes at general elections or in the House of Commons, but also involves insisting on the protection of the rights that protect individual liberty. They insist that the judiciary has a key role to play in limiting the arbitrariness of the government.[11] However, the dichotomy between political and legal constitutionalism is more acute from a British context as they do not have a written constitution.

Either the study of the constitutional history of Sri Lanka or the study of constitutionalism in their own are intriguing. However, it would become more intriguing to study the applicability of the notion of constitutionalism in the constitutional history of Sri Lanka. Therefore, for the purpose of this study, the discussion is divided into three parts. First part will be dedicated towards the study between 1833 and 1946 when Ceylon (as it was known then) was under the total rule of the British. The second part will discuss the period between 1946 to 1972 where Sri Lanka enjoyed a dominion status. The third part is dedicated to study the two sui generis constitutions of 1972 and 1978.

Concept of Constitutionalism in the Colonial Years: 1833 to 1946

The year, 1833 marks the commencement of Constitutional government in the Colony of Ceylon. In that year the British government implemented the Colebrook-Cameron recommendations in the form of a constitution

[11] Marko John Supronyuk, 'Political Constitutionalism v. Legal Constitutionalism: Understanding the British Arrangement' (2015) 2 Edinburgh Student L Rev 1

for the Colony.[12]

From 1833 to 1910 the first constitution that was established by the Colebrook commission was in effect. While some small changes were proposed to the original enactment it was atypical colonial constitution where the Governor acted as the chief executive officer as the representative of the crown with the help of an executive council consisting of official members and a legislative council consisting of both official and unofficial members where towards the latter part of the constitutional reforms the unofficial members grew in number at the legislative council. The unofficial members were initially nominated to represent the different ethnicities in the country. In the constitutional reforms of 1912 for the first time some of the unofficial council members of the legislative council were elected through a vote.

With the cumulative reforms brought in 1920 and 1924 the local members became the majority in the legislative council and some of them were nominated to the executive council as well. However, the problem with this was the constant quarrel and arguments, which arose as a result of this duality of power. At the legislative council since the majority were locals, they vehemently opposed any new proposals brought forward by the governor to show faith and confidence in them to the public. The period after 1924 became totally unworkable since there was a duality of power and responsibility. The power was with the executive council and the responsibility was with the legislative council. Therefore, it was contended that the locals were put in a council with responsibility without power. The Donoughmore commission called the constitutional reforms that have been introduced in the country is an unqualified failure.

[12] Lakshman Marasinghe, 'The British Colonial Contribution to Disunity in Sri Lanka' (1994) 6 Sri Lanka J Int'l L 81

Sir Charles Collins[13] opines that, the system that prevailed from 1833 to 1931 suffered from the defects that are inherent in interim constitutions of the colonial era. In these constitutions though an unofficial majority comprising of the locals had the legislative responsibility they lack the executive power to implement what they have decided upon. Though they had both financial and legislative control, they could not take any action since the executive power was vested with the governor lead executive council. The common phrase used for this kind of a situation was 'responsibility without power'. Even the governor had his share of problems and difficulties since he could not work together with the unofficial member since they always opposed the governor even in instances where the governor acted bona fide in trying to help the locals. The constitutional reforms that were brought during this period was brought with the ambition of furthering the British interests in the island than providing and democratic means of governance for the country. Most of the provisions were aimed at the exploitation of the natural and human resources in order to accumulate wealth for the British crown.

If one applies the notion of constitutionalism into this context, one will find that such notion could not exist in this kind of a setting. One of the fundamental tenants of constitutionalism rests in the concept of separation of powers and that concept was totally absent in the constitutional framework during this period and the subsequent reforms that were brought. The executive branch and the legislative branch for the most part consisted of the same personnel. It was always the British influence that took center stage in the early years of the constitutional enactments. The notion of fundamental rights was not even used as a word in this period. The rule of law was present even during this period. The notion of everyone being equal before the law was admitted with regard to the locals at least. The idea of accountability a *sine qua non* of constitutionalism was absent during this period as many of the people who took decisions were not elected representatives of the people.

[13] Charles Collins, The Significance of the Donoughmore Constitution in the Political Development of Ceylon, Parliamentary Affairs, Volume IV, Issue 1, 1950, Pages 101–110,

The main issue regarding the constitutional reforms that were brought during the period was that they were relatively small in their contents. It was not like the constitutions that we find today. Most of these constitutional reforms were brought in for administration purposes and not as a constitution *per se*. The British anyway did not have a written constitution of their own and therefore, they did not take much trouble to enact a comprehensive constitution for the colonies that included Ceylon.

The 1931 constitutional reforms are a significant landmark in the constitutional history of the country. It came in a period when the British government was trying to find answers to the problem of local demand for more power and autonomy for managing their own affairs. However, the British could not opt for a Westminster type model since people of Ceylon did not have any political parties to who they could vote and elect a government. Therefore, the Earl of Donoughmore had a very difficult task of finding a suitable model to find a solution for all of these matters. The new constitution had to find a framework for devolution of power and responsibility, with self-government as the ultimate goal.[14] The system introduced under the Donoughmore reforms was a unique one where a body called the State Council was to take the dual role of the legislative and executive councils that has previously existed under the earlier constitutional schemes. The dual capacity of the State Council was specifically designed to give its members the ability of being a part of both the legislative and executive branches of the government. The Donoughmore constitution consisted of eight executive committees and each committee had to appoint a chairman out of the members who had decided to be a part of that committee. The chairman was considered as a Minister on the subject(s) on the committee to that he belonged. The decisions of the executive committees were to be reported to the Council in executive sessions for approval, and were then to go to the Governor for ratification.

[14] Charles Collins, The Significance of the Donoughmore Constitution in the Political Development of Ceylon, Parliamentary Affairs, Volume IV, Issue 1, 1950, Pages 101–110,

The Donoughmore constitutional reforms were revolutionary at the time since it introduced many features that accord with the general notion of constitutionalism. For instance, the members of the State Council were selected through universal franchise recognized under the Donoughmore reforms. There was both a separation of power and accountability of the members of the executive branch achieved through the use of a State Council where the members of the executive branch had to get the assent of the State Council in order to implement their decisions. The Government Service commission was established in order to give advice to the governor on matters related to appointment, transfer and disciplinary actions against government servants. This led to a more transparent form of government.

Compared to all the other constitutional reforms, the Donoughmore reforms were more appealing to the broader notion of constitutionalism. It gave the people the power to elect their representatives, the members of the State Council to have both power and responsibility at the same time, a commission to take unbiased decisions with regard to the public service. The executive committee system was successful in providing the much-needed education to the inhabitants of Ceylon to gain valuable experience in the administration of affairs of a country which was very helpful in building up the Ceylonese case for an independent country. The Donoughmore method is still highly phrased today for its ingenuity and the changes that it brought to the political domain of the country. The Donoughmore reforms, when compared to earlier constitutional reforms, were much more democratic and it really did have a good intention of giving the necessary experience for the locals in relation to attaining first-hand experience on running a country. The people who were selected as Ministers in their respective executive committees with their experiences became cabinet Ministers under later constitutional reforms brought under the Soulbury Constitution. All in all, the Donoughmore reforms were a moment of success in otherwise a century of failure.

The Dominion Era: 1946 to 1972

The Donoughmore constitutional reforms continued for a period of 15 years from the date of its inception. It has to be remembered that during this period the British were involved in the second world war and the pressure from the locals for a more autonomous form of government. With the political and administrative experience that was provided under the Donoughmore reforms, Soulbury constitution was designed based on a Westminster model with the ideal of parliamentary sovereignty in mind.

The Soulbury Constitution promoted a moderately conservative form of liberal democracy based on the British system of government. While traditional British Principles relating to Parliamentary Sovereignty and cabinet systems were adopted, the Soulbury Commissioners were keen to prevent ethnic tensions, encourage a national consciousness and create a constitution which would meet the requirements of a plural society.[15]

The Soulbury Constitution introduced a Parliament with two houses. The Senate consisted of 30 members. The members were elected using different procedures. 15 were elected by the House of Representative and the other 15 was nominated by the governor. The House of Representatives consisted of 105 members, out of which 95 were elected, 4 were selected from the Indian and Pakistani electoral districts and the governor had the power to appoint 6 members. The executive branch was elected from the parliament and the governor played a nominal role in comparison to earlier governors.

The Soulbury Constitution did not in the British sense create a constitution based on parliamentary sovereignty which according to Dicey meant the power of the parliament to make and unmake any law whatever and there being no other authority to compete or question such authority. Article 29 of the Constitution in particular, restricted the legislative

[15] R. Edirisinha and A. Welikala, *Essays on Federalism in Sri Lanka* (1st Edn, CPA 2008)

power of the parliament where Article 29(2) declared that, no laws are to be made that would interfere with the rights of the minority.

The limitation upon the legislative power could be seen as complying with the broader notion of constitutionalism. This limitation was pointed out in the case of ***Queen v Liyanage***[16] where the Court opined that, we do not have a sovereign Parliament in the sense that the expression is used with reference to Parliament of the United Kingdom. In addition to this, the Soulbury Constitution was secular in nature and it tried to provide racial and religious equality. It upheld most principles of Constitutionalism, the supremacy of the Constitution, by enabling judicial review of legislation which even the sui generis constitutions of 1972 and 1978 failed to provide. It also provided a system of checks and balances by providing for an independent judiciary and public service. It also promoted the notion of accountability and transparency by providing that all wielders of executive power were both responsible and answerable to Parliament.[17]

The specific limitations on the legislative powers of the Parliament were introduced as a means of protecting the rights of the minorities who felt anxious since they were easily outnumbered in the Parliament. It is also noteworthy that the Soulbury constitution did not limit the scope of Article 29. For example, under the 1978 Constitution, only the fundamental rights violations which have occurred as a result of executive and administrative actions could be vindicated. However, Article 29 of the Soulbury Constitution did not stipulate any such limitations and this gave additional protection to the minorities. This was a special tool used by the British in providing a suitable model for a multi-ethnic and multi-religious country.

The endeavours of the Soulbury Constitution in protecting the rights of the minorities were seriously hampered by several decisions of both the local Courts and the Privy Council. The Citizenship Act No 18 of 1948,

[16] [1964] 66 NLR 78
[17] R. Edirisinha and A. Welikala, *Essays on Federalism in Sri Lanka* (1st Edn, CPA 2008)

Ceylon Parliamentary Elections (Amendment) Act No 48 of 1949 and the Official Language Act No 33 of 1956 were the crucial legislations that invoked the jurisdiction of the Courts under Article 29 (2) of the Constitution.

In the cases of ***Mudannayake v Sivagnanasunderem***[18] and ***Kodakanpillai v Mudannayake***[19] the question of citizenship was questioned. Both the Citizenship Act No 18 of 1948 and Ceylon Parliamentary Elections (Amendment) Act No 48 of 1949 restricted the ability of Indian Tamils to vote. The Court in its decision adopting a strict and textual interpretation of the Constitutions held that both the legislations did not contravene the Article 29 of the Constitution. When the matter went to the Privy council, it too took a narrow view and opined that, 'it is perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals.

These two decisions were a black mark for the notion of Constitutionalism which was one of the main features of the Soulbury Constitution as mentioned above. Article 29 and the ability of reviewing legislations through a Court of law was specifically designed to protect the minority from the tyranny of the majority, a fundamental under the notion of Constitutionalism. However, neither the local Courts nor the Privy Council endeavoured to act in a manner to protect such interests.[20]

Perhaps the greatest setback for the Soulbury Constitution is the decision in ***Kodeswaran v Attorney General***[21]***.*** Kodeswaran challenged the official Language Act No 33 of 1956 in both the local Courts and in the Privy Council. The question posed from the Courts related to the validity of the Act and whether it infringes the Article 29 of the constitution. The Supreme Court held that since the case was filed against the Crown it could not be entertained as no Crown servant could sue the Crown.

[18] [1957] 53 NLR 25
[19] [1953] 54 NLR 433
[20] R. Edirisinha and A. Welikala, *Essays on Federalism in Sri Lanka* (1st Edn, CPA 2008)
[21] [1967] 70 NLR 121 (SC) and [1969] 72 NLR 337 (PC)

When the matter went before the Privy Council while deciding that a Crown servant has the right to sue the Crown it failed to pronounce anything concerning the constitutional validity of the alleged Act and it stated that, ' they express no opinion upon any of the other issues as to the constitutionality Act.

The Soulbury Constitution was brought with the ambition of providing adequate protection to the minorities while helping Ceylon to achieve its dominion status. However, the things did not work according to plan. This was not because the framers had bad motives, instead it was due to the wielders in power and the judicial attitude both in the Supreme Court and the Privy Council that lead to the ultimate decline of the Constitution. While the Soulbury Constitution being compatible with most of the fundamentals of Constitutionalism as we know it today in theory provided for a very good set of constitutional values that were not well managed and adhered to in actual practice.

The Sui Generis Era; From 1972, 1978 and Beyond….

The 1972 Constitution was implemented as the first sui generis constitution of the country. It followed the Westminster model in the strict sense. The 1972 constitution was enacted using a different method. At the time, it was argued that due to Article 29 of the Soulbury Constitution, it can not be repealed. However, during the general elections of 1970, the Sri Lankan Freedom party specifically asked for a mandate to implement a new constitution in its election manifesto and it was based on this manifesto that they created the 1972 Constitution. The 1972 Constitution was based on a Parliamentary model with a single house called the National Assembly. It was a Westminster model with an executive prime minister and a cabinet of ministers. The members were elected by the people under the first past-the-pole method for an electorate. The 1972 Constitution replaced the role played by the Queen by introducing a nominal President.

From the outset, the 1972 Constitution was incompatible with the notion of constitutionalism and this was due to several reasons. Firstly, the 1972 Constitution refuted the idea of separation of powers. Article 05 of the Constitution stipulated that, the National Assembly is the supreme body of the State power and it shall exercise the legislative, executive and the judicial power of the people. Further, according to Article 44 the National Assembly has the power to repeal or amend the Constitution without the need of a referendum. The argument for this was the fact that National Assembly being an elected body of the people it should have the highest authority and that no other person or authority should challenge that authority.[22] The 1972 Constitution was based on the principle of the Sovereignty of Parliament and therefore the notion of Constitutionalism was always going to conflict with such an ideal. To make things worse, the Constitution itself provided for discriminatory provisions against the minorities.

Article 07 of the Constitution empowered and endorsed the official Language Act, No. 33 of 1956 which made Sinhala, the official language of the country. Article 06 stipulated that; the government is to give prominence to Buddhism while protecting other religions as well. This affected the secularism of the Constitution and it can be said that the 1972 Constitution was not as secular as the Soulbury Constitution.

Another absent feature of the 1972 Constitution was the judicial review of legislation. The 1972 Constitution did not allow any ordinary Court to look into or inquire about the Constitutional validity of a particular bill that is placed before the Parliament and this function was delegated to a separate Constitutional Court. Article 54 stipulated that; the Constitutional Court had the power to determine the Constitutional consistency of a proposed bill. However, this was a mere decoration. Article 55 declared where a Bill is deemed urgent, the Constitutional Court had to give its decision in twenty-four hours and these so-called

[22] M.J.A. Cooray, *The Judicial Role under the Constitution of Sri Lanka* (1st Edn, Lake House Investments, 1982)

urgent bills were not left open for public scrutiny. Even though Article 54 (3) declared that no proceedings are to be taken with regard to a Bill which has been referred to the Constitutional Court till it gives a verdict on the matter, there were several incidents in which the National Assembly acted without the sanction of the Constitutional Court. The Sri Lanka Press Council Bill and the Associated Newspapers of Ceylon Limited (Special Provisions) Bill are two rather (in)famous examples for the above.

The notions of independence of the judiciary as a fundamental of constitutionalism were not present in the 1972 Constitution as it was under the control of the executive branch. Public service was also the same.[23] The 1972 Constitution introduced two separate commissions with regard to judicial and public matters. The judiciary was controlled through an advisory and a disciplinary commission. The same was present with regard to the public service.

Article 126 of the 1972 Constitution empowers the Cabinet of Ministers to appoint judges that have been nominated by the advisory commission. However, the Cabinet of Ministers can appoint persons not nominated by the advisory commission and such appointments need to get the concurrence of the National Assembly. The 1972 Constitution failed to provide adequate protection to fundamental rights of the individuals. While the constitution recognized fundamental rights under the constitution, it failed to provide for a vindictive mechanism. Therefore, the fundamental rights recognized under the constitution were not made justiciable.[24]

The 1972 Constitution failed to comply with any of the known fundamentals of the notion of Constitutionalism. There was an absence of separation of powers, independence of the judiciary and the rule of

[23] L.J.M. Cooray, *Constitutional Government in Sri Lanka* (1st Edn, Stamford Lake 1984)
[24] In the case of Peoples ***Bank v Jayaratne*** [1986] Sri L R 338, the Court held that even a District Court Would have the Jurisdiction to hear a Fundamental Rights petition. However, this decision is of only academic interest now.

law based on a constitution. The framers of the constitution wanted to bring forward the nationalistic flavour with an aim of getting the popular sovereignty. The framers of the constitution wanted to take a big leaf from the Soulbury constitution and it did not work. While the constitution helped to initiate a democracy based on socialism, it failed in its endeavour as people rejected this plan which was evident from the general elections of 1978 where, the then opposition, the United National Party swept into power with a 5/6 majority.

The 1978 Constitution was a novel invention. It was a combination of the Westminster model and a presidential model. The framers of the 1978 constitution got their inspiration from the French and the American models. There were mixed opinions on the 1978 constitution and while some phrased the creative nature of the constitution, others were sceptical about these new features and they feared that this could lead to authoritarianism.[25] The 1978 Constitution was specifically framed for achieving rapid economic development and it required strong leadership unfettered by the whims and fancies of the Parliament.

From the outset the 1978 Constitution at least in theory tried to be on par with the broader notion of Constitutionalism. Unlike in the 1972 Constitution where it was the National Assembly and not the Constitution which was supreme, where in contrast the 1978 Constitution made it clear in the preamble itself that, the Constitution is the supreme law of the country. The most radical change that was brought about with the 1978 Constitution was the executive presidency. The president was elected at a presidential election and he was to be the leader of the country with numerous powers and functions. In theory there was a separation of powers as Article 04 of the Constitution stipulated how the legislative, executive and the judicial powers of the people were to be exercised. In theory, though the Parliament was not as sovereign as it was under the 1972 constitution, still it had the power to remove the executive president through an impeachment motion with a 2/3

[25] R. Edirisinha and A. Welikala, *Essays on Federalism in Sri Lanka* (1st Edn, CPA 2008)

majority. In theory the constitutionalism fundamental of separation of power was enshrined in the Constitution. However, in practice this separation of power became ineffective when the president was elected from the same party that had the majority in the parliament.

Another salient feature of the Constitution was the recognition of a set of justiciable fundamental rights. Unlike in the Soulbury Constitution which spoke of minority rights, the 1978 speaks of equal rights without any discrimination as enshrined under Article 12 of the Constitution. The fundamental rights chapter puts a restraint on the legislative power of the parliament whereby parliament is preluded from passing legislations which conflicts with the recognized set of fundamental rights. Article 83 of the Constitution precludes the parliament from intruding into fundamental rights recognized under Articles 10 (Freedom of thought, conscience and religion) and 11 (Freedom from torture). If the parliament intends to make legislations which conflicts with these rights it would have to get the sanction of the people at a referendum.

However, there are some limitations set out on the fundamental rights that are incompatible with the broader notion of constitutionalism. Firstly, the fundamental rights chapter does not recognize the right to life as being fundamental. Secondly, violations of fundamental rights through executive and administrative actions are justiciable. Therefore, violations of fundamental rights through legislative and judicial acts are not justiciable. In addition to this Article 15 of the Constitution sets out limitations on the enjoyment of those fundamental rights. With regard to the enjoyment of fundamental rights Article 16 is the most damaging. It is completely against the notion of constitutionalism as it allows for the operation of laws which are in force at the time of the coming of the constitution even when there is a contradiction with the fundamental rights chapter. Lastly, fundamental rights violations have to be petitioned only to the Supreme Court within one month from the date of infringement. This is a constitutional limitation imposed upon the enjoyment of fundamental rights that is not elsewhere. With

regard to the powers of the legislature, the parliament is by constitution allowed to make laws under Article 75 which includes the power to make retrospective laws and this is incompatible with the broader notion of constitutionalism. With regard to the judicial scrutiny of the legislations, the 1978 Constitution, unlike the Soulbury constitution only allows for judicial scrutiny of Bills that have been introduced into the parliament. Article 80 (3) of the Constitution prohibits judicial scrutiny of Acts passed by the parliament.

When it comes to the independence of the judiciary there are several provisions that have been enacted in the constitution itself. Sections 107 to 111C. It has to be mentioned that with the implementation of the 19th Amendment to the Constitution several initiatives have been taken to further strengthen the independence of the Judiciary. The appointment of judges to the Supreme Court and the Court of Appeal are made by the president. However, the appointing power of the president is exercised subject to the approval of the Constitutional Council which is established to act independently. The 19th Amendment can be seen as a step forward in making the 1978 Constitution more constitutionalism friendly. In addition to the above the 19th Amendment also brought into operation several independent commissions in areas such as auditing, elections, police etc to depoliticize those respective areas.

While the 1978 Constitution when compared with the 1972 Constitution is more constitutionalism friendly, it still has some areas to improve. The executive branch is still not under the total control of the legislative and judicial branches of the government. To comply with the broader notions of constitutionalism, the 1978 Constitution would have to still improve its mechanisms which are available to curtail the authoritarian exercise of the executive power.

Conclusion

The constitutional history of both Ceylon and Sri Lanka reveals that many of the Constitutional reforms and the constitutions that were

enacted which either sui generis or foreign have not complied well with the notion of constitutionalism. In the colonial period since the British drafted the constitutional reforms there was a little hope of finding a constitution that would be supreme and which would be drafted upon the broader notions of constitutionalism. As the British themselves did not have a written constitution, where parliamentary sovereignty and the rule of law ran supreme in its constitutional setting, it would have been foolish to expect a constitution which complied with constitutionalism. Regarding the constitutional reforms introduced by the British, the Donoughmore Constitutional reform is seen as the best in the line. However, it too lacked some of the basic notions of constitutionalism such as the separation of powers with a proper system of checks and balances and the independence of the judiciary.

The Soulbury constitution was implemented with the ambition of granting a dominion status to the country. The constitution made special provisions to protect the interests of the minority and it is the only constitution that allowed judicial review of legislation. Article 29 of the Constitution played a key role in protecting the minority rights. However, the judicial attitude both here and in the privy council undermined the potency of Article 29 where on many occasions the Courts refrained from interpreting the true scope and the spirit of the Article. While in theory, the Soulbury constitution did provide for some kind of constitutionalism by providing special protection to the minorities and in the same token by also reducing the legislative power of the parliament, it failed to adhere with the notion of constitutionalism in other aspects, such as the independence of the judiciary and the public service.

Both the 1972 and 1978 constitutions were implemented as sui generis. While the 1972 Constitution followed a strict Westminster model with centralization of power in the national assembly, the 1978 constitution was designed as a hybrid model constituting of an executive president and a prime minister. While the notion of constitutionalism was almost absent in the 1972 Constitution, the 1978 Constitution was both a creative and a

novel one. In comparison the broader notions of Constitutionalism such as, separation of powers, supremacy of the constitution, fundamental rights and the rule of law existed in theory at least. However, even the 1978 Constitutions in its actual practice at the hands of its wielders failed to comply with the broader notions of constitutionalism at a satisfactory level.

Most often than not, constitutions have been implemented not in line with the broader notions of constitutionalism due to several reasons. Firstly, where a constitution is implemented by a foreign power, it may fail to consider the broader notions of constitutionalism as it would be more interested in exploiting the country instead of creating a constitution that is constitutionalism friendly. Secondly, even where a constitution has been implemented as a sui generis product, it still may lack the necessary provisions to protect the minorities and it may sometime lead to an authoritarian kind of rule. The Sri Lankan experience is a classic example for both the above.

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Struggle for Sovereignty in the Air Space: An Analysis of Regulatory Developments and Current Challenges in Establishing "Air Sovereignty"

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Abstract

Achieving air sovereignty has no escape from the challenges of globalization; hence, numerous regulatory frameworks have been established to create a unified institution for maintaining air sovereignty in international aviation. This paper intends to explore the "air sovereignty" concept's regulatory development from the Roman period to the 21st century, as well as the challenges in implementing it in the modern day owing to uncertainties in the legislation controlling it and issues involving national security. The first part of the paper identifies the concept's roots in Roman law as well as the significant contributions made by scholars between the 16th and 19th centuries. The next part of the article discussed the Paris Convention's initiatives and the efforts made in the 20th century to develop the idea of "air sovereignty" in accordance with the Chicago Convention's rules, while highlighting the legal drawbacks of the Chicago Convention. The paper concludes by analyzing the current challenges in the pursuit of air sovereignty caused by a lack of legal agreement on the terms "airspace" and "aircraft" within the convention provisions, as well as those created by the use of force action, using examples of fatal aircraft destructions such as Malaysian Flight MH-7, Korean Air Lines Flight 007, and Iran Air Airbus A-300B.

Keywords**:** *Air sovereignty, Paris Convention, Chicago Convention, National security, Air space*

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Introduction

The fundamental tenet of international air law is that each state has the right to control its own territorial airspace, which is called "total and exclusive sovereignty in the air." In the contemporary period, it is commonly accepted that a state has a sovereign claim over the airspace above its land and territorial waters, regardless of whether it can be considered a part of its territory. As a result, the sovereignty conundrum lies at the core of all aviation relations. Literally thousands of years have been spent debating who owns the air. The sovereignty over the air above their agricultural fields was a point of contention among the Romans. They believed that natural resources like air and water are "*communia omnium*," or shared by all mankind, and therefore cannot be possessed[1]. The idea gained even greater significance as the number of states and interest in flying increased in the 18th and 19th centuries.

A hot-air balloon designed by the French brothers Montgolfier and launched in 1783 was the first aero plane to fly. The first recognized aeronautical law was published in April 1784, a year after the maiden flight, and it forbade balloons from circling Paris without authorization[2]. It was only a police directive, and it created the first aviation regulation in an effort to protect the residents of the French capital. At the beginning of the twentieth century, engine-powered aircraft quickly advanced, especially with the deployment of air power in the two world wars. Many pilots became disoriented during the fights, which led to the first cases of aircraft intrusions. Lawyers were interested in the problem as soon as aircraft began violating a nation's airspace. Therefore, it was anticipated that governmental or civilian aircraft incursions might happen in both peace and war. As a result, debates about airspace management began, and lawyers began to make the case that the idea of state sovereignty needed to be incorporated into the law governing air navigation. The

[1] John Cobb Cooper, "*Explorations in Aerospace Law: Selected Essays, 1946-1966*" (Ivan A Vlasic Ed, Mc Gill 1968) 104-106
[2] Ron Bartsch, "*International Aviation Law a Practical Guide*" (2nd Edn, Routledge 2018)3-4

Paris Convention[3] was the initial attempt at regulation to deal with the question of sovereignty over airspace.

It also included significant ideas like absolute sovereignty over the air and unfettered freedom of innocent passage, demonstrating even stronger support for total and exclusive authority over the airspace. The importance of aviation to all nations became vividly apparent during the Second World War. But first, the regular growth challenges had to be surmounted. For instance, how can a plane from one state fly over the airspace of another state without encroaching on that state's territory or requesting permission each time? In search of a remedy, the international community chose to create a single set of legislation in order to unite aviation sovereignty. This rigid approach was later reinforced, and the 1944 Chicago Convention adopted nearly all of its provisions verbatim.[4]

Even though sovereignty of airspace has been highlighted as one of the most pressing outstanding issues of public international law today, the concept hasn't been fully defined despite several attempts by experts. As a result, in the age of globalization, the basic ideas of sovereignty in aviation law frequently run into problems due to ambiguous legal terms, the use of force in national security, etc. With that, this study is intended to investigate how the idea of air sovereignty gradually evolved as a result of important statutes that were concerned with advancing sustainability in aviation law and to identify the current difficulties facing the achievement of air sovereignty under existing aviation law.

The first part of the paper seeks to provide a brief overview of the evolution of the concept of "air sovereignty" from the Roman era to the nineteenth century. The second section examines the provisions of the Paris and Chicago Conventions in the context of twentieth-century efforts to uphold the concept and principle of air sovereignty. Thirdly, the paper examines the challenges the current aviation law framework

[3] The Paris Convention for the Regulation on Aerial Navigation ,1919
[4] The Chicago Convention on International Civil Aviation,1944

poses for preserving air sovereignty from a legal and national security perspective. The final part of the paper carries the conclusion.

Regulatory developments of the Concept of "air sovereignty"

It has been said that air law is the "latest born of legal notions." Its earliest beginning, which established its regulatory nature, dates back to the era when classical Roman law was introduced.

Roman concept

"As far back as the Roman Empire, the state was thought to have legal authority over the airspace over its territory, and the Romans developed the maxim *cujus est solum, ejus est usque ad coelum*, which means the "right of land ownership brings with it rights of ownership of the airspace above that land."[5] The space above the Roman state's territories was recognised as an important component of the habitable planet. As a result, there was a distinction made between the concepts of air and air space in Roman law. Physical elements such as air and water were seen as "*communia omnium*," or belonging to all humans[6], and could not be possessed. In contrast, the airspace did not have the same legal status as the physical element of air. The Roman legal system seems to have seen utilising the skies as a utility right subject to state sovereignty.

Ideology of "air sovereignty in" 16th to 19th century

In the 16th century, circumstances emerged in which private property rights were established before national supremacy. Iacobus Cuiacius (1522–90) believed that both land and air should have the same legal standing. If any of their statuses were to change, the other's status would also need to alter. Regarding the topic of airspace rights, Hugo Grotius (1583-1645) argues that the terrestrial area and the airspace above it are one indestructible entity. By the end of the seventeenth century, most scholars were in favour of granting sovereignty to the state above all

[5] Rafael Domingo, "*Roman Law: An Introduction"*, (1st Edn Routledge 2018) 30 -49
[6] ibid

else[7]. Obviously, such an idea is no longer viable since it is incompatible with the requirements of the current air transportation sector as the airspace turns into a public highway.

The first flight to leave the earth took place at the end of the 18th century in a hot-air balloon built by the French Montgolfier brothers in 1783. After a year of inaugural hot-air balloon flights, a lieutenant de police in Paris named Lenoir passed the first air legislation on April 23, 1784, outlawing balloon flights without express approval[8]. The directive's main goal was to forbid balloons from flying above Paris without permission in order to protect the state's citizens and maintain control over the state's airspace. This 1784 piece of legislation has since become the first and earliest form of legislation in the field of aeronautical law. However, because aeronautical law was still emerging, the question of "full" and "absolute" sovereignty over the airspace was of little importance at the time.

As the number of eventualities involve in aviation matters increased in the 18th century the concept of air sovereignty gained even greater significance but was not adhered to common footing. The first reported case of 19th century was in the common Law referring to air navigation was ***Pickering v. Rudd*** [9], decided in 1815. It remains an example private of claims brought under the right over private property in contention over air-space. In deciding such claims, Lord Ellenborough questioned whether an aeronaut would be liable "to an action of trespass *quaers clamsom fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage."[10] The "Lord Ellenborough" perspective in the aforementioned case appears to be in favour of restricting a state's sovereignty over the airspace. Additionally, it conveys the appearance that 18th century jurists prioritized private property

[7] Cooper (n2)
[8] Bartsch (n3)
[9] [1815] 171 ER 70
[10] ibid

rights over governmental rights in matters involving air space.[11]

From the standpoint of a state's sovereignty over airspace, there has been an equally wide divergence of opinion. Hence It is obvious that the concept of freedom of the air in the first decade of 19 century was of limited value and no sooner collapsed of the short lived.

The 20th century's attempts to achieve "air sovereignty"

At the beginning of the 20th century, the number of engine-powered aircraft increased significantly; these aircraft were used widely and for a broad range of operations, including aerial combat, reconnaissance, bombing, ground attacks, and naval warfare. As a result, the ideology supporting national sovereignty over the airspace had also matured, and people were aware of the link between national security and airspace sovereignty. Meanwhile, scholars in Europe debated the issue of total freedom and total sovereignty. In 1901, the French legal scholar Paul Fauchille wrote an article entitled "***Le domain aerien et le régime juridique des aerostats***," in which he referred, inter alia, to the freedom of the air[12]. In accordance with Fauchille's theory, states should only be granted rights up to the amount required to ensure their preservation during peacetime and times of conflict. Fauchille proposed a "freedom of the air" that would be comparable to Hugo Grotius' "freedom of the high seas," along with other authors like Lyckama á Nijeholt and Ernest Nys [13]. This school of thinking has long believed that the airspace should be free, just as the open seas should be. Paul Fauchille's idea of "freedom of the air" was coming under more and more fire from academics and politicians. Both Professor Harold Hazeltine of England and the Dutch-born Johanna Nijeholt strongly opposed the idea in their books The Law of the Air (1911) and Air Sovereignty (1910), respectively[14]. As a result, Fauchille's opponents were firmly in favour of total national sovereignty

[11] Robert M. Jarvis, "*Aviation Law: Cases and Materials,*" (Carolina Academic Press 2006)
[12] Pablo Mendes De Leon, "*Introduction to Air Law,*" (10th Edn Kluwer 2017) 2-10
[13] ibid
[14] cf Jarvis (n12)

over airspace.

The very first defenders of total sovereignty over airspace focused their arguments largely on national interests and concepts of national security in light of the escalating international political tensions and the genuine threat of war in Europe. This paved the way for new legal guidelines and aviation freedom accords. The first initiative was the Convention Relating to the Regulation of Aerial Navigation (also known as the "Paris Convention"), which was ratified in 1919, codifying public international air law for the first time. Later, the most significant effort took place once the Convention on International Civil Aviation (also known as the Chicago Convention) was ratified in 1944 and served as the second codification. Both treaties' introductory provisions entrench the idea of national sovereignty, according to which every state has complete and exclusive control over the airspace above its territory.

The Paris convention

The 1919 Paris Convention was the first multilateral instrument to consecrate the victory of the theory of "air sovereignty" in a similar way as it is construed today. The preamble to the Paris Convention included the words "to encourage the peaceful intercourse of nations by means of aerial communications" and "to prevent controversy."[15] There were not many laws governing aviation before 1919, so this development was particularly significant in regard to issues of air sovereignty concept. The Convention's **Article 1** recognized the complete and absolute sovereignty over the airspace of the underlying state.

"*The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory*"[16].

This article confirmed what had become customary law and was thus also applicable to countries that had not signed the 1919 Convention.

[15] ibid (n4) preamble
[16] ibid art 1 (i)

Further, Article implies a categorical rejection of the perspectives on airspace freedom discussed above, including those that called for the division of airspace. As reiterated later in Article 1 of the 1944 Chicago Convention, its fundamental principles continue to serve as the cornerstone of contemporary aviation law. The Paris Convention's **Article 2** is unique in that it addresses the freedom of innocent passage. It stated that "regulations imposed by a contracting state relative to the admission of aircraft of other contracting states over its territory should apply without distinction of nationality."[17] Thus, this Article, which is based on the idea that an aircraft could only be assigned one "nationality" based on its registration, is identical to Article 11 of the 1944 Chicago Convention, which bears the same idea.

The language used in the 1919 Paris Convention demonstrated the intention to formally establish an existing principle that would be binding on all countries in addition to the contracting parties. Thus, the "*usque ad celum*" sovereignty principle is depicted as being both global and independent of the desire of the signatories, giving it the status of customary international law, if only through crystallisation. In fact, a concept of balance between the needs of international civil aviation and the rights of sovereign governments served as the foundation for the Paris Convention. As a result, the 1919 Paris Convention's authors took a considerably more practical approach than that advocated by academics in the early 20th century, and this spirit of balance still prevails today.

The Chicago Convention

On December 7, 1944, the Chicago Convention on International Civil Aviation was ratified, and it became law on April 4, 1947. It is a global agreement "on certain principles and practices in order that international civil aviation may develop in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and run soundly and economically."

[17] ibid art 2

It founded the International Civil Aviation Organization (ICAO), an intergovernmental body whose objectives are to enhance the development of international air navigational principles and procedures as well as the planning and expansion of international air travel. ICAO eventually got affiliated with the United Nations.

Article 1 of the Convention states that
"*The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory*." [18]

This was a repetition of similar clauses from the 1919 Paris Convention. This Article recognizes each state's complete and exclusive sovereignty over the air space above its territory. It appears that the Convention, by its scope, tends to speak for all states, even non-contracting states. The terms "total" and "excusable" emphasize that no right of innocent passage exists. As a result, there is no "freedom of the air" above the territory of a state; liberty exists only in the airspace over the high seas and EEZ.

According to **Article 2** of the Chicago Convention, the lateral limits of air territory, i.e., "air space," include the air above land areas and surrounding territorial seas over which a state exercises sovereignty, suzerainty, protection, or mandate.[19] Additionally, when it comes to the topic of national territory, the same article defines territory as "land areas and territorial seas exclusively." Article 55 of the Law of the Sea Convention 1982 states that the Exclusive Economic Zone is separate from the territorial waters. Simply put, a state's proclaimed territorial sea width and clearly defined land borders correlate to the area of its territorial airspace over which it has exclusive sovereignty. In addition, the height of a state's sovereignty over its domestic airspace is only as high as the boundary with space itself. However, the convention terminology makes no distinction between national airspace and outer space.

[18] ibid (n5) art 1
[19] ibid art 2

The Chicago Convention's **Article 3**, which addresses both state and civil aircraft[20]. However, Article 3 does not establish a definition of either the concept of state aircraft or civil aircraft. Article 3(b) of the Convention edicts that "aircraft used in military, customs and police services shall be deemed to be state aircraft.[21] This is not a definition, but only a presumption since the word "deemed" is used. In interpreting Article 3(b), both the nature of the enumeration and the nature of the presumption must be correctly ascertained. Using a broad interpretation of Article 3(b), the enumeration would not be limitative but would serve as an example of what would be considered to be a state aircraft. The result of such an interpretation is to reduce the exception and expand the scope of applicability of the Chicago regulatory system.

Article 5 of the 1944 Chicago Convention confirms the states' non-scheduled airline rights to fly across or halt continuously without receiving prior authorization[22]. However, **article 6** mandates that states acquire approval from the contracting state before engaging in scheduled air service[23]. Furthermore, **Article 7** of the Chicago Convention of 1944 establishes cabotage as a practice component of the Chicago Convention in order to satisfy the sovereignty concept[24]. This article establishes that each contracting country has the authority to refuse the license provided to aircraft passengers, freight, and mail by receiving payment or renting it from one location to another. Article 1 of the 1944 Chicago Convention, as well as Articles 5, 6, and 7, constitute the foundation of all international civil aviation systems today[25].

[20] ibid art 3
[21] ibid art 3(b)
[22] ibid art 5
[23] ibid art 6
[24] ibid art 7
[25] Ruwantissa Abeyratne, "*Convention on International Civil Aviation : A commentary*," (Springer 2014)

Under **Article 9(a)** of the Chicago Convention, states have the power to restrict or forbid overflight over particular areas of their territory[26]. This provision is based on the concept of sovereignty, which is the bedrock of the Convention and one of its most eloquent expressions. The existence of certain conditions and the fulfilment of specific legal criteria, however, are necessary for the authorized use of the authority under Article 9(a) to establish restricted zones. The wording of the provision states that the following uses are the only ones for which "**no-fly zones"** may be established:

(a) reasons of military necessity; or
(b) reasons of public safety.[27]

Such "**no-fly zones**" must also be reasonable, proportionate, and respect both geographical and temporal requirements. Additionally, if a state wants to restrict access to its airspace, it must do it in a way that "does not unreasonably interfere with air navigation." This shows that while safety is the primary concern, the use of the sovereignty principle to protect airspace must be proportionate to the threat.

The Chicago Convention's legal standing has been hotly contested for many years since it was created. Does the Convention include clauses that recognize ICAO's legislative, or law-making, powers? If so, how far may the Convention be used to pass such a law? All contracting states are required by Articles 37 and 38 to establish uniform standards, rules, practices, and organizational structures in order to enhance air navigation as per convention. As a result, the Chicago Convention's embedded concept of "air sovereignty" comes with a number of associated obligations for governments, notably in the areas of national security and flight safety. In addition, it seems that the Chicago Convention also fails to a certain extent to offer a distinctive legal framework for the

[26] ibid (n5) art 9
[27] ibid

formalities of air travel[28]. The Convention only applies to civil aircraft, according to its wording, and each state continues to have its own authority to regulate other planes. The Chicago Convention may remain in force for many years to come as long as flying operations are restricted to the use of "airspace" and flight instruments—which do not depend on atmospheric reactions—are not used[29]. But given the state of affairs right now, international worries could be detrimental to the future.

Current challenges of maintaining "air sovereignty" of state

Despite all the advancements made by the global aviation industry and all the laws passed pertaining to establishing air sovereignty, from the Police Directive of 1784 to the Chicago Convention of 1944, the question of how much a state can claim sovereignty over airspace still dominates the international community today. Of course, most of the challenges of aviation sovereignty exist in theoretical frameworks, including legal, political, economic, and national security aspects. As such, this study is limited to analyzing the legal and national security challenges that states face when establishing air sovereignty under the current aviation law regime in the contemporary period.

Legal challenges to agreement on the terms "airspace" and "aircraft"

A number of legal interpretations that are based on the different interests of each state have evolved as a result of the lack of a legal consensus on the terms "airspace" and "aircraft." In light of these concerns, the author offers his analysis and perspectives, which are, in essence, as follows:

Problem concerning the determination of "airspace" under state sovereignty

It has been highlighted that the Chicago Convention of 1944, in particular, never defines what the term "airspace" implies. In addition, the 1967 Space Treaty, which governs the use of space, makes no mention of what

[28] Stepen M. Shrewsbury, 'September 11th and The Single European Sky: Developing Concepts of Airspace Sovereignty', [2003] 68 Journal of Air Law and Commerce, 115.
[29] Abeyratne (n26)

outer space is or where it begins. However, every state has complete and exclusive sovereignty over the airspace over its territory, as stated in Article I of the Chicago Convention. As a result, we erroneously assume that the border between space and airspace is present. The absence of a natural line dividing space from the air is the primary basis for the difficulty in establishing a state's vertical sovereignty. This is analogous to how there are no physical lines separating "international seas" from the "territorial waters" of a state. Therefore, it might be claimed that the Chicago Convention's Article 1 expresses total state sovereignty over airspace only up to the point where flying by conventional aircraft and balloons is feasible. There hasn't yet been a definite international agreement on what constitutes "air space."[30] As a result, states have included references to the boundary between Earth and space in their domestic laws. Uncertainty in the law and fragmentation are unavoidable results of such unilateral delimitations. For instance, the downing of Malaysia Airlines MH-7 over Eastern Ukraine in 2014 has highlighted a sensitive subject regarding aerial sovereignty and the scope of airspace. The passenger plane was flying from Amsterdam to Kuala Lumpur when it was shot down over the conflict-torn Ukraine. Ukraine had shut off its airspace up to a height of around 9,750 meters.[31] The Ukrainian authorities said that they had not received any more warnings about dangers in the upper areas' airspace, where MH7 was flying at a height of about 10,000 meters. The fact that this was insufficient caused all 298 individuals to die The Dutch-led joint investigation team (JIT) held that the States must guarantee the safety of the airspace above their territory.[32] However, in the event of armed conflict on the territory, such a guarantee would be difficult to provide. The incident complicated the protection aspect of national sovereignty over airspace. As a result, airspace delimitation is essentially concerned with the question of where airspace ends and what, as the province of all humanity, begins. The answer to this question

[30] Gbenga Oduntan "*Sovereignty and Jurisdiction in Airspace and Outer Space*" (Routledge 2011) 68-72

[31] "MH17 Ukraine plane crash: What we know," (*bbc.com*, 26 February 2020) < https://www.bbc.com/news/world-europe-28357880> accessed 02 November 2022

[32] ibid

is significant in order to determine which activities are indeed construed to determine air sovereignty rights.

Problem of classifying aircraft.

Although it did not fully define the term "plane" outside of Article 3, the Chicago Convention of 1944 distinguished between state and civil aircraft. "State aircraft" refers to aircraft used by the military, customs, and police. Therefore, state-owned aircraft that are used for purposes other than those mentioned above are not regarded as state aircraft, in accordance with Article 3 of the Chicago Convention. Both the Paris Convention and the Chicago Convention have failed to define the term "aero plane." Instead, they simply specify the categories of aircraft that they regard as "state aircraft." But both conventions offer a functional definition of "state aircraft" that does not include prior ownership. It appears that the interpretation is left up to the respective state. Some states maintain that because of the absence of an exact interpretation, they use the term "aircraft."[33] As a result, convention has placed a self-imposed constraint on its rules, stating that they do not apply to airborne flight instruments unless such instruments can obtain support in the environment through air reactions[34]. This classification issue in turn leads to a national security challenge, as explained hereinafter.

National security challenge-use of force restriction

One of the primary reasons for establishing the concept of total and exclusive sovereignty over the airspace was to protect national security. However, current aviation law faces a significant threat to maintaining aerial sovereignty due to actions like the use of force. The following cases involve planes that were shot down because they were deemed a threat to the security of sovereign states.

[33] Ruwantissa Abeyratne, *"Air Navigation Law"* (springer2012)10-18
[34] Abeyratne (n26)

Korean Air Lines Flight 007(KE007), a passenger plane, entered Soviet airspace on September 1, 1983, and was shot down by the Soviet Union (now Russia). It was believed that the civilian aircraft was an American intelligence aircraft on a reconnaissance flight over the Kamchatka peninsula. Soviet fighter jets destroyed their target, and all 269 passengers and crew on board were killed. The Soviet authorities claimed they acted in accordance with their national legislation (use of force for self-defense); however, the proceeding concludes that the Soviet interceptors did not follow ICAO standards and recommended practices before attacking KE007.[35]This creates an issue of balance between the safety of civil aviation and the air sovereignty of the state. Following the incident, the Chicago Convention's **Article 3 bis** was adopted, which forbids nations from employing force against civilian aircraft. It only applies to civilian aero planes that are "in flight," nevertheless.
The article 3 bis (a) states that:

"The contracting States recognize that every State must (a) refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations".[36]

The provision embedded that states in the international community are obliged to adhere to the international norms of protecting and guaranteeing the safety of the civil aircraft of other nationals when in the sovereign airspace of their state. Indeed, customary law says that using weapons on a civil aircraft is not legal. Even if Article 3bis is the first provision to make clear what actions may be taken in case of an intrusion, it only declares what has been known and accepted for a

[35] Farooq Hassan, "A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union",(*scholar.smu.edu.Com,1984*)<https://scholar.smu.edu/jalc/vol49/iss3/3>accessed02 November 2022
[36] ibid (n5) art 3bis (a)

longer time. Also, 3bis expresses common sense in dealing with intruders. However, the long and rather clumsy provisions **(b) to (d) of Article 3 bis**[37] are an expression of the conception that a proportionate reaction by the infringing state against a grave danger or a severe violation shall be allowed in order to restore sovereignty in the airspace. Hence, the risk of the loss of lives is so great if the provisions in the article are not followed that it should deter the offended state from using armed force against the aircraft.

This complication was experienced in a later case ***Islamic Republic of Iran v. United States of America(USA)*** decided at International Court of Justice (ICJ).[38] In 1988, an **Iranian Airbus A-300B** travelling from Dubai to Iran was shot down in the Persian Gulf by the USS Vincennes of the American navy. All 290 people on board, including crew members, died. In assuming that the aircraft was a military aircraft, the US commanders erred. Iran accused the USA of violating the Chicago Convention and the Montreal Convention of 1971 by shooting down the aircraft in a case taken before the ICJ. Even though written pleadings on preliminary objections were filed, the case was settled and dismissed before to the beginning of oral hearings.[39] Subsequently the USA offered compensation ex gratia to the relatives of the victims. It has been established via the ICJ proceedings and ICAO investigation that this incident was a gross violation of the terms of Article 3 bis of the Chicago Convention[40]. As a result, this indicates that, although the principle of complete air sovereignty is recognised in the fundamental introductory Article 1 of the Chicago Convention, states have exercised their sovereign powers in a dynamic fashion. Hence, when it comes to airspace sovereignty, states appear to take a literal stance against allowing outside encroachment.

[37] ibid art 3bis (b) to (d)
[38] Aerial Incident of 3 July 1988 (Iran v. U.S.), [1996] I.C.J. 9 (Order of Feb. 22)
[39] ibid (n39)
[40] ibid

Invading aircraft over their territory are sometimes regarded as an act of aggression, prompting a response by the violated state, and in many cases, the penetrated state has resulted in the downing of such aircraft, sparking the need in the international community for a demarcation between civilian and military aircraft. In such case, article 3bis is not at all relevant under article 3 of the same convention**.**

Conclusion

As early as the Roman Empire, the state was believed to have legal rights to the airspace over its territory. Since the start of the 20th century, as the international air transportation industry has grown, more traditional notions of a state's sovereign power over its territorial airspace have emerged. By ratifying the Chicago Convention on December 7, 1944, which becomes the Magna Carta of civil aviation participation, a static approach to air sovereignty is envisioned. Today, modern airspace sovereignty gives each state exclusive rights to its own airspace, and aircraft that enter that zone without permission are seen as intruders. Though the concept and formalities of air sovereignty are still alive, its application and interpretation have undergone changes, limiting the competencies of states. This study found that aerial sovereignty is not as complete and exclusive as it was when the Chicago Convention was drawn up. Of even more importance, the Convention does not provide legal terminology for the term "aircraft." Nor does it define the term "airspace." Being primarily concerned with questions of aviation sovereignty, the Chicago Convention lacked the ability to establish a concrete legal regime. It just established the foundation for how nations define the regulations for international flight, allowing any nation to determine its own aviation industry regulations at will. Due to these gaps in primary air laws, it has become increasingly difficult to maintain air sovereignty while balancing safety and security. Further, in today's context, decisions on international air sovereignty have been mostly influenced by economic and national security factors. Notably, the use of legal force in self-defense against intruders has created a destructive experience in preserving air sovereignty rather than achieving a positive outcome today.

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Merits and Demerits in the Adversarial Criminal Justice System: With Specific Reference to Sri Lanka

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Abstract

The core objective of the criminal justice system is not only to deliver justice for involved parties but also so to balance the rights of individuals with the rights and interests of society. At the same time, public visibility of fairness, justice, and respect for everyone's rights is vital. Since Sri Lanka is a Common Law-influenced country, the criminal justice system is based on the adversarial system of justice, as contrasted to the inquisitorial system. As a result, in the adversarial system of criminal justice, the parties act independently and are responsible for revealing and presenting the evidence before a judge or jury throughout a passive and neutral trial. In contrast to the adversarial system, an official body that acts as a judiciary and gathers evidence for and against the accused is in charge of discovering the truth in an inquisitorial system. Though, there are practical and theoretical distinctions between inquisitorial and adversarial systems of justice; discussions remain as to which is better than the other. In order to do that, there is a discussion that is invariably valid as; there are merits and demerits in the adversarial system of criminal justice followed in Sri Lanka.

Keywords: *Merits & Demerits, Compare & Contrast, Adversarial system, Inquisitorial system, Sri Lankan Criminal Justice mechanism*

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Introduction

In his article *"The Criminal Justice System,"* L. Brooks Patterson states that "*The criminal justice system is exactly what the name implies: justice for the criminal."*[1] In order to do that, the function of the "criminal justice system" shall deliver justice for all, by prosecuting suspects before the competent courts based on evidence thereby convicting them if they are [2,3]

The legal system is basically formed through a very complex mechanism that was impacted by different cultural rituals and customs. Accordingly, with the social expansion, the criminal justice mechanism is also based on numerous structures. Emphasizing the above fact, in his book "Legal Systems Theory", Rosen Tashev states that, "the two foremost legal systems that have served as replicas of almost all the jurisdictions around the world are the civil/inquisitorial system continental and common/adversarial system Anglo American Law Systems.[4]" However, "comparative research of criminal justice systems is still in its infancy"[5] Among these two main legal systems, the law of the criminal procedure in Sri Lanka relies on the Adversarial system. Confirming the above fact, Pro. G.L. Peiris states that; "A basic feature of a regular criminal proceeding in Sri Lanka is the adoption of the "adversary, as distinguished from the "inquisitorial."[6]

The ground onBentham's Principle of Utility, as Mario Gomez pointed out, utilization and fairness of the criminal justice system could be assessed by the nature of the response from the justice system and the capacity to

[1] L. Brooks Patterson, "The criminal justice system is exactly what the name implies: justice for the criminal" (Detroit College of Law at Michigan State University Law Review,1995-1998)
[2] Ibid.
[3] Ibid.
[4] Rosen Tashev, "Legal Systems Theory" (Sibi,Sofia,2007) P.420
[5] Damaska, Mirjan, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" <http://hdl.handle.net/20.500.13051/831> Accessed on 10/11/2022 at 12.32 PM
[6] Pro. G.L. Peiris, "Human Rights and the System of Criminal Justice in Sri Lanka" <http://repository.ou.ac.lk/bitstream/handle/94ousl/943/Human%20rights%20and%20the%20system%20of%20criminal%20justice%20in%20Sri%20Lanka%20%20by%20G.L.%20Peiris%20%281%29.pdf?sequence=1&isAllwed=y> Accessed on 11/11/2022 at 11.23 AM

access justice mechanisms for the greatest number of people.[7] However, the question that arises from the above fact is; do the two main systems above mentioned correspond with the utility and fairness of criminal justice? However, as a reply to the above question, Pro. G. L. Peiris stated with the criticism that, "Contemporary experience, especially in countries of the Third World, demonstrates the intrinsic value of the 'adversary' system of criminal justice for the purpose of achieving minimum standards of equity and fair dealing in criminal proceedings."[8]

The Adversarial and Inquisitorial system in criminal procedure

With special reference to the adversarial system, Ian McLeod states, "under the English Law the court procedure is Adversarial for all the practical purposes. That is to say when it is produced the facts and submissions relate to facts before the court, the court declares the wining party. Holding an investigation regards to the indictment, is not a duty of the court."[9]

The adversary procedure in common law either party makes their case, calls their witnesses, and questions them.[10] The civil law non-adversary trial resembles an official investigation presided over by the judge; whatever evidence he chooses to consider becomes his evidence, or rather the evidence of the court.[11] Accordingly, there is strictly speaking no "prosecutor's case" and there are no "witnesses for the prosecution." The bulk of questioning comes typically from the bench and it is the presiding judge who begins the examination of witnesses."[12]

When it comes to the modern scenario, disparities between the criminal justice procedures of both legal systems are lodged for limited approach. However, according to Rosen Tashev, disparities between both legal systems, could be evaluated under three different regimes; namely,

[7] *Supra,*4
[8] Ibid.
[9] Ian McLeod, "Legal Theory: Key Legal Concepts in Law" (2006) P.10
[10] Ibid.
[11] *Supra,*2
[12] Ibid. P.423

different Legal sources followed by, relationship between the judiciary and prosecution, the role of the judge in the trial and the presence of the jury.[13]

The main cause for the distinction of the two main legal systems is that the civil law procedure, characteristic for jurisdictions in Continental Europe, reverberations the original Romanic law whilst the common law, applied mostly in England, its former colonies and the US, heads another direction.[14] The primary source of the law in the Continental legal system is the codified legislation…the civil codes while legal custom and precedents have minor significance. The core principle of procedures is from the abstract to the particular/specific courts base their decisions on certain cases. Judges construe the law but they do not make it.[15]

However, in contrast, for common law systems, the legal precedent constitutes the primary source of law. Accordingly, interpretations of the judiciary are the actual designers of legal norms that are applied cases. [16] In England and Wales the law has never been codified has been evolving progressively. Therefore, John Hatchard emphasized that the sources of procedure are various such as legislation, judicial decisions, administrative guidelines and practice directions.[17] Due to the impact of the European Court of Human Rights, Western Europe is moving toward a more uniform legal system.[18] However, the establishment of "democratic" forms of criminal justice usually defined in terms of the adversarial system has long features in Sri Lanka as the influence of the consequences of global foreign policy objectives.[19]

[13] Ibid. P.423
[14] John Hatchard, "Comparative Criminal Procedure" (The British Institute of International And Comaprative Law, London,1996) P.23
[15] Ibid.
[16] Ibid. P.26
[17] Ibid. P.27
[18] Himalee Kularathna,"Judiciary-Under the Anglo-American and Continental Legal Systems." (Hulftsdorp Law Jornal, The Colombo Law Socitey, Vol:1, 2014) P.300
[19] Ibid.

The disparities between the two legal systems have influenced the different functioning of the judiciary, implicit as an instrument for the administration of justice, composed of a system of courts, judges, magistrates, and adjudicators.

The comparative analysis of the French and English criminal justice systems

The assize court in France hears cases involving the most serious crimes, including murder, rape, significant narcotics offences, and armed robbery.[20] The court is comprised of three professional judges and a jury of nine people who were chosen at random from the voter list. The correctional court hears most serious crimes, less serious drug cases, theft, and fraud.[21] The correctional court, which takes the place of the assize court, is presided over by three judges but without a jury.[22] The police court is where small crimes are tried, and there is just one judge presiding over the proceedings.[23] In the court system of England and Wales, it is the Crown Court that hears the most serious offences. The court is composed by a judge and a jury of twelve members.[24] A High Court judge hears the most important matters; circuit judges hear the others. A lower-level court called the Magistrates Court hears cases involving minor offenses in front of three lay judges.[25]

At first glimpse the court systems of England and France seem very comparable; yet, they considerably vary when the role of the judge is examined. The procedure of selection and appointment of judges are different in these two legal systems. In that sense, the Continental law countries are reflected as 'bureaucratic'. France, as a representative of the civil law practice, has a career judiciary; the *magistrature* who is entering into the profession by means of competitive examination

[20] Ibid.P.301
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.

(*concours*), extensive training at the national school, the *Ecolenationale de la magistrature*[26]. This selection procedure and training qualify the judges to perform several judicial functions at various points of their careers.[27]

On the other hand, in Common Law countries the "professional" model is more applicable. Therefore, an informal training through legal practice is preferred, rather to formal training. Judges are nominated from the ranks of experienced and skilled members of the legal profession.[28] Therefore an elite judiciary with no internal hierarchy and no need for promotion is formed.[29] John Bell emphasized that in England, no specific diploma is required for the position of a High Court judge. Suitability for an appointment as a full-time judge was based on substantial experience in the legal profession, a good reputation and a good performance as a part-time judge.[30]

By criticizing the Adversarial system, Richard Frase stated: Judges in the United States at a given court level may aspire to higher judicial positions, but there is little assurance that their ability and performance level will be recognized by the politicians or advisory committees responsible for filling these positions.[31] There are fewer systematic records of judicial performance, such as disposition rates and backlog, appellate reversal rates, forced recusals, and complaints received from parties or witnesses. Moreover, many of the most desirable higher positions are filled not from the ranks of experienced jurists, but the attorneys with political connections with little or no judicial experience. Even where promotions are guided by performance rather than by politics, the bar tends to control advancement decisions and other judges have little input.[32]

[26] Ibid.
[27] Ibid. P.302
[28] *Supra,*10: P.428
[29] Ibid.
[30] John Bell,"Judiciaries within Europe:A Comparative Review"(Cambridge University Press, Cambridge,2006) P.123
[31] Richard Frase, "Comparative Criminal Justice As a guide to American Criminal Law Reform" (California Law Review, 1990) P.78
[32] *Supra,*29

Further to that, nonetheless, many other American jurisdictions still have only minimal judicial training requirements; as a result, the quality of their judges is only as good as their selection process. And the quality of judges determines, in large measure, the quality of justice. This is particularly true in the trial courts, where many decisions are legally or practically non appealable.[33]

Accordingly, it could be argued that in the Anglo – American system the judicial legitimacy originates from the elite professional itself, in the Continental model; the nature of authority is state-centered, fixing the sources of legitimacy in accordance with its own notions.[34] In addition , it is more evident that the adversarial system is more likely to base on traditional practices rather when it comparing to the Continental model.[35]

In Continental judiciaries there is no such exercise as "coaching" the witnesses or experts by lawyers, preparing them for potential interrogations, as it is in the Anglo-American countries. In brief, the contrast in common law courtrooms the judge is neither that vocal nor active. The judge seems detached while the counsel is dynamically cross-examining witnesses, and possibly the defendant. The mere involvement of the judge throughout this course is to safeguard that the advocates behave themselves, to protect the jury's independency and impartiality from influence inside the courtroom and to evade inappropriate approaches to arrest.[36]

The judge has the right to interrogate both the witnesses and the defendant, which is used extremely rarely in the common law tradition. Similarly, the court has no relationto the nomination of experts. It is exclusively an obligation of the parties and their attorneys to select experts and witnesses in order to maintain their cases.[37]

[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Ibid.

The contrasting balance of power in the conduct of the trial procedures is fairly related to the different philosophies assisting the two legal representations. The adversary procedure, common to the Anglo-American system, relies on the principle that truth is determined through the investigation and representation of facts by the two opposite sides of the issue . On the other hand, in civil law legal practice, the truth is best revealed by a competent judge that will direct the demonstration of evidence and will balance the views of the two parties.[38]

However, some legal experts point out that there is no adversarial or investigative distinction in any criminal court system in the real world, making this theoretical distinction obsolete in the present context. Thus, although an adversarial court system in which cases are decided by a jury is in place in England, to a certain extent, it reflects conditions compatible with the inquisitorial court system. Accordingly, the judge will give the sentence based on the final decision of the case.[39] Also, in the French judicial system, the inquisitive criminal court system is more concerned with the oral presentation of facts and the opinions expressed by a jury in certain trials, although it portrays a nature that conforms to the system.[40] Also, the dual roles of judges in this criminal procedure require the participation of lawyers in trials.[41]

In inquisitorial criminal justice system, a very extensive and central place is centered on the role of the judge in a trial, but in adversarial criminal justice system, the judge is a mere arbiter of the contest between the plaintiff and the accused. Also, in the investigative criminal justice system, after preliminary investigations, the matters related to the relevant investigation are presented to other judges and then the accused, witnesses and persons with professional skills are questioned respectively.

[38] Ibid.
[39] Mireille Delmas-May & J.R. Spencer, "European Criminal Procedure" (Cambridge University Press, 2005) P.227
[40] Ibid.
[41] Ibid.

But in the adversarial court system, there may be very important facts of the case that can be hidden from the judge in the criminal procedure. Especially in this judicial system, in all the hearings based on the facts presented by the two opposite parties, the plaintiff and the defendant, the witnesses are initially taken and then the plaintiff party and finally the defendant party. Thus, there is an emphasis on protecting the rights of the accused in this criminal justice process. According to Hein Kotz, a South African lawyer, "The prosecutor can recommend a probable sentence, but the last word is always given to the defence counsel and the defendant."[42]

Also, in the investigative criminal justice system, there is no presence of attorneys who are prepared and trained for in-depth questioning of witnesses and professional individuals as in the adversarial criminal justice system. Also, in this adversarial criminal court procedure, the judge plays a passive role, and the judge is kept abstracted until the witnesses and the accused are subjected to extensive cross-examination by the lawyers in the court. As this judicial system expects only the mere participation of the judge, thus the problem arises as to whether the judge actively contributes to the subject of criminal justice. However, the lawyer named Hein Kotz points out that although the judge has the power to play an active role in the judicial process by cross-examining the witnesses and the accused, it can be seen in this judicial system that judges use this power only in extremely rare cases.[43] Accordingly, this Court cannot choose who should be the professional persons and who should be the witnesses and it should be done by the parties concerned in the case in order to maintain their case.[44]

Thus, in the adversarial criminal court procedure, the truth is determined based on the facts and examinations presented by the opposing parties, but in the investigative criminal court procedure, the truth is fully

[42] HeinKotz, "The Role of the Judiciary in the Court- Room: The Common Law and Civil Law Compared" (Journal of South African Law, 1970) P.35
[43] Ibid.
[44] Ibid.

determined by the judge and thus he balances the opinions between the parties. Conduct is a positive aspect of the investigative criminal justice process. But, another negative situation seen in the investigation of England's adversarial criminal court procedural law is that, even if a document is presented to the judge that shows the facts related to the relevant taxation, it is expected that during the trial, the judge does not have independent knowledge of the relevant legal matters, so the lawyers will inform the judge of the legal situation related to the case. To indicate that it should be explained. But the situation in France is more positive than the system in England.

The situation in England and the United States of America differs from that in France in regard to the taking and identification of evidence. Accordingly, the French courts do not adhere to any strict legal conditions regarding evidence and pay more attention to the value and sufficiency of the evidence than to the corroboration of the evidence. But in the adversarial criminal court procedure, more emphasis is placed on corroboration and exclusion of evidence, and strict legal status and compliance can also be seen in this regard.

Therefore, it can be concluded from the overall legal analysis of the criminal justice procedural situation in England and France that it is possible to identify consistent and contradictory situations in the criminal justice procedural law in the adversarial judicial system and in the investigative judicial system, and that in those situations, each state, as well as that specific criminal justice procedural legal conditions can be identified.[45] Therefore, it is more appropriate to base a more effective approach to the subject of criminal justice on common law and civil law situations, while respecting the essential values in these judicial systems, rather than stating which approach is more successful in criminal justice procedural law.[46]

[45] Ibid.
[46] Ibid.

Furthermore, it would seem that both adversarial and inquisitorial legal procedures should continue to be used to produce fair and just circumstances based on universally recognized human and fundamental rights. Therefore, it may be concluded that "opposing models can hire their differences and transformations in a practice of extension, progress, and advancement of the criminal justice systems in the globe" rather than engaging in "legal dogmatism."[47]

Analysis of the Sri Lankan procedural criminal law's positive approach toward the criminal justice system

A basic focus on the nature of criminal justice procedural law in Sri Lanka reveals that it operates primarily on a prosecution-centered trial system and an adversarial judicial system reflecting an impartial and passive judge, which has become a Sri Lankan legal heritage.[48] However, the criminal justice system in Sri Lanka is basically governed and based on the procedural laws which included the Code of Criminal Procedure Act No. 15 of 1979, Judicature Act No. 02 of 1978, Police Ordinance No. 15 of 1865, Bail Act No. 16 of 1997, and Evidence Ordinance No. 10 of 1988; and the relevant substantive laws which included the Penal Code (Ordinance No. 2 of 1883).

Hence, the latest surveys show that the lowest conviction rate in Sri Lanka's criminal justice system is due to procedural law rather than the substantive weaknesses of substantive law. "The rapid escalation of crime, increasingly committed in an organized manner with violence, impunity and considerable sophistication, thereby resulting in the loss of public confidence in the criminal justice system, has highlighted the need to review the existing criminal justice framework in Sri Lanka. By analyzing the grievous crime abstracts of years 2007 to 2013, it would

[47] *Supra*,17; P.305

[48] In *De Mel v. Hanifa* (1952)1 NLR 433-443: *Gratien J*; has Commented: "It is very relevant to remind ourselves that our Code of Criminal Procedure and the earlier Code which it superseded, were both designed to regulate the process of bringing offenders to justice in accordance with the 'Accusatorial system' which, by the will of succeeding Legislatures, has taken firm root in this country. Indeed, it has long since become part of our heritage.'

create a vivid image of the gravity of this problem."[49] Specifically, the aforementioned report by itself will be confirmed that the criminal justice procedural framework of Sri Lanka has largely lost public trust due to the lack of proportional criminal justice in the systematic growth of crimes. But it is further to be asked if it is really so.

Further, the right to a fair and speedy trial as emphasized in the United Nations Charter of Human Rights and the 1978 Constitution of Sri Lanka is a fundamental requirement of criminal administrative law.[50] A denial of criminal justice is inherent in the delay in a speedy trial. Therefore, in order to prevent and control crimes, unnecessary delays in the criminal justice system should be avoided, while at the same time, the government should focus on limiting the conviction of the accused in the complex burden of proof beyond reasonable doubt and the strict burden of proof in the criminal procedure. Reconsideration is critical to the delivery of criminal justice in Sri Lanka.

In addition, the most important point to be emphasized is that the complainant cannot actively contribute to his case as the state is handling the complaint and the investigations and dealing with it. It can also be argued that this situation, on the one hand, exposes the state's efforts to provide criminal justice, but on the other hand, in the adversarial justice system, it often affects the right of the victim to deal with his case. Thus, it is often appropriate to refer to criminal justice as a condition that is consistent with basic human rights. Therefore, the judge's impartiality and attention to every issue is a must-have situation in Sri Lanka's adversarial judicial system in terms of criminal justice.

Furthermore, when examining the criminal justice system in Sri Lanka, it is revealed that there are problems related to criminal investigations. There is no active contribution of the judge. The problematic nature of

[49] Final report of the Committees which appointed by the Ministry of Justice, Law Reform and National integration to recommend amendments to the practice and procedure in investigations and Court – 2014. P.5

[50] Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Article 13

this is that the evidence may be destroyed if the relevant investigations are not conducted within the specified time. Furthermore, there is a risk of missing forensic evidence such as fingerprints, bloodstains, especially due to lack of attention. Also, emphasizing the distant relationship between forensic science and police investigations, it can be said, "the police fail to work in collaboration with forensic experts. As a result, forensic evidence is not collected for use against the offender. The police may send cases to the court even when the evidence is insufficient for reasons of expediency."[51]

Thus, since the police perform a very wide task in the execution of criminal justice, they must act on their broad capabilities. But in the Sri Lankan criminal justice system, the challenges in the subject of the police, especially the non-updated criminal investigation equipment of the police; therefore, it is very important to develop a high standard in this field that adapts to modern technology. Furthermore, the imbalances in the police administration and especially the police officers in conducting criminal investigations, the investigation malpractice situations by not being directed to a proper training mechanism, create a unique inhibiting situation in criminal justice.

According to the adversarial judicial system operating in Sri Lanka, certain negativity is also highlighted regarding the plaintiff party. In particular, "in Sri Lanka, the prosecutor has absolute authority to determine whether a case should be sent for trial or not."[52] That is, the right of the plaintiff to be tried is fully emphasized, but in Sri Lanka, the file related to the case filed by the police is referred to the Attorney General's Department (for advice) and this process takes some considerable time. Also, the State Counsel is mostly given instructions related to maintaining the high standards of police investigations in the case concerned, thereby creating a greater possibility of delays and weak litigants appearing in court.

[51] *Supra,*48
[52] *Supra,*5

Also, there may be a waste of court time due to prosecution who is presented without proper evidence, and if a situation arises such as the death of witnesses or damage to their memory due to delays in the river hearings, there is a greater chance that the prosecution's right to justice will be damaged. Also, the tendency of witnesses to refrain from testifying due to possible harm to their lives, as well as the fear of crime victims to testify and the retraction of statements given, were common criminal justice problems seen in Sri Lanka. But, it can be said that the legal structure of Sri Lanka has reached a positive approach by establishing the rule of law regarding the protection of the rights of crime victims and witnesses through the enactment of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 04 of 2015.[53]
It is also possible to identify the procedural weaknesses in the adversarial justice system of Sri Lanka, i.e. the weaknesses in the relevant legal framework and the judicial system. Especially in a statement made by a criminal accused to the police, his guilt is proven, but it cannot be used as evidence against him. Also, according to Section 110 of the Criminal Procedure Code[54], even though the police have the legal ability to obtain fingerprints, handwriting and blood samples of an accused, when the police do not have the relevant technical equipment, difficult situations may arise in proving the case of the prosecution. Also, through the amendment of the Code of Criminal Procedure Act No. 11 of 1988[55], it has been sought to avoid unnecessary delay on the basis of unnecessary evidence, in case of non- summary cases even though the Section 420 (1) of the Code of Criminal Procedure Act No. 15 of 1978 has not concentrated that issue.[56] Confirming that fact, the members of the committee that drafted this bill indicated," Provides for the elimination of unnecessary evidence give effect to unnecessary delay. Non-Summary Inquiries ("NSI") should be dispensed with, having regard to several concerns voiced by representatives of the police and the Judiciary

53 Victims of Crime and Witnesses Act, No. 04 of 2015

54 Code of Criminal Procedure Act No. 15 of 1979, Section 110

55 Code Of Criminal Procedure (Amendment) Act, No. 11 of 1988

56 Code of Criminal Procedure Act No. 15 of 1979, Section 420 (1)

including members of the Official and unofficial Bar."[57]

In ***Shaw v. Director of Public Prosecutions***[58], Lord Viscount Simon stated that undue delay has become commonplace in our courts, resulting in a rapid erosion of public confidence and dignity.

However, in reference to Article 13 of the Constitution of 1978, this further lays more weight on the protection of the rights of the accused, but that every person has the right and freedom to be free from arbitrary arrest, detention and punishment. Furthermore, it prohibits the imposition of retroactive penal laws.[59] Further, Article 13(1) secures to individuals the right to know the reason for their detention, while Article 13(5) provides that the burden of proving a special case may be shifted by law to an accused person on a presumption of innocence. Rightful protection is also confirmed in the Constitution which is the basic law. [60]

Also, the prosecution does have the burden of establishing the defendant guilty, which is known as the "golden thread" of the English criminal justice system. It can therefore be argued that this legal scenario in the criminal justice system is not particularly favourable because the burden of proof lies with the prosecution. On the other hand, it means that the accused is considered innocent until the prosecution establishes that the pertinent accusation is beyond reasonable doubt. Accordingly, *John Farrar and Anthony M. Mugdale* points out, "the law has developed heavily on the concept of individual liberty."[61] **Woolminton V. Director, Public Prosecutions**[62] case decision states that this should be the legal policy of criminal justice in this judicial system. However, in Sri Lanka according to this situation, it can be argued that there is a violation of the right to universal justice as indicated by Article 12 because the question

57 *Supra*,51

58 *Shaw v. Director of Public Prosecutions* (1962) Ac 220

59 Supra,49

60 Ibid.

61 John Farrar and Anthony M. Mugdale, "Introduction to legal method" (London : Sweet & Maxwell, 1984)

62 *Woolminton V. Director, Public Prosecutions* (1935) AC 462 HL (E)

arises whether the rights of the prosecution are protected by the basic law. Furthermore, the Ellenborough Dictum emphasizes that only when the prosecution presents a clear and prima facie case against someone accused of a crime can the defence offer some explanation for his innocence. In ***Rajapakshe V. Attorney General*** [63]case, Justice Dr Shirani Bandaranaike has stated; the application of the Ellenborough Dictum in the criminal justice system in this country is represented as an opportunity to prove the innocence of the accused, but on the other hand, it can be shown as an exception to the basic principle that an accused person has no obligation to prove his correctness. Thus, this theory seems to balance the positive and negative situations.

According to the adversarial judicial system operating in Sri Lanka, the nature of the criminal justice procedural law, and the positive approach shown in the execution of criminal justice, it will be clear that it is based on negative conditions beyond the positive.

However, the recent amendment of the criminal trial procedure by introducing a pre-trial system[64] to reduce the existing delays in the High Court trials can be pointed out as a trend towards an inquisitorial approach. In particular, it can be further said that the existence of a hybrid system is very important because the methods implemented in the public policy structure in Japan and the Scandinavian countries to control the number of crimes in their country can be adapted to the Sri Lankan criminal justice system.[65]

Among the crime prevention strategies in the Japanese criminal justice system, which is particularly practical, there is strict control over criminal relics and citizen participation is used to prevent crime. Also, adapting to a more positive criminal justice system based on globalization, information technology, implementing based on the criminal justice procedures in

[63] *Rajapakshe V. Attorney General* [S.C. APPEAL NO. 2/2002 (TAB)] P.113-151
[64] Code of Criminal Procedure (Amendment) Act, No. 2 of 2022
[65] *Supra,*46

Japan and Scandinavian countries, showing a strong tendency towards inquisitorial systems.[66]

Conclusion: What form of criminal justice system should Sri Lanka adopt in order to be the most efficient?

The legal position that can be clearly seen in the filing of all the above-mentioned facts is that the effectiveness of a criminal justice system is determined by the overall efficiency of all matters of crime prevention, suppression, prevention or management. Thus, Sri Lanka also conducts its criminal justice system in discretionary situations of adversarial justice system; naturally the negative aspects of that system are highlighted in it.

Therefore, it could be stated that, if the differences in the criminal justice procedure operating in the two criminal justice systems mentioned above are narrowed down to a situation where the operation of two separately identifiable systems cannot be seen, then Sri Lanka also should move to a hybrid criminal court with a combination of the same two systems. Access to a justice system is more positive, as more balance can be expected through it.

Accordingly, the adversarial justice system and the inquisitorial justice system are the two types of criminal justice that Sri Lanka should really embrace in order to improve the efficiency of the criminal justice system. And also, it should be simultaneously based on the positive aspects of domestic legislation where criminal justice is successfully handled and fundamental rights and equality are upheld, as well as the positive aspects of international criminal justice concepts and compliance. Therefore a logical conclusion can be drawn by filing all the above facts that it is timelier to turn to a hybrid criminal justice system that is more inclined.

[66] Ibid.

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Corporate Accountability towards the Environmental Protection: A Comparative Analysis of Sri Lanka and United Kingdom

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Abstract

Corporate responsibility towards the protection of the environment has been a concept which has gained a higher level of concern in the contemporary business world since it is believed that modern companies tend to expand their responsibility not only towards increasing their income but also for the protection of the environment from business malpractices because well-established concepts like sustainable development have been the requirement of today's society despite the traditional methods of environmental protection. Thus, companies do believe that they are also having a role to play when it comes to achieving the goals of sustainable development since resources would be protected for future generations only if the generations of the present era use the resources wisely without compromising the future generation to meet their needs. Hence, this research is aimed at to determine whether the current Sri Lankan Companies Act No.07 of 2007 encompasses a liability on the directors of companies to protect the environment which will in turn impact on accomplishing the goals of sustainability. The research also seeks to ascertain the compatibility of the Sri Lankan legal framework with the legal system of the United Kingdom relating to the corporate responsibility towards the protection of environment. The research identifies that the Sri Lankan legal system contains statutory loopholes when it is compared to the UK system which made legally bound to consider the environment as an internal part of its business operations. Therefore, the research suggests that Sri Lanka should implement expressed

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legal provisions considering environment as a part of the sustainable survival of the companies by providing for mandatory obligations on the corporations to act towards the environmental protection.

Keywords: *Corporate Responsibility, Environment Protection, Sustainable Development, Sri Lanka Companies Act, UK Companies*

Introduction

The development of national economy of a country is basically based on the direct and indirect contribution of the corporate sector. These corporate sectors represent various types of industries such as agricultural, manufacturing, construction, petroleum, apparel, textiles etc. and each of these industries are operating through a continuous chain of steps which are important to the standard product. However, these operations can be found that making considerable harm to the environment of their activities at any stage. The duty attributed to such corporate sector is to minimize these threats. However, 'sustainability is rapidly becoming a mainstream component of corporate strategies to support 'triple bottom line' results focused on people, planet, and profit.'[1]Therefore, company stakeholders are looking for companies to involve in sustainable practices which produce financial, social and environmental results. However, this pressure on the corporate sector, created the need of the development of the tools and measurements and data analysis which consistently report sustainability progress, risks and opportunities. Since stakeholders consider a business entity not only as an economic unit but also as a socio-economic entity, it has to operate in the socially acceptable behavior. It means organizations should address broader concerns such as the environmental impact of the company and adhere to the concept of corporate social responsibility, which is a self-

[1] A.M. Inun Jariya, 'Environmental Disclosures in Annual Reports of Sri Lankan Corporate: a content analysis' (2015) <https://www.researchgate.net/publication/328782639_Environmental_Disclosures_in_Annual_Reports_of_Sri_Lankan_Corporate_A_Content_Analysis> accessed 19 September 2022.

regulating business model that helps a company be socially accountable to itself, its stakeholders and the public.[2]

The statutory codification of directors' duties in Sri Lanka that can be found in the Companies Act of No. 07 of 2007 had not expressly recognized corporate duties towards the environment. However, Unlike Sri Lanka, the United Kingdom Companies Act 2006 has gone into great lengths in corporate governance in order to consider environment as a major part in corporate responsibility.

Therefore, the article aims to ascertain whether the existing legal framework in Sri Lanka recognizes the corporate accountability towards the environmental protection. However, when compared to the jurisdiction of the United Kingdom, the domestic legal background of corporate accountability in Sri Lanka does not contain adequate expressed provisions. Therefore, the author intended to make a comparative research that will serve to bridge this critical gap in the existing body of knowledge.

The paper will first introduce the corporate governance towards environment and secondly, it seeks to examine the existing legal framework of Sri Lanka that encompasses a liability on companies to the protection of the environment and then make a comparison between Sri Lanka and United Kingdom regarding the corporate responsibility towards the protection of the environment. Thirdly, the paper will lay down recommendations on how the Sri Lankan legal framework on corporate accountability should strengthen to protect the environment by focusing on legal system of The United Kingdom and the final part will lay down the conclusions of the paper.

Corporate governance towards environment protection.

A corporation as a legal entity is not only interested in financial concerns, but also concerns about the environmental impacts as well. The corporate

[2] ibid.

governance of directors' duties are more accountable to the environment pollution and degradation. Most of the corporations in today's world are profit based companies and their main aim is to maximize their profits. On that basis, these companies consider the environment as being outside the interests of a corporation. In the context of Sri Lanka, the Companies Act No.07 of 2007 does not expressly recognize the environment as a part of the business operations. However when compared to Sri Lanka, the United Kingdom companies Act 2006 expressly recognizes environment as a part of the interests of the corporation. In corporate governance, companies are managed and it ensures that it can control the whole decision-making process and balance the interests of all stakeholders. The whole responsibility in corporate governance ultimately rests on the board of directors which is equivalent to trustees and they are bound by fiduciary duties. In this corporate governance, the companies integrate with social and environmental concerns in their business operations and interactions with their stakeholders.

In most of the business companies, the corporate governance takes a Shareholder oriented approach which is based on the idea that the prime objective of a business is to increase profit, which leads to an increase in shareholder wealth.[3] These profit oriented companies do not consider the corporate responsibility towards environment at large. Therefore, recent arguments have created on directors duties towards responsibilities that go beyond the shareholder interests to the company. [4]As a result, the directors' duties are connected to every stakeholder who has interests in the company including suppliers, customers, society and the environment, a major parts of the business operations. However, Companies Act of Sri Lanka No. 07 of 2007 had not expressly recognized director's duties and corporate accountability towards the environment and unlike Sri Lanka, the UK legal system shows the positive behavior towards the concept

[3] Stern, 'The shareholder versus the stakeholder approach-GRIN'(2017)<https://www.grin.com/document/498235> accessed on 29 June 2022.
[4] ibid.

of corporate accountability and disclosure of environmental and social sensitive information connected to the organization operations where it compares to the Sri Lankan context.

Exploring to what extent Sri Lanka and United Kingdom contributed to corporate responsibility towards the protection of the environment

In Sri Lanka, the Companies Act does not contain provisions which impose a mandatory duty on the corporations to disclose the positive and negative environmental impacts of the company through annual reporting. However, it is required to prepare financial statements by the companies as per sections 150 to 153 of the Companies Act of Sri Lanka. This has been emphasized in section 150(2) that, if in any case, the company miscarries this duty, every director in default shall be guilty of an offence[5]. Further, the act imposes a duty on corporations to abide to the rules and regulations when preparing the financial statements[6]. However, these sections do not execute a duty on the corporations to consider the environmental aspects when preparing the financial statements. However, the enclosure of the social responsibility statement in the company's financial statements might be a good move. The provisions of the Sri Lanka Accounting and Auditing Standards Act No. 15 of 1995 impliedly recognize the act of environmental reporting and disclosure of such impacts to a certain limit through LKAS 01, LKAS 08 and LKAS 16. However, only a specified set of companies are liable in performing this conduct[7].

Additionally, The Code of Best Practice on Corporate Governance which is a joint initiative between the Securities and Exchange Commission and the Institute of Chartered Accountants of Sri Lanka provides a valuable

[5] Companies Act No. 7 of 2007.
[6] Companies Act No.7 of 2007, S 151(1).
[7] K.K Thilakasiri, 'Corporate Social Responsibility and Social, Economic and Environmental Developmentin Sri Lanka' (2013) Vol 8 Kelaniya Journal of Human Resource Management <https://pdfs.semanticscholar.org/1c89/76f36185c84245326c7148c72166a884de52.pdf> accessed 29 June 2022.

framework for environmental accountability[8]. According to the clause D 1.4 it is stated that the director's report shall contain the following criteria namely; the directors have complied with the best practices of corporate governance and an analytical review must be conducted covering financial, operational, risk management practices etc[9]. Further, another positive point is that, the annual report shall contain a 'Management Discussion and Analysis' which consisted of social and environmental protection activities carried out by the company, and the importance of sustainability reporting and the importance of the environmental governance[10]. Apart from that, as per this code the products of the listed companies shall be environmental friendly. However, this code is not a legislation and only the listed companies abide by the clauses of this code mandatorily and non- listed companies are not required to compulsorily carry out their business in par with this code.

In contrast, the United Kingdom Companies Act of 2006 has made it a duty of the corporations to assess the environmental impacts when carrying out business operations. Thus, UKCA has expressly imposed a duty on the directors to be accountable for eliminating the environmental harm. As a move for this, section 172 of UKCA requires the directors to act in good faith when dealing with company operations and this emphasizes a stake holder approach rather than a mere narrow share holder approach.[11] Further, a director shall be obliged to work for making his company a successful one while adhering to six factors as per the UKCA. First factor is to be aware of the consequences of any business decision that will have long-term consequences. The second factor is the need to strengthen the company's relationships with suppliers, customers, and others. The third factor is the interests of the employees of the company. The fourth factor is to be keen on the impact of company's operations on

[8] Y.P Wijeratne and A.A Edirisinghe, 'Corporate Responsibility for Environmental Protection with Reference to the Companies Act No.7 of 2007 of Sri Lanka'(2018)<http://www.kdu.ac.lk/dce/2015/10/17/irc-2018/> accessed 29 June 2022.
[9] Code of Best Practice on Corporate Governance 2017, clause D.1.4.
[10] Code of Best Practice on Corporate Governance 2017, clause D.1.6.
[11] United Kingdom Companies Act of 2006, s 172.

the community and the environment. The fifth factor is the desirability of the company maintaining a reputation for high standards of business conduct and the final factor is act fairly among the members of the company'[12]. Thus, this section expressly recognized the director's duty to protect the environment and its resources and this would be a positive approach to determine that companies are progressively developing in a way which they believe that it is their responsibility to care for the environment. Since it is required to pay attention on the decisions taken by the company, it is assumed that companies are aiming at the long term sustainable growth. Section 187 of the Companies Act of SL has taken a similar approach as in section 172 of the UKCA. However, SL act does not make the director's duty bound to care for the environment and to enhance the paradigms of sustainable development.

Apart from that, in United Kingdom, directors shall prepare a director's report for each financial year.[13] Further, a business review must be conducted by large scale and medium scale companies but small scale companies are not required to do such business review[14]. In case of a quoted company, it shall be necessary to determine the impact of the company operations on the surrounding environment when doing the business review. The business review must be to the extent necessary for an understanding of the development, performance, or position of the company's business include where an appropriate analysis using other key performance indicators including information relating to the environmental matters and employee matters[15].

The aforementioned comparison depicts the fact that UKCA is in the frontline when it comes to protection of environment by the companies when compared with SLCA. However, it is still questionable as to whether the UKCA laws mentioned under the corporate governance is adequate to attain the sustainable development. Nevertheless, Sri Lanka could

[12] United Kingdom Companies Act of 2006, s 172.
[13] United Kingdom Companies Act of 2006, s 415.
[14] ibid 4, 417 (5) (b) (i).
[15] United Kingdom Companies Act of 2006, s 417 (6) b.

learn a lesson from UKCA to make director's liable, if any harmful act occurs to the environment by way of a company's business operations. Furthermore, directors shall have to be liable in circumstances where there will not be any promotion, success or profit maximization to the company even though companies are vigilant on the environment degradation. Simply it gives the meaning that even in a situation where it is disadvantageous to the company operations, directors may have to be extremely conscious on preventing environmental destruction. Thus, this would be a modern day strategy to gain a sustainable future.

In today's Sri Lankan context, it is noticed that mostly the large scale companies like Hayley's group, MAS and Unilever, the 'Corporate Social Responsibility' has become a topic which came in to much discussion since those companies are taking their business decisions while considering the consequences of such decisions in the long run towards environmental protection, economic and societal development. According to Corporate Social Responsibility, A company should play a positive role in the community and consider the environmental and social impact of business decisions. It is closely linked to sustainability creating economic, social, and environmental value and ESG, which stands for Environmental, Social, and Governance. All three focus on non-financial factors that companies, large and small, should consider when making business decisions.[16] Thus, this concept can be regarded as one of the essential perspectives of sustainability phenomenon. They both relate to the same spheres of enterprise impact, and enable achieving far-reaching social, ecological, and economical goals based on ethical standard.[17] Hence, it would be grateful companies that should be encouraged to engage in performing Corporate Social Responsibility activities as financial growth of the companies would not only result in creating a sustainable future.

[16] Nadia Reckmann, 'Corporate Social Responsibility – business news daily.com'(2022) <https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/corporate-social-responsibility>accessed on 29 September 2022.
[17] Anna Zelazna, Matylda Bojar and Ewa Bojar, 'Corporate Social Responsibility towards the Environment in Lublin Region, Poland: A Comparative Study of 2009 and 2019'<https://www.mdpi.com/2071-1050/12/11/4463>accessed on 22 September 2022.

Eco-management in CSR is aimed at reducing negative impacts the businesses exert on the environment. The entities assume responsibility for ecological ramifications of their activities, strive to eliminate pollutions and emissions of harmful substances. This means that enterprises responsibly analyze their impacts on different resources and seek solutions that might minimalize environmental burdens of their business operations. To this end, they stimulate their employees to save paper, energy, and water, and monitor the levels of produced emissions in order to stick to applicable emission norms.[18]

As a new trend of Corporate Social Responsibility, companies have to bear up the costs they utilized to conduct business activities without letting the community to bear those expenses. This philosophy highlights the environmental law concept 'Polluter Pays Principle' which means the polluter shall be liable for causing the environmental harm.[19] This was upheld by the land mark case of ***Bulankulama V Secretary Ministry of Industrial Development***[20] by Justice Amerasinghe. Further, there are some developed countries which enable through an act or legislation and made it a mandatory duty for companies to spend certain amount of their annual profit for CSR activities. Hence, the companies are requested to spend some money on the community welfare and service which follows a human rights based approach, to spend such money on winning the labour rights and to achieve the long waiting goal of sustainable development[21]. In the case of ***National Roads and Motorists' Association Ltd V Geeson***[22] it is highlighted that 'companies should act on the best interest of the whole community rather than solely acting

[18] Anna Zelazna, Matylda Bojar and Ewa Bojar, 'Corporate Social Responsibility towards the Environment in Lublin Region, Poland: A Comparative Study of 2009 and 2019'<https://www.mdpi.com/2071-1050/12/11/4463>accessed on 22 September 2022.
[19] Abhishek Gaur, Sangeeta Chaudhary, in Advanced Organic Waste Management,'Polluter-Pays Principle - an overview | Science Direct Topics' (2022) <https://www.sciencedirect.com/topics/earth-and-planetary-sciences/polluter-pays-principle> accessed on 23 September 2022.
[20] SC Application No. 884/99 (F/R).
[21] Y.P Wijeratne and A.A Edirisinghe, 'Corporate Responsibility for Environmental Protection withReference to the Companies Act No. 7 of 2007 of Sri Lanka' (2018) <http://www.kdu.ac.lk/dce/2015/10/17/irc-2018/> accessed 29 September 2022.
[22] [2001] 40 ACSR 1.

on behalf of the company's interest. In doing so, sometimes companies may have to engage in a certain act and vice versa'. Thus, it is evident that directors have a fiduciary duty towards protecting the environment.

Suggestions to Law Reform

It is pertinent to note that companies could expand their responsibility towards protecting the environment and as a positive drive for this even companies can organize awareness programs on the topics 'preserving the environment for future, the importance of core environmental principles like precautionary principle, polluter pays principles and conducting environmental impact assessments before carrying out business operations and public trust doctrine' because modern company law should not be restricted with traditional opinions as established in Anglo-American approach which a company shall act only towards the best interest of its creditors, shareholders and directors deprived of considering the environmental impacts. Based on the precautionary principle, companies should attempt to minimize the environmental degradation at the first stance while complying with CSR policies, rather than finding solutions after the environmental harm occurred. In the UK, the companies Act 2006 requires directors to consider the interests of employees, consumers, suppliers, the environment and the community when pursuing the interests of shareholders.[23] Hence, the author suggests that Sri Lanka Companies Act needs to be amended in order to include sections which ensures that every director and the company itself must involve in protecting the environment with complying with CSR policies as Sri Lanka is currently at the latter part of the list when compared with other jurisdictions.

[23] Li-Wen Lin, 'Mandatory Corporate Social Responsibility Legislation around the World: Emergent Varieties and National Experiences'(2020)<https://blogs.law.ox.ac.uk/business-law-blog/blog/2020/11/mandatory-corporate-social-responsibility-legislation-around-worldext Mandatory CSR Duty under Corporate Law> accessed on 24 September 2022.

Moreover, the author suggests that, Sri Lanka should take steps to initiate requirements like submission of business review into company law and directors shall be made legally bound to present non-financial disclosures including the environmental impact assessment reports etc. Thus, this would directly impact positively on the sustainable development of the nation. Further, companies should be made legally bound to consider the environment as a part of their business and should not treat the environment as an outside element of the business. It is accepted that in stake holder approach, the corporations have an obligation to reveal about the impacts of the corporations activities on the environment to the general public. Section 426 of the UK Companies Act provides that all companies should prepare summary financial statements which will be derived from its annual accounts and through these annual accounts the directors consider a wider range of environmental impacts that are considered to characterize the responsible corporate behavior.[24]

Hence, the author would recommend corporations to prepare annual accounts as these annual accounts include environment effects by their business operations and the public also can access information that would create a transparent governance on corporations.

Section 415 of the UK Companies Act 2006 requires directors to prepare a directors' report to each financial year of the company[25] and as specified by section 417(1), the directors' report must contain a business review.[26] It is an annual report of the company's business operations. This business review constitutes a comprehensive analysis of the performance of the company's business during the course of the year. Furthermore, according to section 417 (5) (b) I, the company review information about the environmental matters and this includes review on the positive and negative impacts of the company's business on the environment.

[24] John Dav, 'A guide to directors' responsibilities under the Companies Act 2006' (2007) <https://www.accaglobal.com/content/dam/acca/global/PDFtechnical/business-law/tech-tp-cdd.pdf> accessed on 19 September 2022.
[25] United Kingdom companies Act 2006.
[26] ibid.

[27]Therefore, in order to know, whether the company acted beyond the company's interests and caused harm to the environment, this review helps to identify the issues caused by the relevant company.

According to Section 417 (6) (b), this business review includes an analysis using key performance indicators including information relating to environmental matters and employee matters.[28] Further, the UK Government has introduced Environmental Key Performance Indicators Reporting Guidelines for businesses carried out in their country.[29] For instance, if a company discharges chemical waste to the environment in day to day operations of the company it is not in the interest of the company, as it would ultimately breach the key performance indicators of the company. It identifies that the company's progress would depend on evaluating the impacts caused by company towards the environment. Moreover, if this business review indicates that the company acted accountable to the environmental sustainability that company perform well in their business. Therefore, the author suggests that as per the UK Company act, in Sri Lanka too directors of corporations should be required to prepare a directors' report in each financial year of the company and include a business review containing the analysis of information relating to the environment matters in their business operations.

Sri Lankan Companies Act No 07 of 2007 considered on corporate accountability discloses information regarding operations, but it did not indicate the environmental aspects at large. Although many counties in the world focused only on profit based approach and consider environment as outside the interests of the corporation, UK is more concerned on corporate governance on environmental aspects. Hence, it is important that lacking provisions in Sri Lanka should be adopted and the author suggests that it is essential to introduce express legal

[27] ibid.
[28] ibid.
[29] Sir Mark Moody-Stuart, 'A truly comprehensive review of sustainable development as it relates to organizations large and small' Reporting Guidelines for UK Business are available at <http://www.defra.gov.uk/environment/ business/envrp/guidelines.htm>accessed on 29 September 2022.

provisions in the Companies Act considering the environment as part of the sustainable survival of the companies.

Environmental reporting is highly in need with the increasing challenges to the environment. With the development of industries worldwide, its ill effects have threatened the natural environment. Today more attention is focused on the environment locally, nationally and globally as this is becoming a grave problem. Environment is recognized as a scarce resource and a depreciating asset. Now the companies are being forced by civil societies and governments to pay more attention towards environment. It is a duty of corporations to protect the environment from pollution and degradation. The responsibility of protecting the environment mainly lies on the governments. As an amendment to the 1985 UK Companies Act, regulations on environmental disclosure for registered companies of Financial Times Stock Exchange (FTSE) were enacted in 2005 and Environment Agency of UK is on the view that 95 per cent of All-Share companies registered in FTSE, declare detailed information on their environmental impacts.[30] In Sri Lanka, the lack of provisions in the legal system is an impediment to environmental reporting. Hence, the author suggests that, it is necessary to establish Strong corporate laws on environment reporting to monitor and regulate activities of corporations towards the environment.

Conclusion

It shows the positive behavior of the UK towards this concept of corporate accountability and disclosure of environmental and social sensitive information connected to the organization operations where it compares to the Sri Lankan context. Though, the Companies Act of UK has clearly established the duty of operating this concept by establishing relevant legal provisions, Sri Lanka doesn't contain any such direct addresses in the Companies Act since it is the main legislature that governs the companies sector. But it must be mentioned that the Code of Best Practices (2017) has required the companies to reveal such information

[30] The Companies Act 1985 Regulations 2005 [S.I. 2005/ 1011].

in their Annual Reports, but the issues are that it is only applicable to the listed Companies in Sri Lanka and it is not the main legislation g that governs the company sector. A company should not consider the environment as outside the interest of corporation since in the present context the stakeholders are willing to consider environment as part of the company. Besides that, since the company must operate its activities with the acceptance of the society it is mandatory to satisfy the society's expectations. To that, companies must consider the environment as an internal part of it and operate by acquiring best practices in the industry. Therefore, in the end of this comparison it can be recommended to attribute the same effect in revealing relevant environmental sensitive information as a practice of the companies and establish suitable provisions in the Companies Act of Sri Lanka to mandate the companies to follow this practice as an obligation.

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A Comparative Analysis of the Existing Legal Framework of Sri Lanka with Regard to the Elimination of Child Labour in Comparison to the South Asian Jurisdictions of Nepal and Bangladesh

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Abstract

The primarary objective of this research is to conduct a comparative analysis concerns on the existing legal framework of Sri Lanka with regards to the elimination of child labour comparing to two other selected South Asian jurisdictions of Nepal and Bangladesh. From a legal perspective, this comparative study highlights the legal background of child labour in comparison to two other selected jurisdictions in order to find out whether the existing legal framework with regards to child labour is sufficient in addressing the presently existing child labour issues in Sri Lanka, Nepal and Bangladesh and the ways in which such child labour legislations could be improved in order to protect the children's rights. Thereby, the researcher scrutinizes the current legislative backgrounds of each of the aforesaid jurisdictions and further concerns the impact of COVID-19 towards the issues that emerged under the legalities regarding child labour. Furthermore, this research seeks to answer the existing research gaps due to the reluctance of legal academics to address this particular research area of social injustice except a few. This legal study is expedient since there is a lack of many research studies conducted by the Lankan and other Asian foreign researchers except a few and it would further address the loopholes existing in each of the aforesaid jurisdictions towards addressing the loopholes under child labour legislation. The primary research objective of this study is to examine the means and method child labour and suggest legal and civil standards to eliminate it.

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To fulfil the primary objective, the researcher mainly used a comparative legal study by comparing two other South Asian Jurisdictions namely Bangladesh and Nepal The researcher follows a blend of qualitative and quantitative research paradigms of socio legal research. As per the primary sources, the researcher utilizes Sri Lankan and selected Asian legislative instruments, local and foreign case laws, and statutes. As per secondary sources, the research has utilized books, law journals, newspaper articles, conference papers, and a quotations of renowned judges, philosophers, and legal academics, and as per tertiary sources, the researcher has utilized credible and relevant e-journals and websites such as Emerald, Westlaw, LexisNexis, Google Scholars and JSTOR etc.. In undertaking this doctrinal legal research, the researcher has followed the black letter doctrinal research methodology focusing upon the letter of law rather than the law of action where the researcher focuses upon a detailed and descriptive analysis of the legal rules available in primary sources such as cases, statutes, and regulations etc. At last, the researcher undertakes revelational epistemology as the philosophical foundation of gathering new knowledge throughout the research by justifying the above-mentioned primary, secondary and tertiary data collection methods. The research findings and specific recommendations of the research shall be discussed in depth within the body of the research.

Keywords: *Child Labour, elimination of child labour, labour legislation on child labour, COVID-19 Impact on child labour, social injustice.*

Introduction

Child labour could be defined as jobs assigned to children causing depreciation and harmful impacts on their physical, mental, social, phycological, moral and ethical aspects interfering negatively with their well-being and education.[1] Even though Sri Lankan government has implemented a legal framework to eliminate child labour, the presence of child labour including child trafficking, convictions for illegal offences,

[1] A Sarveswaran, 'Review on the Existing Legal Instruments on Child Labour in Domestic Work in Sri Lanka' [2016], ILO Country office for Sri Lanka and Maldives, p 3.

deprivation of education, exposure to incurable and contiguous diseases, deprivation of child rights, and engagement in illegal trades are still evident around the country.[2] There are international and national measures towards protecting children from child labour. The United Nations (UN) and International Labour Organization (ILO) have constructed many international conventions.[3] These international conventions are being ratified by Sri Lanka along with many other Asian jurisdictions like Nepal and Bangladesh. Despite the existing framework to eliminate child labour, local legislations of Sri Lanka, Nepal and Bangladesh provides provisions and age limits at which children are permitted to work, however compelling to forcibly work is not allowed and considered illegal to deny children's right to education and limiting their chances of achieving good literacy to achieve favorable standards of future employments would take place.[4]

The existing Sri Lankan legislative framework, gaps, and recommendations

Sri Lanka has ratified fundamental international conventions including ILO C 138[5] concerning minimum age of employment, ILO C 182[6] concerning worst forms of child labour, ICCPR[7],Convention on the Rights of the Child.[8] Thus, National legislation has been enacted incorporating the provisions of the aforesaid conventions namely: National Human Resources and Employment Policy for Sri Lanka[9], Shop and Office Employees (Amendment) Act[10], Employment of Women, Young Persons,

[2] International Domestic Workers Federation and International Labour Organization, 'Tackling child labour indomestic work: a Handbook for action for domestic workers and their organizations' (1st Publication, Publications of the International Labour Office, 2017) 50.
[3] G Betcherman, J Fares, A Luinstra and R Prouty 'Child Labour, Education, and Children's Rights' The World Bank, Social Protection Discussion Paper Series [2004] <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_090161.pdf> Accessed date- 25/10/2022.
[4] Ibid.
[5] ILO Minimum Age Convention (C 138).
[6] ILO Worst Forms of Child Labour Convention 1999 (C 182).
[7] International Covenant on Civil and Political Rights (ICCPR).
[8] Convention on the Rights of the Child.
[9] National Human Resources and Employment Policy for Sri Lanka.
[10] Shop and Office Employees (Regulation of Employment and Remuneration) (Amendment) Act, No.01 2021.

and Children (Amendment) Act[11], Minimum Wages (Indian Labour) (Amendment) Act[12], Factories Ordinance (Amendment) Act[13] and Amendments in 2021 by the four Bills on 5th January 2021.[14]

As per the Sri Lankan Charter on Rights of the Child, it's the state's duty in protecting children from exploitations and abuses due to economic needs and performing hazardous work by children negatively affects their education, and to protect children from any occupations of such which would cause harm towards children's best interests of health physically, mentally, spiritually, morally, and socially without causing any hindrances.[15] Consequentially, The National Human Resources and Employment policy for Sri Lanka provides declarations upon hazardous kinds of child labour determining that; Hazardous activities related to child labour and worst forms of child labour shall be eliminated through awareness programs, provision of legal education towards such trades of child labour and government approach towards multi-disciplinary coordination with employers, organizations of workers and Civil society organizations.[16]

Irrespective of Sri Lankan stern legislation towards child labour prevention, it is unfortunate that child labour is present in society even today as per the statistics of the National Child Protection Authority.[17] However, incidences of internal child trafficking are unreported or cannot be proven under court proceedings due to the presence of parental consent.[18] Nevertheless, the Penal Code of Sri Lanka prohibits children being employed under eighteen years of age in slavery, child

[11] Employment of Women, Young Persons, and Children (Amendment) Act, No.02 of 2021, Minimum Wages (Indian Labour) (Amendment) Act No.03 of 2021.
[12] Minimum Wages (Indian Labour) (Amendment) Act No.03 2021.
[13] Factories Ordinance (Amendment) Act No.04 2021.
[14] Bills in Parliament on 5th January 2021.
[15] Convention on the Rights of the Child 1991.
[16] National Human Resources and Employment Policy (NHREP).
[17] Available at- http://www.childprotection.gov.lk/Accessed on- 25/10/2022.EMYG Ekanayaka, 'Profile of child labour in Sri Lanka' [2018] International Journal of Business, Economics and Law, (17) 14 <https://www.ijbel.com/wp-content/uploads/2019/01/LAW-134.pdf> Accessed date- 22/10/2022.
[18] A Sarveswaran, 'An Evaluation of Sri Lankan Labour Standards in the light of the Core Conventions of the International Labour Organisation' [2010] Research Paper <http://archive.cmb.ac.lk:8080/research/handle/70130/178> Accessed date-25/10/2022.

prostitution, forced labour, producing pornography and engaging children for illegal activities.[19] Violations of the above provisions shall empower the Sri Lankan Department of Police to prosecute such criminal offenders under Sections 286 A[20], 288 B[21], 358 A[22], 360 A[23], 360 C[24] and 363[25] of the Penal Code respectively. Sri Lanka also ratified the Optional Protocol on Involvement of Children in Armed Conflicts.[26] However, the involvement of child soldiers in the Ethnic War of Sri Lanka shows the ineffective and impartial nature of practically applying the aforesaid Optional Protocol.[27]

Moreover, Sri Lankan Government has taken measures to prevent children being employed as domestic workers. Accordingly, the enactment of the Prevention of Domestic Violence Act[28] and 2010 Extra Ordinary Gazette Publication of EWYCA Section 20(A) determined 51 categories of hazardous employment and obstruct individuals who are below the age of eighteen years from engaging in such works.[29] However, there are contradictions concerning definitions under the labour legislation.[30] Therefore, to uphold child domestic workers' rights, the term 'relevant person' under the above laws and regulations should be amended to

[19] Penal Code (Amendment) No 16 2006.
[20] Ibid Section 286 A.
[21] Ibid 288 B.
[22] Ibid 358 A.
[23] Ibid 360 A.
[24] Ibid 360 C.
[25] Penal Code 363.
[26] Optional Protocol on Involvement of Children in Armed Conflicts [2000].
[27] SWE Goonesekere, S Goonesekere and International Labour Office, *Child Labour in Sri Lanka: Learning from the Past* (Illustrated, International Labour Organization, 1993) 67.
Watch List on children and armed conflict, 'Children affected by Armed Conflict in Sri Lanka: Recommendations to the Security Council Working Group' [2010] Coalition to stop the use of child soldiers<http://www.refworld.org/pdfid/4b828b122.pdf>Accessed date-23/10/2022. 90% of the children in North and East participated as child soldiers where their education rights and having best interests of childhood were violated grievously.
[28] Prevention of Domestic Violence Act No 34 2005.
[29] Extra Ordinary Gazzette Publication of EWYCA No. 1667/41, Section 20(A). - Nevertheless, this gazette publication could be argued since it contradicts with certain labour law provisions. In fact, domestic family-oriented employments such as deep-sea fishing which shall be prohibited by this Gazette where it could also be signified as a family employment and children who involves in cutting tobacco leaves shall be restricted whereas it is listed to be an agricultural employment of non- hazardous nature.
[30]Department of Child Labour, 'Sri Lanka towards eliminating Child Labour' [2021] Report <http://www.labourdept.gov.lk/index.php?option=com_content&view=article&id=366&Itemid=101&lang=en#:~:text=The%20government%20of%20Sri%20Lanka,welfare%20and%20development%20of%20children.> Accessed date-28/10/2022.

cover child domestic workers to the same domain whereby Sri Lankan Magistrate Courts would be able to provide protection, maintenance, and counseling towards aggrieved parties from such circumstances.[31]

The child Activity Survey 2016[32] estimated that 90.15% of Sri Lankan children of age gap 5-17 years were attending school, 9.9% were not attending school and the majority of children engaged in both household and economic activities. Children with the age gap of 15-17 years is mostly in the urban sector with 72% participating solely in domestic or economic activities without attending school. The survey further declared that most children engaged in unskilled jobs and work in enterprises without receiving payments. Thus, apart from having various statutory instruments in protecting child labour issues, exclusive monitoring systems should be improved and introduced as Sri Lankan child labour eradication mechanisms.[33]

Furthermore, Sri Lanka has established a separate juvenile court system to adjudicate child-related matters. Thereby, establishing provision of privacy protection towards sensitive data concerning evidence and parties who corporate in such child labour issues would reduce the reluctancy in participation of the public community towards juvenile matters where they would sufficiently disclose relevant evidence without facing privacy concerns.[34]A gap in the existing legal framework is the absence of an exclusive set of legal provisions pertaining to cruelty faced due to child labour. However, the Department of Police is empowered to report such incidents under grievous hurt as stipulated in the Penal Code Sections of 314[35], 315[36] and 316[37]. Thus, implementing such legislative

[31] Ibid.
[32] Child Activity Survey 2016.
[33] Ibid.
[34] EMYG Ekanayaka, 'Profile of child labour in Sri Lanka' [2018] International Journal of Business, Economics and Law, (17) 14 <https://www.ijbel.com/wp-content/uploads/2019/01/LAW-134.pdf> Accessed date- 25/10/2022.
[35] Penal Code (Amendment) No,16 of 2006, Section 314.
[36] Ibid Section 315.
[37] Ibid Section 316.

provisions directly depends on the perseverance of officers who are in charge of such cases.[38]

In adhering to provisions of ILO C 138, Sri Lanka has increased the minimum age of employment from fourteen to sixteen years.[39] Furthermore, the minimum age of employment in Sri Lanka tallies with the age which children complete their compulsory schooling as required under Article 1[40] of ILO C 138.[41] Consequently, the definition of a young person was amended as an individual who is between sixteen to eighteen years of age.[42] Moreover, considering prevailing issues of child labour, the definition of a child was amended to include individuals below sixteen years as children through the passing of four Bills on the 5th of January 2021 which revised the existing laws and regulations.[43]

When elaborating those amendments; Section 10[44] of the Shop and Office Employees Act was amended by Clause 2 of the Bill[45] increasing the minimum employable age from fourteen years to sixteen years. Section 34[46] of EWYCA was amended by Clause 7[47] of the Bill where a young person was defined as an individual from sixteen to eighteen years of age and defined a child as an individual under the age of sixteen years and increased the age of attending elementary school to sixteen years. Consequently, Section 3[48], Section 9[49] and Section 20[50] of the EWYCA to be amended upon new definitions of a child and young person derived from the Bill.

[38] Penal Code (Amendment) Act No. 22 1995.
[39] ILO C 138.
[40] Ibid, Article 1.
[41] ILO C 138- states that Member States should undertake child labour abolition mechanisms raising minimum age of employment progressively to a consistent level by providing maximum mental and physical development of young persons.
[42] Ibid.
[43] Bills in Parliament on 5th January 2021.
[44] Shop and Office Employees (Regulation of Employment and Remuneration) Act No.19 1954, Article 10.
[45] Bill in Parliament on 5th January 2021, Clause 2.
[46] Employment of Women, Young Persons, and Children Act (EWYCA) No.47 1956, Section 34.
[47] Bill in Parliament on 5th January 2021, Clause 7.
[48] Employment of Women, Young persons, and Children (Amendment) Act, No.02 of 2021, Section 3.
[49] Ibid Section 9.
[50] Ibid Section 20.

Considering amendments of Factories Ordinance; Section 127[51] was amended by Clause 7[52] of the Bill by increasing minimum employable age to sixteen years, Sections 66[53], 78[54] and 86[55] specified a young person to be an individual who has not attended eighteen years of age. As per working hours, Section 67(b)[56] was amended by Clause 2[57] of the Bill stating the employment period per day of a young person shall not exceed 12 hours on any day of the week between 6am to 8 pm and working hours shall end by 1pm one day a week.

Amendments of Minimum Wages Ordinance, Clause 2[58] of the Bill amended Section 4[59] increasing the employable age to sixteen years whereas; Section 18[60] was amended by Clause 4[61] of the Bill increasing the employable age of female labour to sixteen years considering payment of minimum wages rates. Nevertheless, children however not being prevented or exempted from associating with agriculture-related family businesses, any charity-related business work, or of educational importance where the child can participate in such businesses prior to or after school's commencement.[62] Thereby, it should be recommended in revising and amending the present Sri Lankan child labour legislation with the aim of persuading children's best interests and eliminating the loopholes.[63]

[51] Factories Ordinance (Chapter 128) No. 45 1942, Section 127.
[52] Bill in Parliament on 5th January 2021, Clause 7.
[53] Factories Ordinance (Chapter 128) No. 4 1942, Section 66.
[54] Ibid Section 78.
[55] Ibid Section 86.
[56] Factories Ordinance (Chapter 128) No. 45 1942, Section 67(b).
[57] Bill in Parliament on 5th January 2021, Clause 2.
[58] Bill in Parliament on 5th January 2021, Clause 2.
[59] Minimum Wages (Indian Labour) Ordinance No.27 1927, Section 4.
[60] Ibid Section 18.
[61] Bill in Parliament on 5th January 2021, Clause 4.
[62] EMYG Ekanayaka, 'Profile of child labour in Sri Lanka' [2018] International Journal of Business, Economics and Law, (17) 14<https://www.ijbel.com/wp-content/uploads/2019/01/LAW-134.pdf> Accessed date- 25/10/2022.
[63] A Sarveswaran, 'Review on the Existing Legal Instruments on Child Labour in Domestic Work in Sri Lanka' [2016], ILO Country office for Sri Lanka and Maldives, p 3.

Although Sri Lankan child labour surveys give comparatively low rates of child labour, there are many cases which are unreported within the corporate sector upon child labour. These conditions take place since the Sri Lankan public has insufficient knowledge of child labour legislation and reluctance of the public in complaining about these sensitive issues concerning them to be violations of child labour rights by seeking necessary legal protection.[64] Thereby, it could be critically analyzed that, though Sri Lanka has ratified international conventions upon child labour by amending prevailing Sri Lankan Legislative provisions, still there prevails inconsistencies and loopholes in legislation towards implementing such child labour legislations.[65]

The existing Nepal legislative framework, gaps, and recommendations

As per Nepal's national legislation, child labour includes individuals from five to seventeen years of age engaging in a single or a variety of occupations during a specific period of time; children of age five to thirteen years working a minimum of one hour at work, children aged fourteen to seventeen years working a minimum of 36 hours within a week, children who participate in hazardous occupations upon the hazardous work list and children who work in night shifts.[66] In the year 1990, Nepal Constitution protected children's rights and their interests in ensuring they are not to be exploited and abused.[67] Thus, Article

[64] S Khan and S Lyon, 'Measuring Children's Work in South Asia' [2015] International Labour Organization (ILO) and Understanding Children's Work (UCW) <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_359371.pdf> Accessed date- 26/10/2022.

[65] S Priyadharsan and AM Channa, 'Influence of Credit Rationing on Child Labour in Poor Household in Sri Lanka' [2019] Trincomalee Campus, Eastern University, Report <https://www.researchgate.net/publication/335740334_Influence_of_Credit_Rationing_on_Child_Labour_in_Poor_Household_in_Sri_Lanka_Special_Reference_to_Hulandawa_Estate_in_Matara_District?enrichId=rgreq-2703f3740e87670c510839bf5f019c0e-XXX&enrichSource=Y292ZXJQYWdlOzMzNTc0MDMzNDtBUzo4MDE4NzEzMDAxNTc0NDFAMTU2ODE5MjQyNDMzOQ%3D%3D&el=1_x_2&_esc=publicationCoverPdf> Accessed date- 23/10/2022.

[66] International Labour Organization and Government of Nepal National Planning Commission, 'Nepal Child Labour Report' [2021] <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-kathmandu/documents/publication/wcms_784225.pdf> Accessed on- 25/10/2022.

[67] International Labour Organization and Government of Nepal National Planning Commission, 'Nepal Child Labour Report' [2021] <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-kathmandu/documents/publication/wcms_784225.pdf> Accessed on- 22/10/2022.

29[68], Article 39[69] and Article 51[70] of the Nepal Constitution of 2015, ensured children's best interests were safeguarded and preserved and guaranteed their rights stipulating all citizens to be ceased exploitation, forced and bonded labour, slavery and trafficking.[71] Though at present the child labour population of Nepal seems to be lower its numbers, Nepali children often face high vulnerabilities and risks with regard to issues in child labour than any other South Asian country.[72]

Concerning legislative instruments which majorly prevented the occurrence of forced child labour and bonded child labour practices in Nepal communities, they are Nepal Civil Code[73], Civil Rights Act[74], Child Labour Act[75], Child Labour Prohibition and Regulation Act[76], Bonded Labour (Prohibition)Act[77], Children's Act[78], Social Security Act[79], Foreign Employment Act[80], Human Trafficking and Transportation Act[81]Labour Act[82], Citizen Rights Act[83], Begging Prohibition Act[84], National Civil (Code) Act[85], Prison Act[86], Foreign Employment Act[87] and Public Offence and Punishment Act[88].

[68] Constitution of Nepal 2015, Article 29.
[69] Ibid Article 39.
[70] Ibid Article 51.
[71] Constitution of Nepal 2015.
[72] International Labour Organization and Government of Nepal National Planning Commission, 'Nepal Child Labour Report' [2021] <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-kathmandu/documents/publication/wcms_784225.pdf> Accessed on- 21/10/2022.
[73] Nepal Civil Code Act No. 67 2019.
[74] Civil Rights Act No.12 1955.
[75] Child Labour Act 1992.
[76] Child Labour (Prohibition and Regulation) Act 2000.
[77] Bonded Labour (Prohibition) Act No. 21 2002.
[78] Children's Act 2018.
[79] Social Security Act 2017.
[80] Foreign Employment 2007.
[81] Human Trafficking and Transportation Act 2017.
[82] Labour Act 2017.
[83] Citizen Rights Act 1995.
[84] Begging Prohibition Act 2018.
[85] National Civil (Code) Act 2017.
[86] Prison Act 1962.
[87] Foreign Employment Act 2007.
[88] Public Offence and Punishment Act 1970.

These Acts established in providing sufficient legal grounds towards curbing Nepal child labour concerned issues.[89] Based on Nepal Constitution, Child Labour Act[90] established where it strictly prohibits employing children under fourteen years. If such an act is encountered where employment of a child less than fourteen years would take place, then such perpetrator would be sentenced to three months of imprisonment and if work done by such a child is of hazardous nature, then culprit would be sentenced to one year of imprisonment.[91] Moreover, this Act sternly acts upon circumstances where children are used for immoral professions where such actions are prohibited.[92]

The Child Labour Act[93] was amended in 1999[94] establishing Child Labour (Prohibition and Regulation) Act[95] which precludes children from engaging in labour under fourteen years. Furthermore, it expressly determines that if children engage in labour against their will due to misinterpretation, persuasion, duress on threat or fear and by coercion or intimidation and such offenders are liable for one year of imprisonment or a fine of fifty thousand Nepalese Rupees.[96] Reforming Child Labour Act[97], the Children's Act[98] was formed securing thirteen fundamental rights and outlining the responsibilities of parents, state, institutions, and media to act in ensuring children's rights. Furthermore, the Act refrained children under fourteen years from working in hazardous work including

[89] International Labour Organization and Government of Nepal National Planning Commission, 'Nepal Child Labour Report' [2021] <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-kathmandu/documents/publication/wcms_784225.pdf> Accessed on- 24/10/2022.
[90] Child Labour Act 1992.
[91] JE Lansford and P Banati, *Handbook of Adolescent Development Research and Its Impact on Global Policy* (Illustrated, Oxford University Press, 2018) 17.
[92] International Labour Organization and Government of Nepal National Planning Commission, 'Nepal Child Labour Report' [2021] <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-kathmandu/documents/publication/wcms_784225.pdf> Accessed on- 25/10/2022.
[93] Child Labour Act 1992.
[94] Child Labour Act 1999.
[95] Child Labour (Prohibition and Regulation) Act No.14 2000.
[96] Ibid.
[97] Child Labour Act 1992.
[98] Children's Act 2018.

domestic work with payments.[99]

Nepal Child Labour Report 2021[100] declares that the child labour percentage in rural areas is higher than that of urban area child labour percentage and female children have a higher tendency in engaging in child labour than that male children. Furthermore, the child labour population engaged in hazardous work has a significant decline compared to the Child Labour Survey of 2008.[101]

Nepal has ratified international conventions towards the elimination of child labour are ILO Convention 138[102] concerning minimum age in 2003, ILO Convention 182[103] concerning worst forms of child labour in 2004, UN Convention on the Rights of the Child[104] and Convention on the Elimination of all Forms of Discrimination against Women[105] by providing legal standards for child labour and determining legal cornerstones prohibiting child labour and the worst forms of them. The Nepal Government is highly sentimental towards child labour issues where after ratifying UN CRC in 1990, Nepal has included children's rights and their protection towards national development and growth plans and

[99] Ibid.
[100] Nepal Child Labour Report 2021-15.3% among the ages of 5-17 years of Nepali children engaged in child labour which shows a distinct deterioration of child labour percentage compared to Nepal Child Labour Report 2008 which is 22.25%.
[101] International Labour Organization (ILO) and Central Bureau of Statistics of Nepal, 'Nepal Child Labour Report'[2008]<https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-kathmandu/documents/publication/wcms_182988.pdf> Accessed on- 24/10/2022.
Children of unemployed households has high tendency in engaging in child labour of them female headed households have an abundancy in prevailing child labour more than the households headed by male. It's an indication of the survey that percentage of the child labour decrease upon the increase of the wealth index where it could be regarded as an important aspect in increasing the household income to eliminate child labour.
[102] ILO Minimum Age Convention 1973 (C 138).
[103] ILO Worst Forms of Child Labour Convention 1999 (C 182).
[104] UN Convention on the Rights of the Child 1990 (CRC).
[105] UN Convention on the Elimination of all Forms of Discrimination against women 1979 (CEDAW).

programs.[106] These improve the best interests of children by constructing friendly communities in Nepal to develop children into capable qualified citizens towards eliminating the occurrences of any form of violence, exploitation, and abuses towards the children by combatting child labour and enabling children to take proper education within the state of Nepal.[107] Towards improving legislation towards child labour elimination, Nepal ceased traditional systems towards bonded labour by introducing Kamaiya Labour Prohibition Act[108].

The ministry of Labour, Employment and Social Security of Nepal (MOLESS) operates issues towards the prevention of child labour and conducts schemes which are affiliating child security with social security. Nepal Government has conducted programs towards children who are affected by child trafficking, child marriages, child prostitution, sexual exploitation, and abuse and provides funds for child labour eradication, implementing emergency child rescue programs, to raise public awareness programs to acknowledge these subjects and legal impediments.[109]

[106] International Labour Organization and Government of Nepal National Planning Commission, 'Nepal Child Labour Report' [2021]
<https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-kathmandu/documents/publication/wcms_784225.pdf> Accessed on- 23/10/2022.
Some of such plans and programs are 10th National Development Plan, National Master Plan on Child Labour, 15th Plan, National Plan of Action on Education for All, National Plan of Action on Children, National Plan of Action on Human Rights and National Plans of Action on Trafficking of Women and Children and NMP.

[107] Dr. Bishnu, B Bhandari and Prof Abe, 'Education for Sustainable Development in Nepal' [2003] Japan Institute for Global Environmental Strategies (IGES), Views and vision report <https://www.iges.or.jp/en/publication_documents/pub/policyreport/en/749/999-report9_full.pdf> Accessed date- 18/09/2021.

[108] Kamaiya Labour Prohibition Act 2001- It enables prohibiting bonded labour related employments which invalidates any unsettled loans or bonds among landowners and labourers of Kamaiya, Kamlaris and Haliya.

[109] Office of the National Rapporteur on Trafficking in Women and Children (ONRT) and National Human Rights Commission (NHRC), 'Trafficking in persons especially on women and children in Nepal' [2006-2007] National Report
<https://www.unodc.org/pdf/india/Nat_Rep2006-07.pdf> Accessed date- 21/10/2022.
Furthermore, MOLESS has started implementation of National Master Plan on Eliminating Child Labour to implement Sustainable Development Goals by ambitiously targeting in cessation of worst forms of labour and exploitations by 2022 and all child labour types by 2025 respectively. Moreover, National Child Policy 2012 introduced a free help line service towards safeguarding and providing special protection towards such children facing difficulties. Thereby, local governments of Nepal consist of divisions which are child centric and corporate with issues related to child rights, development, and protection.

However, regardless of having legal enforcement through state laws, regulations, plans and monitoring schemes in monitoring children to eliminate and govern child labour concerns, such enforcements are weak in their implementation procedures since most of such legislations are limited to formal sector employment where informal sector child workers still suffer due to absence of proper remedies and legal protection towards their best interests.[110] Thereby, it should be recommended that the Nepal government should take steps in conducting efficient implementation procedures by practically enforcing the local legislations of child labour to strengthen the practical aspects of dealing with issues related to child labour.[111]

The existing Bangladesh legislative framework, gaps, and recommendations

Considering existing Bangladesh child labour legislation, being a British Colony, it inherits all laws and regulations of Britain.[112] Illiteracy rates become high in Bangladesh mainly due to grave economic conditions within the country's households.[113] Furthermore, inefficiencies of children's registration procedures make child labour issues untraceable creating difficulties in adjudication due to cases being dismissed or left not investigated due to public concerns about societal reputation over children's safety and best interests.[114] As per Bangladesh legislative instruments towards child labour, they are the Children Act[115], Mines Act[116], Employment of Children Act[117], Road Transport Workers Ordinance

[110] Ibid.
[111] Ibid.
[112] J Norpoth, L Grob and R Aktar, 'Child Labour in Bangladesh- An analysis of gaps and weaknesses of the existing legal framework' [2014] Institute of Development Research and Development Policy Ruhr University Bochum, An analysis report <https://www.econstor.eu/bitstream/10419/183558/1/wp-204.pdf> Accessed on-20/10/2022.
[113] D Wright, 'Child Labour in Bangladesh: Recent Trends and Labour Standards' [2003] (XXVI) University of New England, Journal of South Asian Studies < https://doi.org/10.1080/0085640032000178952> Accessed on- 21/10/2022.
[114] Ibid.
[115] Children (Pledging of labour) Act No. XI 1933.
[116] Mines Act No. IV 1923.
[117] Employment of Children Act No. XXXVI 1938.

Act[118], East Pakistan Domestic Servants' Registration Ordinance[119], Tea Plantation Labour Ordinance[120], Shops and Establishments Act[121] and Factories Act[122] respectively. The export-oriented garment industry of Bangladesh has created the emergence of child labour where Bangladesh government has taken several mechanisms in combatting such issues.[123] Even though international and national legislature has often made efforts in eliminating child labour, Bangladesh being a developing country still encounter child labourers due to prolonged societal acceptance.[124] The Bangladesh Constitution could be determined as the core of human rights though it hasn't expressly mentioned the prohibition of child labour.[125]

Nevertheless, Articles 15[126], 17[127], 28(4)[128] and 34[129] provide for several regulatory norms upon child labour.[130] Bangladesh Labour Act consolidated and replaced labour laws by incorporating aspects of labour rights and acts as the highly influential national legislation regarding child labour.[131] As per 2013 amendment, some new provisions are brought

[118] Road Transport Workers Ordinance Act No XXVIII 1961.
[119] East Pakistan Domestic Servants' Registration Ordinance No. XLIV 1961.
[120] Tea Plantation Labour Ordinance No. XXXIX 1962.
[121] Shops and Establishments Act No. VII 1965.
[122] Factories Act No. IV 1965.
[123] MN Asadullah and Z Wahhaj, 'Bangladesh's garment industry: Child labour and options' *Himalayan Times* (Nepal, 11 May 2017) <https://thehimalayantimes.com/opinion/bangladeshs-garment-industry-child-labour-options> Accessed on- 20/09/2021.
[124] Government of Bangladesh, 'Understanding children's work in Bangladesh'[2011] Understanding Children's Work (UCW) Programme, Country report<https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_169128.pdf> Accessed date- 20/10/2022.
[125] J Norpoth, L Grob and R Aktar, 'Child Labour in Bangladesh- An analysis of gaps and weaknesses of the existing legal framework' [2014] Institute of Development Research and Development Policy Ruhr University Bochum, Analysis Report<https://www.econstor.eu/bitstream/10419/183558/1/wp-204.pdf> Accessed on-21/10/2022.
[126] Constitution of Bangladesh, Article 15 determines fundamental necessities including right to education, right to proper medical care, right to reasonable rest and right to recreation and leisure.
[127] Ibid, Article 17 states that education shall be granted free and compulsory to all the children until the age determined by Bangladesh legislation.
[128] Ibid, Article 28(4) declares regarding non-discrimination of children and women towards their advancements.
[129] Ibid, Article 34 signify the prohibition of all categories of forced labour and such offences shall be punishable by the law of Bangladesh.
[130] Ministry of Labour and Employment Government of the People's Republic of Bangladesh, 'National Child Labour Elimination Policy' [2010] Unofficial Translation <https://mole.portal.gov.bd/sites/default/files/files/mole.portal.gov.bd/policies/7e663ccb_2413_4768_ba8d_ee99091661a4/National%20Child%20Labour%20Elimination%20Policy%202010%20(English)%2010.pdf>Accesseddate-22/10/2022.
[131] Labour Act 2006.

under; Section 2[132] of the Labour Act a child as an individual who has turned fourteen years of age. The Act declares young people of fifteen to eighteen years as adolescents under Section 34[133] and Section 34(1)[134] and restrains child labour in any occupation or establishment. Section 35[135] re-establish Section 34(1) by prohibiting parents or guardians of children in making agreements towards their children to be used for any occupation.

Furthermore, the Supreme Court of Bangladesh has questioned the lack of child labour protection where sternly criticising the Bangladesh Government for not acting towards such workers as if a fundamental right of the Bangladesh Constitution being neglected and guided to take measures to protect such rights by widening the scope of Labour Act 2013 in covering all forms of domestic workers.[136] However, not addressing informal sector-related child labour systematically by excluding specific domestic work such as family businesses, domestic work and agricultural work, the revised Labour Act of 2013 failed in modifying the provisions as per the Supreme Court's advice.[137]

Nevertheless, Section 44[138] grants an exception towards light work done by children from age twelve or upper mentioning that such work is allowed without hindering their education, mental and physical development in their schooling environment. Section 34(2)[139] elaborates conditions to consider towards employments of adolescents. Sections

[132] Labour Act (Amended) 2013, Section 2.
[133] Labour Act (Amended) 2013, Section 34.
[134] Ibid Section 34(1).
[135] Ibid Section 35.
[136] E Islam, K Mahmud, and N Rahman, 'Situation of Child Domestic Workers in Bangladesh' [2013] (13) Double Blind Peer Reviewed International Research Journal, Global Journal of Management and Business Research Finance <https://globaljournals.org/GJMBR_Volume13/4-Situation-of-Child-Domestic-Workers-in-Bangladesh.pdf> Accessed on-21/10/2022.
[137] Ibid.
[138] Labour Act (Amended) 2013, Section 44.
[139] Ibid Section 34(2).

39[140],40[141] and 42[142] mentions hazardous work prohibited for adolescents. Section 41[143] mentions working hours permitted for adolescents against extensive work-related hazards. Thereby, a major deficiency of Labour Act is its limited application scope where several economic sectors are being excluded from this application though territorial scope extends to the whole country.[144]

Additionally, the Children Act[145] repealed the old Act of 1974[146] by providing comprehensive protection towards child labour based on norms of UN CRC designating to be a milestone for Children in Bangladesh. Whereby, a child is defined to be a person below the age of eighteen which the former Act mentioned to be of sixteen years of age.[147] Furthermore, the law penalizes certain actions regarding child labour with many strong sanctions such as imprisonment in circumstances where the children are forced to beg, supply drugs, deal with arms to children, maltreatment, and criminalization of children at the place of work.[148]

The Bangladesh government has made progress in abetting the worst forms of child labour by establishing Human Trafficking Deterrence and Suppression Act[149]. The main function of this Act is to subdue human trafficking, and labour trafficking focusing on internal and transitional trafficking activities. This Act is very much essential to be enforced and implemented in Bangladesh since child trafficking is distinguished as one of the worst forms of child labour.[150] Furthermore, it shall provide

[140] Ibid.
[141] Ibid Section 40.
[142] Ibid Section 42.
[143] Labour Act (Amended) 2013, Section 41.
[144] Ibid.
[145] Children Act 2013.
[146] Children Act 1974.
[147] J Norpoth, L Grob and R Aktar, 'Child Labour in Bangladesh- An analysis of gaps and weaknesses of the existing legal framework' [2014] Institute of Development Research and Development Policy Ruhr University Bochum, Analysis Report<https://www.econstor.eu/bitstream/10419/183558/1/wp-204.pdf> Accessed on-20/10/2022.
[148] Ibid.
[149] Human Trafficking Deterrence and Suppression Act 2021.
[150] Ibid.

high-end penalties such as fines, imprisonment, and the death penalty.[151] Additionally, the Bangladesh government has introduced policies to regulate child labour-related issues under National Education Policy[152] and Child Labour Elimination Policy[153]

UNICEF[154] and MOLE 2002[155] aid to reach out to children and eliminate child labour in both urban and rural areas. More specificity is given through the first and second Optional Protocols towards worst forms of child labour and sale of children, child pornography and prostitution of children respectively which are being signed and ratified by Bangladesh.[156] However, the Committee on the Rights of the Child recently expressed in 2009 concerns that enforcement mechanisms towards child labour protection lacks in Bangladesh where the worst forms of child labour still prevail though such international conventions have been ratified.[157]

Bangladesh has also ratified international conventions such as ILO Convention of 182[158] and UN CRC[159] to eliminate child labour issues and to reduce loopholes in the child labour-related Bangladesh legal framework. Furthermore, Bangladesh Government has announced ratifying ILO C 138 which is not yet ratified and if it were signed, then Bangladesh accomplishes in ratifying all UN conventions related to child labour.[160] Considering the ILO statistical studies conducted through surveys, it was determined that forced labour cases have been significantly reported in

[151] Ibid.
[152] National Education Policy 2010.
[153] Child Labour Elimination Policy 2010.
[154] United Nation's International Children's Emergency Fund (UNISEEF).
[155] Ministry of Labour and Employment (MOLE).
[156] N Banu, S Bhuiyan, Kushtia and S Sabhlok, 'Child Labour in Bangladesh' [1998] (4) American University of Cairo, International Journal of Technical Cooperation <https://www.researchgate.net/publication/275349072_Child_Labour_in_Bangladesh> Accessed on-20/10/2022.
[157] S Zaman, S Matin, AMBG Kibria, 'A Study on Present Scenario of Child Labour in Bangladesh' [2014] (16) IOSR Journal of Business and Management (IOSR-JBM), Accessed on-23/10/2021.
[158] ILO Worst Forms of Child Labour Convention 1999 (C 182).
[159] UN Convention of the Rights of the Child (CRC) of 1990.
[160] J Norpoth, L Grob and R Aktar, 'Child Labour in Bangladesh- An analysis of gaps and weaknesses of the existing legal framework' [2014] Institute of Development Research and Development Policy Ruhr University Bochum, Analysis Report<https://www.econstor.eu/bitstream/10419/183558/1/wp-204.pdf> Accessed on-23/10/2022.

the Dry Fish Industry of Bangladesh where hazardous work and the worst forms of child labour too are identified.[161]

Concerning statistical surveys conducted towards child labour issues in Bangladesh, it's reported that children participate in child labour for payment or profit or any support towards the family businesses.[162] While conducting hazardous work, these children often face severe abuse such as sexual and verbal abuse and exploitation from such household owners. When considering reasons towards the prevalence of a considerably high rate of child labour, they are; poverty, low-income families, debts, deaths, severe sicknesses of adults due to factors like natural disasters and effects of the economic condition of Bangladesh where children are being provoked towards working below the minimum employable age. Thereby, society would depend upon the income of child labour. [163]

Furthermore, towards enforcement of child welfare, establishing a national level Children Welfare Board and making a child desk available

[161] J Norpoth, L Grob and R Aktar, 'Child Labour in Bangladesh- An analysis of gaps and weaknesses of the existing legal framework' [2014] Institute of Development Research and Development Policy Ruhr University Bochum, Analysis Report <https://www.econstor.eu/bitstream/10419/183558/1/wp-204.pdf> Accessed on-20/10/2022.
Furthermore, around 27,000 children work as domestic workers in Bangladesh households where 78% of such child household workers are female. Considering the working hours of such children, they perform mostly of hazardous nature work since 99% works throughout the week of average nine hours a day.

[162] IREWOC, 'The Worst Forms of Child Labour in Asia' [2010] Main findings from Bangladesh and Nepal <https://resourcecentre.savethechildren.net/sites/default/files/documents/3990.pdf>,Accessed on-21/10/2022.
The statistical information gained by the National Child Labour Survey 2013 evaluate that minimum 3.4 million children of age limit from five to seventeen years are economically active and around 1.8 million children work as child labourers. These children encounter bonded labour, slavery and forced labour where highest number of cases reported from Dhaka which is the highest populated city in Bangladesh. The survey further confirms that working rate of children rises with the age of the children where children's working percentage shows similar numerical amounts in both rural and urban areas. Hence, hours of work too increase with the age of the children. Studies further confirms that higher percentage of male children works as child labourers than that of female child population. Moreover, Bangladesh shows a considerably higher percentage upon children who work outside their family businesses as paid domestic workers, paid employees, self-employed individuals, apprentices. Since the working hours of manufacturing and service sector falls consequent to the school hours, children who work faces grave difficulties in participating in school by encountering challenges to get proper and sound education.

[163] J Norpoth, L Grob and R Aktar, 'Child Labour in Bangladesh- An analysis of gaps and weaknesses of the existing legal framework' [2014] Institute of Development Research and Development Policy Ruhr University Bochum, Analysis Report<https://www.econstor.eu/bitstream/10419/183558/1/wp-204.pdf> Accessed on-24/10/2022.

in every police station where children could make complaints towards violation of their rights at workplace could be recommended.[164] However, these welfare procedures can only be implemented impactfully upon governmental considerations and allowing such enforcements to be taken place effectively and efficiently.

Impact on COVID-19 on child labour in Sri Lanka, Nepal, and Bangladesh

The COVID-19 pandemic has created a considerably negative economic impact on the South Asian region where the loss of jobs in the informal sector, closing of schools by making a huge disturbance to children's education, increase in poverty, lack of social protection has caused families of below the poverty line to think of child labour as an option to save their bread and butter where the children are being forced to work in low-income places with unsound working conditions.[165] This situation is common to Sri Lanka, Nepal and Bangladesh which face challenges in maintaining the stability of the country's income where there is a many lives being lost each day.[166]

UNICEF's objective during the pandemic is to announce the countries in preventing a health crisis which would become a child crisis condition. Thereby, it guides to keep the children healthy by nourishing them, reaching out to vulnerable children populations with the needs providing necessary sanitary and hygienic genes, providing sufficient education to children, supporting families in need to take care of children and their health, protect children from violence, abuse and exploitation, protect refugees and migrated children, and provide vaccinations towards immunizing the families of the kids as advised by the health authorities respectively.[167]

[164] Dr. R Siddiqua, 'Laws Relating to Child Labour in Bangladesh and their Shortcomings' [2003] Bangladesh Journal of Law, Short Article <http://www.biliabd.org/article%20law/Vol-07/Rehena%20Siddique.pdf> Accessed date- 25/10/2022.

[165] I Idris, 'Impact of COVID-19 on child labour in South Asia' [2020] University of Birmingham, K4D Research Article <https://resourcecentre.savethechildren.net/library/impact-covid-19-child-labour-south-asia > Accessed date- 22/10/2022.

[166] Ibid.

[167] UNICEF, 'UNICEF in South Asia Regional Situation Report' [2021] Regional Situation Report < https://www.unicef.org/media/102946/file/UNICEF%20ROSA%20COVID-19%20Situation%20Report,%20

ILO's responses towards COVID-19, it has four pillars in facing the pandemic, they are firstly stimulating of economy and employment, secondly; supports jobs enterprises and incomes, thirdly provide adequate protection to the workforce and finally seeks solutions from approaching society.[168] Furthermore, ILO Standards provide guidelines and safeguard measurements during the COVID-19 crisis by providing International Labour Standards Employment and Decent Work for Peace and Resilience Recommendation 2017 (No. 205)[169] which was adopted by most ILO Member States establishing that responses towards crisis need to be ensured consequential to rule of law and all human rights.[170] However, this situation has made children the most vulnerable towards fighting against the pandemic since their immunity systems are still growing. Not being vaccinated by COVID shield vaccines and being exposed to COVID patients could make the children at a high risk of being infected. Thereby, child labour being forced over a period as such would be crucial and the result would be unpredictable which could create a huge loss of lives for children. Thereby, it's the duty of all states to protect their future by eliminating child labour under any circumstances and providing maximum protection towards the health and well-being of children.[171]

Conclusion

In conclusion, each of the aforesaid jurisdiction's duty to amend, review, renew and implement proper legislation to prevent such unfortunate situations in which children lose their ability to get proper education facilities under sound economic conditions. If the children of nations do not get a sound education in with best interests, there is a higher tendency towards illiteracy creating barriers towards economic, social, and political

31%20May%202021.pdf> Accessed on- 23/10/2022.

[168] International Labour Standards Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205), Preamble and Paras. 7(b) and 43.

[169] Ibid.

[170] Ibid.

[171] UNICEF, 'UNICEF in South Asia Regional Situation Report' [2021] Regional Situation Report <https://www.unicef.org/media/102946/file/UNICEF%20ROSA%20COVID19%20Situation%20Report,%2031%20May%202021.pdf> Accessed on- 24/10/2022.

standards of the countries. It's the collective duty of the legislature, judiciary, and executive bodies to protect the future of each nation by building a sound environment where the economy is stabilized to eliminate child labour issues. Therefore, a collective understanding of the fact that any country's future is held by the literacy rate of its future generations would be of great help in mitigating and eliminating child labour from the societal traditions which have been maintained over decades.

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