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EDITORIAL NOTE

The year 2025 marks a significant milestone in the annals of KDU Law Journal as it steps into the fifth year of publication. The journey of KDULJ commenced in the year 2021 and a year later, it became an internationally indexed and a premier academic publication in the field of Law. The current publication is presented by Faculty of Law as the first issue of the fifth volume of KDULJ.

Since its genesis, there is a substantial development in KDULJ and it has emerged as one of the most sought after academic publications in the international arena. The current issue is a compilation of 08 articles presented by local and foreign researchers under diversified areas of Law including Intellectual Property Law, International Trade Law, Labour Law, Human Rights Law, Public International Law, Military Law and Information Technology Law.

Elevating KDULJ to the current position of fame and success is not a singlehanded effort of the Editorial Committee. The Committee was consistently supported by a panel of reviewers comprising eminent scholars who are well - versed in Law. The contribution made by the manuscript editors was of equal importance. The release of the current issue is an outcome of the constant support and dedication of the academic and administrative staff of the Faculty of Law, KDU.

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TABLE OF CONTENTS

KDU Law Journal
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Volume 05 Issue I
March, 2025

ISSN 2783 - 8870

A Reflection on the Termination of Employment of Workmen (Special Provisions) Act in the light of Different Types of Termination of Employment

Arulanantham Sarveswaran*

Abstract

The Termination of Employment of Workmen (Special Provisions) Act (Termination Act) was enacted in 1971 during the period of closed economy to provide job security to the workman against non-disciplinary terminations, The main objective of the research is to reflect on the Termination Act in the light of different types of termination covered by the Act. The research is a qualitative research based on the analysis of statutory provisions and decided cases. The Act has a rigid procedure of requiring written consent of the workman or written approval of the Commissioner for non-disciplinary terminations. The provisions of the Act are very broadly worded in the manner that would apply to different types of non-disciplinary terminations. The application of the Act to different types of non-disciplinary terminations affect promotion of investments. The Act enacted during the period of closed economy requires an amendment to apply the Act during the period of open economy as the country competes with many other countries to attract investments. Therefore, it is suggested for a legislative intervention to amend the Act to apply the Act only to the permanent workmen for their redundancy termination and termination by closure of business. The workmen who are not covered by the Act could seek relief from Labour Tribunals for unjustified termination.

Keywords: *Closure, Commissioner, Redundancy, Termination, Workman*

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Introduction[1]

The Termination of Employment of Workmen (Special Provisions) Act (Termination Act) has been enacted in 1971[2] to provide job security to the workmen against non-disciplinary terminations by way of lay-off, retrenchment and closure of business in the private sector. However, the wordings in the Act are very broad to include all forms of non-disciplinary terminations. The inclusion of different types of non-disciplinary terminations affects the employers and investments. Therefore, the question arises whether the Act enacted during the period of closed economy is relevant today in the context of open economy which requires promotion of investments in the country.

The main objective of the research is to reflect on the Termination Act in the light of different types of termination covered by the Act. The research is a qualitative research based on legal material. For the purpose of the research, salient provisions of the Termination Act and the principles extracted from relevant cases have been analyzed to reflect on the Act in the light of different types of termination of employment.

Application of the Act

The Termination Act applies to the workmen who work in the workplaces in the private sector[3] where fifteen or more workmen

[1] The extended abstract entitled "A Critical Evaluation of the Termination of Employment of Workmen (Special Provisions) Act in the light of Balancing the Interests of Employers, Workmen and the State" and submitted to the University of Colombo, Annual Research Symposium - 2011 has been expanded with new areas and upgraded with the developments during the last thirteen years and submitted as a full article with the given new title with a focus on different types of termination and a need for legislative intervention.

[2] Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 (as amended). Hereinafter, it is stated as Termination Act. Sometimes, it is called as TEWA.

[3] See Termination Act 1971, ss 3(1)(d)(e)(f)(g) and (h) for exclusion of government sectors from the application of the Act.

are employed.[4] The workmen who completed one hundred and eighty days of employment are covered by the Act.[5] The Act does not apply to the workmen who have reached the age of retirement in terms of the provisions of the Minimum Retirement Age of Workers Act.[6] The Termination Act applies to all types of non-disciplinary terminations including lay-off, retrenchment[7] and closure,[8] but not to disciplinary termination of employment.[9]

The non-disciplinary terminations in the Act are worded as "non-employment of the workman in such employment by his employer, whether temporarily or permanently,[10] or in consequence of the closure by his employer of any trade, industry or business."[11] The broad wordings include different types of non-disciplinary terminations such as terminations for incompetence, disability, illness and infirmity.

The Colombo Port City Economic Commission Act[12] has been enacted, *inter alia*, 'to establish a Special Economic Zone within which there is ease of doing business that will attract new investments…'[13] Part IX of the Act is entitled as "Determination and Grant of Exemptions or Incentives for the Promotion of Business of Strategic Importance." In terms of the provisions of the Colombo Port City Economic Commission Act, application of the Termination Act may be exempted to Business of Strategic Importance within the Colombo Port City.[14] The exemption is to attract investments in Business of Strategic Importance within the

[4] Termination Act 1971, s 3(1)(a).
[5] Termination Act 1971, s 3(1)(b).
[6] Termination Act 1971, s 3(1)(c).
[7] Termination Act 1971, s 2(4)(a).
[8] Termination Act 1971, s 2(4)(b).
[9] Termination Act 1971, s 2(4).
[10] Termination Act 1971, s 2(4)(a).
[11] Termination Act 1971, s 2(4)(b).
[12] Colombo Port City Economic Commission Act, No.11 of 2021.
[13] Preamble to the Colombo Port City Economic Commission Act.
[14] Colombo Port City Economic Commission Act 2001, ss 52, 53 and Schedule II.

Colombo Port City. However, a workman who works within the Colombo Port City could file an application in a Labour Tribunal for relief against termination of his employment.[15]

Termination of Employment

The Termination Act provides that ¨No employer shall terminate the schedule employment of any workman without the prior consent in writing of the workman[16] or the prior written approval of the Commissioner.[17] In *Lanka Multi Moulds (Pvt) Ltd* v. *Commissioner of Labour,*[18] Fernando, J. was of the view that the prior consent of the employees need not be in a 'single sheet of paper', but it could be proved based on relevant documents.[19]

The Termination Act provides that "the Commissioner may, in his absolute discretion, decide to grant or refuse such approval" for termination of employment.[20] If the Commissioner grants approval for termination, the Commissioner may order the employer to pay compensation to the workman.[21] Although, the requirement for the approval of the Commissioner to terminate employment is criticized because of uncertainty, the requirement is needed to provide job security to the workmen.

Employers transfer the workmen to other workplaces without the consent of the workmen to avoid following the procedure for redundancy termination or termination by closure of the business. Superior Courts have decided that such transfers violate the provisions of the Termination Act and defeat the objective of the Act. In *P.M.K.Garments (Pvt) Ltd* v. *Commissioner General*

[15] Industrial Disputes Act 1950, s 31B(1)(a).
[16] Termination Act 1971, s 2(1)(a).
[17] Termination Act 1971, s 2(1)(b). See *Kumara Fernando* v. *Commissioner of Labour*, [2007] 1 Sri LR 124 at 149 for selection of workmen for termination of employment by following professional selection process. See Sobhitha Rajakaruna, J. in *Free Trade Zone and General Services Employees' Union (FTZGSEU) and others* v. *Commissioner General of Labour and others*, CA/Writ/303/2022 (decided on 04-10-2023) for the exercise of discretion by the Commissioner to grant approval for termination.
[18] [2003] 1 Sri LR 143.
[19] ibid at pp 148.
[20] Termination Act 1971, s 2(2)(b).
[21] Termination Act 1971, s 2(2)(e).

of Labour,[22] the Company closed the factories indefinitely and requested the employees to report to a factory belonged to a different Company situated in a different location without the consent of the employees.

The Companies gave an ultimatum to the employees to the effect that failure by the employees to recommence their work at the new factory would be considered as they had vacated their posts. It was decided by the Court of Appeal that the ultimatum given to the employees was a constructive termination of their employment, and violation of Section 2(1) of the Termination Act.[23] Transfer of workmen from one subsidiary Company to another subsidiary Company without the consent of workmen also would become violation of the Termination Act.[24]

In *Continental Apparels (Pvt) Ltd v. Commissioner of Labour*,[25] the letter of appointment had a clause which provided that the employees are transferable to any company or factory within the group of companies. The Company transferred the employees to another group of Company to circumvent the provisions of the Termination Act. The Court of Appeal held that "The Petitioner Company can only rely on the transfer clause of the employee's letter of appointment if a transfer is effected in the course of a regular business…This act cannot be seen or construe as a transfer but a closure of the Petitioner Company…." The judicial interpretation restricts the freedom of the employers from inserting clauses to defeat the objective of the Act.

The Termination Act expressly excludes termination of employment for disciplinary reasons and worded as ¨by reasons of a punishment imposed by way of disciplinary action.¨[26] In *St. Anthony's Hardware*

[22] CA/Writ/02/2012 (decided on 23-05-2016).
[23] See Sarveswaran, A. "COVID 19 Pandemic and Emerging Labour Issues in Sri Lanka: An Assessment of Legal Responses" (2020) Colombo Law Review, Symposium Special Edition, pp191-198.
[24] *Sascon Knitting Company (Pvt) Ltd* v. *Commissioner General of Labour and others* [2020] 1 Sri LR 350.
[25] CA/Writ/344/08 (decided on 18-06-2012). Appeal is pending before the Supreme Court, APL – 0107-13; S.C.L.A.No.SC/SPL/LA/144/12.
[26] Termination Act 1971, s 2(4).

Stores Ltd v. Ranjit Kumar and another,[27] the Court of Appeal did not agree with the argument that termination for incompetence is a termination for misconduct. The Court stated: "if a workman is incompetence it is always open to the employer to make an application to the Commissioner to terminate the employment of such workman on the ground of incompetence."[28]

Employers´ Federation of Ceylon states: ¨Though originally intended to cover all employee retrenchments or lay offs due to enterprise restructuring or closure, ´non disciplinary´ situations have now been interpreted to include employee absence on account of ill health and even employee incompetence at work.[29] The extension of the Termination Act to termination for incompetence affects productivity at workplaces and discourages investments in the country. Therefore, it is suggested to amend the Act to exclude the terminations for incompetence[30] and leave the option to the workman to seek relief from a Labour Tribunal for unjustified termination of employment.[31]

Projects and Application of the Act

The employments in different projects for a long period under an employer also come under the Termination Act. In *E.T.C.Lanka (Pvt) Ltd and other v. Commissioner General of Labour and others*,[32] a Local Consultancy Company which was part of an International Company in Netherlands continuously employed

[27] [1978-79] 2 Sri LR 06.

[28] ibid at p.09. Sarveswaran, "COVID 19 Pandemic and Termination of Employment: An Appraisal of Legal Responses Available in Sri Lanka" (2020) Annual Research Journal, Ministry of Labour, Sri Lanka. Sarveswaran, "A Critique of the Industrial Law of Sri Lanka in the Context of Foreign Investment" (2000 Vol VIII Part II) Bar Association Law Journal, pp M148 – M151.

[29] Employers´ Federation Ceylon, "Review of Labour Legislation in Sri Lanka" Submissions made by the Employers´ Federation of Ceylon (EFC) to the Government of Sri Lanka as proposals for the budget 2008/2009, Sri Lanka Labour Gazette (March 2009 Vol 60 No 01) 35, 41.

[30] Employers´ Federation Ceylon, "Review of Labour Legislation in Sri Lanka", ibid 43.

[31] Industrial Disputes Act 1950, s 31B(1)(a).

[32] S.C. Appeal No.5/2005 (decided on 02-10-2007).

the workmen in different projects for 16,15,13,12,09 and 07 years respectively during the period of 1985 to 2001. At the end of the final Project, the workmen complained to the Commissioner that their employment were unlawfully terminated. The Commissioner held that the discontinuation of their employment after the Project was covered by Section 2(4)(a) and 2(4)(b) of the Termination Act, and ordered compensation for closure in terms of Section 6A(1) of the Termination Act.

In this case, the Court of Appeal held that the workmen continued in their employment without a break in the same capacity and the real character of their employment was permanent, and the Commissioner was correct in law to order the Compensation.[33] While delivering the judgment of the Supreme Court, Jagath Balapatabendi J, observed that "It is an accepted principle of law that the said Termination of Employment (Special Provisions) Act will not cover cases where the contract of employment ceases by effluxion of time as in the fixed terms contracts where employment comes to an end of contract period…" The Supreme Court, considered the facts of the case and agreed with the decision of the Commissioner and the Court of Appeal and held that the workmen "…have been in continuous employment for many years in the said projects…and their real character of the employment is of permanent nature."

The application of the Act to project-based employments would discourage the employers to continue to employ the same workmen in different projects. Therefore, it is suggested to amend the Act to exclude the application of the Act to project-based employments.

In *Lanka Multi Moulds (Pvt) Ltd* v. *Commissioner of Labour*,[34] the employer terminated the fixed term contract of a workman within the fixed term period. The Court of Appeal ordered the employer to pay

[33] *E.T.C.Lanka (Pvt) Ltd and other* v. *Commissioner General of Labour and others*, CA/ Writ/1632/2002 (decided on 30-08-2004).
[34] [2001] 3 Sri LR 301.

back wages for the balance period of the contract in terms of Section 6 of the Termination Act. In appeal, the Supreme Court[35] agreed with the decision of the Court of Appeal subject to a variation in the amount of back wages. Although the decision is in accordance with the provisions of the Act, the question arises whether the Legislature intended to apply the Act to such terminations as well. It is suggested to amend the Act to exclude such terminations from the application of the Act, and leave them to be decided by the Labour Tribunals.

Recent Court of Appeal Judgments

The question arises whether termination of employment of a probationer who has worked for more than one hundred and eighty days, for a reason other than disciplinary termination is covered by the Act and the procedure prescribed in the Act should be followed for such termination.[36] Recently, the Court of Appeal has given many decisions in this regard.

In Sri Lanka, common law principles relating to termination of probationary employment have been developed by the Superior Courts. Therefore, the Termination Act does not apply to termination of employment of probationers for inefficiency, inability or incompetency to perform their work. The presumption that a ´statute law cannot be presumed to alter established common law principles¨ applies to exclude termination of probationers from the application of the Act.[37]

In *Brown and Company Ltd* v. *Commissioner of Labour and another*[38] the workman was employed by the Company as a probationer in the capacity of a sales executive. The Company was not satisfied with the efficiency and ability of the workman. The Company warned the workman at least

[35] *Lanka Multi Moulds (Pvt) Ltd* v. *Commissioner of Labour* [2003] 1 Sri LR 143.
[36] See K.Wijayaratnam, ¨Extensions and Terminations of Probationary Employments¨ (March 2009 Vol 60 No 01) Sri Lanka Labour Gazette, 08,11.
[37] See Geoffrey Alagaratnam, ¨Probationary Employment and the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971¨ (2005 Vol 1) Junior Bar Law Journal, 259,266.
[38] [2002] B.L.R 16.

on three occasions and there was no improvement in the performance of the workman. The Company terminated the services of the workman who was a probationer.

The workman complained to the Commissioner of Labour, and the Commissioner after an inquiry decided that the termination was bad in law and ordered reinstatement as the Company had not obtained the consent of the workman or approval of the Commissioner. The Court of Appeal cited the legal principles extracted from decided cases and held that the Company had a right to terminate the services of the probationer who was incompetent, and the probationer was not entitled to relief in terms of the Termination Act.[39] In this case, the termination was for the inefficiency and inability of the probationer to perform his work.

However, the question arises whether termination of employment of a probationer, not for the reason of his inefficiency or incompetence but for non-disciplinary terminations such as redundancy termination or termination by closure of the business, is covered by the Termination Act.

In *Lanka Canneries (Pvt) Ltd* v. *Commissioner of Labour and others*,[40] a Manager – Supply Chain was employed subject to a probationary period of twelve months. The probationary employment of the workman was terminated after a period of two years and nine months. The workman made a complaint to the Commissioner under the Termination of Employment of Workmen (Special Provisions) Act. After an inquiry, the Commissioner ordered the employer to reinstate the workman with back wages.

In the writ case filed against the decision of the Commissioner, the Court of Appeal affirmed the decision of the Commissioner and stated that although an employer could terminate the services of a probationer for unsatisfactory work, the termination is 'subject to the provisions of the section 2 (particularly 2(1) & 2(4) of TEWA)'. Section 2(4) of TEWA

[39] ibid at p. 17.
[40] CA/Writ/385/2021 (decided on 31-08-2022).

refers to non-disciplinary terminations which include redundancy termination and termination by closure of the business.

In *Timex Garments (Private) Limited* v. *Commissioner General of Labour and others*,[41] the question to be decided by the Court of Appeal was whether the Termination Act applies to termination of services of a probationer. Justice Sobhitha Rajakaruna who delivered the Court of Appeal judgment stated based on a paragraph in the letter of termination that it is crystal clear that the termination of services of the probationer was due to financial distress of the employer, and not for unsatisfactory performance of the probationer. The Court decided that the Termination Act applied to the probationer, and his services have been terminated by the employer in violation of the provisions of the Act.

In *Embody Trading (Pvt) Ltd v. Commissioner General of Labour and others*,[42] the Court of Appeal decided that a clause in a letter of appointment which gives the authority to an employer to terminate the employment of a probationer without notice cannot be considered as consent given by the workman for termination in terms of Section 2(1)(a) of the Termination Act even though the letter of appointment has been signed by the workman at the time of recruitment.

The Court of Appeal decisions have taken the right approach to apply the Termination Act for redundancy terminations of employment of probationers who have worked for more than one hundred and eighty days under their employers.[43] The approach assures job security to the probationers against non-disciplinary terminations.[44]

[41] CA/Writ/486/2021 (decided on 08-02-2024).
[42] CA/Writ/227/2022 (decided on 11-12-2024).
[43] The decisions may be subject to the decisions by the Supreme Court in appeal.
[44] Sarveswaran, A. "COVID 19 Pandemic and Termination of Employment: An Appraisal of Legal Responses Available in Sri Lanka" (2020) Annual Research Journal, Ministry of Labour, Sri Lanka.

Minimum Retirement Age of Workers Act

The Minimum Retirement Age of Workers Act[45] applies to an employer who employs fifteen or more workers[46] in the private sector.[47] According to the provisions of the Act, the minimum retirement age of a worker is sixty years.[48] The Act does not apply to certain types of workers including a probationary worker, casual worker and seasonal worker.[49]

According to the interpretations in the Act,[50] a probationary worker works for a period of not exceeding 180 days with extension for a maximum period of hundred and eighty days.[51] A casual worker works not exceeding hundred and eighty days in a year.[52] A seasonal worker works for a period not exceeding six months in a year.[53]

If a probationer or casual worker or seasonal worker works more than the period in the interpretation, the employer cannot prematurely retire the worker,[54] without an approval of the Commissioner in accordance with the Termination Act.[55] The combined effect of the provisions of the Minimum Retirement Age of Workers Act and the Termination Act provides job security to the workers who work in the types of employment beyond the period in the interpretation.

Reliefs for Termination

The Act provides that if the termination is in violation of the

[45] Minimum Retirement Age of Workers Act, No.28 of 2021.
[46] Minimum Retirement Age of Workers Act 2021, s 3(1).
[47] Minimum Retirement Age of Workers Act 2021, s 3(1) and Schedule II.
[48] Minimum Retirement Age of Workers Act 2021, s 2.
[49] Minimum Retirement Age of Workers Act 2021, s 3(1) and Schedule II.
[50] Minimum Retirement Age of Workers Act 2021, s 18.
[51] ibid.
[52] ibid.
[53] ibid.
[54] Minimum Retirement Age of Workers Act 2021, ss 3(1) and 11.
[55] Minimum Retirement Age of Workers Act, proviso (d) to s 3(1) Sarveswaran,A. "A Reflection on the Minimum Retirement Age of Workers Act" (2021 Vol 72 No. 2) Sri Lanka Labour Gazette, pp 05-14.

provisions of the Act, the Commissioner may order the employer to 'continue to employ the workman' and to pay the wages and all other benefits entitled to the workman during the period of termination. [56] The question arises whether the provision provides the only relief of continuation of employment with arrears of wages and other benefits or enables the Commissioner to order alternative reliefs without continuation of employment.

The Superior Courts have given conflicting judgements by interpreting the provision. In some cases, the Superior Courts were of the view that the provision mandates the Commissioner to provide the only relief of continuation of employment with arrears of wages and other benefits.[57] But, in some other cases the Superior Courts have interpreted the words 'may order' in the provision and decided that the provision enables the Commissioner to provide alternative reliefs as well.[58]

If the Commissioner does not have discretion to order an alternative relief such as compensation in lieu of continuation of employment or only the arrears of wages and other benefits without continuation of employment, considering the circumstances such as age of retirement, infirmity, strained relationship, conduct of the employee after termination, changes in the business environment or expiry of the visa period for a foreign worker or delay in making decision, the order of the Commissioner may result in anomalous situations that affect the interests of the employers, workmen and the State. Therefore, it is suggested to amend Section 6 of the Act as provided in the Industrial Disputes Act[59] and grant the discretion to the Commissioner to order an alternative relief such

[56] Termination Act 1971, s 6.

[57] *Eksath Kamkaru Samithiya* v. Commissioner of Labour, [2001] 2 Sri LR 137 *Wickremasinghe* v. *Nethasinghe*, [2005] 1 Sri LR 97.

[58] *Lanka Multi Moulds (Pvt) Ltd* v. *Commissioner of Labour* [2001] 3 Sri LR 301. *Blanka Diamonds (Pvt) Ltd* v. *Coeme*, [1996] 1 Sri LR 200. *Lanka Multi Moulds (Pvt) Ltd* v. *Commissioner of Labour* [2003] 1 Sri LR 143. *Samyang Lanka (Pvt) Ltd* v. *Commissioner of Labour*, C.A/ Writ/No: 1837/2004 (decided on 09-02-2007).

[59] Industrial Disputes Act, Ss 31B(6)(C), 33(3), 33 (5), 33 (6) and 47C(c).

as compensation in appropriate cases.

However, the Termination Act provides for payment of compensation as an alternative to reinstatement for illegal termination of employment by closure of trade, industry or business.[60] Therefore, the reliefs for termination in terms of Section 6 of the Termination Act apply to non-disciplinary terminations other than terminations by closure of the business.

The Termination Act did not provide a formula for payment of compensation until it was amended in 2003. It created uncertainties as to quantum of compensation as Commissioners made non-uniform decisions without following satisfactory guidelines. After the Amendment Act in 2003,[61] the Termination Act provides for payment of compensation according to the formula determined by the Commissioner under the Act[62] when the Commissioner grants approval for termination of employment[63] or makes an order to pay compensation for termination of employment by closure.[64]

Reasons for Decisions of the Commissioner

The Act expressly provides that the inquiries under the Act should be conducted in accordance with the principles of natural justice.[65] However, it does not expressly provide to give reasons for the decisions of the Commissioner. In some cases, the Superior Courts have emphasized on the importance of giving reasons for the decisions,[66] while in some other cases the Superior Courts have

[60] Termination Act 1971, s 6A(1).
[61] Termination Act 1971, s 6D. Termination of Employment of Workmen (Special Provisions) Amendment Act, No. 12 of 2003.
[62] Gazette (Extraordinary) No. 1384/07 dated 15-03-2005 as amended by Gazette (Extraordinary) No. 2216/17 dated 25-02-2021.
[63] Termination Act 1971, s 2(2)(e).
[64] Termination Act 1971, s 6 A(1).
[65] Termination Act 1971, s 17.
[66] *Lanka Multi Moulds (Pvt) Ltd* v. *Commissioner of Labour and others* [2001] 3 Sri LR 301. International Cosmetic Applicators (Pvt) Ltd v. *Arialatha and others* [1995] 2 Sri LR 61. *Unique Gemstones Ltd* v. *Karunadasa and others* [1995] 2 Sri LR 357. C & S Lanka (Private) Limited v. *Commissioner General of Labour and others,* C/A No: 986/2004 (decided on 04-09-2006). *Ceylon Printers Ltd* v. *Commissioner of Labour and others* [1998] 2 Sri LR 29. *Liyanage* v. *Commissioner of Labour and others* [2004] 2 Sri LR 23

not emphasized on the importance of giving reasons for the decisions.[67]

In *Karunadasa v. Unique Gem Stones Limited and others*,[68] Fernando, J. stated: "…Natural Justice entitles a party to a hearing does not mean merely that his evidence and submissions must be heard and recorded; it necessarily means that he is entitled to a reasoned consideration of the case which he presents..."[69] The recent judgments indicate that the present trend requires giving reasons for administrative decisions.[70]

In *Sirimasiri Hapuarachchi and another v. Commissioner of Elections and another*[71], Shirani A.Bandaranayake,J. stated: "…to deprive a person of knowing the reasons for a decision, which affects him would not only be arbitrary, but also a violation of his right to equal protection of the law."[72] Therefore, the requirement in the Termination Act to conduct inquires in accordance with the principles of natural justice also mandates the Commissioner to give reasons for his decisions.

Law Delays

The Termination Act provides that the Commissioner shall grant or refuse his approval for termination of employment 'within three months from the date of receipt of an application' made by an employer.[73] The Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act[74] provides that it shall be the duty of the Commissioner to make his decisions[75] within two months from the date of receipt of an

[67] *Samalanka Ltd* v. *Commissioner of Labour* [1994] 1 Sri LR 405. *Yaseen Omar* v. *Pakistan International Airlines Corporation* [1999] 2 Sri LR 375. *Kundanmals Industries Ltd* v. *Commissioner of Labour* [2001] 3 Sri LR 229.
[68] [1997] 1 Sri LR 256.
[69] ibid at p. 263.
[70] See Senanayake, J. *Kegalle Plantations Limited* v. *Silva and others*, [1996] 2 Sri LR 180 at p. 185.
[71] [2009] B.L.R 34.
[72] ibid at p. 40 See also Fernando,J. in *Lanka Multi Moulds (Pvt) Ltd* v. *Commissioner of Labour and others*, [2003] 1 Sri LR 143 at pp 152-153.
[73] Termination Act 1971, s 2(2)(c).
[74] Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act, No. 13 of 2003
[75] Under the Termination Act 1971, ss 2,6 and 6A(1).

application under the Termination Act.[76]

It could be interpreted, based on the principle of subsequent legislation, that the provisions of the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act prevail over the provisions of the Termination Act. However, this provision is not a mandatory provision but a directive provision,[77] and as such the Commissioner could make his decision even after this period.

Employers' Federation of Ceylon states: ¨Employers are often compelled to offer huge packages, especially in situations where restructuring has to be done quickly without having to go through a protracted inquiry before the Commissioner of Labour…¨[78] It is suggested that the Commissioner should give priority to the inquiries under the Termination Act and endeavor to make his decision within the specified time period.

Judicial Review

The Termination Act does not provide for appeal against the decision of the Commissioner of Labour. Therefore, a party who is aggrieved with the decision of the Commissioner will have to invoke the writ jurisdiction of the Court of Appeal to obtain writ of certiorari to quash the decision of the Commissioner.

In *Jayawardena and others* v. *Pegasus Hotels of Ceylon Ltd and others*,[79] the Court of Appeal has refused to issue writ of certiorari against the decision of the Commissioner as the Petitioners have failed to establish that "…the impugned decision is *ex facie* not within the

[76] Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act 2003, ss 11,12 and 13.
[77] *Nagalingam* v. *De Mel and others* [1975] 78 NLR 231 at p 236.
[78] Employers´ Federation Ceylon, "Review of Labour Legislation in Sri Lanka" Submissions made by the Employers´ Federation of Ceylon (EFC) to the Government of Sri Lanka as proposals for the budget 2008/2009, Sri Lanka Labour Gazette (March 2009 Vol 60 No 01) 35, 41.
[79] [2004] 2 Sri LR 39.

power conferred on the Commissioner of Labour or that there has been any failure to conform to the rules of natural justice or any mandatory provisions of any law which is a condition precedent to the making of the said decision."[80]

Law Reform

As discussed above, the Termination Act applies to different types of non-disciplinary terminations. It causes difficulties to the employers and affects promotion of investments in the country. Therefore, it is suggested to amend the Termination Act to apply it only to permanent workmen for their redundancy terminations (retrenchments) and terminations by closure of the business. The Labour Tribunals have jurisdiction to hear applications with regard to any type of termination and provide just and equitable relief for unjustified terminations. After the incorporation of the suggested amendment into the Act, the workmen not covered by the Termination Act and affected by any other type of termination could seek relief from Labour Tribunals.[81]

Conclusion

In 1971, when the Termination Act was enacted the country had closed economy and it was intended to apply the Act to control the wake of redundancy terminations and terminations by closure of the business. The country has open economy since 1977 and competes with many other countries to attract investments. As discussed above, the wordings in the Act and the judicial interpretations result in application of the Act to various types of non-disciplinary terminations. The rigid procedure in the Act and its applications to different types of non-disciplinary terminations affect promotion of investments in the country. Therefore, there is a need for a legislative intervention to amend the Act to apply it only to permanent workmen for their redundancy terminations and terminations by closure of the business.

[80] ibid at p.54. See also Grero,J. in *Desmond Perera and others* v. *Commissioner of National Housing and others* [1994] 3 Sri LR 316 at pp 329-320.
[81] Industrial Disputes Act 1950, s 31B(1)(a).

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Examining the Applicability of Hate Speech Laws to Online Harassment: A Comparative Analysis

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Abstract

This paper seeks to examine the applicability of hate speech laws to prosecute different online harassment offences in several jurisdictions, namely Sri Lanka, Singapore and the UK. In order to achieve its objective, this paper uses doctrinal methodology coupled with comparative analysis. The paper first engages in an in-depth exploration of the link between hate speech and online harassment and identifies hate speech as a constituent element of certain types of online harassment. Secondly, the hate speech laws of the above jurisdictions are analysed to find out their applicability to different types of online harassment. This reveals that the majority of the hate speech laws (except for a few), in the jurisdictions considered in this paper, would be of limited use in relation to online harassment as many require relevant speech to relate to some characteristic of another individual or group such as their race, religion etc, and lead to communal violence/disharmony/ breach of peace or enmity/hatred among groups. Hate speech occurring in online harassment generally does not meet the above criteria. In conclusion, the study underscores the need for legal reforms to extend the scope of hate speech laws or to introduce targeted laws to better address the complexities of online harassment in the digital era.

Keywords: *Online Harassment, Hate Speech, Cyber-bullying, Cyber Harassment*

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Introduction

The internet and information communication technologies have become essential for the daily lives of people today. The increase in the use of the internet has led to an increase in different forms of online harassment worldwide. Online harassment in simplest terms is the use of different internet platforms, such as social media, email, chat groups, other websites (created for dating/connecting people), and gaming platforms, to harass an individual or groups of persons. The severity of online harassment can be understood through its physical, psychological, social and economic impacts on victims. Emotional distress, withdrawal from social media and sometimes even from society, and resorting to self-harming and suicidal tendencies are among some of the negative psychological impacts of online harassment as revealed by the existing literature.[1] Humiliation, rejection by friends and family, losing employment or educational opportunities, having to change schools/workplaces etc are among the negative social and economic impacts of online harassment.[2] While some jurisdictions have recently taken steps to introduce specific laws targeting different types of online harassment, some have resorted to using their existing laws on extortion, sexual harassment etc for prosecute perpetrators of online harassment.

Hate speech, which could be defined as an expression intended to humiliate or incite hatred against a person or a group of persons, is another prevalent and pernicious offence worldwide. Similar to online harassment, hate speech too can have severe negative impacts on victims such as psychological and pathophysiological symptoms similar to post-traumatic stress disorder which are

[1] Vitak, J., Chadha, K., Steiner, L., & Ashktorab, Z. "Identifying women's experiences with and strategies for mitigating negative effects of online harassment." Proceedings of the 2017 ACM Conference on Computer Supported Cooperative Work and Social Computing. 2017.
[2] Vogels, E. A. "The state of online harassment." (2021). Pew Research Center, 13, 625.

panic, fear, anxiety, nightmares, intrusive thoughts of intimidation and denigration.[3] However, unlike in the case of online harassment, many countries have enacted laws specifically targeting hate speech. There appears to be a close relationship between hate speech and online harassment as many online harassment offences consist of the use of derogatory or belittling terms, or words inciting hatred against an individual or a group of individuals. For example, defamation involves the use of derogatory words, cyber sextortion involves making threats, and cyberbullying, *inter alia* involves the use of offensive and insulting terms.

This paper aims to explore the applicability of hate speech laws to online harassment with reference to the laws in four selected jurisdictions. The four jurisdictions are selected to provide a comprehensive picture of the applicability of hate speech laws to online harassment in different contexts, i.e. with Sri Lankan representing a developing country in the Asian region, Singapore representing a developed country in the Asian region, UK representing a developed nation from the global West.

All the countries considered in this analysis have recently enacted laws on various types of online harassment. Nevertheless, this analysis is warranted for several reasons. Firstly, there could be instances where prosecution of a perpetrator of online harassment under cyber harassment legislation could be difficult due to the lack of physical evidence left behind by crimes committed via technology.[4] For example in the instance where there is not enough evidence to prove that a perpetrator cyber stalked a victim on several occasions (generally repeated conduct is required for stalking offences), one can ensure that the perpetrator does not escape liability if the latter can be prosecuted under hate speech laws

[3] Teh, P. L., Cheng, C. B., & Chee, W. M. "Identifying and categorising profane words in hate speech." *Proceedings of the 2nd International Conference on Compute and Data Analysis*. 2018.

[4] Information Management, 'Why Computer Crime Is Hard to Define and Prosecute' (2017) https://www.brainkart.com/article/Why-Computer-Crime-Is-Hard-to-Define-and-Prosecute_9733/ accessed 22 January 2025.

for derogatory, humiliating or insulting words communicated by him to the victim and/or others. Moreover, as online harassment is a crime that emerged in the last decade or so, law enforcement often lacks adequate training on how to respond to or to keep up with the crime.[5] On the other hand, as hate crimes have been in existence for a long time in most jurisdictions, it could be argued that, generally law enforcement would have a good understanding of the hate speech laws. Therefore, the ability to use a familiar provision such as a hate speech provision in a cyber harassment case may lead to an increase in law enforcement's enthusiasm and efficacy in prosecuting cyber harassment-related crimes. Given the above, an examination of the applicability of hate speech laws to online harassment would be pertinent.

The rest of this paper is organized as follows: Part 2 defines the terms online harassment, and hate speech with reference to the relevant literature. Part 3 discusses the relationship between hate speech and online harassment in detail with reference to different types of online harassment offences while Part 4 analyses the hate speech laws in several jurisdictions and whether they could be used to prosecute different types of online harassment offences. Part 5 concludes the paper with some recommendations.

Unwrapping Terms

Harassment in very simple terms is unwanted/unwelcomed/uninvited behaviour that causes annoyance, distress, alarm or even fear to the victim and which is done intentionally. Online harassment refers to causing harassment with the use of information communication technologies, and often involves, *inter alia*, threats of violence, privacy invasions, spreading of reputation-harming lies, calls for strangers to physically harm victims and committing

[5] Cipher, 'Challenges of Prosecuting Cybercrimes' (Cyber Security) https://cipher.com/blog/prosecuting-cybercrime-challenges/#:~:text=The%20world%20of%20cyber%20crime,prevent%20criminals%20from%20being%20prosecuted accessed 22 January 2025.

technological attacks.[6] It includes a range of abusive behaviours such as flaming (or the use of inflammatory language, name-calling or insults)[7]; doxing (or the public release of personally identifiable information such as a home address or phone number)[8]; impersonation (or the use of another person's name or likeness without their consent)[9]; public shaming (the use of social media sites to humiliate a target or damage their reputation)[10]; cyberbullying (behaviours performed through electronic or digital media that repeatedly communicate hostile or aggressive messages intended to cause harm or discomfort on others)[11]; cyber stalking (using the internet, email, or other types of electronic communications to stalk, harass or threaten another person)[12]; revenge porn (posting sexually explicit images/videos of a person without that person's consents especially as a form of revenge or harassment)[13]; cyber extortion (using the internet to demand money or other goods from another person by threatening to inflict harm to his person, his reputation or his property)[14]; and cyber-sextortion (the practice of extorting money or sexual favours from someone by threatening to reveal evidence of their sexual activity)[15].

[6] Seth Lewis Seth, Zamith Rodrigo, Mark Coddington, Mark, 'Online Harassment and Its Implications for the Journalist-Audience Relationship' *digital Journalism* (2020)

[7] O'Sullivan, P. B., & Flanagin, A. J. (2005). Reconceptualizing 'Flaming' and Other Problematic Messages. New Media & Society 69.

[8] Douglas, D. M. "Doxing: A Conceptual Analysis." (2016). Ethics and Information Technology 199.

[9] Smith, L. R., Smith, K. D., & Matthew, B. "Follow Me, What's the Harm? Considerations of Catfishing and Utilizing Fake Online Personas on Social Media." (2017). Journal of Legal Aspects of Sport.

[10] Blackwell, L., Dimond, J., Schoenebeck, S., & Lampe, C." Classification and its consequences for online harassment: Design insights from heartmob." Proceedings of the ACM on Human-Computer Interaction 1.CSCW (2017): 1-19.

[11] Mairead, F., Muthanna, S., & Carlbring, P. (2015). A Review Of Cyberbullying And Suggestions For Online Psychological Therapy'. Retrieved October 4th, 2022, from www.sciencedirect.com: https://www.sciencedirect.com/science/article/pii/S2214782915000251

[12] Bocij, P., & McFarlane, L. "Online harassment: Towards a definition of cyberstalking." Prison Service Journal (2002): 31-38.

[13] Hall, M., & Hearn, J. "Revenge pornography and manhood acts: A discourse analysis of perpetrators' accounts." Journal of Gender Studies 28.2 (2019): 158-170.

14 Abdulhameed, R. S. "Crimes Of Threats and Cyber Extortion Through social media: A Comparative Study." Review of International Geographical Education Online 11.12 (2021).

[15] Reid, R G. "Exploring online sexual extortion in Scotland." (2019).

Online harassment can, thus, be identified as behaviour intended to cause distress, alarm or harm to a victim committed using the internet and information communication technologies. Online harassment can, thus, be identified as behaviour intended to cause distress, alarm or harm to a victim committed using the internet and information communication technologies.

Although there is an abundance of definitions of hate speech in the literature, there is no clear consensus on its meaning.[16] Hate Speech, according to Calvin Massey, is any form of speech that produces the harms that are ascribed to hate speech: loss of self-esteem, economic and social subordination, physical and mental stress, silencing of the victim and effective exclusion of the victim from the political arena.[17] Nockleby defines hate speech as "any communication that disparages a person or a group based on some characteristic such as race, colour, ethnicity, gender, sexual orientation, nationality, religion or other characteristics."[18] Some other scholars define it as speech that denigrates a person because of their innate and protected characteristics such as religion, race, ethnicity etc.[19] According to Twitter, hate speech is any tweet that promotes violence against other people based on race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease.[20] It is evident from

[16] Kansok-Dusche, J., Ballaschk, C., Krause, N., Zeißig, A., Seemann-Herz, L., Wachs, S., & Bilz, L., 'A Systematic Review on Hate Speech among Children and Adolescents: Definitions, Prevalence, and Overlap with Related Phenomena' *TRAUMA, VIOLENCE, & ABUSE* 2022

[17] Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 *UCLA L. Rev.* 103 (1992). Available at: https://repository.uclawsf.edu/faculty_scholarship/1376

[18] W Warner and J Hirschberg, 'Detecting Hate Speech on the World Wide Web' in *Proceedings of the Second Workshop on Language in Social Media* (2012).

[19] ElSherief, M., Kulkarni, V., Nguyen, D., Wang, W. Y., & Belding, E."Hate lingo: A target-based linguistic analysis of hate speech in social media." Proceedings of the international AAAI conference on web and social media. Vol. 12. No. 1. 2018.

[20] Twitter's Policy On Hateful Conduct. (2021). Retrieved from Twitter Help: https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy

the above that most definitions associate hate speech with certain characteristics of individuals such as religion, ethnicity, sexual orientation etc, while Massey's definition is broader in scope and regards as hate speech any expression designed to cause harm such as social subordination, emotional distress etc.[21] Hate speech that occurs in cases of online harassment does not necessarily relate to a victim's protected characteristics like religion, race etc. For instance, it may relate to a victim's conduct or their views. Therefore, following Massey's example, for the purposes of this study hate speech is defined as any speech which is primarily intended to distress, intimidate or harm to a person, and is devoid of any value such as expressing an evaluative or political opinion or finding the truth or initiating dialogue.

Hate speech can be either directed at a specific individual (personal) or a group (generalized). Directed hate speech tends to be more personal, often angrier, and reflects a higher level of hostility compared to generalized hate speech,[22] which typically targets broader categories such as religions, nationalities, gender, or sexual orientation. Directed hate speech is often informal and more aggressive. For example, in 2013, protests on Facebook and Twitter arose in response to groups encouraging the uploading of graphic pornography and abusive comments against women. [23] This is an example of hate speech targeting a group. On the other hand, the 2017 Sri Lanka Comic-Con incident, where two women were ridiculed for their Wonder Woman costumes, and the recent defamation campaigns against the female politicians exemplify

[21] Massey, C. R. "Hate speech, cultural diversity, and the foundational paradigms of free expression." (1992). UCLA L. Rev., 40, 103; Sellars, A. "Defining hate speech." (2016). *Berkman Klein Center Research Publication*, (2016-20), 16-48.

[22] Vogels, E. A. "The state of online harassment." Pew Research Center 13 (2021): 625.

[23] Kleinman, Z. "Facebook Sexism Campaign Attracts Thousands Online." BBC Online (2013).

hate speech directed at individuals.[24] While both forms of hate speech occur online, online harassment often involves directed hate speech targeting specific individuals.

Having understood the meaning and scope of hate speech in online harassment, the next section is focused on exploring the inter-relation between hate speech and online harassment.

Relationship between Hate Speech and Online Harassment

This part of the paper examines the relationship between hate speech and online harassment with reference to a few types of online harassment such as cyberstalking and cyber-bullying with the aim of understanding the interconnection between these concepts. It examines, in particular, how hate speech can be a constituent element or a manifestation of different types of online harassment.

Hate speech can be identified as a constitutive element of online harassment such as cyberbullying, doxing, cyber sextortion, cyber stalking, flaming etc. Cyberbullying encompasses a range of conduct that is aggressive and intentional, carried out repeatedly using online platforms against a victim who cannot easily defend himself/herself.[25] It can involve launching hate campaigns on social networking sites against specific individuals or groups through posting derogatory comments based on their identity, lifestyle, beliefs, or ideologies, spreading false information and rumours, and creating hostile messages or social media posts

[24] Sohngen, T. 'Gal Gadot Defends Bullied Sri Lankan "Wonder Woman" Cosplayers' (2017) https://www.globalcitizen.org/en/content/gal-gadot-supports-cosplayers-wearing-wonder-woman/ accessed 23 January 2025; Dharmasinghe G, 'New Frontier Against Women in Power: Targeted, Silenced and Objectified' Daily News (5 January 2025) https://www.dailynews.lk/2025/01/02/featured/697999/targeted-silenced-and-objectified/ accessed 23 January 2025.

[25] Cross, M. "The Dark Side. Social Media Security." (2013). Oxford, Syngress Publishing, 161-191

targeting them.[26] Some cases of cyberbullying involve perpetrators threatening victims or extorting them.[27] In almost all of these instances, cyberbullying is committed through the expression of hate towards a victim or victims, and thus, it can be argued that in these types of situations, hate speech is a constitutive element of cyberbullying. A case in point is the US case Kowalski v. Berkeley County Schools,[28] where Kara Kowalski, a high school student, created a discussion web page on MySpace.com titled S.A.S.H. (alleged to stand for 'Students Against Shay's Herpes') which was dedicated to humiliating and denigrating another student in her class, Shay N. In this case, bullying was committed by posting of derogatory comments, and thus, hate speech was a constitutive element of cyberbullying.

Hate speech could also be a key element of cyberstalking as cyberstalkers often send offensive messages and threats to intimidate their victims.[29] Similarly, hate speech, intended to distress or intimidate, is also a key component of cyber sextortion, where perpetrators threaten to release private sexual images unless the victim provides more explicit content, money, or other benefits.[30]

The above discussion reveals that a close interconnection exists between hate speech and online harassment as hate speech can be seen as a constitutive element of various types of online

[26] Del Vigna1, F., Cimino, A., Dell'Orletta, F., Petrocchi, M., & Tesconi, M. "Hate me, hate me not: Hate speech detection on facebook." Proceedings of the first Italian Conference on Cybersecurity (ITASEC17). 2017.

[27] Badenhorst, C. "Legal responses to cyber bullying and sexting in South Africa." *Centre for Justice and Crime Prevention* 10 (2011): 1-20.

[28] Kowalski v. Berkeley County Schools, 652 F.3d 565, (Court of Appeal 2011).

[29] Mirto, A. "Detecting cyberstalking from social media platform (s) using data mining analytics." (2022). (Doctoral dissertation, University of West London); Palmer, J. Expanding The Understanding of Online Harassment and Online Harassers by Investigating Internal Narratives: An Exploratory Study. Diss. University of Huddersfield, 2019; Melton, C. H. "Stalking in the Context of Intimate Partner Abuse." (2007). Feminist Criminology .

[30] Harasgama, K., & Munasinghe, M. A "Multi-Jurisdictional Analysis of Cyber Sextortion Laws: Australia, India and Sri Lanka." (2022).

harassment such as cyber bullying and cyberstalking. Given this interconnection between hate speech and online harassment, the next part of the paper is devoted to reviewing the hate speech laws in four jurisdictions and analysing their applicability to different types of online harassment.

Hate Speech Laws in Three Jurisdictions and their Applicability to Online Harassment

As discussed above, hate speech comes in different forms such as verbal or written expressions, as expressions made through conduct, as hate speech directed at one specific individual or hate speech targeting a class of individuals. Therefore, different jurisdictions around the world have implemented laws that are different from one another, and that address these different aspects of hate speech. This part of the paper reviews the hate speech laws in three jurisdictions, namely, Sri Lanka, Singapore, and the United Kingdom with the aim of examining their applicability to online harassment. As explained in the introduction section, such an analysis is important as it would be possible for authorities to have recourse to hate speech laws where there is no targeted law on online harassment or where existing online harassment offences are inadequate or other complications such as of lack of proper training to handle cyber harassment cases. However, it should be noted that the applicability of hate speech laws to a given case of online harassment would depend on the facts of each case.

Sri Lanka: Sri Lanka has several legal provisions which can collectively be identified as hate speech laws. Thus, sec 16 of Sri Lanka's recently enacted Online Safety Act No.9 of 2024 criminalizes outraging religious feelings by insults or attempts to insult the religion or the religious beliefs by communicating false statements through online accounts or locations while sec 20 prohibits causing harassment by publishing private information. Section 3 of the International Covenant on Civil and Political Rights

Act No.56 of 2007 (hereinafter referred to as ICCPR Act) prohibits advocating national, racial or religious hatred that constitutes incitement to discrimination, hostility and violence. Section 2(1)(h) of the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979 (hereinafter PTA Act) criminalizes causing or intending to cause the commission of acts of violence or racial/religious/ communal disharmony through spoken/written words, signs or representations. In addition to these provisions, Chapter XV of the Penal Code Ordinance No.2 of 1883 has several provisions which deal with religion and race-related hate speech. Section 291A criminalizes the uttering of words with intent to wound religious feelings while section 291B criminalizes deliberate and malicious acts intended to outrage religious feelings. Section 120 of Chapter VI criminalizes promoting feelings of ill will and hostility between different classes of people. Section 79(2) of the Police Ordinance No.16 of 1865 provides the police with the power to arrest a person without a warrant when such person in a public place or meeting uses threatening, abusive or insulting words or behaviour intending to provoke a breach of the peace or where a breach of the peace is likely to be occasioned.

When examining the applicability of the above hate speech laws to cases of online harassment, it is evident that the provisions of the ICCPR, PTA, the Police Ordinance and section 16 of the Online Safety Act mainly target hate speech directed at specific racial/ ethnic/religious groups, and/or speech which can lead to communal violence, disharmony or breach of peace. Hate speech in online harassment cases is often directed at specific individuals and would not normally lead to communal violence or breach of peace. Given the above, it can be argued that the provisions of the ICCPR, PTA, the Police Ordinance and sec 16 of the Online Safety Act would be of little use in the prosecution of online harassment. Section 20 of the Online Safety Act, although having the capacity to directly address certain types of online harassment such as non-consensual

pornography (or revenge porn), cyber-bullying through defamation, flaming and doxing, is not capable of addressing the whole gamut of online harassment such as cyber-sextortion, cyber-stalking etc. Sections 291A and 291B of the Penal Code too can be of limited application in cases of online harassment. These provisions can be used where a perpetrator engages in cyberbullying of a victim by defaming/denigrating the latter on the basis of religion. However, as noted earlier, hate speech in online harassment is not limited to the racial/religious characteristics of a victim but is generally related to the personal life and conduct of a victim. Given the above, it appears that Sri Lankan legal provisions on hate speech would be of limited use in online harassment cases.

UK: In the UK, online harassment and hate speech are addressed through a variety of legislation, notably the Online Safety Act 2023, the Public Order Act 1986, alongside additional provisions from laws such as the Malicious Communications Act 1988. Online Safety Act of UK has a range of provisions dealing with different types of online harassment such as sections 179 (false communications causing psychological or physical harm), 181 (threatening communications), 183 (sending or showing flashing images), 184 (encouraging self-harm), 188 (sharing or threatening to share intimate photos or films) etc. Unlike traditional hate speech laws which often require an element of racial or religious vilification or incitement of communal violence or breach of peace, the provisions of the Online Safety Act are broad enough to cover the individual targeted hate speech that occurs in online harassment. In addition, section 1 of the Malicious Communications Act which criminalizes sending indecent or grossly offensive letters or electronic communications too can be regarded as a provision capable of addressing certain types of online harassment such as cyber-sextortion, unwanted sexualization, cyber stalking and cyber-bullying. The hate speech provisions of the Public Order Act 1986 such as sections 4, 4A and 5 which criminalize using

threatening/abusive/insulting words/behaviour or distributing/ displaying such material to another person with the intent to cause fear/ provocation/ harassment/ alarm or distress too can be used to address the individual centred hate speech that occurs in many cases of online harassment. However, the application of the provisions in online harassment cases can be limited as they have a defence attached to them which provides that no offence is committed where the relevant conduct takes place inside a dwelling and the person to whom it is directed is inside that or another 'dwelling'[31] In the case of online harassment offences, often the perpetrator may engage in the relevant harassing conduct (for example, sending threatening emails, posting defamatory material etc) from the safety of his/ her own home with just a click of a button. Thus, if a perpetrator of online harassment is prosecuted under any of the provisions in the Public Order Act, he/she may be able to argue that the above defence applies to them as the relevant conduct happened within a dwelling. However, in cases of online harassment occurring on social media sites, public chat rooms, public WhatsApp groups etc, it would be possible to counter this argument by demonstrating that such platforms are 'public' spaces rather than private spaces[32] Thus, it can be concluded that UK has an adequate arsenal of legislation to address online harassment including their hate speech laws.

Singapore: In Singapore, Section 7 of the Protection from Online Falsehoods and Manipulation Act of 2019 provides that a person must not do any act in or outside Singapore to communicate a statement knowing or having reason to believe that it is false and such communication is likely to incite feelings of enmity, hatred

[31] 'Dwelling' means any structure or a part of a structure occupied as a person's home or as other living accommodation (whether the occupation is separate or shared with others) but does not include any part not so occupied, and for this purpose "structure" includes a tent, caravan, vehicle, vessel or other temporary or movable structure; An accused can take up the defence that he was inside a dwelling and had no reason to believe that the words/ behavior would be heard/seen by a person outside that or any other dwelling.

[32] Burkell, J., Fortier, A., Wong, L. L. Y. C., & Simpson, J. L., 'Facebook: Public Space, or Private Space?' (2014) 17 Information, Communication & Society 974

or ill-will between different groups of persons. This section can potentially be applied in online harassment cases where, for example, a statement made by a cyberbully or a cyber-troll is likely to incite feelings of enmity or hostility between groups. However, this would not apply where the relevant statement is a true statement or where the statement is not likely to incite feelings of enmity between groups. Thus, a statement made about a person's private life, perhaps about their past sexual behaviour etc (which often happens in cases of online harassment), even if false, may not attract liability under this provision as it is unlikely to incite ill-will and enmity between groups. For the same reason, a false statement made in private to a victim, however harassing or offensive or menacing it may be to the victim, too would not attract liability under this section.

Furthermore, Section 298 of the Penal Code of Singapore provides that a person commits an offence if he with the deliberate intention of wounding religious or racial feelings of another person, utters or makes any sound in the hearing of that person or causes any matter howsoever represented to be seen or heard by that person. Section 298A criminalizes the deliberate promotion or attempt to promote enmity, hatred, or ill-will between different racial and religious groups through written or spoken words, by signs, visible representations etc. Section 298, in particular, appears to be broad enough to capture cases of online harassment including those which occur in private. For instance, this section can be applied to a case where a cyberbully sends via email or through social media offensive material that is intended to wound the religious or racial feelings of a person. However, this provision may not apply to cases where there is no racial/religious element involved. As seen above section 298A requires the relevant words/representations etc to have the effect of promoting or attempting to promote enmity, hatred etc among communities. Thus, this provision would not be capable of capturing online harassment committed in private where the relevant

expression may be heard or seen only by the relevant victim and may not lead to the promotion of communal hatred/disharmony.

In contrast, Singapore's Protection from Harassment Act 2014 (PHA) provides broader coverage for online harassment, including situations not involving racial or religious aspects.[33] Under Section 4 of the PHA, it is an offence to cause harassment through insulting, abusive, or threatening words and/or communications, which includes online platforms. Additionally, Section 7 of the PHA criminalizes stalking, which covers actions such as repeated communication with the victim or a relative of the victim with the intent to cause harassment, alarm, or distress.

Together, these various provisions in Singapore provide a comprehensive legal framework to address online harassment in multiple contexts, including those involving hate speech. However, as noted, the application of certain laws, such as those in the Penal Code, requires that racial or religious elements be present for the law to apply. On the other hand, the Protection from Harassment Act offers a more general approach that can cover online harassment beyond just hate speech, making it relevant for a broader range of online behaviors intended to cause emotional distress.

It is evident from the above analysis that the hate speech laws of the three jurisdictions considered here can be applied to various instances of online harassment to a certain extent.

Conclusion

This paper examines the applicability of hate speech laws of several jurisdictions (Sri Lanka, Singapore and the United Kingdom) to online harassment. To this end, first, the inter-connection between hate speech and online harassment is examined. This analysis reveals how hate speech often forms a constitutive element of

[33] Harasgama.K.S, & Rathnayaka, H. (2021). Combatting Cyber bullying: An Analysis of Laws in India, Singapore and Sri Lanka. KDU Law Journal, 128-146 ; Protection from Harassment Act 2014

certain forms of online harassment. The analysis further reveals that the majority of the hate speech laws in the jurisdictions analysed, require the communication in question to relate to a characteristic of the victim/s such as race/religion/gender/sexual orientation etc while some hate speech laws require the relevant speech to lead to communal violence/disharmony/breach of peace or enmity/hatred among groups. Thus, these laws can be of limited application when it comes to online harassment as many cases of online harassment (for instance a case of cyberbullying where some defamatory material unrelated to religion, race etc is published) would not involve racial/religious/gender elements, and may also be committed in private without leading to any communal violence/ disharmony or breach of peace.

In conclusion, the complex intersection of hate speech laws and online harassment across jurisdictions highlights the evolving challenges faced by legal systems worldwide. The analysis of hate speech laws in Sri Lanka, the United Kingdom, and Singapore underscores both the potential and limitations of existing legal frameworks in addressing online harassment involving hate speech.

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Termination of the India- Sri Lanka BIT of 1997 and the 'Survival' of Indian Investments in Sri Lanka: A Legal Perspective

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Abstract

India and Sri Lanka are two neighbouring countries in South Asia that have continued their friendly relations for more than 2,500 years. The increased presence of Indian foreign investors in contemporary Sri Lanka has raised concerns as to whether Sri Lanka could rely on foreign investments from India at a time when the country is being subject to its unprecedent economic crisis. The frustration over investor-state claims brought against India directed India to terminate around 75 Bilateral Investment Treaties (BITs) unilaterally. In this background, the purpose of this research is to evaluate the legal implications of the termination of the India-Sri Lanka BIT particularly on Indian foreign investments in Sri Lanka. According to the 'survival clause', investors who made or purchased their interests in India (or vice versa) before March 22, 2017, are only entitled to the protection offered by the India-SL BIT for fifteen years after its termination. The paper aims to examine how the termination and sunset clause of the India-Sri Lanka BIT impacts Indian investments established in Sri Lanka. This paper elaborates on how the potential disputes that arise before and after the termination of BIT are to be dealt with. It is argued that negotiating a new investment treaty between India and Sri Lanka with characteristics of modern BIT will strike an appropriate equilibrium between the regulatory power of the host state and the investors for Sri Lanka to be better integrated with the global economy. The study further suggests an appropriate method that can be followed when drafting the termination and survival clauses of the

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new investment treaty between India and Sri Lanka. The research adopts a doctrinal research methodology, employing exploratory and analytical approaches to investigate the subject matter.

Keywords: *Bilateral Investment Treaties, Survival Clause, Termination, Investor-State Dispute Settlement Mechanism*

Introduction

India and Sri Lanka, two neighbouring countries in South Asia, share a history of friendly relations spanning over 2,500 years. India is Sri Lanka's largest trading partner[1] and the leading source of foreign investment.[2] During Sri Lanka's recent economic crisis characterized by severe fuel shortages, extended power outages, and related challenges India's support as a regional superpower was widely acknowledged and appreciated both domestically and internationally. India provided approximately USD 4 billion through currency swaps, loan deferments, and credit lines to aid Sri Lanka's economic recovery.[3] Maritime connectivity, air connectivity, energy and power connectivity, trade-economic and financial connectivity, and people-to-people connectivity are the major areas identified for promoting the India- Sri Lanka partnership in the economic sector.[4] In short, it is believed that India is secure when Sri Lanka is secure.[5]

[1] 'Impact of FTA on Bilateral Trade' <https://www.cgijaffna.gov.in/page/display/112> accessed 23 October 2024; 'India-Sri Lanka Relations' (*Ministry of External Affairs.in*) <https://www.mea.gov.in/Portal/ForeignRelation/Sri_Lanka_January_2014.pdf>.

[2] '2023 Investment Climate Statements: Sri Lanka' (*United States Department of State*) <https://www.state.gov/reports/2023-investment-climate-statements/sri-lanka/>accessed 23 October 2024.

[3] Business Standard, 'India Provided Nearly $4 Billion in Food, Financial Assistance to Sri Lanka' (5 September 2022) <https://www.business-standard.com/article/international/india-provided-nearly-4-billion-in-food-financial-assistance-to-sri-lanka-122090500038_1.html> accessed 23 August 2024.

[4] ibid.

[5] Kelum Bandara, '"India Is Secure When Sri Lanka Is Secure"' <https://www.dailymirror.lk/opinion/India-Is-Secure-When-Sri-Lanka-Is-Secure-Gopal-Baglay/231-273393>accessed 25 August 2024.

In this context, concerns have been raised about whether Sri Lanka could actually rely on foreign investments from India rather than China at a time when the government is alleged to be caught in a 'strategic debt trap' of China for having put unjustified faith in significant infrastructure investment projects, which is suspected to be the primary cause of the current foreign currency deficit.[6]

Nonetheless, government regulatory measures of Sri Lanka have not always welcomed foreign investors. Notably, due to a significant public backlash, the Sri Lankan government unilaterally terminated its agreement of 2019 to build the Colombo East Container Terminal (CECT) with India and Japan. The CECT was strategically crucial for India to monitor the activities occurring in the Indian Ocean. Relating to Sri Lanka's termination, concerns had been raised about whether India had a strong case of filing an investor-state dispute against Sri Lanka for violating legitimate expectations of foreign investors based on the India-Sri Lanka Bilateral Investment Treaty (BIT).[7] However, the Sri Lankan government was able to "politically" compromise the termination by hiring the same foreign investor, Adani Group of India, to build the West Container Terminal (WCT) at Colombo Port. A similar prima facie violation happened earlier with Chinese investors as well.[8] Hence, it is crucial for Sri Lanka to enhance its capacities, including strengthening its regulatory framework, to effectively leverage investment opportunities and achieve its economic objectives, rather than becoming vulnerable in the geopolitical rivalry between India and China. Notably, on March 23, 2016, India unilaterally terminated approximately 52 Bilateral Investment Treaties (BITs), including the India-Sri Lanka BIT

[6] Chulanee Attanayake and Chulanee Attanayake, 'Sri Lanka's Economic Crisis: Lessons for Those in China's Debt' (*ORF*, 2023) <https://www.orfonline.org/expert-speak/sri-lankas-economic-crisis/> accessed 11 October 2023.

[7] Prabhash Ranjan, 'Indian Investments and BITs' *The Hindu* (15 February 2021) <https://www.thehindu.com/opinion/op-ed/indian-investments-and-bits/article33845509.ece>accessed 12 October 2024; see *National Grid v Argentina* [2008] UNICITRAL Award.

[8] See, bugsbunny, 'New Tripartite Agreement Signed on Colombo Port City Project' (*Colombo Gazette*, 12 August 2016) <https://colombogazette.com/2016/08/12/new-tripartite-agreement-signed-on-colombo-port-city-project/> accessed 18 August 2024

of 1997. Termination of IIA is a part of state sovereignty and states retain freedom to terminate or amend the treaties they have signed.[9] Similarly, termination of IIAs is an inseparable part of the reformation process, which justifies Rosco Pound's assertion that law cannot stand still and must evolve from time to time.[10]

Against this backdrop, the purpose of this research is to assess the consequences of the termination of the India-Sri Lanka BIT on the Indian foreign investments in Sri Lanka. The current status of the Treaty governing foreign investment must be assessed in light of the country's increasing foreign investments with India in order to comprehend any potential repercussions. Since there is a dearth of literature in this regard, this study aims to shed some light on the regulatory framework applicable to Indian- foreign investments in Sri Lanka. The first section offers an overview of the increasing presence of Indian investments in the territory of Sri Lanka. Section two delves into the key features of the India-Sri Lanka BIT, with an emphasis on its termination and the implications of the survival clause. This is followed by a detailed analysis of the mechanisms for resolving potential present and future investment disputes between Indian investors and the Sri Lankan government. The final section advocates for the negotiation of a new investment treaty between India and Sri Lanka, incorporating modern BIT provisions. The research employs a doctrinal methodology, utilizing exploratory and analytical approaches to investigate the subject matter comprehensively.

Indian Investments in Sri Lanka

The Indian foreign direct investment (FDI) in Sri Lanka began in 1982, with the opening of Ashok Leyland's bus assembly factory in Homagama in conjunction with the Sri Lankan government.[11] Since then, Indian

[9] Catharine Titi, 'The Right to Regulate in International Investment Law (Revisited)'[2022] International and Comparative Law Research Center.
[10] R. Pound, Interpretations of Legal History (Cambridge University Press 1923) 1.
[11] Lanka Ashok Layland PLC, ANNUAL REPORT 2022 / 2023 <https://www.lal.lk/wp-content/uploads/2023/07/LAL-AR-2022_23-RE-.pdf > accessed on accessed 18 August 2024

investors have invested in Sri Lanka based on various considerations, such as close proximity, geopolitical concerns, shared values, etc. As of December 2023, the total FDI received from India has exceeded US$ 2.2 billion.[12] The decision of the Sri Lankan government to restructure its state-owned enterprises has created increased opportunities for Indian investors. Notably, India has shown interest in investing in key sectors, including energy, tourism, and infrastructure, through both public and private firms, aiming to support Sri Lanka's economic recovery.[13] Recently, the government approved the proposals from the Marubeni Corporation and the Adani Group to invest in the energy sector as a government-to-government agreement to revitalize the country's electricity supply.[14] In July 2022, the government amended the Ceylon Electricity Act No. 20 of 2009, eliminating the monopoly enjoyed by the Ceylon Electricity Board of Sri Lanka (CEB) on the production, distribution, and development of electricity in the country.[15] This amendment makes it possible for both domestic and foreign investors to enter into the electricity sector. Additionally, Sri Lankan Airlines, the state-owned carrier, has planned to privatize its activities, seeking to revive its activities, particularly with TATA Sons of India.[16] Moreover, ONGC Videsh Limited (OVL) has expressed willingness to participate in oil and gas exploration opportunities in Sri Lanka[17] in addition to the

[12] (*High Commission of India*, January 2023) <https://hcicolombo.gov.in/Economic_Trade_Engagement> accessed 12 October 2024)

[13] Aljazeera, 'India to "Encourage Greater Investments" in Crisis-Hit Sri Lanka' (20 January 2023) <https://www.aljazeera.com/news/2023/1/20/india-to-encourage-greater-investments-in-crisis-hit-sri-lanka> accessed 10 October 2024.

[14] Nirupama Subramanian, 'To Legalise Power Project Given to Adani Without Tender, Sri Lanka Wants It Turned Into Govt-to-Govt Deal' (*The Wire*) <https://thewire.in/south-asia/to-legalise-power-project-given-to-adani-without-tender-sri-lanka-wants-it-turned-into-govt-to-govt-deal> accessed 10 October 2024.

[15] See, Sri Lanka Electricity (Amendment) Act, No. 16 of 2022

[16] Aviation talks, '"Tata Sons Emerges as a Promising Investor for SriLankan Airlines: A Look at the Potential Benefits and Challenges"?' (5 May 2023) <https://www.linkedin.com/pulse/tata-sons-emerges-promising-investor-srilankan-airlines/> accessed 12 October 2024.

[17] Sukalp Sharma, 'ONGC Videsh Interested in Oil and Gas Exploration in Sri Lanka: MD Rajarshi Gupta' (*The Indian Express*, 11 October 2023) <https://indianexpress.com/article/business/ongc-videsh-interested-in-oil-and-gas-exploration-in-sri-lanka-md-rajarshi-gupta-8978691/> accessed 12 October 2024.

Lanka IOC (LIOC), a Sri Lankan subsidiary of Indian Oil, which has operated since 2003 to deal with bulk supply to industrial consumers and retail marketing of petroleum products.

The growing presence of India in different investment sectors of Sri Lanka entices to investigate the regulatory framework applicable to Indian investments in Sri Lanka. As renowned investment law expert Jeswald Salacuse has mentioned, the applicable law relating to Indian investments in Sri Lanka can be comprehended as India- Sri Lanka BIT, domestic laws and Contractual agreements if any.[18] Among them, the India-Sri Lanka BIT has acquired the most dominant role in treaty interpretation.[19]

1. India- Sri Lanka BIT

The Bilateral Investment Treaties are the primary source of contemporary investment law that regulates foreign investments.[20] A BIT is an agreement between two contracting parties that establishes reciprocal obligations to promote and protect investments made by investors in each other's territories. [21] The accorded protection includes admission and establishment of investments, promotion of investments, standard of treatment, protection from expropriation, and dispute settlement. As of December 2024, 2221 BITs are in force to integrate the domestic economy with the globe.[22]

In an investment treaty, the host state voluntarily limits certain aspects of its sovereignty in exchange for attracting new investment opportunities that might not have been attainable without the treaty.[23] As observed by the Tribunal in *ADC v Hungary,*

[18] Salacuse Jeswald W, *The Law of Investment Treaties*, vol 1 (Oxford University Press 2015).
[19] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (Third Edition, Oxford University Press 2022).16
[20] ibid.35-40
[21] Ibid.
[22] 'International Investment Agreements Navigator, UNCTAD Investment Policy Hub' <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 24 December 2024.
[23] Dolzer, Kriebaum and Schreuer (n 29) 26–7.

'It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have boundaries. As rightly pointed out by the claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a state enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.' [24]

The objective of any IIA is to minimize the risks associated with foreign investments.[25] Fundamentally, all BITs include provisions aimed at protecting foreign investors from abrupt policy changes in the host state that could disrupt the smooth functioning of their investments.[26] 'Often, the business plan of the investor is to sink substantial resources into the project at the outset of the investment, with the expectation to recoup this amount plus an acceptable rate of return during the subsequent period of the investment, sometimes running to 30 years or more.'[27]

The Agreement Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Republic of India for the Promotion and Protection of Investment (India-Sri Lanka BIT) of 1997 came into force on February 13th, 1998.[28] Sri Lanka initiated its BIT programme in 1963 with Germany, much more before introducing

[24] *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No. ARB/03/16) Award, 02 October 2006, para 423

[25] M Sornarajah, *The International Law on Foreign Investment* (4th edition, Cambridge University Press 2017).

[26] James Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' (2012) 13 The Journal of World Investment & Trade, 932–34.

[27] Dolzer, Kriebaum and Schreuer,(n.29)

[28] 'India - Sri Lanka BIT (1997)' (*International Investment Agreements Navigator | UNCTAD Investment Policy Hub*) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1955/india---sri-lanka-bit-1997-> accessed 01 November 2024.

the open economic policy.[29] As of December 2024, Sri Lanka has concluded BITs with 28 countries, including both developed and developing countries.[30]

A close scrutiny of India-Sri Lanka BIT suggests that it is primarily oriented towards defending the interests of foreign investors of capital-exporting nations. The preamble of the treaty intends to create a conducive environment for greater investment. A similar language is stipulated in the preambles of many other BITs of Sri Lanka.[31] Though this provision per se does not create a direct legal obligation, when the other treaty provisions are interpreted in a holistic manner, the preamble becomes important to supplement the interpretation of treaty provisions.[32]

Further, the treaty contains a broad asset-based definition followed by an inclusive or non-exhaustive list of assets, which includes direct investment, portfolio investment, intellectual property rights, rights to money or any performance under contract having a financial value, and business concessions conferred under law or contract.[33] By covering such a wide range of investments, the treaty effectively brings a significant portion of Sri Lanka's regulatory authority under the jurisdiction of investment treaty arbitration (ITA). According to the Treaty, fair and equitable treatment should be accorded to foreign investment at all times, but it does not

[29] Treaty between the Federal Republic of Germany and Ceylon for the Promotion and Reciprocal Protection of Investments 1963

[30] Australia, Belgium-Luxembourg Economic Union, China, Czech Republic, Denmark, Egypt, Finland, France, Germany, India, Indonesia, Iran, Japan, Korea, Kuwait, Malaysia, Netherlands, Norway, Pakistan, Romania, Singapore, Sweden, Switzerland, Thailand, United Kingdom, United States of America and Vietnam,at ibid

[31] The Preamble of Pakistan- Sri Lanka BIT 1997, China – Sri Lanka BIT 1986, Australia- Sri Lanka BIT 2002, Czech Republic- Sri Lanka BIT 2011

[32] Prabhash Ranjan, 'Object and Purpose of Indian Investment Agreements: Failing to Balance Investment Protection and Regulatory Power' in Vivienne Bath and Luke Nottage (eds), Foreign Investment and Dispute Resolution: Law and Practice in Asia (Routledge, London 2011) 192.

[33] Art 1.b of India-Sri Lanka BIT

define any normative content or guidance regarding its meaning.[34] The ITA jurisprudence evidences how the investors have challenged the public welfare state measures as FET violations.[35] Furthermore, the National Treatment Clause and Most-Favoured-Nation Treatment Clause are broadly framed, allowing only traditional exceptions. These exceptions typically pertain to obligations arising from free trade agreements, customs unions, or matters of taxation.[36] This approach reduces the regulatory space of Sri Lanka as a host state to regulate Indian investments. The Provision on expropriation clearly states that investment shall not be nationalized or expropriated or subjected to measures having 'effect' equivalent to expropriation unless there is a public purpose, and further on a non-discriminatory basis and fair and equitable compensation is paid according to the law.[37] The absence of clear guidelines for determining expropriatory actions may lead arbitrators to apply the 'sole effect test' when interpreting disputes involving regulatory measures by the host state.[38] Moreover, the monetary transfer provision guarantees the transfer of 'all funds related to investment', restricting the monetary sovereignty of Sri Lanka.[39] If a domestic law conflicts with the inclusive list specified in the monetary transfer clause of the India-Sri Lanka BIT, a foreign investor could challenge it as a violation of the treaty's protections.[40] Deviation from these treaty obligations is permitted only in cases involving the protection of "essential security interests" or "circumstances of extreme emergency," both of which require meeting a very high threshold.[41]

[34] Art3.2 of India-Sri Lanka BIT
[35] Prabhash Ranjan, *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (1st edn, Oxford University Press 2019
[36] Art 4 of India-Sri Lanka BIT
[37] Art 5.1 of India Sri Lanka BIT
[38] Niroshika Liyana Muhandiram, 'The Formulation and Determination of Expropriation Clauses in BITs of Sri Lanka: Gaps and Prospects' [2022] Asia Pacific Law Review 1.
[39] Dolzer, Kriebaum and Schreuer (n 29) 26–27.
[40] Adaeze Agatha Aniodoh, 'Host States' Monetary Sovereignty Within the Construct of Bilateral Investment Treaties' (2021) 65 Journal of African Law 1.
[41] Mohammad-Ali Bahmaei and Habib Sabzevari, 'Self-Judging Security Exception Clause as a Kind of Carte Blanche in Investment Treaties: Nature, Effect and Proper Standard of Review' (2023) 13 Asian Journal of International Law 97.

Additionally, the treaty does not provide exceptions based on the protection of the environment, labour rights, human rights, or public health. As a result, it primarily emphasizes the host state's obligations to protect and promote foreign investment. Therefore, the author contends that the India-Sri Lanka BIT of 1997 reflects the characteristics of a first-generation BIT, lacking provisions that adequately legitimize the host state's bona fide regulatory authority within its text.

The hesitation to address public welfare issues could result in a "regulatory chill" preventing the state from all public welfare state initiatives affecting foreign investments.[42] As Indian investors have a much more significant presence in Sri Lanka, they are more likely to benefit from the India-Sri Lanka BIT's protections than Sri Lankan investors in Indian territory.[43] Where the BIT's text provides insufficient direction for its interpretation, this indeterminacy might permit the arbitrators to decide any future dispute relying on the boundaries demarcated by the text of the BIT favoring the Indian investors.

Mere substantive treaty regulations, however, are insufficient to provide stability for investors if they are subject to abrupt termination or revocation. Since India has terminated Sri Lanka-India BIT, the laws pertaining to the application and termination of BITs also require to be examined to recognize its impact on the stability and legal security of Indian investors.

1.1 Termination of India Sri Lanka BIT

The general rule for termination of a treaty is termination by invoking BIT Provision. Article 54 (1) of the Vienna Conventions on the Law of Treaties (VCLT) permits the parties to terminate or

[42] Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 Transnational Environmental Law 229.
[43] Prabhash Ranjan, 'Indian Capitalism and Bilateral Investment Treaties' (*ORF*) <https://www.orfonline.org/expert-speak/indian-capitalism-and-bilateral-investment-treaties/> accessed 13 November 2023.

withdraw the Treaty in conformity with the provisions of the treaty.[44] In general, a BIT can be terminated at the end of its initial validity period, provided timely notice is given to the other party.[45] The inclusion of a clause specifying a minimum period of application is a common feature in most first-generation model BITs.[46] This clause aims to provide investors with a sense of stability and security, assuring them that the treaty's protections will remain in place for a defined period.[47] According to Article 44.1 of the VCLT, state parties can agree on which parts of the treaty the termination applies to; and in the absence of such an agreement, termination, withdrawal, or suspension applies to the entire treaty.

Article 15.1 of India-Sri Lanka BIT states that,

'This Agreement shall remain in force for a period of ten years and thereafter it shall be deemed to have been automatically extended unless either Contracting Party gives to the other Contracting Party a written notice of its intention to terminate the Agreement. The Agreement shall stand terminated one year from the date of receipt of such written notice.'

The context of the above clause indicates that it applies to the cases of unilateral termination only.[48] Accordingly, the Treaty was intended to continue for an indefinite period after coming into force for a ten-year period, subject to unilateral termination.

Notably, as part of a Cabinet decision to terminate BITs whose

[44] Vienna Convention on the Law of Treaties (1969)' 23 May 1969, United Nations, Treaty Series, 1155; August Reinisch and Sara Mansour Fallah, 'Post-Termination Responsibility of States?The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors' (2022) 37 ICSID Review - Foreign Investment Law Journal 101,104-06

[45] Harrison(n.27); Tania Voon and Andrew D Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law' (2016) 31 ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL

[46] Harrison, ibid.

[47] ibid 933–35.

[48] Also see Ethiopia- Libiya BIT, Art 12 (3)

initial duration had expired, India unilaterally terminated the India-Sri Lanka BIT, which had been largely beneficial to Indian investors in Sri Lanka.[49] The state practice of India emphasized that the termination notice of India-Sri Lanka BIT was given after completing the initial ten years period (12th February 2008 is the date of initial expiry of 10 years of the India- Sri Lanka BIT)and by September 2021, India has terminated 77 BITs altogether.[50] The primary cause of this termination is the rise of investor-state arbitration (ISA) claims followed by state policy to implement a new model BIT of 2015, which is intended to restrict the extent of investors' rights and provide greater space for regulation and policymaking.[51] The opposing award in the *White Industries case*[52] and other notices of investment disputes[53] compelled India to revisit and make reformations to their whole BIT programme.[54] Although investment disputes directly impacted only a small number of investor states, India extended the termination to all BITs for which unilateral termination was legally permissible. India's decision to unilaterally terminate these treaties was part of a broader strategy of treaty reformation. After the new model BIT was approved by the Cabinet in December 2015, the termination process was initiated as part of a planned BIT reform effort.[55] Based on the new Model BIT, India has concluded BITs with Belarus, Kyrgyzstan, Taiwan,

[49] Ranjan (n.36)

[50] See 1.13, Tenth Report of the Committee on External Affairs (2020-21) on the Subject "India and Bilateral Investment Treaties". [2021] Parliament of India.

[51] Ranjan,(n.36); Simon Hartmann and Rok Spruk, 'The Impact of Unilateral Bilateral Investment Treaties Terminations on FDI: Evidence from a Natural Experiment' (2 May 2020)

[52] *White Industries Australia Limited v Republic of India*, UNCITRAL, Final Award (30 November 2011).

[53] *Vodafone v. India*, UNCTIRAL, Notice of Arbitration (not public), 17 April 2014; *Deutsche Telekom v. India*, ICSID Additional Facility, Notice of Arbitration (not public), 2 September 2013; *Louis Dreyfus Armateurs SAS v. The Republic of India*, PCA Case No. 2014-26, Final Award, 11 September 2018; *Astro All Asia Networks and South Asia Entertainment Holdings Limited v. Indi*a,PCA Case No. 2016-24/25, Consent Award, 8 October 2018

[54] See 1.1-1.9, Committee on External Affairs (n 51).

[55] ibid1.11-1.12.; Press Information Bureau Government of India, 'Model Text for the Indian Bilateral Investment Treaty' (16 December 2015)

and Brazil, while negotiations are pending with 37 other countries for various IIAs.[56]

The denunciation of IIAs in response to ISDS claims has been a trend followed by several countries. In 2013, South Africa unilaterally terminated its BITs with Luxembourg, Switzerland, and Spain, and in 2014, with Denmark, the UK, France, Australia, and Germany. Similarly, consequent to ISDS claims,[57] Indonesia unilaterally terminated around 60 BITs between 2014 to 2017 keeping track of the expiry of the initial terms of the BITs.[58] A common feature of these BITs is that they provided only limited policy space for the host state to address legitimate governance challenges, such as those related to public health, the environment, and human rights.[59] The Latin American countries reflected their dissatisfaction towards IIAs by withdrawing from the ICSID Convention.[60] These tendencies exemplify the frustration of host states to be associated with the ISDS mechanisms.

1.2 Survival Clause

Despite the inclusion of a minimum period of application clause, most BITs also feature a survival clause (commonly referred to as the "sunset clause"),[61] which allows member states to unilaterally terminate the BIT while regulating the effects of such termination.

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[56] 1.17 ibid.

[57] *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction (24 February 2014)

[58] Anastasiia Koltunova, Etale Reagan and Marina Trunk-Fedorova, 'Termination of Bilateral Investment Treaties: Alternatives for Least Developed Countries' (Master of Laws in International Economic Law and Policy, International Economic Law Clinic 2018).

[59] Suzanne A Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 Journal of International Economic Law 1037.

[60] Christian Tietje, Karsten Nowrot and Clemens Wackernagel, 'Once and Forever? The Legal Effects of Denunciation of ICSID', Beitrage zum Transnationalen Wirschaftsrecht Heft 74, March 2008, 5

[61] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, Art 7 (1)- "Sunset Clause" means any provision in a Bilateral Investment Treaty which extends the protection of investments made prior to the date of termination of that Treaty for a further period of time.

This clause applies to both substantial and procedural provisions. It enables investors to pursue claims in investment arbitration even after the treaty has technically expired.[62] Each treaty has its own unique survival clause with specific language, and these clauses do not adhere to a uniform standard. Most BITs specify the duration of the treaty's initial validity period, the conditions for notifying the termination to the other party, and provisions for renewal.[63] The survival clause ensures that investors can initiate legal action, continue ongoing legal actions, or retain certain substantive rights even after the treaty has expired.[64]

The Article 15(2) of the India-Sri Lanka BIT provides that,

'Notwithstanding termination of this Agreement pursuant to paragraph (I) of this Article, the Agreement shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement.'

As a result, the treaty will remain in effect for an additional fifteen years from the date the unilateral termination declaration is made. This prevents foreign investments from being affected by the immediate termination of the treaty. Survival clauses are crucial for maintaining investor expectations and ensuring the stability of the investment climate.[65] Even though India terminated the India-Sri Lanka BIT, Sri Lanka is still obligated to provide both substantive and procedural protections, as outlined in the treaty, for investors who made investments or acquired interests in Sri Lanka (or vice versa) before the termination. This obligation extends for another 15 years. Since the treaty termination became effective on March 23, 2017, all Indian investment projects established before that date remain protected by the India-Sri Lanka BIT provisions until 2032.

[62] Reinisch and Mansour Fallah (n 45), 110–11.
[63] Koltunova, Reagan and Trunk-Fedorova (n.59)
[64] Reinisch and Mansour Fallah (n 45).
[65] Harrison (n 27).

In the case of *Magyar Farming v. Hungary*, the ICSID tribunal noted that by incorporating a survival clause, parties recognize that the long-term interests of investors who relied on the treaty's guarantees must be respected.[66]

Apart from unilateral termination, another option available for the parties to terminate the Treaty is termination by consent. In 2019, Australia negotiated two BITs with Hong Kong and Uruguay terminating and replacing the old BITs. Those new BITs contain clauses that abandon the survival clause's application in the old BITs.[67] Also, states may terminate the BIT by mutual consent without negotiating any replacement treaty.[68] Several tribunals have also accepted the relevancy of the survival period relating to a mutually terminated agreement.[69] Nonetheless, mutual termination does not apply to India- Sri Lanka BIT, as India has already unilaterally terminated the BIT.

1.3 Termination v Survival: In Between Death and Life

Generally, the termination of a treaty releases the parties from any further obligation to perform the treaty.[70] Nonetheless, this is subject to the agreement between the parties and it does not affect any right, obligation, or legal situation of the parties created through the execution of the treaty prior to its termination.[71] Therefore, the survival clause is not contradictory to the termination clause but supplementary to each other. So far, no ISDS claim has arisen between India and Sri Lanka. The survival clause of the Treaty

[66] ibid.,'*Magyar Farming and others v. Hungary*(Award) 13 Nov 2019, para 222.
[67] Art 40.2 of Australia- Hong Kong BIT; Art 17.5 of Australia- Uruguay BIT
[68] Czech Republic terminated its BITs entered with Denmark, Italy, Slovenia and Malta in 2009 and 2010 without replacing the BIT with a new Treaty, but they agreed to extinguish the survival clause in the exchange notes effecting the termination.
[69] *Walter Bau AG (in liquidation) v Thailand*, UNCITRAL, Award (1 July 2009) para 9.5; *Eastern Sugar BV (Netherlands) v The Czech Republic*, SCC Case No. 088/2004 (n 49) para 175; *Mohamed Abdel Raouf Bahgat v Arab Republic of Egypt*, PCA Case No 2012-07, Decision on Jurisdiction (30 November 2017) para 313
[70] Art 70.1 (a) of the VCLT(n45)
[71] Art 70.1 (a) and (b) of the VCLT, ibid

extends the treaty's application for an additional length of fifteen years with regard to current investments established before March 22, 2017 (which is the effective date for termination). Established Indian investors enjoy greater security the longer the survival period. Additionally, from a policy standpoint, it makes sense to prohibit one treaty party from abruptly ending the other party's protection of investors, given the lengthy duration of foreign investments.[72] Therefore, it would seem that "sunset" or "survival" sections were added in the first place to safeguard against the unexpected consequences of unilateral treaty termination.

Nonetheless, this clause has clear disadvantages as well. Since the degree of stability is applicable for the survival period, in terms of Indian investments made after 2017, including the prospective ones, could be exposed to stringent or discriminatory regulatory measures in which no ISDS claim can be made as there is no BIT in force between India and Sri Lanka. If Adani Group or TATA Group wants to bring a claim against any of the state measures, they cannot bring an ISDS claim under the India-Sri Lanka BIT.

As the Parliamentary Committee on External Affairs of India has pointed out, the purpose of the unilateral termination of BITs by India is to reform the IIA treaty practices.[73] Even the recent state practice suggests that unilateral termination is a way adopted by developing states to modernize their IIA treaty practice.[74] However, the long duration of the protection accorded to foreign investments through the survival clause discourages this treaty reformation process. Even if a new investment treaty is introduced to regulate investments between India and Sri Lanka, Indian investments (and vice versa) would be subject to two different treaties based on the period of establishment of such investments. Therefore, the author argues that the long duration of the survival clause of the India-Sri

[72] ibid.,
[73] Committee on External Affairs (n 51).
[74] Koltunova, Reagan and Trunk-Fedorova (n 59).

Lanka BIT has had a lasting impact on the old-style BITs on the one hand and impliedly delayed the treaty reformation process on the other.

It is noteworthy that different states have followed different treaty practices to bar these negative consequences of the survival clause. Limited application of the survival clause is found in France -Korea BIT, which states that "investments covered by its provisions and made during the period during which it was in force."[75] The approach followed by Norway in its Model IIA is unique as it allows unilateral termination at any time to take effect from the first day of the very next month after notification.[76] Ethiopia- Libya BIT does not contain a survival clause or any reference to the survival period after the termination of the BIT.[77]

The effects of a sunset clause can create challenges, as it may lead to an "eternity" problem, conflicting with the parties' intent to amend or update the law. To address this, some states have adopted strategies to neutralize the sunset clause before the termination takes effect.[78] Parties can mutually agree to nullify the survival clause before ending the BIT. For example, Indonesia and Argentina agreed to terminate the Argentina-Indonesia BIT and neutralized the survival clause, which originally provided for a 10-year survival period.[79] Similarly, the Czech Republic neutralized its survival clauses with EU member states before terminating its BITs.[80] However, when a survival clause has a definite validity period, such as five years as in the Egypt-Ethiopia BIT and the Bangladesh-Italy BIT it does not pose

[75] France-Korea BIT, Article 9(4)
[76] Draft Model Agreement for the Promotion and Protection of Investments (2015) (Norway Model IPPA) art 34.1
[77] Art 12 (3)
[78] *UP and CD Holding Internationale v Hungary*, ICSID Case No ARB/13/35, Award (9 October 2018) para 265
[79] Peterson, 'Indonesia ramps up termination of BITs – and kills survival clause in one such treaty – but faces new $600 mil. claim from Indian mining investor' <https://isds.bilaterals.org/?indonesia-ramps-up-termination-of> accessed 26 December 2023.
[80] United Nations, (2017) 'PHASE 2 OF IIA REFORM: MODERNIZING THE EXISTING STOCK OF OLD-GENERATION TREATIES'.

significant obstacles to IIA reforms.

India, as a regional powerhouse, is a significant capital-exporting country to various nations, including Bangladesh, Maldives, Germany, Libya, Saudi Arabia, Japan, and Bolivia. However, India's protectionist stance toward IIAs has overlooked the reciprocal nature of investment protection provisions, potentially exposing Indian investors abroad, including those in Sri Lanka, to increased risks. Despite this, the provisions of the India-Sri Lanka BIT were largely skewed toward protecting the interests of Indian investors. Had both states neutralized the survival clause or reduced its duration to five years, they could have avoided or mitigated future disputes arising from the legacy of the old BIT.

2. Settlement of India- Sri Lanka Investment Disputes

The termination of the India- Sri Lanka BIT poses an important question as to how the investment disputes arising after the termination (After March 2017) are supposed to be solved. No BIT provision would apply if Adani Group or any other Indian investor found that the state actions taken by the Sri Lankan government violated the investment agreement. As a result, if an Indian investor gets into regulatory trouble in Sri Lanka, they will not be able to bring an ISDS claim against Sri Lanka's regulatory measures. Even though commercial diplomacy could play a vital role in countries like Sri Lanka preventing harm consequent to non-discriminatory state measures in the absence of an investment treaty, the recent tendencies of developing countries such as Iran, Nigeria, Chile, Slovakia and Morocco are to make reformations to traditional investment treaties to reflect possible opportunities for the investment protection while preserving sovereign regulatory authorities.[81]

Termination of India- Sri Lanka BIT makes the new Indian investor

[81] Clint Peinhardt and Rachel L Wellhausen, 'Withdrawing from Investment Treaties but Protecting Investment' (2016) 7 Global Policy 571.

rely exclusively on domestic legislation and judiciary.[82] Hence, the effect of BIT termination is contingent on the effectiveness of the domestic judiciary system.[83] However, it is uncertain how appealing Sri Lanka's protracted court process would be to international investors, even though the host state's domestic judiciary system remains accessible to them. Consequently, it is reasonable to assume that investors would instead rely on the dispute resolution clause in their specific investment contract. Such disputes would typically be treated as private matters to be resolved through commercial arbitration, provided an investment contract exists between the parties.[84]

3. What is next?

Although India viewed the termination of BITs as a way to hinder the ISDS mechanism, empirical studies have pointed out that most states that have encountered ISDS have chosen not to terminate their bilateral investment treaties.[85] For instance, Argentina has not terminated any BIT despite having the greatest number of publicly reported ISDS lawsuits (60 as of 2019).[86] On the contrary, some states have responded by reforming their BITs with explicit reference to the regulatory power of the state.[87]

As recommended by the Parliamentary Committee of India, a new investment treaty should be negotiated to regulate the investment relationship between India and Sri Lanka. Empirical data indicates that India's unilateral termination of BITs has had significant and

[82] Hartmann and Spruk (n52).
[83] ibid.
[84] Niroshika Liyana Muhandiram, 'Sri Lanka, a Destination for Indian Investors: An Assessment of Legal Framework - South-South Research Initiative' (*South-South Research Initiative - Research Initiative*, 31 October 2022) <https://www.ssrinitiative.org/sri-lanka-a-destination-for-indian-investors-an-assessment-of-legal-framework/> accessed 15 October 2023.
[85] ibid 9.
[86] Tuuli-Anna Huikuri, 'Constraints and Incentives in the Investment Regime: How Bargaining Power Shapes BIT Reform' (2023) 18 The Review of International Organizations 361.
[87] Peinhardt and Wellhausen (n83).

substantial negative effects on FDI inflows into the country.[88] However, no study has shown such a negative impact on Sri Lanka. Rather, more Indian investments are flowing to Sri Lanka due to geopolitical concerns in the absence of a BIT.[89] Recently, the Economic Transformation Act of 2024 was introduced to ensure the continuation of projects and policies of national importance in spite of changes in the government in power.[90] Nonetheless, in an investment dispute, a BIT takes precedence over domestic laws.

As reported, both countries resumed their negotiations in July 2023 for an Economic and Technology Cooperation Agreement (ECTA) with rules for investment relations.[91] The previous negotiations held between 2016 to 2018 for the same agreement were not successful due to the public opposition on the long list of professional services that India intended to provide including engineering, urban planning, computer, telecommunication, research and development and etc.[92] However, the recent press release issued by the Ministry of Commerce and Industry of India on ECTA does not make any explicit reference to investment regulation.[93]

In this context, this study recommends that Sri Lanka negotiate an investment treaty or a comprehensive trade agreement with India that includes an investment chapter. Such an agreement should be drafted in a way that strikes a balance by fostering greater investment opportunities without unduly compromising or undermining Sri Lanka's legitimate regulatory autonomy. Additionally, Sri Lanka can

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[88] ibid.
[89] '2023 Investment Climate Statements: Sri Lanka' (n.2)
[90] Economic Transformation Act No 45 of 2024
[91] Shashank Mattoo, 'India, Sri Lanka to Work for Economic, Tech Agreement' (*mint*, 21 November 2024) <https://www.livemint.com/economy/india-sri-lanka-to-work-for-economic-tech-agreement-11689962998630.html> accessed 1 November 2024
[92] Gamanayake Piumi, 'The Economic and Technological Cooperation Agreement: Full Steam Ahead for India and Sri Lanka?' (*South Asia@LSE*, 20 October 2016)
[93] 'India and Sri Lanka Re-Launch Negotiations of the Economic and Technology Cooperation Agreement (ETCA)' Ministry of Commerce & Industry (1 November 2024) <https://pib.gov.in/pib.gov.in/Pressreleaseshare.aspx?PRID=1973859> accessed 2 December 2023.

adopt various strategies to rebalance the interests of the state and foreign investors effectively.[94] For instance, Sri Lanka could include explicit exceptions in the treaty for health, environmental protection, human rights, and similar public interest concerns, providing clear circumstances under which these provisions can be invoked. The definition of "investment" could also be narrowed to exclude certain categories, such as portfolio investments. Furthermore, the treaty could specify the content of the FET provision and provide detailed guidance on determining indirect expropriation. The recommendation to negotiate a new BIT with India is further supported by the following reasons.

To ensure a Level Playing Field: An IIA establishes equal and legal treatment for investors from both countries, regardless of geopolitical considerations. This fosters investor confidence by ensuring protected investments are treated fairly. For Sri Lanka, currently facing an economic crisis, such a treaty provides assurance of consistent and cohesive investment treatment.

To promote Good Governance and the Rule of Law: Investment treaties hold the host state accountable to foreign investors under standards established in IIAs, promoting transparency and adherence to the rule of law. This minimizes the impact of governmental changes on the establishment and operations of foreign investments, as seen in instances like the Port City Project.

To Depoliticize Investment Disputes: Investment treaties help to mitigate the influence of powerful states on disputes involving the other contracting party. In the case of India and Sri Lanka, predetermined treaty clauses would govern dispute resolutions rather than diplomatic relations. This ensures that the ISDS mechanism remains impartial, with the host state having no undue influence over its outcomes.

[94] 'World Investment Report 2015 - Reforming International Investment Governance' (2015) <https://unctad.org/system/files/official-document/wir2015_en.pdf> accessed 7 June 2024.

Regarding the survival clause, the approach followed by the Indian Model BIT seems more effective and pragmatic as it requires the consent of the parties to continue the treaty application after the initial 10 years, and the duration of the survival clause is only limited to five years.[95]

Conclusion

States terminate BITs either to replace it with another IIA or to enter into another FTA incorporating an investment chapter modifying the provisions or to reflect the dissatisfaction of IIA regime by placing no replacement at all. Various studies have indicated that the cumulative effect of exposure to ISDS is making states deviate from their old-generation BITs.[96] The step taken by India to terminate the India- Sri Lanka BIT is a positive indication of its investment treaty reformation process. Otherwise, Sri Lanka would never make such a bold decision due to less bargaining power. However, the sunset clause, or the survival clause of India- Sri Lanka BIT, has resulted in the termination being complicated while it acts as a safeguard mechanism for the already established foreign investors in the host state. The member states could have minimized the application of the survival clause to five years through mutual consent to expedite the investment reformation process. As discussed, modern IIAs have attempted to address these concerns by stipulating expressive provisions to modernize existing treaties without unilateral termination thereby bringing certainty to the duration and application of the treaty. When India and Sri Lanka negotiate for a new investment treaty, they should both push for a five-year restricted duration for the survival clause to prevent having two distinct investment regulatory frameworks for the investors coming from the same country. Until states provide greater clarity in the provisions of investment treaties, arbitral tribunals will continue to exercise their discretion in interpreting and determining the scope and application of these provisions.

[95] Article 38.2
[96] Huikuri (n88).

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In Search for a Justification for Copyright Protection for Mashup Songs; A Philosophical Investigation through the Lens of Lockean Philosophy

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Abstract

The world of creativity expands radically in the current digital age, leading to the development of diverse and extensive creativity levels. Mashup songs can be considered a genre of creativity that developed over the past few decades. A plethora of arguments circulate around the act of granting copyright protection for mashup songs and the legal arguments regarding the subject appear to be quite significant. Various arguments regarding granting copyright protection for mashup songs offer a reasonable opportunity to inquire about the matter in detail from a philosophical perspective. Thus, to investigate the philosophical basis for the protection offered to mashup songs by copyright, the current research has attempted to utilize the natural rights theory by John Locke. By utilising the doctrinal approach and explorative method of qualitative research, the research has attempted to identify various philosophical justifications connected to the subject of the research. The findings suggest a close affiliation between the natural rights theory and the justification that can be raised in favour of granting copyright protection for mashup songs. However, it was further identified that there are certain complications in using the natural rights theory in matters pertaining to intellectual property due to the nature of intellectual property, including mashup songs.

Keywords: *Mashup songs, Intellectual property, Natural rights theory, John Locke, Jurisprudence*

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Introduction

Intellectual property law is the branch of law that attempts to ensure protection to the creations of the human mind.[1] For the purpose of ensuring rights regarding such products of human creativity, the intellectual property legal framework offers numerous intellectual property tools or rights, through which protection for such creations can be ensured.[2] Examples for such intellectual property rights include copyright, patents, trademarks and industrial designs which may protect diverse creations provided that certain requirements are effectively satisfied. For instance, for a certain claimed invention to be protected by way of a patent, as per Section 63 of the Intellectual Property Act, No.36 of 2003, the relevant creation should be novel, should involve an inventive step and should be capable of being utilized industrially[3] whereas copyright protection can be attracted by artistic, literary and scientific work that are original as enshrined in Section 6 of the same.[4] Fixation requirements pertaining to the content that can be protected by copyright should also be given due consideration depending on the law of the relevant states.[5]

With the advent of technology and extreme competitive behavior of organizations and persons engaged in business, the boundaries of creativity and their reach have widely expanded.[6] Such developments

[1] Sanjib Bhattacharya and Chandra Nath Saha, 'Intellectual Property Rights: An Overview and Implications in Pharmaceutical Industry' (2011) 2 Journal of Advanced Pharmaceutical Technology & Research 88.
[2] ibid
[3] Cornell Law School, 'Patent' (*LII / Legal Information Institute,* 23 October 2017) <https://www.law.cornell.edu/wex/patent> accessed 20 June 2024.
[4] Will Kenton, 'Copyright Explained: Definition, Types, and How It Works' (*Investopedia,* 27 March 2022) <https://www.investopedia.com/terms/c/copyright.asp> accessed 18 June 2024.
[5] Tabrez Ahmad and Soumya Snehil, 'Significance of Fixation in Copyright Law' [2011] SSRN Electronic Journal <https://www.researchgate.net/publication/228186404_Significance_of_Fixation_in_Copyright_Law> accessed 24 June 2024.
[6] Dan Ikenson, 'The E-Commerce Revolution Is Transforming Global Trade and Benefitting the U.S. Economy' (*Forbes,* 13 June 2022) <https://www.forbes.com/sites/danikenson/2022/06/13/the-e-commerce-revolution-is-transforming-global-trade-and-benefitting-the-us-economy/> accessed 8 June 2024.

can be considered as an effective platform that expanded the overall opportunities available for creators to share their creativity with a wider audience with minimal costs. However, the same opportunity can also be considered to have developed various new challenges that should be effectively addressed by law, especially regarding creativity and utilizing the results of the products of creativity. For instance, increased awareness and ability to share creations can make creations vulnerable to unethical and unfair exploitation which may consequently vest the benefits of creations to parties other than the actual creator.[7] Such tendency is widely visible in the matter of copyright protection for content. Since intellectual property law attempts to strike a balance between the rights of creators and how the benefits of the creations are effectively utilised, intellectual property law will act as a mode of balancing various conflicting rights regarding creations, irrespective of their nature.[8]

To illustrate the said point of consideration, copyright protection should be guaranteed to the extent that the freedom of expression is not excessively impinged. Furthermore, on the other hand, the level of protection offered to subject matter that can be protected by copyright should not be trivial and insignificant to the extent that there is no protection for the creators of a literary work from exploitation.[9] Thus, the function of balancing conflicting interests appears to be a key function of intellectual property. Thus, it is quite evident that a thorough though process is essentially necessary to find the effective middle path for protecting intellectual property in a way that protects creators while promoting creativity.

[7] Contributor CSM, 'Intellectual Property: Mitigating Threats through Loss Prevention' (*City Security Magazine,* 6 February 2023) <https://citysecuritymagazine.com/risk-management/intellectual-property-mitigating-threats-through-loss-prevention/> accessed 14 June 2024.

[8] Alessia Segalini, 'Intellectual Property and Human Rights: A Conflict or a Relation to Be Established? – the Sustainable Development Watch' (*Sdwatch.eu,* 11 September 2018) <https://sdwatch.eu/2018/09/intellectual-property-and-human-rights-a-conflict-or-a-relation-to-be-established/> accessed 27 June 2024.

[9] Ragnhild Brøvig-Hanssen and Ellis Jones, 'Remix's Retreat? Content Moderation, Copyright Law and Mashup Music' (2021) 25 New Media & Society <https://doi.org/10.1177%2F14614448211026059> accessed 22 June 2024.

Supportively, to foster effective understanding about the functions of law, various philosophers and scholars have engaged in different coordinated intellectual stimuli to discover the philosophical foundations of law the defines and discussed the reasons for its existence. Thus, it is essentially important to discover various philosophical considerations behind intellectual property law to effectively justify the process of recognizing specific intellectual property rights pertaining to creations, which would lead to an effective thought process in deciding the correct course of action to protect intellectual property. Hence, it should also be noted that the theoretical foundations behind various concepts and systems can be quite insightful and productive in developing sound policy decisions to strengthen the law and thereby, maintain a proper balance between rights and obligations of various stakeholders.[10] Therefore, by utilising the natural rights theory introduced by John Locke through his treatises, the current research attempts to evaluate the rights of authors of songs and the mashup song artists to evaluate the theoretical basis behind promoting rights of both parties in a fair and just manner.

Analysis

Mashups songs can be considered as a style of music that contains various samples from songs composed by various artists in a single song.[11] The Cambridge Dictionary defines mashup songs as a type of recorded music or video that consists of various parts of different songs and images that are combined in a creative manner.[12] Mashup songs also requires a certain degree of thought and creativity, in its creation process, and has widely developed as an art during the past few decades. However, there are various arguments for and against mashup songs, mainly under the fair use exception and author's

[10] Hanoch Dagan and Roy Kreitner, 'The Character of Legal Theory' [2010] SSRN Electronic Journal <https://law.bepress.com/cgiviewcontentcgi?referer=&httpsredir=1&article=1121&context=taulwps> accessed 27 June 2024.

[11] *Bridgeport Music, Inc. v. Dimension Films* 410 F.3d 792 (6th Cir. 2005*)*

[12] 'MASHUP | Meaning in the Cambridge English Dictionary' (*dictionary.cambridge.org*) <https://dictionary.cambridge.org/dictionary/english/mashup> accessed 15 June 2024.

rights that are depicted in the sphere of copyright protection.

For instance, case law such as *Bridgeport Music, Inc. v. Dimension Films,* which is a judgement that was passed by the United States Court of Appeals for the Sixth Circuit, indicated that the *de minimis* rule, cannot be utilized by defendants for digitally sampling recorded music, can be considered.[13] The *de minimis* rule suggests that using small proportions of materials protected by copyright will not constitute infringement. Such arguments and perspectives of thought clearly portray a possible conflict between the rights of various parties within the sphere of creativity in music, which the law should be competent in addressing. For instance, Reynolds opines that since mashup songs will involve various songs being mixed with each other in a manner that is against the original intentions of the authors may result in violating the moral rights of authors.[14] However, another argument countering the same can be made suggesting that an act of raising the constraints imposed on freedom to create mashup songs may stifle creativity, which justifies an inquiry regarding the said matters. Yet, it should be noted that for the purposes of the current research, the main theoretical basis will be provided by the natural rights theory, which is also a limitation of the research.

The natural rights theory can be considered as a political theory that is based on the rationale that an individual possesses certain rights, which are referred to as natural rights, that are inseparable from him or her.[15] In the dimension of natural law, the Lockean perspective appears to be quite convincing and thought provoking, especially due to the detailed philosophical considerations pertaining to property ownership. At birth

[13] *Bridgeport Music, Inc., et al. v. Dimension Films, et al.* 410 F.3d 792

[14] Graham Reynolds , 'A Stroke of Genius or Copyright Infringement? Mashups, Copyright, and Moral Rights in Canada' (*IPOsgoode,* 25 August 2009) <https://www.yorku.ca/osgoode/iposgoode/2009/08/24/a-stroke-of-genius-or-copyright-infringement-mashups-copyright-and-moral-rights-in-canada/> accessed 15 June 2024.

[15] Arundathi K. and Sonali Awasthi, 'The Critical Analysis of Natural Rights Theory' (2020) 3 Issue 4 International Journal of Law Management & Humanities 1557 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/ijlmhs6&div=150&id=&page=> accessed 20 July 2024.

a person will have rights towards the person, yet the other rights will allow them to develop further rights over various aspects. The natural rights, as identified by Locke, are rights that are given by God, and consist of the right to life, liberty and property.[16] Natural rights are God-given rights, they cannot be taken away or separated from an individual under any circumstances. Such rights are borne by an individual from their birth.[17] Even though there is a possibility that one might decide to forfeit the enjoyment of any such natural rights, as per the thoughts of Locke, human laws are not competent enough to repeal such rights.

Considering such line of rationalization, it could be considered that Locke's philosophical considerations pertaining to natural rights convinces a person to consider individuals as equals regarding rights and obligation since one person's right becomes another person's obligation. Thus, in relating the same to creations and intellectual property, it could be assumed that every person's creativity should be valued the same and the rights pertaining to creations should be effectively embedded in the creator without discrimination. Yet, the theory portrays the fact that each individual will possess a common and identical set of powers, competencies and rights irrespective of the differences they may have based on various factors, including social factors, which promote equality.

In the eyes of Locke, rights pertaining to property, as enshrined in the foregoing parts of this text, is rather considered as a natural or a pre-contractual right that precedes civil society or any other social arrangement that persons have developed.[18] John Locke's arguments that are made based on property rights circulates around various principles such as labour, non-waste, value creation, self-ownership

[16] Mark Cartwright, 'Natural Rights & the Enlightenment' (*World History Encyclopedia,* 13 February 2024) <https://www.worldhistory.org/article/2375/natural-rights--the-enlightenment/> accessed 4 July 2024.

[17] ibid

[18] David C Snyder, 'Locke on Natural Law and Property Rights' (1986) 16 Canadian Journal of Philosophy 723 <https://www.jstor.org/stable/40231500?searchText=&searchUri=&ab_segments=&searchKey=&refreqid=fastly-default%3Ae5a8e2b013b2228387548ce6d7f5c9a2&seq=4> accessed 20 July 2024.

and leaving enough and as good for others, which will be discussed in the latter parts of this research.[19] The arguments pertaining to private property, as depicted in the philosophical considerations behind the Lockean thought, stems from the idea that even though earth and all other inferior creatures can be considered as common to all men (individuals), every person will have property rights to which no other person will have any rights.[20] The said notion directs a reasonable thinker to discover the rationale behind private property ownership. In the outset of the theory, a reasonable person may inquire the way in which property rights can be generated by an individual.

The rationale that leads to private property ownership may contain various implications pertaining to the authorship of mashup songs, which goes to the roots of the current research. To answer the said query, it should be understood that according to Lockean thoughts, even though God has provided all men the equal right to utilize the resources of earth, that are referred to as property in the commons, it is necessary for them to appropriate resources from the commons for the purposes pertaining to survival.[21] Such purposes include satisfying the needs regarding food, shelter and other purposes pertaining to survival and satisfying such needs.

Hence, a person will be able to inject private property rights to a property in the commons when the same is utilized for a certain purpose. However, it should be inquired as to what needs to be done to effectively generate property rights over a certain property in the commons. Can a person claim ownership merely by declaring that he or she requires it? To answer the said question, one of the examples that Locke cites in his work to can be explained as

[19] Adam D Moore, 'A Lockean Theory of Intellectual Property Revisited' (2012) 49 The San Diego law review 1069.
[20] JP Day, 'Locke on Property' (1966) 16 The Philosophical Quarterly 207 <https://www.jstor.org/stable/2218464>.
[21] George H. Smith, 'John Locke: The Justification of Private Property' (*Libertarianism.org,* 2014) <https://www.libertarianism.org/columns/john-locke-justification-private-property> accessed 29 June 2024.

follows.[22] When a fruit is attached to a tree, the fruit will be in a state where it is commonly owned by all individuals, yet, when a person picks the same fruit, he or she can be considered to have exercised independent labour in doing so. Such an act will consequently assist him or her to develop private property rights over the fruit that was removed from the tree by exercising independent labour and effort.[23]

Thus, according to the thoughts of Locke, private property rights can develop in circumstances where a person removes something from the commons (state that nature has provided) and mixes the same with his/her own labour, as noted in the example provided.[24] Thus, the combination of one's own labour and what is extracted from the commons develops private property rights in the Lockean thought pertaining to private property ownership. Locke opines that one's own labour can be considered as his/her own property since one's body will be his or her own property.[25] Thus, since labour will be a product of one's own body, labour should belong to the individuals as of a property.[26]

Hence, any aspect that will be developed using one's own labour, utilising anything from the commons, could still be argued as something that should belong to such a person alone. Thus, as per the perspective of Coradetti, since a man would own his labour, he shall own the object of his work.[27] Coradetti further opines that the right to property is the factor that excludes other individuals

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[22] John Locke, *Two Treatises of Government* (Signet Book 1965).
[23] ibid
[24] Snyder (note 18)
[25] Johan Olsthoorn, 'Between Starvation and Spoilage**:** Conceptual Foundations of Locke's Theory of Original Appropriation' (2022) 106 Archiv für Geschichte der Philosophie 236.
[26] Lawrence C Becker, 'The Labor Theory of Property Acquisition' (1976) 73 The Journal of Philosophy 653.
[27] Claudio Corradetti, 'Locke's Theory of Property and the Limits of the State's Fiduciary Powers a Critical Appraisal of the Second Treatise on Government' (2022) 24 Etica & Politica / Ethics & Politics 287 <https://sites.units.it/etica/2022_1/CORRADETTI.pdf> accessed 20 July 2024.

from interfering and exercising the same right. This perspective can be duly justified and supported when creativity is considered. For instance, the chances and the opportunities pertaining to creating or inventing appear to be an opportunity that is available for all individuals equally without any discrimination. For instance, person A will have the same opportunity, in terms of cognitive skills to varying degrees, to engage in creation of diverse subject matter. Thus, in a case where the same has been effectively utilised, the creator should be entitled to the benefits of the same meaning which, if A creates a poem where B also had the same opportunity to do so, there is no argument that can be fairly made against A securing rights over what A created.

The said notion can be considered as a value that is deeply embedded in the sphere of intellectual property, which makes protection possible for the creations of the mind. Thus, a reasonable person may make assumptions pertaining to the creativity of authors of mashup songs in a similar manner. Even though mashup songs are made using existing materials by creators, there is no question that such an exercise will require a sufficient degree of independent judgement, skill and labour. Hence, it could be argued that mashup songs should be protected under copyright because of the independent judgement, skill and labour exercised within the creation process along with the impact on originality.[28] The requirements of 'originality' does not require the relevant work to be novel, yet it requires the same to derive from a certain person.[29] Even though an argument can be made suggesting that mashup songs do not involve novelty, it should be noted that novelty is not the standard pertaining to copyright protection, thus, standards pertaining to originality is what will determine the suitability of mashup songs for protection due to it being an artistic work. Thus, as mashup songs originate from its owner, they can be protected by copyright because it can be assumed that works protected by copyright reflect the personality of the creator and the

[28] Andreas Rahmatian, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine under Pressure' (2013) 44 IIC - International Review of Intellectual Property and Competition Law 4 <https://link.springer.com/article/10.1007/s40319-012-0003-4>.
[29] ibid

personality is an aspect that is deeply connected to a person.

To further support the said point of view, the way a person would act upon inspired by his or her personality traits will decide how his or her labour is utilized in any creation. For example, a composer might prefer to use two music tracks as per his or her own requirements and preferences and the manner in which the labour used to create the mashup song will therefore be solely dependent on personal preferences and capacity of the creator, which will be the basis for the independent skills and judgement. Hence, the inspiration behind the coordinated efforts to compose the track, that is the labour, will stem from the creator's personality, which supports claims over the track composed using existing material.

Therefore, an argument, supported by the Lockean thought, can be made in favour of mashup songs theoretically. However, still, a query that inquires whether the songs used by mashup authors can be considered as a property in the commons can be made. For instance, unlike what is stated in the theory, it is a question whether available music tracks can be considered to be part of the commons. For the said purpose, if a presumption is utilized suggesting that human mind is also a creation of God, the theoretical basis can be more concrete. However, if such rationalization is followed, any creation that is made by an individual will be considered as a God given resource, which will make the creation available to anyone to utilize freely. Such an argument can be considered to be far-fetched and inaccurate since a song that is already available is a result of someone's effort. Thus, an exercise of labour and effort. Thus, for songs that are created, it is fair to conclude that the author will have complete rights to due to the said fact involving the act of exercising independent labour. The said argument may not make a case for the mashup artists as their creativity is based on someone else's creation to which the authors will already have rights.

Yet, if the social contract theory is considered, as introduced by Locke, people appoint government to protect the natural rights by evading any possible conflicts.[30] Hence, it is quite essential for people to act according to the laws that are passed by the government. The said fact opens a leeway to justify mashup songs and related intellectual property standards as they are introduced by statutes that stems from the legislature and common law, which contains interpretations and practices pertaining to applying such standards by the courts of law. Moreover, a further argument can be developed indicating that the content that is available in the public domain due to the lapse of its copyright protection to be considered to be in the commons similar to any other material aspect provided by God that is available for anyone to take advantage of. Thus, based on the way the resources are utilized, the competency of the same to be protected by copyright can be supported in light of the natural rights theory.

However, alternatively, regarding the content that is presently protected by copyright, an argument can be made suggesting that any such resource can still be considered to be in the public domain to the extent that the use of resources constitute a fair use of knowledge. However, if so, the said argument will be based on a substantially inaccurate basis since any creation that is in the public domain is not protected by the intellectual property framework. Anyhow, still, mashup songs can be made as long as the same can be considered as an effective derivative work as per Sections 7 and 12 of the Intellectual Property Act, No. 36 of 2003. For instance, within the ambit of derivative work and the fair use exception, any material can be utilized in a manner that promotes originality and creativity, within certain boundaries.[31]

[30] The Editors of Encyclopedia Britannica, 'Social Contract', *Encyclopedia Britannica* (2016) <https://www.britannica.com/topic/social-contract> accessed 22 October 2024.

[31] Peter S Menell, Shyamkrishna Balganesh and David Nimmer, 'Mashups and Fair Use: The Bold Misadventures of the Seussian Starship Enterprise' (2019) 106 SSRN Electronic Journal <https://www.degruyter.com/document/doi/10.1515/agph-2021-0121/html>accessed15 June 2023.

Thus, in such a way, provided that such standards imposed by the government which is instituted through the social contract are not violated, an argument in favour of mashup songs can be made with the support of the natural rights theory.

The arguments and insights shared thus far further constitutes the labour theory of property acquisition as per the Lockean thoughts, which is a philosophical viewpoint that supports the fact that an individual will have rights over his/her labour, thus, the work of such person will be his/her property.[32] This is one of the cardinal arguments that supports the act of recognizing intellectual property rights. In the perspective of intellectual property rights, a person or persons who have contributed to the development of a certain creation or an invention will be able to obtain rights pertaining to the creation or invention by law. The said function of intellectual property law can be identified as an act of recognizing one's right to private property.

A similar notion, or an inspiration of the said premise, can be more specifically located in the Intellectual Property Act, No. 36 of 2003 as well. For instance, Section 10 (1) in the Intellectual Property Act, No. 36 of 2003, specifically enumerates the fact that the author of a work will have the moral rights of a work independently of the economic rights. Moral rights include all the non-economic rights which represents the control over how the author is divulged and attributed,[33] whereas the economic rights are entangled with the financial dimension of the work.[34] An author of a work is entitled to both rights and the same can be transferred according to the relevant legal requirements as per the wishes of the author.

[32] JP Day, 'Locke on Property' (1966) 16 The Philosophical Quarterly 207 <https://www.jstor.org/stable/2218464>.
[33] David Alan Simon, 'Moral Rights in Copyright Law: Personality, the Self, & the Author-Work Relation' (2019) <https://www.repository.cam.ac.uk/handle/1810/298861> accessed 21 July 2024.
[34] WIPO, 'Understanding Copyright and Related Rights' (2005) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf>.

However, it should also be further noted that even though the right to private property is recognized in the philosophy of Locke, the same freedom is not without limitations. Private property ownership, as per Lockean philosophical considerations, is influenced by a number of limitations. The said limitations include the 'Enough and as Good' provision and the waste perspective, which is considered and identified as the 'Spoilage Proviso'.[35] The 'Enough and as Good' provision suggests that enough property should be left in the commons, thus, preventing an individual from utilizing resources in the expense of others. No person should have more than what is required for the person to survive. This, however, raises a question as to whether private property ownership is not possible when there is not enough and as good left in common for other individuals. The answer to this question can be identified in the Lockean perspective, as depicted in 'The Second Treatise on Government' which stresses on the fact that a man's first moral responsibility is to himself.[36]

Therefore, the requirement pertaining to the duty that one has for himself or herself cannot be considered as a right, but as an obligation or a duty. In a case where appropriating food or shelter for himself or herself in required, facilitating the same will be an obligation irrespective of the needs of others.[37] However, it should also be noted that this will not in any way act as a justification for appropriating more than what is necessary for the individual to survive as the premise 'his own preservation comes not in competition' suggests the fact that the right to appropriate or the duty to appropriate resources from the commons will be restricted

[35] Jeremy Waldron, 'Enough and as Good Left for Others' (1979) 29 The Philosophical Quarterly 319 <https://www.jstor.org/stable/2219447?saml_data=eyJzYW1sVG9rZW4iOiI5ODU1MDkxMy0yODRjLTQ4MmMtYWE2OS1iOGIyMTkwYjM3ZWQiLCJlbWFpbCI6InN3NTFAYWZmaWxpYXRlLnN0YWZmcy5hYy51ayIsImluc3RpdHV0aW9uSWRzIjpbIjVhN-TAzNDVjLWRmYTYtNGFjMy05YmQ5LWRjZTA1MmQ0Y2IyZSJdfQ> accessed 13 June 2024.

[36] John Locke, *Two Treatises of Government* (Awnsham Churchill 1689).

[37] Waldron (Note 34)

to the extent of survival, thereby, preventing any chance of over utilization.[38] Additionally, it should further be understood that once a certain individual ensures his or her preservation, any further use of resources will be conditional upon the preservation of others.[39] Can the development of mashup songs be considered in line of the said thoughts or line of rationalization? Can the development of mashup songs be an aspect that can be connected to the very survival of an individual? The argument that can be made in the viewpoint of a mashup song author regarding the exception is that, using a person's creative music will not disqualify another from utilsing the same music track in anyway.

Even though the theory might shed a certain degree of clarity with regard to property ownership, there are certain aspects which might render the theory inapplicable to intellectual property, including mashup songs as a subject that can be protected under the intellectual property framework. For instance, private property rights can go as far as enough is left for others, thus, a question remains as to whether intellectual property is limited in such a way. Intellectual property can be considered as non-rivalrous, which simply denotes the fact that one person having a certain idea will not prevent another from having the same idea.[40] Thus, it is clear that one person can conveniently utilize an intellectual object without diminishing the same capability of another. Even with reference to mashup songs, two persons might have the same two songs in their mind, yet, might utilize the two songs quite differently when devising the new sound track. Moreover, since the limitations imposed by scarcity will not be applicable to ideas of persons, applicability of the Enough and as Good provision

[38] ibid

[39] James Tully, *An Approach to Political Philosophy* (Quentin Skinner ed, Cambridge University Press, 1993).

[40] Patrick Croskery, 'Institutional Utilitarianism and Intellectual Property' (1993) 68 Chicago-Kent Law Review 631 <https://scholarship.kentlaw.iit.edu/cklawreview/vol68/iss2/5> accessed 21 July 2024.

in intellectual property appears to be immaterial. Thus, the main limitation that appears to be applicable for mashup songs, are the restrictions imposed by the intellectual property legal framework itself.

In terms of the second restriction with reference to private property ownership, Locke stresses on the spoilage proviso. The spoilage provision is narrated by Locke as "*As much as anyone can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others".*[41] Thus, the spoilage proviso suggests the fact that one could appropriate resources to the extent that such appropriated resources can be utilized before they spoil. Further to the same, another dimension through which the spoilage proviso can be looked at is as a restriction that is imposed on appropriating property more than what is required by an individual. Harding is of the view that this proviso does not impose any limitations on the extent of how much property can be acquired by an individual because the proviso stresses on the appropriation or use of property to be done effectively.[42] Thus, if what is appropriated is put into proper use, the quantity will not be a limitation.

For example, if certain individual uses his or her own labour to pluck a number of apples for his or her own use, he or she should be in a position to successfully and productively utilize the same for consumption, in various ways, before the apples become unusable. Thus, the aforesaid proviso suggests the fact that any number of resources from the commons that will be appropriated by an individual beyond what is required to satisfy his or her requirements pertaining to survival is prohibited. This premise incorporates a certain specific limitation against the relentless and uncontrolled utilization of resources. This matter can be related to various actions pertaining to the world of intellectual property.

[41] Locke (Note 35)

[42] Eloise Harding, 'Spoilage and Squatting: A Lockean Argument' (2019) 26 Res Publica 299 <https://link.springer.com/article/10.1007/s11158-019-09445-0> accessed 17 June 2024.

For instance, patent trolling,[43] which is the process of obtaining patents for inventions without the intention to promote the invention, yet, attempting to secure benefits by threatening to sue and filing lawsuits can be considered. Even though the said process might not mirror the proviso as it is, the result of patent trolling would be to deny the opportunity of persons to use effective creations for their use mainly because trolling can prevent creativity and stagnate the process of inventions from reaching end consumers. However, with regard to copyright violation claims instigated through the creation for mashup songs, it is questionable whether mashup songs have an effect as such as enumerated within the previous statement, rendering the proviso's application to mashup songs questionable.

Conclusion

As per Harding, the theory pertaining to private property, according to the Lockean perspective, proposes a mechanism that can ensure that sufficient amount of resources will be made available to the whole population for the purpose of survival and without promoting unnecessary and irrational segregations as well as relentless accumulation.[44] Even though the natural right theory can be considered as a philosophical foundation that will compel a reasonable person to look into the meaning of intellectual property and its rationale, the theory is not without its limitations. Anyhow, the merits of the theory in understanding the rational of private property ownership, to which intellectual property can also be related, should not be disregarded.

When due consideration is directed towards the discussion of the current research, it is quite clear that the natural rights theory, in the lens of John Locke, allows a reader to develop an understanding about a possible philosophical justification for mashup songs due a number of reasons. However, due to the nature of intellectual

[43] Will Kenton, 'Understanding Patent Trolls' (*Investopedia,* 10 June 2022) <https://www.investopedia.com/terms/p/patent-troll.asp> accessed 25 June 2024.
[44] Harding (Note 40)

property from other types of properties with physical existence and how connected intellectual property is to the human mind, certain thought enshrined in the Lockean thought may not mirror the complications pertaining to mashup songs and copyright protection. Anyhow, the Lockean thought, as enumerated within the course of the analysis, can be considered to have laid a concrete philosophical foundation that offers a significant number of insights to engage in a critical thought process regarding the same.

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The Role of Local Women in Post-War Peacebuilding in Sri Lanka: Navigating the Local Turn and Everyday Peace in Peacebuilding

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Abstract

This study examines the crucial contributions of Sri Lankan women to post-war peacebuilding, using the frameworks of the "local turn" and "everyday peace." It investigates how these women engage in grassroots peace initiatives. Limited time in research necessitated the use of secondary qualitative data, including journal articles, books, and news reports. While informative, the study acknowledges that primary data collection, such as interviews, would have provided richer insights into the lived experiences and perspectives of these women. Analysis of the secondary data reveals that local women are vital to post-war peacebuilding, participating in activities such as community reconciliation, trauma healing, and economic empowerment. They foster connections between communities and address local needs, making significant contributions to the peace process. However, their efforts are frequently overlooked or undervalued in traditional top-down peacebuilding approaches. For more effective post-war peacebuilding in Sri Lanka, a holistic approach is crucial. This requires a shift away from state-centric models and towards community-driven initiatives that recognize and empower the roles of local women. Integrating their perspectives into peace processes is essential for achieving more sustainable and equitable peace.

Keywords: *Local Women, Peacebuilding, Sri Lanka, Local Turn, Everyday Peace*

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Introduction

The thirty-year Sri Lankan civil war, fought between the predominantly Sinhalese government and the LTTE, caused widespread suffering and left deep social, economic, and psychological wounds. The war's conclusion in 2009, marked by a decisive military victory for the government, initiated a new phase characterized by the intricate challenges of post-war national reconstruction. This study focuses on examining the pivotal role of local women within this peacebuilding framework. It is situated within the broader context of the "local turn" in peacebuilding a paradigm shift emphasizing bottom-up and community-driven initiatives. Additionally, it explores how "everyday peace" contributes to sustaining long-term peace through grassroots efforts.

Despite women being historically disproportionately affected by armed conflict, they have continued to play pivotal roles in peacebuilding efforts worldwide. Their experiences of war, coupled with their roles as caregivers and community leaders, position them uniquely to contribute to post-conflict recovery. Regardless of their contributions, women's voices often go unheard and marginalized in traditional, top-down peacebuilding processes. This has led them to seek alternative methods of conflict recovery that are better suited to their needs. Thus, this research seeks to examine how Sri Lankan local women have contributed to post-war peacebuilding by navigating the challenges and opportunities presented by the 'local turn' and cultivating 'everyday peace' within their communities. By addressing this question, this study will contribute to a deeper understanding of the intricacies of post-conflict reconstruction and center the experiences and perspectives of local women and their indispensable role in this process.

Notions of Peace and its Application in Post-conflict Settings

Peace, traditionally conceived as the mere absence of war, has undergone a significant conceptual evolution. Scholars now advocate for a more comprehensive understanding known as 'positive peace,' which encompasses social justice, equity, and the fulfilment of human needs. This paradigm shift has prompted a critical examination of conventional definitions of peace, leading to the recognition of their limitations. By delving into the multifaceted dimensions of peace, including political, economic, and cultural factors, strategies for constructing more durable and inclusive peacebuilding frameworks have been developed.

The broader understanding of peace has revolutionized our approach to peacebuilding by moving beyond merely the cessation of hostilities. Traditionally, peacebuilding focused primarily on post-conflict reconstruction and security measures. However, positive peace introduces a holistic strategy that aims to tackle the root causes of conflict such as economic inequality, social injustice, political marginalisation etc. By acknowledging that lasting peace requires more than the absence of violence, this framework underscores the importance of investing in education, healthcare, economic development, and good governance. As a result, peacebuilding efforts have become more comprehensive, participatory, and sustainable. They aim to prevent future conflicts by fostering resilient and harmonious communities, through investments in human capital and the promotion of reconciliation and justice mechanisms, coupled with the establishment of institutions essential for securing long-term peace gains within the positive peace framework.

Moreover, the effectiveness of positive peace is especially apparent in post-conflict societies, as it offers a framework for post-conflict recovery. Notably, Bart Klem's conventional view of peace as a definitive post-war state is noteworthy. Instead, he advocates for a nuanced understanding of the complex and protracted post-war transition, suggesting that "post-war" is not a clear temporal break but a shift in focus towards addressing the legacies of conflict. Klem's work encourages a critical re-examination of peacebuilding efforts, highlighting the need for a more complex and contextualized approach to understanding and addressing the challenges of post-conflict societies.

The Sri Lankan Experience

Post-conflict Peacebuilding in Sri Lanka

While the cessation of hostilities offered a glimmer of hope, the path to recovery and rebuilding has been difficult despite peacebuilding initiatives emerging as a response to the conflict's aftermath. The government's activities in this regard were divided under the following three main categories: Immediate Humanitarian Assistance, Reconstruction and Rehabilitation, and, Accountability and Reconciliation.[1] The need to rebuild brought about substantial economic growth and infrastructure development, with significant investments in rebuilding war-torn regions and stimulating local economies.[2] Reconciliation efforts, supported by NGOs and community organizations, aimed to bridge ethnic divides, while international support from organizations such as the UN provided crucial financial and technical assistance.[3] Additionally, there

[1] Md. Nazmul Islam, 'The Peace Building in Sri Lanka' (*South Asia Journal*, 16 September 2015) <https://southasiajournal.net/the-peace-building-in-sri-lanka/> accessed 12 August 2024

[2] Peshan Gunaratne, Post War Reconstruction and Peace Building in Sri Lanka: A Case Study of Jaffna

[3] Daya Somasundaram and Sivayokan Sambasivamoorth, 'Rebuilding community resilience in a post-war context: developing insight and recommendations-a qualitative study in Northern Sri Lanka, (2013) 7 International journal of mental health systems 1-2

have been legislative reforms aimed at improving human rights protections and truth commissions.[4]

However, challenges remain profound. Ethnic tensions within the country continue to impede national unity as "a community of winners and a community of losers must live in a nation side by side."[5] Displacement issues persist, with many groups still in temporary shelters, exacerbating land disputes and tensions. The pursuit of justice has been hampered by a lack of adequate accountability for alleged war crimes, leading to concerns about impunity and eroded trust in the justice system. Similarly, institutional weaknesses, including corruption and inefficiency, undermined the effectiveness of peacebuilding efforts.[6] Moreover, while these efforts have sought to address the broader societal challenges, their impact on women has been uneven. While some initiatives have focused on women's empowerment and leadership development,[7] others have often failed to consider the unique challenges women face in post-conflict settings, leading to unintended negative consequences for women's security and well-being.[8]

Sri Lankan Women as Peacebuilders

Politically, within the country, women's representation in decision-making bodies remains limited, hindering their ability to influence policies that directly impact their lives. Socially,

[4] UN Habitat, Good Practices and Lessons Learnt in Post-Conflict Reconstruction in Sri Lanka (2017)

[5] Kavita Singh, When Peace Is Defeat, Reconstruction Is Damage: "Rebuilding" Heritage in Postconflict Sri Lanka and Afghanistan in Cultural Heritage and Mass Atrocities, James Cuno and Thomas Weiss (Getty Publications, 2022)

[6] Accountability Central to Sri Lanka's Future' (*OHCHR*, 2023) <https://www.ohchr.org/en/press- releases/2023/09/accountability-central-sri-lankas-future-un-human-rights-report> accessed 11 August 2024

[7] Kristine Höglund, 'Testimony under Threat: Women's Voices and the Pursuit of Justice in Post-War Sri Lanka' (2019) 20 Human Rights Review 361

[8] Brounéus K and others, 'Women, Peace and Insecurity: The Risks of Peacebuilding in Everyday Life for Women in Sri Lanka and Nepal' (2024) 19 (5) PLoS ONE

the scars of the civil war continue to linger, with women often bearing the emotional burden of reconciliation. Economically, the challenges of rebuilding a war-torn nation have amplified pre-existing disparities, with women facing disproportionate rates of unemployment and poverty.[9]. Despite facing these significant challenges, Sri Lankan women have emerged as crucial actors in peacebuilding processes, demonstrating exceptional resilience and strategic acumen.[10] Examples include women advocating for peace during the conflict by forming groups such as the Mother's Front and the Women's Action Committee, which lobbied for an end to hostilities and highlighted the need for inclusive peace negotiations.[11] Following the conflict, women continued to engage in grassroots peace initiatives, emphasizing community cohesion and support for survivors of violence. Notably, the establishment of a Gender Sub-Committee during the ceasefire period allowed women to participate formally in peace negotiations, fostering trust and dialogue between conflicting parties.[12]

The Local Turn & Everyday Peace

The 'local turn' in peacebuilding examines the growing emphasis on local actors and perspectives in peacebuilding initiatives,[13] and via its application, encourages scholars to critically examine and potentially revise their existing concepts and normative frameworks to better align with local contexts and needs. MacGinty and Richmond argue that this is a response to the limitations of top-

[9] Ibid

[10] UNP, Empowering women for an inclusive and sustainable transitional justice and reconciliation process in Sri Lanka Final Evaluation Report (2019)

[11] 'The Role of Women in Peace-Building: A Sri Lankan Perspective' (*ReliefWeb*,8 April 2015) <https://reliefweb.int/report/sri-lanka/role-women-peace-building-sri-lankan-perspective> accessed 12 August 2024

[12] Simon Harris, 'Gender, participation, and post-conflict planning in northern Sri Lanka' (2004) 12(3) Gender & Development 60-69

[13] Thania Paffenholz, 'Unpacking the local turn in peacebuilding: A critical assessment towards an agenda for future research' (2015) 36(5) Third world quarterly 857-874

down, international approaches.[14] By prioritizing the experiences of local actors, the local turn facilitates a more nuanced understanding of conflict dynamics and promotes the integration of indigenous knowledge and practices into peacebuilding efforts.[15] This approach not only enhances the legitimacy and effectiveness of peace initiatives but also empowers communities to take ownership of their peace processes, thereby increasing the likelihood of lasting stability.

Critics argue that many scholars still operate from Eurocentric assumptions, which can undermine the intended inclusivity of the local turn. Some argue that despite advocating for a local agency, in reality, critical peacebuilding literature often reverts to prescriptive norms that reflect Western ideals of peace and democracy.[16] The debate on liberal peacebuilding has largely been confined to scholars and policymakers in the Global North, which is a significant shortcoming. As a result, the local turn has catalyzed a broader discourse around inclusivity in peacebuilding scholarship, urging scholars from the Global South to actively participate in shaping the agenda.[17] This enriches the academic landscape and challenges existing power dynamics within the field. Also, MacGinty and Richmond oversimplify the complexities of local contexts in their article.[18] While emphasizing increased local agency is laudable, the authors' focus on power dynamics and knowledge production remains superficial. A more critical analysis would delve deeper into the potential pitfalls of localized peacebuilding, such as the risk of reinforcing existing power structures, the challenges of

[14] Roger MacGinty & Oliver P Richmond, The Local Turn in Peace Building: a critical agenda for peace' (2013) 34(5) Third World Quarterly 763-783

[15] Mathijs Van Leeuwen, Joseph Nindorera, Jean-Louis Kambale Nzweve, and Corita Corbijn, The 'local turn'and notions of conflict and peacebuilding–Reflections on local peace committees in Burundi and eastern DR Congo' (2020) 8(3) Peacebuilding 279-299

[16] Ibid

[17] Jonas Wolff, The Local turn and the Global South in Critical Peacebuilding Studies (Working Papers No. 57 March 2022)

[18] Ibid (n 22)

balancing local ownership with external accountability, and the potential for homogenizing diverse local experiences.[19]

'Everyday peace' on the other hand, constitutes the daily micro-level practices and interactions that individuals and communities employ to navigate conflict-ridden environments. By focusing on hyperlocal contexts, everyday peace highlights how ordinary citizens can disrupt cycles of violence, construct peaceful realities and contribute to broader peace processes.[20] This localised approach not only addresses immediate tensions but also cultivates a culture of peace that can withstand future challenges, making it a vital component of sustainable peacebuilding strategies. In this discussion, Richmond's work on everyday peace challenges the hegemony of liberal peacebuilding and advocates for a post-liberal framework that acknowledges the hybridity of local agency and international intervention.[21] However, while the concept of everyday peace offers a nuanced understanding of local agency, it risks overemphasizing the resilience of communities without adequately addressing structural inequalities and power imbalances that often underpin conflict.[22] Additionally, the authors' focus on hybridity might obscure the complex and often contradictory nature of local responses to external interventions, potentially oversimplifying the challenges faced by peacebuilders.[23]

[19] Elisa Randazzo, 'The paradoxes of the 'everyday': scrutinising the local turn in peace building' (2016) 37(8) Third World Quarterly 1351-1370

[20] Roger MacGinty, 'Everyday peace: Bottom-up and local agency in conflict-affected societies' (2014) 45(6) Security Dialogue 548-564

[21] Oliver Richmond, *Hybrid forms of peace: from everyday agency to post-liberalism* (Palgrave Macmillan, 2011)

[22] Roger MacGinty, 'Everyday Peace Power' in *Everyday Peace: How So-called Ordinary People Can Disrupt Violent Conflict* (Oxford Academic, 2021) 80-103

[23] Pamina Firchow, 'Understanding Everyday Peace' in 'Reclaiming Everyday Peace: Local Voices in *Measurement and Evaluation After War* (Cambridge University Press, 2018) 27-84

The Concepts under the Sri Lankan Context

The adoption of the usual male-dominated strategy of peace processes was noted to have fostered more social division, as women were largely excluded in the formal peace talks despite their inclusion in peacebuilding being argued as critical to strengthening human security, justice, and development.[24] Thus, the subsequent years after the Civil War saw a marked shift in the landscape of peacebuilding, characterized by a decentralization of power and a focus on community-led initiatives apart from state interventions.[25] Another key reason local initiatives began to gain traction can be attributed to the fact that women were more sceptical than men towards formalised peacebuilding measures that involved increased risk in everyday life, such as truth-telling initiatives and the reintegration of ex-combatants.[26]

Against this backdrop, Sri Lankan women have skilfully navigated the 'local turn' by recognising the importance of their participation, ownership, and agency. Interestingly, the 'local' in peacebuilding can be considered as a means of emancipation of local agency as well, expressed partly through the emphasis on voices from below.[27] By leveraging indigenous knowledge and local resources to tailor solutions to the unique needs of their communities, they challenge and complement traditional, externally imposed frameworks.[28] This shift from the usual approaches has been embraced via their intimate understanding of local customs, social structures, and historical contexts to foster reconciliation and stability. While this

[24] M Takeda and C Yamahata, Human Security and the Roles of Ethnic Women's Organisations in Transitional Myanmar (2022)

[25] Ibid (n 19)

[26] Ibid (n 16)

[27] Hanna Leonardsson and Gustav Rudd, 'The 'local turn'in peacebuilding: A literature review of effective and emancipatory local peacebuilding' (2015) 36(5) Third world quarterly 825-839

[28] Catherine Goetze, *The Distinction of Peace: A Social Analysis of Peacebuilding* (University of Michigan Press, 2016)

method has shown promise in addressing local needs, its impact on women's participation and leadership in peacebuilding remains a critical area of inquiry. This is so because the local turn has been noted to offer a potential space for women to assume leadership roles and address gender-specific concerns at the grassroots level.[29]

Yet, the intersectionality of gender with other social identities, such as ethnicity, caste, and class, has long complicated women's experiences in peacebuilding. While the Lankan government has attempted to strengthen these local initiatives, their effectiveness is often scrutinized, particularly regarding their inclusivity and responsiveness to the needs of women from all walks of life.[30] Also, deep-rooted patriarchal norms and power structures have hindered women's full participation in such endeavours. Women from marginalized communities face additional barriers to participation and navigating the local turn. Furthermore, the existence of the complex dynamics of local elites and their influence on local agencies serve as hindrances to the local turn as well. While academic discussions often focus on the friction between local and international actors, the reality is that local elites may hinder genuine local agency, especially in instances where women are at the forefront.

The assumption that local actors possess the capacity and desire to drive peacebuilding is often challenged in practice, as many locals may lack knowledge of their traditional resources or are hesitant to take ownership due to various factors.[31] This particular disconnect between academic ideals and on-the-ground realities highlights a significant gap in understanding the local agency as well. To fully realize the potential of the local turn for gender equality, it is essential to address these challenges and create an enabling environment for women's agency. This includes promoting gender

[29] Sung Yong Lee, 'Reflection on the "Local Turn" in Peacebuilding: Practitioners' Views' (2020) 9(2) Journal of Human Security Studies 25-38

[30] Ibid (n 10)

[31] Ibid (n 36)

equality within local governance structures, investing in women's capacity building, and supporting women-led peacebuilding initiatives.[32]

Bearing the scars of war, communities have attempted to foster peaceful daily practices in order to prevent another civil war from occurring. In the Sri Lankan context, the concept of 'everyday peace' encapsulates the ongoing, localized efforts of individuals and communities to foster stability and cohesion in daily life, extending beyond formal peacebuilding initiatives.[33] Women play a pivotal role in this realm by leveraging cultural and traditional practices to build social cohesion, trust, and mutual understanding within their communities. For example, local women utilize traditional communal activities, such as cooperative farming or village festivals, as platforms for dialogue and reconciliation, creating spaces where individuals from diverse ethnic and socio-economic backgrounds can engage in meaningful interactions.[34] Additionally, integrating the perspectives and experiences of marginalized groups via women, enhances the inclusivity and effectiveness of peacebuilding efforts, ensuring that diverse voices contribute to the narrative of peace and conflict resolution. These activities not only facilitate the normalization of post-conflict relations but also reinforce community bonds through shared cultural experiences. Through their engagement in everyday peacebuilding, Sri Lankan women promote gender equality and women's rights by challenging patriarchal norms and advocating for inclusive participation in these communal processes. However, navigating everyday peace also involves overcoming obstacles such as entrenched gender biases and limited resources, which can impede the full realization of their efforts.[35] Structural barriers, including discriminatory legal frameworks

[32] Kemal Erzurum and Berna Eren, 'Women in peacebuilding: A criticism of gendered solutions in postconflict situations' (2014) 9(2) Journal of Applied Security Research 236-256
[33] WKIN Premachandra, 'Everyday Art Peace: Art as a Medium for Fostering Peace between Divided Societies in Sri Lanka' (Doctoral dissertation, Central European University, 2023).
[34] Ibid
[35] Ibid (n 16)

and inadequate representation in political and peace processes, limit their effectiveness and marginalize their voices.[36] Social norms and traditional gender roles often undermine their authority, as prevailing patriarchal attitudes can obstruct their participation and diminish their influence.[37] Resource constraints also pose a substantial challenge; limited funding and logistical support can hinder the scope and sustainability of their initiatives. The ongoing advocacy for women's inclusion in peacebuilding reflects a broader recognition that sustainable peace requires the active participation of women as they bring diverse perspectives and experiences to the table, ultimately enhancing the overall effectiveness of peace initiatives in Sri Lanka.[38]

Conclusion

It is imperative to recognize that sustainable peace cannot be achieved without the full participation of women in all aspects of society. Having women involved in the local turn and everyday peace offers a gendered lens in peacebuilding design and implementation to mitigate risks and insecurities for women in the post-conflict phase. As a result, women have been helping to restore a culture of peace within the country post-war. Despite its pros and cons, the prioritisation of grassroots initiatives and recognition of the agency of local communities offer a counterbalance to traditional peacebuilding approaches. Together, they provide a holistic framework for addressing the complex challenges of transitional societies. Within this framework, women emerge as vital actors at the nexus of local turn and everyday peace within post-war peacebuilding. Their pivotal roles in fostering social cohesion, reconciliation, and community resilience align seamlessly with the grassroots focus of these approaches. As primary caretakers and often the backbone of their communities, women possess unique

[36] Ibid
[37] Ibid (n 15)
[38] Ibid (n 16)

insights and capacities to address the underlying causes of conflict. Therefore, their agency in shaping local peacebuilding agendas is paramount to achieving sustainable and equitable outcomes.[39] Moreover, their navigations within these initiatives significantly contribute to the fields of peacebuilding, gender studies, and Sri Lankan studies. However, these concepts need to be constantly revisited, taking into account changing socioeconomic and political landscapes.[40] Thus, strong calls are made for a more nuanced understanding of how local dynamics can be integrated into peacebuilding efforts, advocating for a genuine engagement with local voices and practices to foster more effective and contextually relevant peacebuilding strategies.

[39] Laura J. Shepherd, 'Victims of Violence or Agents of Change? Representations of Women in UN Peacebuilding Discourse' (2016) 4(2) Peacebuilding 1–15

[40] Filip Ejdus, 'Revisiting the local turn in peacebuilding' (2021) A Requiem for Peacebuilding? 41-58

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A Herculean Task: Can Military Laws Around the World Strike a Balance Between Human Rights and Security?

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Abstract

Military laws, also known as military justice systems, ensure the discipline, efficiency, and the operational effectiveness of armed forces. These laws provide a legal framework for managing military personnel, adjudicating illegal activities, and addressing extraordinary situations such as emergencies, armed conflicts, and national crises. The primary objective of these laws are to safeguard state sovereignty and public safety, however, these laws often blur the line between ensuring security and upholding individual liberties. Due to the excessive powers granted to the armed forces, the possibility of human rights violations increases. There are numerous instances where the civilian lives have been compromised in the name of state security. This creates inherent tension between security and liberty, sparking the global debates, especially in regions marred by protracted conflict, insurgency, or authoritarian governance.This paper critically examines the consequences of military laws on human rights by exploring ethical and legal dilemmas arising from their implementation. It highlights how extensive powers granted to military authorities in the name of security can lead to potential human rights violations, including the repression of dissent and the erosion of civil liberties. The study also explores the international legal instruments designed

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to control the misuse of law by armed force or by states and to mitigate its adverse effects on civilians.

Keywords: *Military laws, Armed Conflict, war crimes, human rights violations.*

1. Introduction

Military laws, also called military justice systems, play an important role in ensuring the discipline, efficiency, and effectiveness of the armed forces.[1] These laws offer a framework for the regulation of the military personnel, the adjudication of offences, and the management of extraordinary situations such as states of emergency, armed conflicts, or national crises.[2] The main objective of these measures is to protect the state sovereignty and guarantee the safety of the general public, particularly in situations where the continued existence of the state or the well-being of its residents is in jeopardy. However, military laws normally need a careful balance between the state's security obligation and the individual's right to freedom and dignity. This relationship between security and liberty has been disputed globally, particularly in places characterised by protracted conflict, insurgency, or authoritarian governance. There is possibility that military laws might violate human rights.[3] It is possible that granting the extensive powers to military authorities in the name of security may result in misuse, the repression of dissent, and the restriction of civil liberties.[4]

[1] Rachel E. VanLandingham, '*Military Justice'* (2023), DCAF <https://www.dcaf.ch/sites/default/files/publications/documents/MilitaryJusticeFundamentals.pdf>accessed on 18 December 2024.

[2] Clara Dcosta, 'An Analysis of the Origin and Growth of the Indian Military Justice System and its Drawbacks' (2023) 5(6) IJFMR<https://www.ijfmr.com/papers/2023/6/8387.pdf> accessed on 18 December 2024.

[3] Amnesty International, '*Armed Conflict'* (Amnesty International, 2024) <https://www.amnesty.org/en/what-we-do/armed-conflict/ > accessed 19 December 2024

[4] Office of the United Nations High Commissioner for Human Rights (OHCHR), '*Human Rights, Terrorism, and Counter-terrorism*' (United Nations 2008) <https://www.ohchr.org/sites/default/files/Documents/Publi cations/Factsheet32EN.pdf> accessed 11 December 2024.

The conflict zones and places where military personnel are deployed to combat internal unrest, terrorism, or insurgency are the example of such possibilities.

In this study, the researcher examined the consequences of military laws on human rights by conducting an in-depth analysis of the ethical and legal conundrums. It explores the ways in which international legal instruments, including the Geneva Conventions, the Universal Declaration of Human Rights (UDHR), and a variety of human rights treaties, have attempted to limit the use of military force and ameliorate the negative effects on civilians and non-combatants.

2. Research Methodology

In this paper, qualitative research methodology was followed, using doctrinal and analytical approaches to examine the paper titled "*A Herculean Task: Can Military Laws Around the World Strike a Balance Between Human Rights and Security*". In the doctrinal approach, primary and secondary legal materials were examined, including statutes, case law, constitutional provisions, international conventions, and treaties. This approach was essential for interpreting the legal principles governing military laws and their impact on human rights. The analytical approach was adopted to critically evaluate the socio-political dimensions and impact of military laws on human rights. It includes an extensive review of scholarly articles, books, government reports, and topic-related online resources. The analysis aimed to identify patterns, contradictions, and gaps in the application of military laws and their alignment with international human rights norms.

3. The Evolution of Military Laws

Military discipline and justice were initially informal and driven by commanders, rooted in the prerogative powers of Roman monarchs

and magistrates.[5] Ordinances issued by sovereigns during the Middle Ages laid the groundwork for early systems of discipline. Richard I's Articles of War (1189) marked an early effort to codify military conduct, though limited to specific campaigns with no uniform enforcement. The progressive formalization of military justice was influenced by the codes of *Prince Rupert*[6]*, Gustav II Adolf*[7], and *Maurice of Nassau*[8]. By the 17th and 18th centuries, *England's Mutiny Acts (1689)*[9] and Articles of War aimed to balance royal authority with parliamentary oversight.

Despite focusing on order and discipline, early military laws had minimal impact on citizens, prisoners, and warfare. However, the destructive nature of modern warfare and an emphasis on international cooperation and human rights led to the development of broader regulations. The most important military law milestones are listed below:

3.1 The Lieber Code (1863)

The Lieber Code, formally known as *Instructions for the Government of Armies of the United States in the Field*, was introduced during the American Civil War as the first formalized military rule.[10] Drafted by legal expert *Francis Lieber*, it comprised 157 clauses addressing key legal concerns during armed conflict.[11]

[5] C E Brand, *Roman Military Law* (University of Texas Press 1968) https://doi.org/10.7560/733930 accessed 19 December 2024

[6] Wikipedia, Prince Rupert of the Rhine (Wikipedia, 2024)<https://en.wikipedia.org/wiki/Prince_Rupert_of_the_Rhine> accessed 14 December 2024

[7] Wikipedia, *Gustavus Adolphus* (Wikipedia, 2024) <https://en.wikipedia.org/wiki/Gustavus_Adolphus> accessed 15 December 2024

[8] Wikipedia, *Maurice, Prince of Orange* (Wikipedia, 2024) <https://en.wikipedia.org/wiki/Maurice,_Prince_of_Orange> accessed 19 December 2024

[9] The Mutiny Act (1689) restrained the monarch's control over military forces in England by restricting the use of martial law.

[10] Kelly Buchanan, '*The Lieber Code: The First Modern Codification of the Laws of War'* (Library of Congress, 24 April 2018) <https://blogs.loc.gov/law/2018/04/the-lieber-code-the-first-modern-codification-of-the-laws-of-war/#:~:text=The%20Lieber%20Code%2C%20however%2C%20presents,1907%2C%20and%20customary%20international%20law> accessed 19 December 2024

[11] ibid

The Code regulated troop conduct, emphasizing civilian protection, humane treatment of prisoners of war, and prohibiting wanton destruction and unnecessary torture. Its principles inspired later legal frameworks, such as the Geneva Conventions and the Hague Conventions.[12]

3.2 The Hague Conventions (1899 and 1907)

The Hague Conventions marked one of the earliest significant international efforts to codify the laws of war.[13] Held in The Hague, Netherlands, these conferences sought to establish uniform standards for conducting hostilities and protecting those affected by war.[14] Key provisions included prohibitions on expanding bullets, poisonous gas, and unnecessary violence, as well as protections for civilians, cultural property, neutral nations, prisoners of war, and the injured.[15] Though groundbreaking in promoting humanitarian principles, the Conventions faced challenges due to the lack of enforcement mechanisms and partial compliance by some states. Nevertheless, their principles continue to influence international humanitarian law.[16]

3.3 The Geneva Conventions (1949)

The Geneva Conventions are the cornerstones of modern international humanitarian law.[17] Originating in the mid-19th century, they underwent significant expansion after World War II to address the protection of those not actively participating in

[12] Paul R Bartrop and Samuel Totten, *Dictionary of Genocide* (2007), 2 Bloomsbury 286
[13] Wikipedia, Hague Conventions of 1899 and 1907 (Wikipedia, 2024) <https://en.wikipedia.org/wiki/Hague_Conventions_of_1899_and_1907#cite_ref-3> accessed 15 December 2024
[14] Zahraa Kareem Mahmood Al Karawi, '*The Hague Conventions: Cornerstone of Modern International Law*' (2024) 12(1) Russian Law Journal
[15] UNIDIR, *The Role and Importance of the Hague Conferences: A Historical Perspective* (UNIDIR, 2017) <https://unidir.org/files/publication/pdfs/the-role-and-importance-of-the-hague-conferences-a-historical-perspective-en-672.pdf> accessed 17 December 2024
[16] Zahraa Kareem Mahmood Al Karawi, '*The Hague Conventions: Cornerstone of Modern International Law'* (2024) 12(1) Russian Law Journal
[17] International Committee of the Red Cross (ICRC), *International Humanitarian Law: Answers to Your Questions* (ICRC, 2002) <https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/icrc-002-0703.pdf> accessed 18 December 2024

hostilities civilians, healthcare professionals and humanitarian workers and those no longer engaged, such as the wounded, sick, shipwrecked troops, and prisoners of war.[18] "*The first convention dealt with the treatment of wounded and sick armed forces in the field.*[19] *The second convention dealt with the sick, wounded, and shipwrecked members of armed forces at sea.*[20] *The third convention dealt with the treatment of prisoners of war during times of conflict.*[21] *The fourth convention dealt with the treatment of civilians and their protection during wartime."*[22]

The 1949 conventions have been modified with three amending protocols: "*Protocol I (1977) relating to the Protection of Victims of International Armed Conflicts, Protocol II (1977) relating to the Protection of Victims of Non-International Armed Conflicts and Protocol III (2005) relating to the Adoption of an Additional Distinctive Emblem."*[23]

These protocols extended protections to victims of internal armed conflicts and non-international wars. The Geneva Conventions remain among the most universally accepted international treaties, reflecting a global consensus on the need to mitigate human suffering during armed conflicts.

3.4 Post-World War II Tribunals

The Nuremberg and Tokyo Tribunals were pivotal in military law and international justice, prosecuting high-ranking officials for World War

[18] International Committee of the Red Cross (ICRC), *Geneva Conventions and Their Commentaries* (ICRC, 2024) https://www.icrc.org/en/law-and-policy/geneva-conventions-and-their-commentaries accessed 16 December 2024

[19] Sperry C, '*The Revision of the Geneva Convention, 1906'* (1906) 3 Proceedings of the American Political Science Association 33

[20] Raymund Yingling, '*The Geneva Conventions of 1949*' (1952) 46(3) The American Journal of International Law 393–427

[21] 'The Geneva Convention Relative to the Treatment of Prisoners of War' (1953) 47(4) The American Journal of International Law 119–177.

[22] Francios Bugnion, '*The Geneva Conventions of 12 August 1949: From the 1949 Diplomatic Conference to the Dawn of the New Millennium*' (2000) 76(1) International Affairs 41

[23] Wikipedia, *Geneva Conventions* (Wikipedia, 2024) <https://en.wikipedia.org/wiki/Geneva_Conventions#cite_ref-25> accessed 19 December 2024

II atrocities.[24] The Nuremberg Tribunal (1945–1948), established by Allied powers, defined key legal terms like crimes against peace, war crimes, and crimes against humanity,[25] laying the foundation for the International *Criminal Court (ICC)*.[26] The ICC, created in 1998 through the Rome Statute, prosecutes severe international crimes. However, military law remains contentious, often exploited to suppress dissent and justify human rights abuses. Issues like excessive force, extrajudicial killings, and challenges from asymmetric warfare and private military contractors highlight the difficulty of adapting legal frameworks to evolving threats.

4. The Legal Framework for Balancing Security and Liberty

The worldwide legal framework for guaranteeing that the pursuit of security does not come at the expense of individual liberties and human rights has also grown in tandem with the evolution of military laws. This framework functions on two levels: the international level and the national level. Its goal is to strike a balance between the interests of state sovereignty and security and the universal principles of justice, equality, and accountability. However, the success of this framework is frequently contingent on the manner in which laws are implemented. This highlights the ongoing tension that exists between security and liberty, which is

[24] Robert B. Walkinshaw, '*The Nuremberg and Tokyo Trials: Another Step Toward International Justice'* (1949), 35(4) American Bar Association Journal 299.

[25] US Department of State, *The Nuremberg Trial and the Tokyo War Crimes Trials* (1945–1948) (Office of the Historian)<https://history.state.gov/milestones/1945-1952/nuremberg#:~:text=the%20full%20notice.-,The%20Nuremberg%20Trial%20and%20the%20Tokyo%20War%20Crimes%20Trials%20(1945,crimes%20and%20other%20wartime%20atrocities> accessed 17 December 2024.

[26] Robert H Jackson Center, *The Influence of the Nuremberg Trial on International Criminal Law (Robert H Jackson Center*, 2024) <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> accessed 17 December 2024.

one of the topics that is debated in the development of military laws.

In the United States, the evolution of military law has been the direct consequence of *Uniform Code of Military Justice (UCMJ),* which is a codified system of military law passed by Congress in 1950 to ensure uniform and consistent treatment of military legislation. The UCMJ addresses offences like desertion, insubordination, and other acts categorised as misconduct, while itself addressing serious violations such as war crimes and breach of international law.[27] It strikes a balance between maintaining military discipline and respecting fundamental rights, reflecting principles from international instruments like the *International Covenant on Civil and Political Rights (ICCPR).*[28]

Amendments to the UCMJ have aligned it with evolving international standards, such as the Geneva Conventions and the Rome Statute of the *International Criminal Court (ICC).*[29] Provisions ensuring the humane treatment of detainees and due process rights demonstrate the UCMJ's adaptability to global norms. U.S. military legal mechanisms for prosecuting war crimes and holding commanders and non-state actors accountable underscore the nation's commitment to international humanitarian law.[30]

Judicial interpretations have also shaped U.S. military law. In *Parker v. Levy*[31], the judiciary balanced military necessity with constitutional safeguards, ensuring military power does not infringe

[27] Uniform Code of Military Justice, 10 USC Chapter 47 (1950).
[28] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[29] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.
[30] David W Rivkin, 'The Rule of Law and Accountability in the Military Context' (2018) 20 Int'l Legal Prac 32.
[31] *Parker v Levy* [1974] 417 US 733.

on civil liberties. The inclusion of whistleblower protections and military tribunals reflects the gradual transformation of military law to address contemporary social values and challenges.[32] The interaction between the domestic and international frameworks stands testimony to the dynamic evolution of military law in reconciling competing security and liberty agendas.

4.1 International Legal Instruments

Through the establishment of global principles that serve as a guide for the interaction between military power and human rights, international law plays a very important role. The foundation for striking a balance between freedom and security is provided by quite a few important instruments:

4.2 The Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights (UDHR) is a landmark document in the history of human rights. It is a global treaty ratified by the United Nations General Assembly that codifies the rights and liberties of all individuals.[33] It established universal human rights for the first time, drafted by delegates from worldwide backgrounds with different legal and cultural perspectives.[34] Established in 1948, the UDHR provides the foundation for contemporary human rights norms, encompassing those that restrict the misuse of military law. Article 3 ensures the right to life, liberty, and personal security for every individual, ensuring a baseline of basic rights even during conflicts. Article 9 further forbids arbitrary arrest and imprisonment, a stipulation frequently contravened by oppressive military legislation. The UDHR functions as a moral and legal

[32] Eugene R Fidell, *Military Justice: A Very Short Introduction* (Oxford University Press 2016).

[33] Wikipedia, *Universal Declaration of Human Rights* (Wikipedia, 2024) <https://en.wikipedia.org/wiki/Universal_Declaration_of_Human_Rights> accessed 19 December 2024

[34] Office of the United Nations High Commissioner for Human Rights (OHCHR), Universal Declaration of Human Rights (OHCHR, 2024) <https://www.ohchr.org/en/universal-declaration-of-human-rights> accessed 19 December 2024

guide for nations, highlighting that security protocols should not compromise human dignity.

4.3 The International Covenant on Civil and Political Rights (ICCPR)

For the purpose of creating a legally enforceable framework for the protection of civil and political rights, the ICCPR, which was enacted in 1966, draws on the Universal Declaration of Human Rights (UDHR). Additionally, the ICCPR recognises that extraordinary situations, such as national crises, could allow for limited derogations from some rights under very stringent criteria.[35] According to Article 4 of the ICCPR, states are permitted to temporarily suspend some rights; however, this is subject to stringent restrictions. These measures must be necessary, reasonable, and non-discriminatory, and they must not violate any peremptory rules, such as the prohibition of torture or extrajudicial killings.[36] In addition, derogations are required to adhere to the concept of legality and must be disclosed to the Secretary-General of the United Nations in order to provide openness and accountability.[37] The idea that the suspension of rights cannot be arbitrary or disproportionate, even during times of crisis, is brought to light by this framework. It emphasises the importance of striking a balance between the protection of the state and the rights of individuals.

4.4 The Geneva Conventions

Concerning the protection of civilians, prisoners of war, and other non-combatants during armed conflicts, the Geneva Conventions

[35] United Nations, *Universal Declaration of Human Rights* (UN, 2024) <https://www.un-.org/en/about-us/universal-declaration-of-human-rights> accessed 19 December 2024

[36] Joseph, Sarah, et al., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed., Oxford University Press, 2013

[37] Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11 (2001) <https://digitallibrary.un.org/record/453977> accessed 19 December 2024

and its Additional Protocols are the foundation of international humanitarian law. These conventions and protocols were established in Geneva, Switzerland. In order to curb the excesses that are associated with military operations, the Conventions have been enacted to outlaw actions such as targeting civilian populations, torturing individuals, and providing cruel treatment. The laws in question emphasise the concept that even in times of conflict, there are legal and moral boundaries that must be observed in order to preserve human dignity and lessen the amount of suffering that occurs.

4.5 The Rome Statute of the International Criminal Court (ICC)

An important turning point in the history of international law was the establishment of the International Criminal Court (ICC) in 2002, which was established in accordance with the Rome Statute. This court was the first permanent court dedicated to prosecuting individuals for the most serious violations of international law. The International Criminal Court (ICC) is responsible for prosecuting crimes of aggression, as well as war crimes, genocide, and crimes against humanity.[38] The purpose of this framework is to guarantee that those who commit such crimes, whether they are state officials, military commanders, or non-state actors, are held accountable for their actions.[39] This will prevent impunity for serious violations of human rights and abuses of power. The International Criminal Court (ICC) emphasises the notion that security measures cannot excuse atrocities or systemic abuses by holding both state and non-state actors responsible. This contributes to the ongoing discussion on the appropriate balance between military power and human

[38] International Criminal Court, *Rome Statute of the International Criminal Court* (International Criminal Court, 2024) <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf> accessed 19 December 2024

[39] Sarah Joseph and others, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013)

rights.[40]

4.6 National Legal Systems

Even though international legal instruments set the framework, national laws are crucial for applying and interpreting these principles in the context of specific political, social, and cultural realities. However, national military policies often struggle to reconcile security and liberty:

4.7 The United States: The Uniform Code of Military Justice (UCMJ)

The Uniform Code of Military Justice (UCMJ) regulates the behaviour of military personnel in the United States, maintaining discipline and accountability within the armed services. The UCMJ creates a legal structure that delineates offences, stipulates penalties, and facilitates military courts to evaluate violations.[41] The UCMJ includes protections to avert abuses and maintain the integrity of military justice; yet, it has been criticised for its restricted capacity to address the rights of civilians affected by military actions, particularly during counter-terrorism operations and foreign conflicts.[42] This difficulty intensifies in situations when sustaining military efficacy conflicts with the necessity to preserve human rights and international standards.[43] The tension highlights the necessity of reconciling operational demands with accountability to prevent compromising civilian safeguards in conflict areas.

[40] Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press 2004) 65–85
[41] Eugene R Fidell, Military *Justice: A Very Short Introduction* (Oxford University Press 2016) 45–47
[42] Geoffrey S Corn and others, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edn, Wolters Kluwer 2018) 365–372
[43] William C Banks, '*The Role of Military Justice in Counter-Terrorism Operations'* (2012) 5(2) Journal of National Security Law & Policy 319–340

4.8 India: The Armed Forces (Special Powers) Act (AFSPA), 1958

Within the context of conflict zones in India, the Armed Forces Special Powers Act (AFSPA) confers extensive powers upon the military, including the right to make arrests without a warrant, to employ force, and even to shoot to kill under certain conditions.[44] Despite the fact that the Act is justified as a tool to combat insurgency and preserve public order, it has been subjected to considerable condemnation for facilitating human rights breaches such as extrajudicial killings, enforced disappearances, and arbitrary detentions. The fact that the Armed Forces Special Powers Act (AFSPA) does not include any accountability procedures exemplifies how national security legislation may occasionally undermine the ideals of democracy and human rights, which in turn sparks recurring arguments over the necessity and appropriateness of the policies.

4.9 China: The National Defence Law

According to China's National Defence Law, the military is granted the authority to interfere extensively in domestic matters. This includes the ability to respond to internal disturbances, counter-terrorism operations, and emergency situations.[45] Concerns have been raised over the ramifications that these measures may have for various civil freedoms, despite the fact that they are presented as instruments to protect the stability and security of the nation. The centralised character of China's government, in conjunction with the inadequate judicial monitoring, contributes to the escalation of concerns regarding the unrestrained authority of the

[44] Suhas Chakma, *The State of Encounter Killings in India* (Asian Centre for Human Rights 2018) 88

[45] Standing Committee of the National People's Congress, *National Defense Law of the People's Republic of China* (revised 26 December 2020) http://www.npc.gov.cn accessed 19 December 2024.

state.[46] Some people believe that these kinds of regulations blur the boundary between national security and state control, and that they frequently put the suppression of dissent ahead of the preservation of individual rights.

5. Case Studies: The Impact of Military Laws on Human Rights

The worldwide implementation of military regulations demonstrates a complicated and sometimes contentious interplay between security protocols and human rights. Each case study illustrates the impact of military law implementation on human rights, revealing deficiencies in accountability and ethical governance. These instances highlight the persistent conflict between state security imperatives and the fundamental principles of liberty and justice.

5.1 Pakistan: Military's Role in Governance and Human Rights Concerns

After the Pakistan's independence in 1947, there was a history of military influence in their governance has often infringed upon civil liberties and human rights. The military leaders such as *Ayub Khan, Zia-ul-Haq, and Pervez Musharraf* imposed the martial law during their regimes. This shows the direct involvement of military in country's political framework.[47] Under their regimes, the judicial procedures were bypassed. For instance, the era of *Zia-ul-Haq* was marked by the introduction of stringent laws that curtails the basic freedom of the civilians.[48]

Pakistan Army Act (1952) gives exclusive military power to detain and try anyone alleged to present a national security threat.[49] However, these provisions have been criticised for arbitrary

[46] Clarke DC, *'China's Legal System and the Limits of Authoritarian Rule'* (2014) 219 China Quarterly 579.
[47] Ayesha Jalal, *The Struggle for Pakistan: A Muslim Homeland and Global Politics* (Harvard University Press 2014) 213.
[48] Asma Jahangir and Hina Jilani, *Human Rights in Pakistan: A Report* (HRCP 1995) 56.
[49] Pakistan Army Act 1952.

arrest and custodial torture. There have been recent discussions of accountability and transparency regarding military courts trying civilians in terrorism-related cases.[50]

The extensive role played by the military in counterterrorism operations, particularly in large regions of *Khyber, Pakhtunkhwa and Balochistan*, has raised the concerns of enforced disappearances, extrajudicial killings, and collective punishment of local populations.[51] Nonetheless, international pressure and domestic advocacy have yielded limited success, most notably with the judiciary questioning the legality of civilian-military trials. However, continued military dominance over civilian institutions lays bare the ongoing struggle for human rights within Pakistan's legal and governance frameworks.

5.2 United States: The War on Terror

The consequences of the 9/11 terrorist attacks prompted the U.S. government to enact extensive measures under the "*War on Terror"* initiative. Legislation like the Patriot Act (2001) augmented surveillance authorities, diminished privacy liberties, and enabled the imprisonment of persons accused of terrorism without sufficient protections. The installation of military detention camps, notably Guantánamo Bay, was one of the most controversial practices, becoming notorious for allegations of torture and indefinite incarceration without trial.[52] Judicial conflicts, shown by *Hamdi v. Rumsfeld* (2004), highlighted these concerns. The U.S. Supreme Court determined that people designated as "enemy combatants" possess the ability to contest their imprisonment through habeas corpus.[53] The case underscored the constraints of judicial

[50] International Commission of Jurists, 'Military Courts in Pakistan: An Assessment' (ICJ, 2019) https://www.icj.org accessed 26 January 2025.
[51] Amnesty International, 'Pakistan: Human Rights Under Military Operations' (2021) https://www.amnesty.org accessed 26 January 2025.
[52] Margulies, Joseph, *Guantánamo and the Abuse of Presidential Power*, Simon & Schuster, 2006.
[53] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)

supervision over national security, while tactics like as enhanced interrogation and rendition continued under legal rationales for counterterrorism efforts.[54]

Critics contend that these policies, although aimed at safeguarding national security, undermine essential rights, establishing concerning precedents for bypassing due process and the ban on torture. These acts underscore the necessity of reconciling counter-terrorism initiatives with constitutional protections and international human rights norms.

5.3 India: The Armed Forces (Special Powers) Act (AFSPA)

The Armed Forces (Special Powers) Act of India, established in 1958, confers exceptional authority on the military in designated "disturbed areas," including Jammu and Kashmir and the Northeast.[55] Although AFSPA is defended as a mechanism for addressing insurgencies and maintaining public order, its execution has been plagued by accusations of significant human rights violations.[56] Allegations of extrajudicial killings, enforced disappearances, torture, and the repression of opposition have compromised the integrity of the law. In Manipur, *Irom Sharmila's* 16-year hunger strike against AFSPA exemplified the pervasive discontent with the law among impacted populations.[57]

In 2005, the *Jeevan Reddy Committee* advocated for the abrogation of AFSPA, characterising it as legislation that had evolved into a symbol of tyranny and estrangement.[58] Nonetheless, political and

[54] Dworkin A, *'Detention in the "War on Terror": Can Human Rights Fight Back*?' (2009) 85(1) International Affairs 1.
[55] Armed Forces (Special Powers) Act 1958 (India) <https://www.mha.gov.in> accessed 20 December 2024.
[56] Suhas Chakma, *The State of Encounter Killings in India* (Asian Centre for Human Rights 2018) 88
[57] Kaur R, *'Irom Sharmila and the AFSPA: An Icon of Protest'* (2005) 40(36) Economic and Political Weekly 3909.
[58] Government of India, Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958 (Jeevan Reddy Committee) (2005) https://www.mha.gov.in accessed 20 December 2024.

security apprehensions have obstructed substantial improvements, resulting in the retention of the legislation and the afflicted regions being in a condition of ongoing dissatisfaction. AFSPA exemplifies how military legislation may facilitate human rights abuses when executed without accountability or sufficient monitoring.

5.4 Myanmar: Military Junta and Rohingya Crisis

Myanmar's military, the Tatmadaw, has suppressed opposition and marginalised ethnic minorities. The Rohingya crisis, described by the world community as mass killings, sexual violence, and forced deportation, is the most notable example.[59]

A military onslaught forced over 700,000 Rohingya to flee to Bangladesh in 2017, sparking genocide and ethnic cleansing claims. The UN Fact-Finding Mission on Myanmar called the military's actions "*genocidal intent*.»[60] The *International Court of Justice (ICJ)* is presently adjudicating complaints against Myanmar, pursuing accountability for grave violations under international law.[61]

Despite worldwide condemnation, Myanmar's military has used its state power to avoid punishment. The Tatmadaw has substantial autonomy under national and constitutional law, limiting civilian oversight and legal redress.[62] This case shows the difficulty of holding military rulers responsible when national laws are complicit or ineffectual and international processes are difficult to implement.

[59] United Nations Office on Genocide Prevention, *Fact-Finding Mission on Myanmar: Report* (2018).
[60] United Nations Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (A/HRC/39/64, September 2018).
[61] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Provisional Measures, Order of 23 January 2020) ICJ Rep 2020.
[62] Constitution of Myanmar (2008), Chapter I, Section 20, which grants the Tatmadaw control over the nation's security and defense sectors.

5.5 Israel-Palestine Conflict

The Israeli Defence Forces (IDF) function within a stringent framework of military regulations intended to govern their conduct in the *Occupied Palestinian Territories (OPT)*. Although Israel contends that these laws are essential for addressing security threats, their enforcement has provoked considerable human rights concerns. Human rights organisations, including Amnesty International and Human Rights Watch, have recorded practices such as arbitrary detention, excessive use of force, and collective punishment directed at Palestinian civilians.[63] Instances encompass the recurrent application of administrative detention, when individuals are incarcerated without formal charges or trial, with military operations that have resulted in extensive civilian fatalities, as observed in Gaza.[64]

Critics contend that Israel's military legislation has established a legislative structure that favours state security over personal freedoms, frequently undermining international humanitarian law. The case underscores the difficulties of enforcing military regulations in prolonged battles, when legal rationales are frequently disputed by many parties.

5.6 Russia-Ukraine Conflict

Russia's military operations in Ukraine, especially with the annexation of Crimea in 2014 and the comprehensive invasion in 2022, have elicited international denunciation for extensive human rights abuses. International organisations have reported indiscriminate bombings of civilian zones, coerced conscription in

[63] Amnesty International, *Israel and the Occupied Palestinian Territories: Annual Report 2022/23* https://www.amnesty.org accessed 12 December 2024; Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (2021).
[64] United Nations Human Rights Council, *Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict* (A/HRC/29/52, June 2015).

occupied regions, and targeted assassinations of non-combatants.[65] Russian soldiers' activities have prompted allegations of war crimes, currently under investigation by the *International Criminal Court (ICC*).[66] The bombardment of civilian shelters and infrastructure, including hospitals and schools, contravenes the Geneva Conventions, which forbid assaults on civilian entities during armed combat.[67]

Russia's military legislation and administration in occupied territories have been employed to rationalise acts perceived by many as egregious breaches of international law. This case highlights the pressing necessity for enhanced international accountability frameworks to address violations of military law in modern wars.

6. Challenges in Balancing Security and Liberty

In order to achieve a balance between security and liberty, it is a difficult task that is fraught with various challenges, which are frequently impacted by institutional, legal, and socio-political issues. These challenges create an environment where military laws, rather than serving as tools for justice, can become instruments of abuse.

6.1 Accountability Gap

Military activities typically take place in secret. This lack of transparency allows military personnel to commit extrajudicial executions, torture, and unlawful imprisonment without consequence. States often use national security to insulate the military from scrutiny, creating impunity.

6.2 Judicial Control

[65] United Nations Office of the High Commissioner for Human Rights (OHCHR), *Report on the Human Rights Situation in Ukraine: 24 February 2022 to 30 June 2023* https://www.ohchr.org accessed 21 December 2024.
[66] International Criminal Court, *Situation in Ukraine: ICC Investigations into War Crimes and Crimes Against Humanity* (2022) https://www.icc-cpi.int accessed 20 December 2024.
[67] Geneva Conventions, *Convention (IV) relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entered into force 21 October 1950) art 18.

Many countries' courts lack the ability or independence to evaluate military acts. Military tribunals, which generally functioning under different legal frameworks, often prioritise state and military interests above civilian rights. This gap undermines the rule of law by denying human rights victim legal recourse.

6.3 Derogation clauses

Emergency provisions in international law, such as the ICCPR, allow nations to waive some rights. However, governments often use derogation clauses to repress dissent or justify authoritarianism. Illegal arrests and detentions are often justified as "emergency provisions," even when they are completely unnecessary.

6.4 Political and cultural factors

Sociopolitical factors heavily influence military law. Politically unstable and authoritarian regimes prioritise state security over individual liberties. Public tolerance for military abuses is shaped by cultural views of authority and national security, making it hard to push for changes or challenge the military's position in government.

6.5 Recommendations for Reform

An approach that is both all-encompassing and multi-faceted is required in order to address the challenges posed by military laws. Ensuring that concerns regarding national security are addressed while simultaneously promoting human rights, strengthening accountability, and enhancing legal safeguards are the goals of the recommendations that following.

6.6 Strengthening International Mechanisms

The ICC and ICJ must be empowered to monitor and prosecute human rights violations under military law. This includes increasing these bodies' jurisdiction to cover more military abuses, enhancing the cooperation between national governments and international

courts to punish the perpetrators and strengthening the enforcement of international rulings.

6.7 Transparency and Accountability

States should establish independent monitoring bodies to investigate allegations of misconduct by military personnel. These entities must operate autonomously from the military and include participants from civil society and human rights organisations. Public disclosure of results and transparent prosecutorial procedures are crucial for restoring confidence in military institutions.

6.8 Legal Safeguards

Torture, arbitrary detention, and enforced disappearances must be expressly prohibited under national law. Reforms may include limiting military authority in domestic concerns and requiring judicial approval of all military activities impacting civilians. Systematising military necessity and proportionality.

6.9 Training and Education

Training armed forces in international humanitarian law (IHL) and human rights concepts is crucial for mitigating abuses during military operations. Standard programs should concentrate on: Acquainting military personnel with the Geneva Conventions and other international treaties; Advocating for ethical decision-making in conflict areas; Promoting accountability and understanding of personal responsibility for war crimes.

6.10 Public Participation

It should involve human rights activists and civil society should be involving in the drafting, implementation, and revision of military law. Such an engagement will guarantee that military legislation yields human rights aspects and societal concerns cohesively. Public consultations, parliamentary debates, and independent discussions on military legislation might further augment legitimacy and acceptance.

For example, in South Africa, public consultations during the drafting of post-apartheid military and security legislation considered the human rights violations committed under apartheid. Public participation in developing the *Defence Act 2002* ensured civilian safety and accountability mechanisms.[68] Such participation brings greater trust to the people and promoted respect for human rights.

7. Conclusion

The international human rights norms, which are outlined in documents such as the Universal Declaration of Human Rights (UDHR), the Geneva Conventions, and the International Covenant on Civil and Political Rights (ICCPR), play a significant role in the process of formulating military strategies that are fair and reasonable. For the purpose of monitoring and addressing infractions, international courts like as the International Criminal Court (ICC) and the International Court of Justice (ICJ) need to be reinforced. At the same time, governments should align their national military laws with these global standards.

When it comes to the application of military laws, striking a balance between security and liberty has proven to be a formidable challenge, but it is not an insurmountable one. The recommendations that were presented earlier highlight the significance of developing legal frameworks that are accountable, transparent, and focused on human rights at both the national and international levels. States are able to guarantee that military laws accomplish their intended goal, which is to preserve security without sacrificing the basic rights and freedoms of individuals, by placing a priority on supervision, legislative reform, and public engagement.

[68] Laurie Nathan, 'Civil Society's Role in Security Sector Reform in South Africa' (2007) 13 JSS 22.

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From Bloodlines to Belonging: Transforming Sri Lanka's Adoption Laws to Champion Every Child's Right to Love and Family

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"*And these Children that you spit on as they try to change their worlds are immune to your consultations. They're quite aware of what they're goin' through*"[1]

Abstract

This article critically analyses Sri Lanka's adoption laws, primarily the Adoption of Children Ordinance No. 24 of 1941 as amended, alongside relevant international and personal laws, to identify key legal gaps and challenges impacting child welfare. It explores restrictive provisions, such as stringent age criteria, adopter-child age gaps, and disparities arising from Kandyan, Muslim, and Thesawalamai laws that can hinder uniform application. The article also evaluates Sri Lanka's adherence to international standards, particularly the UN Convention on the Rights of the Child (UNCRC), highlighting the absence of clear guidelines on the "best interest of the child." Issues such as limited support for single and foreign adopters, procedural inefficiencies, and inadequate safeguards against unlawful adoptions are addressed. To promote a more inclusive and protective framework, the article proposes legal reforms, including a unified adoption ordinance, alignment with global child rights principles, and streamlined processes, aimed at ensuring equitable and effective protection for all adoptive children in Sri Lanka.

Keywords: *Adoption Ordinance, Best Interest of Child, Children, Deficiencies and Welfare*

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[1] David Bowie, quoted in *Ceylon Today* (Colombo, 17 July 2024) <https://ceylontoday.lk/2024/07/17/sri-lanka-is-failing-its-own-future/> accessed 11 November 2024

Introduction

Family law is a broad domain, encompassing a range of issues from matrimonial disputes to matters of guardianship and custody. Within this scope, adoption stands out as a crucial legal and social construct, bridging the needs of childless individuals with those of parentless or vulnerable children. Adoption provides not only the possibility of family to those without children but also a path for orphaned or neglected children to gain access to the security, care, and educational opportunities of a stable family environment, as illustrated in ***McCall VS McCall.***[2]

In Sri Lanka, the concept of adoption plays a pivotal role in shaping family structures and fulfilling the promise of family life for children in need. However, the current adoption laws, rooted in the Adoption of Children Ordinance, exhibit certain deficiencies, limiting the inclusivity and effectiveness of the process. These restrictions impact the lives of children and prospective parents alike, often hindering what could otherwise be meaningful and transformative relationships.

This manuscript seeks to critically analyse the existing legal framework surrounding adoption in Sri Lanka, identifying gaps and challenges within the system.

Methodology

This research adopts a qualitative approach to examine the legal framework and practical application of adoption laws in Sri Lanka. It involves a detailed analysis of primary legal texts, including the Adoption of Children Ordinance No. 24 of 1941 and relevant case law, to understand statutory provisions and judicial interpretations. Court records and judgments on adoption cases will be reviewed to examine the application of the law in practice, particularly the role of

[2] *McCall v McCall* [1994] 3 SA 201 (C)

courts in assessing eligibility and consent in adoption proceedings. Secondary data from academic articles, reports, and books will contextualize Sri Lanka's adoption system within international standards. The collected data will be analyzed thematically to identify key issues such as eligibility criteria, the role of the family and state, and challenges in international adoption.

What is Adoption?

The term 'adoption' was defined by Webster's Dictionary as follows, "*To take voluntarily as one's own child."* This means that an adoptee cannot be in the same lineage of the adopter. Author Dr. U. L. Abdul Majeed put this doctrine in simple words. According to him in the adoption process generally three parties are involved. Namely: Child,[3] Adopter,[4] and Natural parents. By virtue of this doctrine, the person who is adopting a child is not the natural parent of such a child, and the child is born to some other parties.

Adoption, therefore, is a method by which a parent-child relationship is created through legal mechanisms, even when the individuals are not biologically connected. Furthermore, adoption is not limited to cases without biological ties - it can also be used by biological parents who lack legal recognition of parentage to formalize their parental rights.

In Sri Lanka, there are two primary types of adoption processes,[5] international adoptions and local adoptions, each with specific procedures.

International Adoptions: Managed by the Department for Probation and Childcare Services (DPCCS), this process is for

[3] Adoption of Children Ordinance No 24 of 1941, s 17: "'Child' means a person under the age of fourteen years."

[4] *Ibid*: "'Adopter' means the person authorised by an adoption order to adopt a child, and where such an order is made in favour of a husband and wife on their joint application, means both husband and wife."

[5] Radhia Rameez, 'Child Adoption In Sri Lanka: A Snapshot' (Roar Media, 14 May 2018) <https://archive.roar.media/english/life/in-the-know/child-adoption-in-sri-lanka-a-snapshot> (accessed 11 November 2024)

foreign nationals or Sri Lankans living abroad. Applicants work through licensed adoption agencies in their country and submit a joint application with essential documents like home study reports, marriage certificates, and employment records. Once reviewed, DPCCS allocates a child to them. Only after allocation can the adoptive parents travel to Sri Lanka, where they must stay for four to five weeks to complete the adoption. This allows for local oversight and final verification of the child's placement in the adoptive family.[6]

Local Adoptions: Adoption within Sri Lanka is decentralized and handled by provincial authorities, specifically by each province's Commissioner of Probation and Childcare Services. Applicants, typically a couple, apply through their province's Commissioner, providing documents such as asset details and a formal request. After eligibility is confirmed, the applicants receive a permit allowing them to visit childcare centers to meet children eligible for adoption.[7]

There are also provisions for adopting relatives, like a nephew or niece. In such cases, the applicant files a case in district court, where the DPCCS acts as a respondent to confirm the suitability of the adoption. Even with close family ties, the court examines the applicant's capacity to provide proper care, ensuring that a familial relationship alone isn't the sole criterion.[8]

In both international and local adoptions, children eligible for adoption are those screened and approved by the DPCCS. Final adoption approval rests with a judge, who verifies all aspects of the adoption's suitability and the best interest of the child.[9]

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[6] *Ibid*
[7] *Ibid*
[8] *Ibid*
[9] Adoption of Children Ordinance No 24 of 1941, s 3(1)

Procedure to Follow

In Sri Lanka, the adoption process begins when the adopter submits a petition and affidavit to the District Court, listing the child's natural parents and child as respondents if they are known. The court then appoints a probation officer from the Department of Probation and Child Care Services to act as the child's guardian, tasked with ensuring the child's best interests.[10] The probation officer assesses the adopter's financial stability, health, and overall suitability and submits a report to the court.[11] If there are living natural parents, they must provide oral evidence; if not, the probation officer testifies on the child's behalf. The adopter, as the petitioner, also gives evidence of their commitment to care for the child.[12]

To further assess the welfare of the child in the adopter's care, the court may issue a temporary order allowing the child to live with the adopter for a probationary period of up to two years.[13] If all requirements are satisfactorily met, the court finalizes the adoption, possibly assigning the adopter's surname to the child.[14] Thereafter, the amended birth certificate should be handed over to the register with the court order.

The adopting parents should be at or below 60 years. However, the Adoption of Children Ordinance does not specifically state that adopting parents must be at or below 60 years.[15] It can be seen in the practice because the adopting parents must be able to bring up

[10] Laws on Child Adoption Should Be Simplified" (Ceylon Today, 13 May 2023) https://ceylontoday.lk/2023/05/13/laws-on-child-adoption-should-be-simplified/ accessed 11 November 2024
[11] *Ibid*
[12] *Ibid*
[13] *Ibid*
[14] *Ibid*
[15] *Ibid*

a child.[16] They must also demonstrate financial stability sufficient to support the child's educational and general needs. For young married couples, proof of infertility is required.[17] Preference is generally given to Sri Lankan citizens over foreign applicants. A probation officer investigates the couple's background, including community feedback, to ensure a supportive home environment.[18] If approved, they receive a three-year adoption license, during which they can select a child under 12 after a final assessment.[19]

For international adoptions, prospective parents need to be registered with the Sri Lankan government through a diplomatic mission. This process ensures the adoption meets both legal and welfare standards, safeguarding the child's future.[20]

What is the Law Applicable to the Adoption Matters in Sri Lanka?

Dr. U. L. Abdul Majeed spelled out that Sri Lanka is a multi-racial country where several communities live adopting their personal laws in their family transactions, except those matters that are governed by the common law of the country. When it comes to the adoption matter, general law applies to all persons who reside in Sri Lanka except those who are governed by the personal law.[21]

As per Voet, under the RDL the adopted father should provide the care,custody and education to the adoptee. If the adopted father dies then the adopted mother should provide the care,custody and education to the adoptee. This is because under the RDL pater

[16] *BabySpace*, 'Adopting a Baby or Child in Sri Lanka' (BabySpace, 7 June 2016) <https://babyspace.lk/2016/06/07/adopting-a-baby-or-child-in-sri-lanka/> accessed 11 November 2024

[17] *Ibid*

18 *Ibid*

19 *Ibid*

[20] 'Laws on Child Adoption Should Be Simplified' (Ceylon Today, 13 May 2023) <https://ceylontoday.lk/2023/05/13/laws-on-child-adoption-should-be-simplified/> accessed 11 November 2024

[21] The term personal law refers to Kandyan, Muslim and Tesawalamai Law.

family was recognised.

Even though RDL is the general law of the country which follows Adoption of children Ordinance No: 24 of 1941 and by subsequent amendments. This Ordinance is applied to all the person's who are governed by the general law of the country.

The preamble of this ordinance read that, "An Ordinance to provide for the adoption of children, for the registration as custodians of persons having the care, custody or control of children of whom they are not the natural parents, and for matters connected with the matters aforesaid." Whilst part I of this Ordinance deals with 'Adoption of Children'. Part II deals with 'Registration of Custodians of Children.'

Existing Legal Framework Relatng to the Process of Adoption In Sri Lanka

Who Can Adopt a Child?

As per Section 2(1) Adoption of Children Ordinance, any person desirous to adopt a child may make an application to the District Court.[22] In the case of ***McCall VS McCall***; it was held that the district Court has jurisdiction in the case of adoption.

Although this section permits all persons to adopt a child, there are a number of restrictions given in this ordinance. In this sense, as per Section 3(1), the person who applies for adoption must attain twenty-five years of age and there must be a twenty-one years age gap between such person and the child in respect of whom the application is made. But some exceptions have given to this based on the relationship with the parties, because rule of age difference will not be considered when the child is a direct descendant or sibling/ the child of the applicant or step baby of applicant[23].

[22] The District Court**,** within whose jurisdiction the applicant or the child in respect of whom the application is made resides, has jurisdiction to entertain the application.

[23] Adoption of Children Ordinance No. 24 of 1941, s 3(1)

Further, under the adoption ordinance, a sole applicant can adopt a child but if such sole applicant is a male and the child in respect of whom the application is made is female, court cannot provide adoption order[24]. This restriction aims to prevent the sexual exploitation between adoptees and adoptive children. However, the court has the discretion to make an adoption order in these situations if the applicant satisfied the court. For an example if the sole applicant is the biological father[25] of a female child to whom the application was made, the court may give the adoption order. However, the mother has no need to adopt her illegitimate child since she has the maternal rights over her illegitimate child even without adoption.

Moreover, according to Section 3(4), court cannot make adoption order without the consent of both spouses when the application is made one of the two spouses unless there are reasonable circumstances[26]. And there must be consent of the parents or guardian of the child in respect of whom the application was made[27].

Further as per, Section 2(2), the court is entitled to make an adoption order authorising two spouses jointly to adopt a child upon their joint application. For the spouses to become eligible to obtain a joint adoption order, their marriage should be a valid one. In the case of ***Baby Nona VS Milton***[28]a question arose whether a joint adoption order made on the application made by a 'husband

[24] *Ibid*, s 3(2)
[25] Oxford Dictionary of Law, 'Putative father is a man alleged to be the father of an illegitimate child' (Oxford University Press, 2021).
[26] Adoption of Children Ordinance No. 24 of 1941, s 3(4): 'An adoption order shall not be made upon the application of one of two spouses without the consent of the other of them; provided that the court may dispense with any consent required by the preceding provisions of this subsection if satisfied that the person whose consent is to be dispensed with cannot be found or has been adjudged by a competent court to be of unsound mind, or that the spouses have been judicially separated by a decree of a competent court.'
[27] Adoption of Children Ordinance No. 24 of 1941, s 3(3)
[28] Baby Nona v Milton (1984) 1 Sri LR 61

and wife' is void when their marriage was not a valid one. In this case Athukorale J. took the view that an adoption order can be attacked collaterally, in subsequent proceedings, and further stated that, "it is not necessary that such an order should be set aside in the very proceedings in which it was made. It is open to the contesting respondents in the instant proceedings to show that the order is a nullity. However, in the subsequent case of ***Milton VS Baby Nona***[29] It was decided that the adoption order being voidable not void, it could only be set aside in direct proceedings and is not open to collateral attack in other proceedings.

Who Can be Adopted?

Section 17 interprets the term "Child" as a person under the age of fourteen years. Thus, any child under the age of fourteen can be adopted in Sri Lanka and such child must be resident in Sri Lanka[30].

Further, Section 3(5) set out another condition that if the child is over the age of ten, then his or her consent must be received to be adopted. Author craies on statute law 5th edition page no. 243[31] clearly pointed out that, if the consent of a ten years old child was not obtained then the adoption order became void. *In **Hapuganoralage Menikhamy VS Podimenike***[32] ; the majority judges observed that when an inquiry is held into an application for adoption of a child over 10 years old, the consent of the child must be obtained and recorded by the judge, otherwise the adoption order may be challenged as it is invalid in law.

Effects of Adoption

When an adoption order is made all the rights and duties of natural

[29] Milton v Baby Nona (1985) 1 Sri LR 274
[30] Adoption of Children Ordinance No. 24 of 1941, s 3(6)
[31] «... If the statute enacts that it shall be done in such a manner and in no other manner, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceedings…»
[32] Hapuganoralage Menikhamy v Podimenike (1978) SC 108-109

parents or guardians of an Adopted child in relation to the future custody, education, maintenance, etc, is transferred to the Adoptive parents. In other words, as per Section 6 (3), under the adoption order, the adopted child shall for all the purposes whatsoever be deemed in law to be the child born in the lawful wedlock of the adopter and it permanently deprive the natural parents from parental rights over the child adopted, vice-versa[33].

In this sense, adoption provides all the rights including inheritance rights to the adoptive child from adoptive parents like their natural child. Further, An adoptive child can claim the maintenance from adoptive parents under Section 2(2) of Maintenance Act No 33 of 1999. On the other hand, although an adoptive child is entitled to the property rights of adoptive parents, some restrictions have been given by the adoption ordinance in this regard. Because As per section 6(3), adoptive child has no right (a) over the property devolved to any other child of adopter by the virtue of any instrument executed prior to the adoption, (b) to testate or intestate succession of the *jury representation* (representative of the adoptive parents).

However, Adoptive parents cannot succeed any property of adoptive child other than the property which was devolved to such child by way of gift of adoptive parents or his ascendant or descendant or siblings[34].

Special Features of Adoption in Practice

McCall VS McCall case it was clearly spelled out that where the parental care is in doubt, the state will intervene as the upper guardian of all minors in order to protect the best interest the child is better able to promote and ensure child's physical, moral, emotional and spiritual welfare, since the children's beings are not considered as the parent's private matters alone.

[33] Adoption of Children Ordinance No. 24 of 1941, s 6(1) and 4(a)
[34] *Ibid* s 6(5)

International Instruments

The Sri Lankan Government ratified the UNCRC[35] in 1991 which contains a number of rules regarding child adoption. Consequently, the Children's Charter was developed by Sri Lanka in line with UNCRC.

Convention on the Rights of the Child, which was adopted and opened for signature, ratification and accession by the General assembly resolution 44/25 on 1989 and entered into force on 1990, recognizes the child rights such as; inherent right to life, survival and development of the child, right to name and nationality at birth, right to know about parents and their care, right to education etc.

Moreover, Article 21 of CRC mentioned that the adoption system shall ensure the best interests of the child. Basically it discusses about the inter-country adoption which is authorized only by competent authorities who determine in accordance with the applicable laws and procedures, and that adoption is permissible in view of child's status concerning the parents/relatives or legal guardians, if required, the person have their informed consent to adoption on the basis such counseling as may be necessary; inter-country adoption may be considered as an alternative means of child care, if the child cannot be placed an adoptive family in the child's country of origin; ensure that the adoptee child enjoys safeguards and standards equivalent to those existing in the case of national adoption; inter-country adoption does not result in improper financial gain for those involved in it; ensure that the placement of the child in another country is carried out by competent authorities or organs.

However, all international conventions on child rights, the Adoption of Children Ordinance, and Section 5(2) of the ICCPR Act aim

[35] 'UNCRC' refers to the United Nations Convention on the Rights of the Child.

to achieve the 'Best Interest of the Child' when making adoption orders. But, it is questionable whether the laws relating to adoption in Sri Lanka fully comply with the 'Best Interest of the Child.' For instance, the Adoption Ordinance contains ambiguities regarding eligibility criteria, procedural safeguards, and the mechanisms to ensure the child's welfare throughout the adoption process. Additionally, certain principles in Sri Lanka's special laws, such as Kandyan law and Tesawalamai, prioritize cultural or familial considerations over the child's individual needs and rights. These conflicts create inconsistencies in ensuring that the 'Best Interest of the Child' remains paramount in all adoption cases.

Deficiencies under the Laws of Adoption in Sri Lanka (General Law and Special Laws)

Restriction on Age

A person only below the age of fourteen can be adopted in Sri Lanka because Adoption Ordinance[36] And, Section 88 of Children and Young Persons Ordinance defines a child as a person under the age of fourteen. And as per this Section 88, a person who attained the age of fourteen years and is under age of sixteen, is considered as Young person. This position was established based on ancient English law. But, Sri Lankan laws are outdated in this regard, because this position was amended in England and European Countries to adopt the children up to the age of eighteen.[37] In this sense, According to Article 1 UNCRC and Children's Charter of Sri Lanka, a Child is a person below the age of eighteen, unless relevant law recognizes an earlier age of majority. In this sense, any person under the age of eighteen can be adopted under Article 1 UNCRC and Children's Charter of Sri Lanka[38]. However, these

[36] Adoption of Children Ordinance No. 24 of 1941, s 17.

[37] Radhia Rameez, 'Child Adoption In Sri Lanka: A Snapshot' (Roar Media, 14 May 2018) <https://archive.roar.media/english/life/in-the-know/child-adoption-in-sri-lanka-a-snapshot> (accessed 11 November 2024)

[38] UN Convention on the Rights of the Child, art 22

rules have no binding force in Sri Lanka even though they were ratified by Sri Lankan Government, because, "as Sri Lanka Is a dualist country, a treaty or covenant must be incorporated into domestic law by parliament, to have the legal force[39]." But, it is not incorporated yet. Further, Draft Matrimonial Causes Act 2007 proposed by the Law commission of Sri Lanka defines the child as the person under eighteen years of age but this draft was not enacted yet. However, National Child Protection Authority (NCPA) of Sri Lanka in 2021, announced that the minimum age for employment has been increased from fourteen to sixteen and the cabinet proposes raise the minimum age of employment to eighteen[40]. Thus, it impliedly shows that a person needs financial and other support until the age of sixteen or eighteen. Therefore, in order to remove this outdated position, adoption ordinance should reform the age of fourteen to eighteen for the adoption or UNCRC should be incorporated by the parliament.

Another issue is, as per the adoption ordinance there must be a twenty-one years age gap between the child and adopter. This rule aims to prevent sexual exploitation. but in practice, it is possible for sexual exploitation even if there was a twenty-one years age gap. Further, this ordinance urged that adopters must be over twenty-five years old.

Thus, for an example if a twenty-five year old person desires to adopt a child whose age is thirteen, cannot adopt such a child, due to the lack of age gap. Thus, the Adoption Ordinance itself has ambiguity in this regard. Therefore, the age gap between child and adopter should be removed.

[39] *Nallaratnam Singarasa v The Attorney General* [2006] SC Spl 182/99)

[40] The Morning, 'Minimum Age for Employment in Sri Lanka Raised from 14 to 16' (The Morning, 2024) <https://www.themorning.lk/minimum-age-for-employment-in-sri-lanka-raised-from-14-to-16/> accessed 11 November 2024.

Restriction on Making Adoption Orders

As per Section 3(2) the adoption order shall not be made where the sole applicant is male. In this line it is clear that the court has granted adoption order if the sole applicant is female. Jayampathy Jayasinghes in his recent article argues that the adoption order should not be granted to the female if is the sole applicant and the child in respect of whom the application is made is male in order to avoid sexual exploitation. This same approach was followed in China. Thus, the An adoption order under the Ordinance should not be granted to the female if she is a sole applicant and the child in respect of whom the application is made is male.[41]

Problem associated with the Consent

As per **Section 3(5) of the Adoption of Children Ordinance**, when adopting a child over the age of 10 years, the consent of the child must be obtained. However, when comparing this approach with China, the consent of the child is not treated as the sole factor in adoption decisions. Similarly, Sri Lankan law should also ensure that the consent of the child is not considered the sole determining factor but rather one of several elements evaluated to prioritize the 'Best Interest of the Child.

Contradictions between General Law and Special Laws

Any person including Muslims may adopt a child under the Adoption of Children Ordinance[42]. Upon the adoption, such child is regarded as a child born from lawful wedlock of adopter, and child is entitled to succeed the intestate of adoptive parents[43]. In this sense, Muslim Parents may adopt a child under this ordinance even

[41] Jayampathy Jayasinghe, 'The Case of the Adopted Baby' (*Sunday Observer*, 20 January 2008) <http://www.sundayobserver.lk/2008/01/20/imp07.asp> accessed 20 January 2023.
[42] Adoption of Children Ordinance No. 24 of 1941, s 2(1)
[43] *Ibid*, s 6(3)

though Muslim Law does not recognize the concept of adoption. But a conflict arises in respect of the property rights of Adoptive children. Because Muslim Law did not accept the notion of Natural parental relationship between Adoptive Child and Adopter. In this sense, Muslim Law gives intestate rights only to the natural child. Section 2 of Muslim Intestate succession Ordinance of 1931 provides that "law applicable to the intestate of any deceased Muslim shall be the Muslim law governing the Sect to which the deceased Muslim belonged".[44]

And any sect does not recognize the rights of adoptive children. further, Although, an adoptive child can acquire the property of Muslim Adoptive parents by Last Will, they cannot devolve more than 1/3 of property to Adoptive Child due to the lack of blood relationship (non-mahram).

The case of ***Ghouse vs Ghouse***[45] is a great authority in this regard. In this case Supreme Court Held that "although Muslims may adopt under General Law, **Section 6 (3)** of Adoption Ordinance which provides the intestate rights to adoptive children has no application in Muslim Law". Thus, an adoptive child of Muslim adopters cannot acquire the intestate of adoptive parents under Muslim Law as well as such child is not entitled to the property of natural parents under General law.

Moreover, Kandyan Law declaration and Amendment Ordinance 1938 provides a number of rules and procedures regarding the adoption Under Kandyan Law. A Kandyan Person may choose General Law or Kandyan law to govern when he adopts a child. however, in Kandyan Law adoption, there is a deficiency arise, as decided in ***Lokubandara vs Dehigama Kumarihamy***[46]*that*

[44] Saleem Marsoof, Adoption of Children in Muslim Law of Sri Lanka, 'Mahram refers to a specific legal relationship that regulates marriage and other aspects of life'.

[45] *Ghouse v Ghouse* (1986) 1 Sri LR 48

[46] *Lokubandara v Dehigama Kumarihamy* (1904) 10 NLR 505

the adopter and adoptee must belong to the same caste. But this requirement becomes obsolete.

When examining adoption under Tesawalamai Law, it follows a special procedure whereby a person desirous of adopting a child must seek permission from their siblings or nearest relatives.[47] Additionally, if a higher caste man adopts a lower caste child, the child will inherit the caste of the adoptive father, while if a woman adopts a child, the child will retain their original caste. Under Tesawalamai Law, an adopted child is entitled to only 1/10 of the property from their adoptive parents, whereas general law provides equal rights to an adopted child, similar to a natural child. It is important to note that individuals governed by Tesawalamai Law are still required to follow the Adoption Ordinance; however, certain customary practices continue to apply alongside the Ordinance.

Therefore, it is clear that these rules of special law violate the rights of equality and non-discrimination guaranteed under Article 12 of the Constitution of SriLanka. And it is against the international obligations of Sri Lanka regarding the Child rights protected by UNCRC[48] and the "Best Interest of Child". However, if there is conflict between General Law and Special law, later will prevail former because of the Article 16 of Constitution which permits the customary laws to override the fundamental rights[49]. And Section 16 of Adoption Ordinance expressly protects rules of adoption under customary laws even though they are contrary to the Adoption Ordinance. Thus, this position challenges the uniformity of the law. In this context, the discriminatory provisions of special laws

[47] Tambiah, H.W.,1968, p. 133

[48] UN Convention on the Rights of the Child, art 2: 'State parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'

[49] Sri Lanka Constitution, art 16(1): 'All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.'

should be repealed, and the Adoption Ordinance should be codified as a single law or a uniform law of adoption in Sri Lanka to ensure the equal rights of adoptive children without any discrimination.

Lack of Proper Guidelines Relating to the "Best Interest of Child "

Article 3(1) and 21 of UNCRC obligates the stated parties to ensure the "Best Interest of Child" when they permit the adoption, and it will be the paramount consideration in making the adoption order. But the Adoption Ordinance does not expressly recognize the concept of Best Interest of the Child. However, under Section 5, courts may impose some terms and conditions in adoption orders to require the adopter by bond. In this sense, generally courts require the adopter to deposit a certain sum of money in the name of the adoptee as a bond. But bond is not a decisive factor of adoption. And in addition to legal requirements, the department of probation and child care services considers certain social requirements, namely; income, age, health, residence of adopter and suitability to educate the child, etc. however, Adoption Ordinance or Courts does not provide a proper guideline in this regard. Thus, Best Interest of Child may be affected due to this lack of guideline and non-express recognition of the Concept of Best interest of child. Therefore, as mentioned in Section 13, the District Court as the upper guardians of Child must ensure the best interest of adoptive Child. and adoption ordinance should give a proper guideline regarding the bond and social requirements of adopter in respect of the mental and physical health of child, education, religious rights, etc. further, like foreign adoption, home study report and police report of adopter should be made as legal requirements in local adoption.

Ambiguities Relating to the Adoptions by Foreigners

After the amendment of 1992 to the Adoption Ordinance, as per **Section 3 (5) (A),** a person not domiciled in Sri Lanka (Foreigners) may adopt a child in Sri Lanka by making the application to the commissioner of Probation and Child care services. and under this section certain procedures have been set out in this regard.

However, as per **Section 2 (2)** two or more persons cannot adopt a child unless both of them are married spouses (not living together)[50]. And Section 365 of Penal Code prohibits the Same sex marriage in Sri Lanka. Thus, only a man and women who are legally married can adopt a child jointly. But on the other hand, number of countries have legalized the Homosexuality (same sex marriage) and allows them to adopt the child. in the case of ***Du Toit vs Minister of Welfare and Population Development*[51]**, Constitutional Court of South Africa amended the Child Care Act, to allow the joint adoption by LGBT partners (same sex partners).

And in 2005, same sex partners were permitted to adopt the child in UK[52]. Thus, since the foreign adoption is permitted, confusion arises whether the same sex foreign couple can adopt a child under the adoption ordinance of Sri Lanka. The Ordinance itself has no express provision in this regard. Therefore, adoption by LGBT partners should be permitted through the adoption ordinance. Because it will help to reduce the number of helpless children.

Restrictive Policies of DPCCS

Section 2(2) of Sri Lanka's Adoption Ordinance legally allows any individual, including single persons, to apply for child adoption,

[50] *Milton v Babynona (*1985) 1 SLR 212
[51] *Du Toit v Minister of Welfare and Population Development* (2002) 10 BCLR 1006.
[52] Radhia Rameez, 'Child Adoption In Sri Lanka: A Snapshot' (Roar Media, 14 May 2018) <https://archive.roar.media/english/life/in-the-know/child-adoption-in-sri-lanka-a-snapshot> (accessed 11 November 2024)

as indicated by the use of the term "any person" and the language "applicant/s" on official forms. However, in practice, the Department of Probation and Child Care Services (DPCCS) has a restrictive policy that bars single individuals from adopting. This policy is generally applied across all provinces, though there may be some regional variations in its implementation. This policy not only contradicts the legal rights granted under Section 2 but also limits the opportunities for orphaned or vulnerable children to find a stable family. As Nanayakkara argues, these DPCCS policies should be amended to respect the legal framework and support every child's right to a loving home, regardless of the adoptive applicant's marital status.[53]

Delays in the Adoption Process

Adoption process often takes a long period of time. For instance, local adoption generally takes at least a year and foreign adoption takes more than that.[54] In this sense it led the applicant to give bribes to speed up the adoption process.[55] Thus, in order to avoid these illegal actions, the time period for the adoption process should be reduced, and there must be great supervision in this regard

Illegal Abduction and Child Trafficking in the Cases of Adoption.

Sri Lanka is facing this problem of abduction of infants for the illegal adoption for the last couple of decades. Usually the punishment is not enough to get the offence done. As well as under the slow process of law, the Punishment of such individuals is delayed.[56]

Even though there are laws which are mentioned in the Penal code, to curb kidnapping of infants, unfortunately, certain hospitals do not have adequate regulations to prevent such issues which are taking place

[53] Ibid
[54] Ibid
[55] Ibid
[56] Jayashika Padmasiri, 'Infant's Abduction Rocks the Nation' (*The Nation*, 23 December 2007) <http://www.nation.lk/2007/12/23/newsfe1.htm accessed 23 December 2023 >.

within their premises. Moreover, no specific provisions are granted to punish government officers or staff who breach their responsibilities fraudulently or negligently regarding infant abduction from hospitals, or those who help create a fake identity card for the parents and falsely re-register a baby.[57]

It is not clear about the legal situation to protect the parents who will be going in search of legal remedies whose children have been abducted. Since the legal fees are so high, people suffering from poverty would not be able to seek legal assistance. There was no legal aid given to such individuals, because most of the parents, whose child has been abducted, does not seek any legal assistance as the fees of the lawyers are exorbitant.[58]

Government officers in the Probation Department, police, or hospital staff lack knowledge of the legal background of adoption law, the crime of kidnapping, and modern technology.[59]

According to the authors' findings, there are around more individuals (than 1200) in the probation list waiting to adopt children legally. But probation receives few children per year. As a result, the individuals try to adopt the infant or child illegally and women, who conceive a baby before marriage or who act as a sex worker, always try to expose their identity and they secretly give that baby for illegal adoption.

Conclusion

In conclusion, Sri Lanka's adoption laws, while serving as a critical means to secure family for vulnerable children, exhibit significant limitations that hinder the equitable protection and welfare of adoptive children. The current legislation, rooted in the Adoption

[57] David H. Sells, 'Security in the Healthcare Environment' <https://books.google.lk/books?id=FzKwK8ocnrwC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false > accessed 1 January 2023.

[58] Ann Wolbert Burgess and Kenneth V. Lanning, 'An Analysis of Infant Abductions' <http://takeroot.org/ee/pdf_files/library/Burgess.pdf> accessed July 2003.

[59] Jayashika Padmasiri, 'Infant's Abduction Rocks the Nation' (*The Nation*, 23 December 2007) <http://www.nation.lk/2007/12/23/newsfe1.htm accessed 23 December 2023 >.

of Children Ordinance of 1941, is inadequate in addressing modern needs and international standards, such as the "best interest of the child" principle set out in the UN Convention on the Rights of the Child. Additionally, the contradictions between general and special laws challenge the uniformity and equal rights of adoptive children across Sri Lanka. Reforms are essential to modernize these laws, integrating clear guidelines and social safeguards that ensure every child's right to love and security. A reformed adoption framework would not only align Sri Lanka with global child rights standards but would also reinforce the country's commitment to upholding children's welfare as paramount, irrespective of racial or religious distinctions.

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State Accountability in Land Acquisition: A Legal Analysis on Rights Perspective with Special Reference to Sri Lanka

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Abstract

This study analyses the state accountability in land acquisition in Sri Lanka, concentrating on the conflict between development projects and citizens' land rights. Land issues remain combative, specifically involving state acquisition under the Land Acquisition Act No. 09 of 1950. This research examines whether the state violates the rights of the Citizens related to lands adhering to the provisions of the above mentioned Act aligning with property rights and state accountability. The objectives of the research are to critically evaluate the practical impact and the discrimination that occurred to the affected citizens by arbitrary land acquisition within Land Acquisition Act No.09 of 1950 and to identify the state accountability of discharging private lands for projects; hiding behind the veil of "public purpose" and finally to provide recommendations. This study follows the doctrinal research methodology and a qualitative research approach and the researcher examines, discusses, and compares the available internal and external enactments, amendments, constitutions, and information gathered from relevant books, journals, and articles, as well as concepts and facts. The study reveals the nature of the state accountability and challenges that affect the land rights of citizens governed under the law related to the Land Acquisition Law in Sri Lanka. Accordingly, it concludes and recommends that, firstly, to establish strong protection of land rights of citizens, strengthen the obligation and accountability of the state, prevent manipulating the term "public purpose" and arbitrary land

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acquisition for political or personal determinations and establish the role of the state as a trustee to safeguard the natural resources for the public benefit.

Keywords: *Land Acquisition, State Responsibility, Public Interest, Citizens' Rights*

Introduction

Every person has a right to live in any place in the country as they wish, and the Sri Lankan constitution has accepted that right. To achieve that purpose, possession of the land is essential. When considering the evolution of the procedure of administration of justice, it is evident that possession and ownership of land have developed as basic concepts of land law. Even though the right to land or property is not accepted as a fundamental right, land issues have become controversial in Sri Lanka.[1] In particular, the state has acquired lands, using political strategies for development purposes, violating the people's rights on their lands. Simultaneously, the government arbitrarily acquires and uses state lands and offers possessions to external parties. The state tries to prove these arbitrary conveyances as the betterment of the public but without adhering to and respecting the existing laws and rights on lands. However, in the Sri Lankan context, Land is considered a natural resource.

The legal concept of the 'Public Trust Doctrine' accepted in the country is discussed in many fields of law. Accordingly, the government has an accountability and responsibility to adhere to the public trust doctrine and protect and hold the country's natural resources as a trust on behalf of the public. In *Bulankulame case*[2], Justice Amarasinghe highlighted the responsibility of the state to hold the natural resources as a trust, and it was used as a precedent emphasized in the Gubeikavo-

[1] Land Rights and Justice in Sri Lanka – Legal Lacunae and the People's Plight, Law &Trust Society, LST Review, Vol.23 Issue 300 Oct. 2012.
[2] (2000) 3 SLR 243.

Negimarous project[3]case by Justice G.C Weeramanthry. Justice Weeramanthry explains the sermon of the Mihindu Maha Thero to King Dewanampiyathissa, three centuries before the birth of Christ; "We are its guardian – Not its Owners". Consequently, the real owners of the country's natural resources are the general public, and the lands in the country are also a natural resource. The government/ state has accountability for the lands and holds them as a trust on behalf of the general public. Therefore, the state/ government is not in a position to acquire the land for its political purposes using arbitrary powers. However, the existing law provides provisions explaining the power vested to the government to acquire lands for "public development purposes". The government acquires lands for massive projects such as highways, irrigation projects, harbours, airports, and urban development. The Land Acquisition Act No. 09 of 1950 vested this power in the government.

Against this backdrop, the following research problem has been addressed in the paper; Land acquisition by the state is often justified in the name of public interest and national development. However, in Sri Lanka, concerns persist regarding the extent to which such acquisitions align with constitutional and human rights protections. Issues such as inadequate compensation, lack of transparency, limited public participation, and the potential for abuse of power raise questions about the effectiveness of legal safeguards ensuring state accountability. Despite existing legal frameworks, affected communities frequently face difficulties in challenging acquisitions, leading to possible violations of their property and fundamental rights. This study seeks to critically examine the adequacy of Sri Lanka's legal mechanisms in balancing state authority with citizens' rights in land acquisition processes, identifying gaps in accountability, and proposing reforms to enhance legal protections.

Answering the above problem, this research critically evaluates the state's policy of property rights and responsibility in Sri Lanka's

[3] Hungary/ Slovakia- The Danube Case (1997) General List N92-25th Sep.

land acquisition process. Specifically, it analyzes whether the government violates the land rights of the citizens, manipulating the veil of "public purpose" within the existing Land Acquisition Act. Further, the study aims to evaluate the legislative provisions that affect fundamental property rights and the state's accountability in land management.

Objectives

This study aims to find out the land acquisition process implemented in Sri Lanka according to the statutory provisions, to elaborate on the obligations imposed on the state parties in the country by the public trust doctrine regarding protecting the lands belonging to the public, to identify the similar or comparative situation in India regarding state obligations to suspend the arbitrary actions of land acquisition by the state and to provide reforms to ensure more stringent and equitable protection of citizens' land rights and strengthen state obligation sustainably.

Methodology

The qualitative method was used, together with a thorough critical review of the literature and decided cases, to accomplish the main goals of the study. Critical content analysis accompanied by a qualitative approach provided a conceptual, analytical examination of the black letter, doctrinal, and comparative methods. The researcher studied and discussed contemporary Sri Lankan legislation in this study. Ideas, data, and facts from relevant books, journals, articles, treaties, conventions, and national, local, and foreign legislation were used to provide further clarification.

Existing Constitutional and Legislative Framework on Land Acquisition

The constitution in Sri Lanka does not recognize land or property rights and has not made any effort to establish them as fundamental rights. The land administration laws were enacted several decades

ago, and the legal framework remains complicated. These laws have not been framed and developed in alignment with international human rights standards and models. However, to organize and implement the acquisition of lands for development projects or public purposes, the Government has established a legal system, which is identified as the land Acquisition Law.

The Land Acquisition Act No.09 of 1950 (LAA) was enacted to provide legal provisions for acquiring private lands for public purposes subject to award compensation to the affected citizens. The Act was amended several times to address state requirements despite providing effective solutions for the affected public.

Section 2 of the Act explains the discretionary power of the Minister to declare the land acquisition for the "public purpose" and publish the acquisition notices in all three official languages. Section 4 describes the arbitrary power of the Minister; if he considers the problematic land suitable for a public purpose, the Minister can direct the relevant authorized acquiring officer to issue the notices to the land owners

Accordingly, the Land Acquisition Act does not clearly define the word "public Purpose." It can be defined and decided by the minister at his discretion. However, it is crucial to identify whether the minister always uses this power for fair or arbitrary decisions. Section 2 (1)[4] of the Act has vested the power to the Minister to acquire lands for government projects if he thinks those acquiring are for the sake of the public. It reflects that the minister is the person who decides the areas that belong to the word "public purpose" in his unlimited, uncontrolled administrative power. Therefore, the government can acquire land for political and personal purposes with mala fide intention hiding behind the word "public purpose".

[4] Section 2(1)"Where the Minister decides that land in any area is needed for any Public Purpose, he may direct the acquiring officer of the district in which that area lies to cause a notice in accordance with subsection (2) to be exhibited in some conspicuous places in that area".

In such a situation, the state's accountability for its fraud actions should be questioned by the public[5].

According to section 02 of the Act, the government can acquire private lands from the state for public purposes by informing the public that their lands will be possessed. The government allocates budgetary allocations for land acquisitions to compensate the public who lose their living places and lands. Even so, the government still fails to pay millions to the public with unsettled compensation dues. On the other hand, natural disasters and insecurities have arisen from large massive projects implemented by the government, which have covered the word 'public purposes.' These challenges have affected and disrupted the lives of the population. The relevant authorities always used section 38 (a) to acquire immediate possession of lands. This law allows the government to compromise with the public and allows the affected parties to raise objections or proposals. It demonstrates government accountability more firmly. But these clauses are deliberately ignored in favour of barging in and taking over.

The judicial involvement in Sri Lanka's land acquisition process needs to be analysed to obtain a deep understanding of challenges and existing issues in the framework. The court interprets the word "public purpose" transparently depending on the incidental facts and always tries to uphold the citizens' land rights to ensure public utility[6]. Further examining the case laws, it is evident that the Sri Lankan court has attempted to strengthen the policy of land acquisition, ensuring the requirement of citizen and state accountability through the public trust doctrine to establish the protection of the citizens' land rights. In Mendis and Others v.

[5] Gunarathne R, 'Acquisition of Private Land for a 'Public Purpose' by the State – Should Due Process Requirements Be Met?' (2013) Colombo Telegraph <http://www.colombotelegraph.com> accessed 21 August 2024.

[6] Dilrukshi G.S and N.C Wickramarachchi, Compensation for Compulsory Land Acquisition: Does Social Sustainability Matters on Satisfaction 2021 Issue18 (2) Sri Lankan Journal of Real State

Perera[7] and Others, the court clearly defined the word "public purpose", highlighting the essential need to ensure the public utility and benefit of the public when acquiring the lands. Further, the court highlighted the despondency of the lack of required and relevant constitutional provisions and legislations to ensure significant due process in the land-acquiring context. The discretionary declaration of the Minster to grab the lands significantly impacts the economic repercussions of affected landowners. It will influence legitimate expectations regarding the investments made by the land owners, depending on the security of land ownership and future possession.

In some cases, the Sri Lankan Supreme Court has responded to its concerns regarding the due process of acquiring lands belonging to individual persons. Justice Mark Fernando, in the case of Manel Fernando v. D.M Jayarathne[8], mentioned that the relevant public purpose should be revealed when the Minister decides the land is necessary for public purpose. This principle was further discussed in the case of Horana Plantation Ltd. v. Minister of Agriculture and Others[9]. However, it is argued that the uncertainty of the protection and upholding of the precedent by a most politicized court system. Increasing the despondency of the arbitrary nature of the provisions of the Land Acquisition Act, state agencies frequently acquire properties[10].

The above discussion suggests that the absence of explicit legal provisions, clear guidelines, criteria, and efficient impact assessment leads to the government's arbitrary land acquisition,

[7] Mendis and Others v. Perera and Others [2007] SC (FR) 352.

[8] Manel Fernando v D.M.Jayaratne, Minister of Agriculture and Lands and others (2000) S.L.R. 112

[9] S.L.R. 112. 462 / Horana Plantations Ltd. v Minister of Agriculture and others (2009) SC Appeal No.06.

[10] Fonseka B. and Jegatheeswaran D, 'Politics, Policies And Practices With Land Acquisitions And Related Issues In The North And East Of Sri Lanka' (2013) Centre for Policy Alternatives<https://www.cpalanka.org/policy-brief-politics-policies-and-practices-with-land-acquisitions-and-related-issues-in-the-north-and-east-of-sri-lanka/> accessed 09 October 2024.

which is not aligned with valid public interest and public purpose. Finally, it affects the citizens' land rights[11].

The government also uses administrative circulars and gazettes as a mechanism to acquire lands from private owners beyond the legislative provisions. It was extensively criticized the circular enacted in 2011, "Regulating the Activities Regarding Management of Lands in the Northern and Eastern Provinces" (Circular No: 2011/04), issued by the Land Commissioner Generals Department, and was questioned and challenged before the Supreme Court by a writ application and a fundamental case highlighting that the circular violates Articles 12[12] and 14[13] of the 1978 Constitution and legislative protection.

Pragmatic Issues on Land Acquisition

In 2016, the descendants of famous philanthropist Charles Henry de Soysa, who donated his properties for the public good, lost their inheritance rights on the lands at Kompannaweediya due to the government acquiring the vast region under the Urban Development Projects (Special Provision Act) and unfortunately, they didn't receive any cent as the compensation from the government. There are serious concerns and faults in acquiring land by the government, such as not paying compensation to the owners before vacating the lands, which is a significant mistake. On the one hand, it cheats on the public for their hard-earned assets. When the state implemented the construction of the flyover in Rajagiriya, under provision 38(a), the minister issued the notice to acquire the lands, and there was no prior discussion or consultation with the residents. They were informed to remove their walls within one week or face demolition. However, it took several years to compensate for the restructuring or rebuilding of premises and residences after the acquisition, and

[11] Ibid.
[12] Article 12- All people are equal before the law.
[13] Article 14- Freedom of speech, assembly, association, occupation, and movement. of the Constitution of Sri Lanka, 1978

several residents who were affected by this arbitrary action were pensioners. However, there was some dissatisfaction among the landowners regarding the adequacy of the compensation and the timeline the government had taken to settle the matter. Presently, in the Supreme Court, there is an ongoing case regarding the breach of fundamental rights due to the government arbitrarily possessing the land with the petitioner's ancestral house to construct the Colombo Kandy highway road.

It is strongly argued that the power vested by section 38(a) violates fundamental rights as every Sri Lankan has the freedom of movement and of choosing his residence within Sri Lanka under Article 14(h). Section 38(a) permits the government to acquire any land at any time for the word 'public purpose'. It is ethically, morally, administratively, and fundamentally wrong, even if Section 38 permits the acquiring. There is a world-accepted principle that development programmes should not leave any person worse off than they were before. These circumstances raise complicated legal issues and historical situations, establishing the need for the Sri Lankan state to be influenced to suspend the actions through acquiring lands for the covering to the phrase "public purpose' for their arbitrary purposes and to hold the land as a trust for the Public.

In Sugathapala Mendis and Another vs. Chandrika Kumaratunga and Others[14] (Waters Edge case) the action of acquiring state land for a private golf course covered by the word 'public purpose' done by former president Chandrika Bandaranayake Kumaratunga was questioned at the Supreme Court and fined. In the case, the court emphasizes that all facets of the country, such as land, economic opportunities, or other assets, should be administered and governed under the rigorous limitations of the trusteeship postured by the Public Trust Doctrine and always for the benefit of the entire country. In the case of Manel Fernando and another

[14] (2008) 2 SLR 339.

Vs. D.M Jayarathne, Minister of Agriculture and Lands and De Silva vs. Atukorale[15], Minister of Lands, Irrigation and Mahaweli Development, and Another[16], the court highlighted that the public purpose should be disclosed.

Under the supervision of the government, the Mahaweli Development Authority implemented an Agricultural and Livestock Development Project at Pollebedda- Rambakan Oya area to utilize a project for commercialized plantation of maize/corn and clear the area to acquire the land for public purposes. As a result of filing a case, the leader of Indigenous people, Wanniyala Aththo, with the Centre for Environmental Justice, filed a Writ application against this arbitrary action, claiming to issue an interim order suspending the approval given by the Mahaweli Authority and to issue a Writ Mandamus demanding to conduct an EIA[17].

The government has approved the cultivation of sugarcane through the Mahaweli Authority, a Singapore-based Gazelle Ventures and local company IMS Holdings, to cultivate sugarcane, generate power, and produce sugar. By the proposed project, nearly 18000 hectares of land from local farmers and public lands are grabbed, evicting the people from their cultivated lands. The affected people, with the support of the Centre for Environmental Justice, have filed a case in the Supreme Court objecting to the government's action[18].

Arguably, the above issues explore that the state's accountability and responsibility for acquiring the lands should be questioned. On some occasions, it can be observed that the Sri Lankan government acquires the lands without any justifiable reasons and tries to show those acquisitions and conveyance as the betterment of the public. A good example is acquiring the 10 acres of government land near

[15] (2000) 1 SLR 112.
[16] (1993) 1 SLR 283.
[17] CA Writ 70/2021 ongoing case against the destruction of Pollebadd area.
[18] 08/05/2020 ongoing case against the land grabbing in Redeemaliyadda for Sugarcane Plantation.

the Galle Face green promenade and selling it to the construction of Shangrila Hotel for $125 million, relocating the Army Headquarters to a suburb of Colombo. However, several concerns were raised regarding the procedure for the disposal of state land, the tender process was not allowed, and a parliament debate on transferring the public land to a foreign company for this massive project.

The government allowed the sand mining in Mannar District, encompassing a total area of 2002 square kilometres, which holds the fourth largest ilmenite deposits in the world. According to the Geological Survey and Mines Bureau (GSMB), the island is estimated to have 53 million tons of mineral soil, containing valuable minerals such as ilmenite, leucoxene, zirconium, rutile, titanium oxide, granite, sillimanite, and orthoclase found in alkaline soil[19]. This project was given to several private companies since 2015 and finally, the project was taken over by an Australian company named Titanium Sands Limited (TSL). In the face of protests from residents regarding the harm to their livelihood and the environment, the mining license was ceased. However, mysteriously, the permit was reissued by the GSMB, allowing the company to recommence the mining and drilling activities despite the protests and harm to the public[20]. With the knowledge of the repercussions and circumstances of the arbitrary action to allow the company to export the land in the area, the state evades the accountability and responsibility towards the public in its territory.

Silawathurai is a small village in Mannar District. After the war, the families who were expelled from the area returned and tried to resettle in their home village with the aspiration of rebuilding their lives. However, 36 acres out of the private land area were acquired

[19] 'Sand Excavation in Sri Lanka's Mannar Will Lead To Destruction' Earth Journalism Network (28 February 2022) <https://earthjournalism.net/stories/sand-excavation-in-sri-lankas-mannar-will-lead-to-destruction >accessed 18 August 2024.

[20] Australian Company destroying Mannar Island' Ceylon Today (1 October 2022) <https://ceylontoday.lk/2022/10/01/australian-company-destroying-mannar-island/> accessed 18 August 2024.

by the government to establish the Navy camps. This particular land area was situated in the middle of the town. This public purpose of 'national security' is the continued justification for militarily occupied lands, and in this instance, the navy has stated that compensation would be paid for the private lands acquired[21]

An influential urban theorist, the world's most widely cited geographer, and a distinguished Anthropologist, Professor David Harvy, through his theory "Accumulation by Dispossession", magnificently elaborates on the power gathered by the government for their purpose. This concept describes how neoliberal capitalist policies centralize wealth and power in the hands of a few, and it is done by dispossessing the public and private entities of wealth or land belonging to the public[22].

Also, American Political scientist and Anthropologist James C. Scott's theory of "the art of not being governed" provides a similar example of states acquiring regional land strategically and arbitrarily. He observes that states attempt to acquire the lands of the Zomia Region by establishing military campaigns and forcibly incorporating the population who live in those regions into their administrative systems[23].

View through the Lens of Indian Legal Provisions on Land Acquiring Process

The land-acquiring process in India is making a justifiable situation when compared with Sri Lanka. Land Acquisition, Rehabilitation, and Resettlement Act No. 30 of 2013 in India provides a more comprehensive framework than the Sri Lankan Law. However,

[21] The intersectional trends of lands conflicts in Sri Lanka, Centre for Policy Alternatives (24 August 2024) <https://www.cpalanka.org/wp-content/uploads/2024/08/The-Intersectional-Trends-of-Land-Conflicts-in-Sri-Lanka.pdf > accessed 12 November 2024.

[22] David Harvey's Theory of Accumulation by Dispossession: A Marxist Critique Raju Das *World Review of Political Economy*, Vol. 8, No. 4 (Winter 2017), pp. 590-616.

[23] James C Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (Yale University Press 2009) http://www.jstor.org/stable/j.ctt1njkkx accessed 13th November 2024.

when transferring land ownership from private individuals to the government or private entities for public or private projects, the Indian government often portrays such acquisitions as serving a public purpose. Further, India has their unique land acquisition Act to establish fair compensation and transparency in land acquisition. Indian Land Acquisition Act 1894 was repealed, and the new Act, The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR Act), was initiated, addressing the new legal trends and developments on land rights of the public. India's LARR Act is designed to uphold equity principles by ensuring fair compensation, promoting transparency, and facilitating the rehabilitation and resettlement of landowners and other affected stakeholders.

India employs a more structured approach to land acquisition, guided by the principles of fairness, transparency, and comprehensive support for affected individuals. The process begins with identifying land for either public or private projects, followed by a Social Impact Assessment (SIA) to understand the potential consequences on communities[24]. The government then issues a preliminary notification, inviting stakeholder objections before formally declaring the acquisition. Compensation, calculated based on factors like market

Indian government enforces a structured method in land acquisition, directed by the principles of transparency, fairness, and comprehensive provisions for affected citizens. The land acquisition procedure starts with detecting land for either private or public projects, followed by a Social Impact Assessment (SIA) to recognize the prospective concerns of the public. The state then issues a preliminary notification, allowing for stakeholder objections before officially declaring the land acquisition. Compensation or

[24] Tiwari, Aush, Symbiosis Law School, NOIDA <https://blog.ipleaders.in/the-land-acquisition-act-2013/> accessed, 12th October 2024.

award is calculated depending on the facts such as market value and deficiency of livelihoods. Accordingly, a rehabilitation and resettlement (R&R) plan guarantees the protection of displaced families. Only after awarding the compensation and R&R measure are implemented, the land acquisition is enforced.

Section 2(1) of the Indian Land Acquisition Act clearly defines the "public purpose" compared with the Sri Lankan Act. However, it is argued that the definition does not provide a descriptive and exhaustive explanation of the word "public purpose"[25]. 'The Himachal Pradesh High Court's Judgment alias Jishan Lal Raitka Vs Roshan Lal &Another[26], in this case, the land belongs to the people who acquired it to build a safety zone surrounding the mining area of raw materials of Ultra Tech Cement Ltd. The compensation was not properly awarded to the landowners, and the company tried to highlight that the development had occurred for a public purpose. The Supreme Court held that when land is acquired for public purposes without the consent of the landowners, the state has the responsibility and accountability to guarantee whether the compensations and agreed awarded payment amount is compensated as mentioned in the relevant statutory provisions.

In the case of Indore Development Authority Vs. Manoharlal and Ors. Etc[27] The Indian Supreme Court highlighted the importance of upholding the balance between the LARR Act and the affected land rights of citizens. The court held that land acquisition, rehabilitation, and resettlement are two sides of the same coin. It is necessary to have one integrated legal system to administer the issues regarding land acquisition rehabilitation and resettlement. Therefore, the existing provisions should address the concerns of the farmers who depend on their livelihoods on their lands being acquired,

[25] Anjana L, 'Land Acquisition for "Public Purpose" – A Critical Analysis' (25 July 2018) SSRN <https://ssrn.com/abstract=3772691> or <http://dx.doi.org/10.2139/ssrn.3772691>- accessed 12th November 2024.

[26] Cr. Revision No. 2-of 2022 & 12.07.2022

[27] AIR 2020 SUPREME COURT i1496, AIRONLINE 2020 SC 346.

and simultaneously, the state has the responsibility to use the land acquisition for infrastructure, industrialization, and urbanization development projects in a transparent manner and appropriately.

The Supreme Court, in the case of Sooraram Pratap Reddy & ors vs. Distt. Collector Ranga Reddy[28] upheld the land acquisition for a project combined with the development of a business on tourism infrastructure in line with the policy to develop Hyderabad as a significant business destination. In this case, the court interpreted "public purpose" as any public benefit and held that if this project is considered from a broader perspective, it is a challenging endeavour to bring foreign currency into the country, create employment opportunities, and develop the region, hence, it can be observed that it will fall within the domain of public purpose[29].

However, according to the Indian Constitution, it is prohibited to acquire tribal land on any grounds, and tribal societies have conferred the right to self-governance[30]. Nevertheless, the Political and Social activist Arundathi Roy analyzes the arbitrary actions of the Indian Government in land acquisition belonging to the Maoists in her book "Broken Republic"[31]. She highlights the active action of the government on its interest in mining companies and acquiring the lands for mining against and violating its constitution. She argues that who will uphold the Constitution even if the government violates it? The surface appearance of the Indian LARR Act follows a fair, justifiable procedure to acquire land from citizens for public purposes or private projects by the government. On the other hand, the Indian government treats its tribal citizens in separate ways and proceeds with arbitrary acquisitions. The Indian

[28] Civil appeal no. 5509 of 2008.
[29] MS Anusha Reddy and H Murali Krishnan, 'Understanding the Judicial Interpretation of Public Purpose under the Land Acquisition Laws in India: A Case of Robbing the Poor to Feed the Rich' <http://www.nlujodhpur.ac.in/downloads/lawreview/law_review_vol21.pdf> accessed 1 November 2024.
[30] Constitution of India, art 41(1).
[31] Roy, Arundathi, *Broken Republic: Three Essays* (Penguin Books 2011) xii, 220.

government tried to arbitrarily acquire the lands belonging to the Maoists for development projects, highlighting those for public purposes. The eastern central area and southern of India, where the Maoists had a strong presence, was called the "Red Corridor". In 2009, the Indian government launched an attack using para-military forces and state forces against the Maoists in the Recd Corridor, and Indian media used the word" Operation Green Hunt" to describe the incident[32].

The above incident provides an example of violation of the right to equality provided as a fundamental right in Article 14 (Indian constitution), and the right against discrimination in Article 15. "Article 244 (1) of the fifth Schedule in the Indian Constitution describes the administration and control of the areas mentioned in the schedule and tribes mentioned in the schedule in any state other than the states of Assam, Meghalaya, Tripura, and Mizoram. The purpose of scheduling the area is to protect the tribal sovereignty culture, traditions, and economic empowerment to establish justifiable peace and good governance, which includes fair economic, social, and political justice[33]. In the Samata Judgement, the court held that it is prohibited to lease the lands belonging to the government, forest, and tribals in the scheduled area to nontribal or private entities. The government lands, forest lands, and tribal lands in the expected area cannot be leased out to nontribal or private industries.

Considering the above facts, it is evident that the Indian government also evades its state accountability in acquiring lands and ensuring every citizen's land ownership rights. The LARR Act is interpreted in different ways according to the incidental circumstances, and there is no consistency in applying its provisions. Accordingly, it can be proved that the Indian government is also hiding behind

[32] Sethi A, 'Green Hunt: The Anatomy of an Operation' (6 February 2013) *The Hindu* <https://www.thehindu.com> accessed 23 October 2013.
[33] Samatha vs. State of Andhra Pradesh (1997) 8 SCC 191.

the veil of the public purpose for its arbitrary and subjective determinations.

Conclusion and Recommendations

Given the concern raised in the above discussion, it is vital to find solutions and proposals to uphold the balance between the acquisition of lands for public purposes and safeguarding citizens' land rights. A well-structured and organized legal framework that addresses international human rights, administrative standards, and best practices will enhance the transparency of due process and protect property rights in the land acquisition process.

it is proved that state accountability is to provide a clear and valid definition for the word "public purpose" cited in the Land Acquisition Act and to prevent the misuse of land acquisition hidden behind the veil of 'public purpose'. It can be recommended that the state considers including a clear interpretation of the term "public purpose", which contains lawful and accepted public purposes incorporating an open-ended provision to the Land Acquisition Act to maintain flexibility.

On the other hand, the concept of land pooling, also known as land readjustment, can be recommended to the Sri Lankan legal system. It will preserve and establish the rights of the citizens and satisfy the land acquisition for development projects according to the state's requirements. The land pooling system is a land purchasing system. The landowners can collectively contribute to their lands, and after the developments, a proportionate portion of the developed land is given back to the original landowners[34]. Through this system, citizens become equal partners in the development, and the value of the lands is increased because of the developments. Landowners are not being displaced, and the government does not need to take

[34] Akinyode B.F. A Critical Review of land Pooling Technique for sustainable urban renewal in Developing Countries, Geo Journal (2022) 87(1), <https://www.researchgate.net/publication/351393944_A_critical_review_of_land_pooling_technique_for_sustainable_urban_renewal_in_developing_countries> accessed 10 November 2024.

measures to award compensation. Also, accomplishing the project provides better infrastructure for the citizens. Compared with the existing system, which increases the land conflict between the public and the government, the land pooling system minimizes the conflicts relatively. Acquiring lands should be limited only to government-sponsored public-purpose projects. Grabbing lands for Private projects such as the Galle Face green incident should cease emphasizing state accountability. Initiating an independent committee to review the acquiring process will control the arbitrary and discretionary power of the Minister. The committee should include administrative officers from relevant authorities, judges, and members who know the difficulties faced by the citizens who were displaced by the land acquisition.

The existing Land Acquisition Act has many loopholes and has vested the most extensive power in the minister. The acquisition process depends on the minister's consent and preference. It affects the democracy of the citizens. The Act was enacted in 1950, and after 75 years, the citizens of Sri Lanka need to see the emergence of a new democratized legal process on land acquisition.

With a sustainable and justifiable acquisition process, the citizens of Sri Lanka can better adhere to the land acquisition rules and regulations by being aware of their rights and responsibilities. On the other hand, the project developers can limit and minimize the risk of not aligning with the proper acquisition procedure. Finally, state accountability should be on the fair and transparent land acquisition process, which will contribute to the sustainable development and safeguarding of the land rights of the citizens of Sri Lanka.

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