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EDITORIAL NOTE

The Editorial Board of the Sri Lanka Journal of Legal Studies is delighted to announce the publication of its inaugural issue. This marks the first-ever journal publication by the Department of Legal Studies since its establishment. Recognising the importance of fostering a research culture and providing a platform for legal scholars to share their findings, the Department-initiated work on this journal last year. We are overwhelmed to receive number of articles, book reviews, and case reviews for our first issue. After undergoing a rigorous review process, we have selected four articles, one case review, and one book review for the first issue.

This inaugural issue comprises contributions from both international and local scholars. The current issue contains four articles covering the rights of suspects, corporal punishment of children, national legal regime of pesticide use, governance of natural resources. Additionally, a case review on air-space law and a book review on the inter-connection between Neoliberalism and human rights are included.

The editorial board extends gratitude to the eminent reviewers from overseas and local, for their immense support, without which this endeavour would not have been possible. The English Language Department contributed significantly to language editing of manuscripts. We express our appreciation to the assistants of the editorial board, desktop publisher and the Open University press for their unwavering support. This inaugural issue stands as the outcome of a collective effort and dedication. We hope this journal will serve as a valuable source for the legal scholars, practitioners, and law students.

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RIGHTS OF THE SUSPECTS UNDER THE SRI LANKAN LAW: AN ANALYSIS

Isuru Liyanage [#]

ABSTRACT

Being a suspect in a criminal investigation could undoubtedly lead to certain restrictions of rights. As a result, suspects could experience different challenges during the criminal investigation process. Many international reports, including the 2016 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, identify that there is a tendency for the rights of the suspects to be violated during criminal investigation and custodial arrest in Sri Lanka. Despite the possibility that the rights of suspects could be limited, there are certain avenues where their rights can be effectively upheld during criminal investigations. The objective of this paper is to analyse the domestic legal framework of Sri Lanka pertaining to the rights of suspects during the criminal investigation process. A library-based qualitative research method has been employed. This paper argues that although the rights of suspects are sufficiently enumerated in the legal framework, they lack meaningful implementation.

Keywords: suspects rights, protection, criminal investigation, fundamental rights, justice

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1. INTRODUCTION

The general objective of criminal law is to prosecute offenses committed by the accused. The conviction of the offense will be based on the evidence and the collected data through the criminal procedure system. In this process, a suspected person may face some critical conditions. It is evident that although a person has been marked as a suspected person until he is proven guilty, he could be entitled to certain safeguards from the law. However, Sri Lankan domestic laws generally give more prominence to the victims of a crime than the suspect. A primary feature of regular criminal proceedings in the *coram judice* in Sri Lanka is the adoption of the 'adversary', as distinguished from the 'inquisitorial' system, and this is implicit in the whole scheme of the procedural laws of the country.[1] Eminent Sri Lankan Judge Gratien has commented in *De Mell v. Haniffa*[2] about this context. According to him, "it is very relevant to remind ourselves that our code of criminal procedure, which it superseded, was both designed to regulate the process of bringing an offender to justice in accordance with the 'accusatorial system' which, by the will of succeeding legislatures, has taken firm root in this country".[3] This system of administration gave different instructions for following such proceedings. Although this system could restrict the rights of the suspects in such a process, we can still see certain protections that will assist in the protection of the rights of the suspects.

Therefore, this paper, is intended to find out what rights of suspects are protected and guaranteed within the domestic legal framework of Sri Lanka in the criminal investigation process. The Constitutional provisions, Criminal Procedure Code, Evidence Ordinance, and other relevant

[1] G L Peiris, "Human Rights and the System of Criminal Justice in Sri Lanka" (1990) Sri Lankan Journal of International Law 2, 104.
[2] *De Mell v. Haniffa* (1952), 53 NLR 433.
[3] Ibid. at 435 – 436.

legislation will be assessed in this paper for this purpose. Since this paper focuses only on the rights of suspects in Sri Lanka, this paper will not emphasize the miscarriage of justice in the criminal justice system as a result of failing to protect suspects' rights.

2. CONSTITUTIONAL PROTECTIONS

The 1978 Second Republican Constitution of Sri Lanka (the Constitution) demonstrates a gradual development in the constitutional parameters of the country. Significant features of the Constitution include a separate fundamental rights chapter, an executive presidency system, a Westminster-modelled Parliament, and devolved power among secondary-level institutions. Within these features, introducing a fundamental rights chapter with a mechanism to litigate fundamental rights violations can be identified as a milestone in the Constitutional history of Sri Lanka.

Article 27(2)(a) of the Constitution states that the "state is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include the full realization of the fundamental rights and freedoms of all persons". This constitutional provision spells that 'all persons' can be eligible for the full realization of fundamental rights in the constitution. Then, it is reasonable to argue that, since the suspect is also a human being, such a suspect could also get the entitlements under the Constitution.[4]

In this regard, it is essential to focus on the fundamental rights chapter of the Constitution. Article 126 and Article 17 of the Constitution introduce a mechanism against an imminent infringement or an infringement of the rights under this Constitution. Accordingly, any victim of such a violation can file a petition with the Supreme Court within one month of the said

[4] This comes under the 'Directive Principles'-Chapter VI of the 1978 Constitution.

infringement. Additionally, this provision only covers rights that are violated by executive or administrative action. It has been established in this discussion that a majority of suspects' rights are violated by police officers and representatives of the state. Hence, this group can be included in the category of Article 126 of the Constitution.[5] Although there are rights under Chapter III of the Constitution, suspects can get entitled to a few rights during the criminal investigation process, such as the right to equality, the right to be free from torture, freedom from arbitrary arrest and detention, and the right to access information.

2.1. Right to Equality

Equality can be interpreted as the core of many other rights. Today, equality is recognized as a basic and essential requirement of a democracy.[6] This right is incorporated under Article 12(1) of the Constitution, which reads that "all persons are equal before the law and are entitled to the equal protection of the law". This is also called equality before the law. According to the comment made by Justice Sharvananda in the landmark judgement, *Palihawadana v. AG*[7], the classification of persons is important to grant this right at different levels.[8] This right has been given to "all persons", and it can be interpreted broadly to include suspects within the meaning of the article. Therefore, whatever actions taken by law enforcement officials that restrict this right can be litigated as a violation of a fundamental right. There is no specific case in Sri Lanka that deals only with the suspects' right to equality. Most of the petitions on the right to equality are filed along with the other rights under the

[5] *Sriyani Silva v. Iddamalgoda, OIC Payagala* (2003) 2 Sri.L.R 63.
[6] J Wickramaratne (2006), *Fundamental Rights in Sri Lanka*, Stamford Lake Publication, p. 275.
[7] *Palihawadana v. AG* (1979)1 FDR 1.
[8] This case dealt with a promotion issue.

Constitution, such as the right to be free from torture, freedom from arbitrary arrest and detention, etc.

2.2. Right to be Freedom from Torture

Article 11 of the Constitution states that "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[9] Amarasinghe defines the term torture as "the suffering occasioned must be of a particular intensity or cruelty. In order that ill-treatment may be regarded as inhuman or degrading, it must be severe".[10] Therefore, severity as well as cruelty are significant factors under this Article. Torture is a severe experience that most suspects face in Sri Lanka.[11] This happens during criminal investigations in Sri Lanka. In *Sivakumar v. Officer-in-Charge and others*[12] , the petitioner complained that, while he was in police custody, he was subjected to various forms of torture. In this case, the medical reports confirmed that the petitioner was subjected to cruel torture. This case further establishes the Supreme Court's recognition of medical reports as essential evidence in proving torture and other cruel, inhuman, or degrading treatment.

Under Article 11 of the Constitution, it is important to assess the level of cruelty or inhumane treatment. *Amal Sudath Silva v. Kodithuwakku*[13] is another case in which the suspect was subjected to torture and cruel, inhumane treatment during the interrogation. This case is one of the classic examples of custodial violence in Sri Lanka. In this case, the suspect was questioned about a crime, but police officers used the

[9] The Constitution of Sri Lanka 1978, Art 11.
[10] Amarasinghe A.R.B., (1995), *Our Fundamental Rights of Personal Security and Physical Liberty*, Sarvodaya Book Publishing Services, p. 29.
[11] Apart from this constitutional provision, Sri Lanka enacted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994. This Act interprets torture as a crime.
[12] *Sivakumar v. Officer-in-Charge and others* (1987) 2 SLR 119.
[13] *Amal Sudath Silva v. Kodithuwakku* (1987) 2 SLR 119.

maximum of cruel and inhumane methods, such as chopping the male organs by using drawers in the police station. The Supreme Court held this to be a violation of Article 11 of the Constitution.

The case of *Sanjeewa v. Suraweera, Officer-in-Charge, Police Station, Wattala*[14] (also known as the *Gerald Mervin Perera case)*, is yet another example that shows the level of inhuman treatment used by police officers during criminal interrogations in Sri Lanka. Here, police arrested Gerald Mervin Perera without informing him of any reason for the arrest. During the custodial period, he was subjected to torture, and cruel and inhuman treatment. The police officers attempted to get a confession from Gerald. However, Gerald knew nothing about the offense he was being questioned about. The police officer kept Gerald in custody for more than twenty-four hours, and finally, they found that they had arrested the wrong person. By this time, the suspect had been subjected to ruthless treatment by the police officers, and he was hospitalized upon his release from police custody. The Supreme Court held this was a violation of Article 11 of the Constitution. This case shows that most police officers resort to violence and torture to extract confessions from suspected persons, even amidst repeated claims by the suspect that he or she is not aware of the particular offense.

Another challenge that Article 11 encounters is difficulties in establishing torture before a court of law. The case of *Velmurugu v. The Attorney General and Two Others*[15] is an example. The petitioner, in this case, was arrested by army forces and placed in an officer-driven jeep. The petitioner claimed he endured torture and brutal treatment while riding in the jeep.

[14] *Sanjeewa v. Suraweera, Officer-in-Charge, Police Station, Wattala* (2003) 1 Sri L.R. 317.
[15] *Velmurugu v. The Attorney General and Two Others* (1981) 1 Sri L.R. 406.

However, despite the judicial medical officer's assistance, the petitioner could not prove the inhuman treatment.[16]

It is evident from the above discussion that Article 11 is an integral Constitutional safeguard for suspected persons during the criminal investigation process. However, in certain cases, there is difficulty in establishing torture and cruel, inhumane treatment.[17] On the other hand, there are reported cases in which, such torturous activities have been successfully proved.[18]

2.3. Freedom from Arbitrary Arrest, Detention and Punishment

This right is incorporated under Article 13 of the Constitution. Article 13 can be considered as a provision that encompasses a collection of other important rights. Additionally, this provision can be identified as a procedural safeguard for suspects in Sri Lanka. Procedural safeguards rest upon two underlying assumptions of democracy: the integrity of the individual and the government by law rather than men.[19]

According to Article 13(1) of the Constitution, "no person shall be arrested except according to procedure laid down by law. Any person arrested shall be informed of the reason for his arrest". This indicates a procedural requirement that all police officers should follow during the criminal investigation. In *Piyasiri v. Fernando, A.S.P.*[20] the petitioners were asked to go to a particular police station, but no reason was given. The petitioners travelled in their own cars. While they were in the police station, their belongings were searched and then they were asked to go to the

[16] Similarly, in *Namasivayam v. Gunewardena* (1995) 2 Sri L R 167, the petition failed because the claim that the petitioner had been tortured was unsupported by any medical proof.
[17] See *Malinda Channa Peiris and others v. AG and others* (1994) 1 Sri L.R.1.
[18] See *Kapugeekiyana v. Hettiarachchi* (1984) 2 Sri L.R.153.
[19] L Pfeffer, '*The Liberties of an American'*, Beacon Press Boston (1956), p. 158.
[20] *Piyasiri v. Fernando, A.S.P* (1988) 1 Sri LR 173.

Bribery Commission in Colombo. Later, they were released after recording their statement. In this case, Justice H.A.G. de Silva explained that ;

> custody does not today necessarily import the meaning of confinement but has been extended to mean a lack of freedom of movement brought about not only by detention but also by threatened coercion, the existence of which can be inferred from the surrounding circumstances.

This definition shows that, due to the threat or coercion, if a person's freedom of movement is being restricted, then that is sufficient to prove the violation of this right. Therefore, failing to inform them of the reason for the arrest could lead to a restriction of the right enumerated in Article 13(1) of the Constitution. As per this provision, authorities are bound to follow the procedural requirements stipulated in the procedural law. These processes are codified under the Code of Criminal Procedure Act No. 15 of 1979. As arrest and detention are integral steps in criminal interrogation, Article 13 aims to protect the liberty of the person by following due process of law.[21] In *Namasivayam v. Gunewardene*[22], Chief Justice Sharvananda pointed out the importance of protecting the liberty of a person, even if he is a suspected person. He further stated that the liberty of an individual is a matter of great constitutional importance[23]. In addition to the requirements in Article 13(1), there is another requirement that comes along with Article 13(2) of the Constitution. Accordingly, once a suspected person is arrested, it is important to produce the suspect before a judge within the time stipulated under the procedural laws. This is also an essential requirement since the longer the period in police custody, the higher the possibility of more rights being violated. Police

[21] See *Premalal de Silva v. Inspector Rodrigo* (1991) 2 Sri LR 307 and *Vivienne Goonewardena v. Perera* FRD (2) 426.
[22] *Namasivayam v. Gunewardene* (1989) 1 Sri L.R. 394.
[23] [1989] 1 Sri L.R. 394, at p. 402.

officers can use this prolonged time to violate the rights of the suspects for their own benefit. [24] Nevertheless, Article 13 (1) and (2) can be restricted based on some reasons, such as national security and public order[25]. This shows an explicit restriction on these safeguards. In most cases, this right has been restricted by emergency regulations in Sri Lanka[26]. Even though the restrictions were originally introduced in cases where a terrorist was concerned, these same restrictions paved the way for the rights of a criminal suspect to be violated.

Article 13(3) of the Constitution deals with the importance of a fair trial. The assistance of an Attorney-at-Law and a fair trial by a competent court are the requirements under this provision. This is important to prepare the defense of the suspects. In *Fernando's*[27] case, Justice Malcolm Perera stated that "by denying counsel an opportunity to take instructions and prepare for the case, the cherished right to have the assistance of counsel was reduced". This quotation indicates the importance of legal assistance in presenting the case. Given the vulnerability of criminal suspects, it is imperative that legal assistance be made available immediately following arrest and detention. In the *Kumaratunga v. Samarasinghe*[28] case, Justice Soza noted how this right can be implemented, discussing that the right can be applied to the suspects coming under the Code of Criminal Procedure.[29] When analysing this view, it is clear that suspects are more entitled to this right. If not, the defense of the case will not become a reality, thereby adversely affecting the objectives of the criminal justice administration at large.

[24] This requirement was stressed in *Channa Peiris v. AG* (1994) 1 Sri L.R. 1 and *Edirisuriya v. Navaratnam* (1985) 1 Sri L.R.100.
[25] The Second Republican Constitution of Sri Lanka, Article 15(7)
[26] *Wickremabandhu v. Herath* (1990) 2 Sri LR 34 and *Visvalingam & Others v. Liyanage* (1983) 2 Sri L. R.312, FRD (2) 529 are some examples.
[27] *Fernando v. The Republic of Sri Lanka* 79 (II) NLR 313.
[28] *Kumaratunga v. Samarasinghe* (1983) 2 Sri LR 63.
[29] See Section 260.

Arbitrary punishment is restricted by Article 13 (4). Accordingly, "no person shall be punished with death or imprisonment except by order of a competent court". This provision prevents police officers from punishing or treating suspects inhumanely during the custodial period. Article 13(4) has been elaborated further in the case of *Kumaratunga v. Samarasinghe*[30]. According to this case, arrest and detention, in the absence of a pending investigation or trial, amount to punishment by imprisonment, which is prohibited by Article 13(4). This progressive interpretation connects with keeping the suspect longer than the stipulated time under the procedural law. Moreover, Justice Colin-Thome in *Nanayakkara v. Henry Perera*[31] states that the detention of a person for an unspecified and unknown purpose would be an infringement of Article 13 (4). Similarly, it seeks to ensure that a suspect is produced before a competent court during a reasonable, stipulated time period. Hence, it is submitted that Article 13 encompasses a series of basic safeguards that are fundamental to the protection of the rights of the criminal suspect. The application of this provision is further enhanced by the judges, thereby progressively shaping the written law of the country.

2.4. Right to Access Information

In general, the right to information enables the suspected person, his Attorney, or his close relatives to obtain the required pieces of information from law enforcement officials. In a situation where the suspect is in police custody and there is no way of receiving any information about the arrest or detention, relatives of the suspect can use this as an avenue to obtain information about the arrest of a suspect.[32] Until the 19th Amendment to

[30] *Kumaratunga v. Samarasinghe* (1983) 2 Sri LR 63.
[31] *Nanayakkara v. Henry Perera* (1985) 2 Sri LR 375.
[32] The EU's model of the Letter of Rights, 'Understanding your rights in police custody' (*Fair Trial*, January 2022) <https://www.fairtrials.org/app/uploads/2022/01/LOF-Summary-Spreads.pdf> (accessed on October 10, 2023).

the 1978 Second Republican Constitution, this was not recognized as a right under the Constitution of the country.[33] Additionally, the application of this right comes with the Right to Information Act No. 12 of 2016 and the Gazette notification No. 2004/66 of February 03, 2017. Section 3 (1) of the Right to Information Act states that "every citizen shall have a right of access to information that is in the possession, custody or control of a public authority". However, if the disclosure of [any] information would cause grave prejudice to the prevention or detection of any crime or the apprehension or prosecution of offenders, then the Act prevents accessing such information[34]. This is the only restriction that can be seen in the Act relating to the suspects. Therefore, we can argue that while suspects are in the custodial period, their close relatives can use this legislative enactment to protect the rights of the suspect.

3. THE CODE OF CRIMINAL PROCEDURE ACT NO.15 OF 1979

The Code of Criminal Procedure Act (Code) spells out the procedural requirements to be followed in criminal trials. This originated in 1979 and was subsequently amended several times. The Code includes procedural requirements in investigation, the procedure to arrest, the procedure to find competent jurisdiction, and the authorized individuals in criminal trials. This part assesses the provisions of the code that contribute towards protecting the rights of the suspects in two stages: during the criminal investigation and during the arrest and custodial period.

[33] Constitution of Sri Lanka 1978, art 14A.
[34] Right to Information Act No. 12 of 2016, Section 5(1)(h).

3.1. During the Criminal Investigation Period

Criminal investigation commences with the recording of the first information, and this can be given orally or in writing to a police officer[35]. Then, it is the duty of the police officer to record it in the first information book. This step initiates the criminal investigation. Collecting evidence and obtaining statements is the next stage of the criminal investigation. This is facilitated by Section 110 of the Code. As per this provision, police officers can examine, witnesses and record the statements given by such individuals. Section 110 (2) of the code states that "such person shall be bound to answer truly all questions relating to such case put to him by such officer or inquirer other than questions which would have a tendency to expose him to a criminal charge". This provision can be used in favour of the suspected person as well. For instance, there are many cases where suspects are forced by police officers to give a statement or confession about a fabricated issue. The literal meaning of this provision restricts those and makes a safeguard. Section 110 (3) further states that "a statement made by an accused person in the course of any investigation shall only be used to prove that he made a different statement at a different time". This safeguard is vital from a suspect's point of view since some police officers use force to induce suspects to make statements or confessions. However, according to this protection, a police officer is prohibited from using such violence or force against a suspect or an accused. Any statements or confessions thus obtained become inadmissible in this case. In *Queen v. Mapitigama Buddharakkita Thero*[36]*,* the court held that "the use of the oral statement made to a police officer by the accused was as obnoxious to the prohibition contained in Section 122 (3) of the Code as the use of the same statement reduced into

[35] Criminal Procedure Code Act No. 15 of 1979, s 109(1).
[36] *Queen v. Mapitigama Buddharakkita Thero* 63 NLR 433

writing". The same issue was discussed in the case of *Anandagoda v. The Queen* and the court held that it needed to align with the requirements of the Evidence Ordinance and stated that such statements would become inadmissible in the trial.

Further, Section 111 of the Code provides vital protection for a suspect. Accordingly, "any police officer shall not offer or make or cause to be offered or made any inducement, threat, or promise to any person charged with an offense to induce such person to make any statement with reference to the charge against such person". This provision thereby provides a safeguard for suspects in terms of confessions or statements extracted through force or duress.[37]

One of the objectives of a criminal investigation is to find sufficient evidence that leads to the actual offender of the crime.[38] If police officers are unable to find sufficient evidence or reasonable grounds of suspicion to justify the wrongfulness of the suspect, then such a person in police custody can be released.[39] This will ensure that suspects are not kept in police custody unreasonably. However, this provision bestows any such discretion on releasing the suspect to the police officers.

These are the main protections that can be identified under the criminal investigation provisions of the Code. This article does not discuss the actual implementation of these provisions.

3.1.1 During the Arrest and Custodial Period

The arrest of a suspect supports the criminal investigation. The Code identifies arrest as "making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless

[37] *Queen v. T.M. Appuhamy* 60 NLR 313.
[38] R F Becker, *Criminal Investigation* (2nd Edition 2005, Jones and Bartlett) 11.
[39] Criminal Procedure Code Act No. 15 of 1979, s 114; *AG v. Punchi Banda and others* (1986) 1 Sri LR 40, is an example of the applicability of this provision.

there be a submission to the custody by word or action shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested".[40] This definition identifies that the arrest can be made by touching or by confinement, and this provision urges the need to inform the reason or the allegation of the person who will be subjected to arrest. In *Mariyadas Raj v. AG and others*[41], the court noted that "if a police officer arrests without a warrant, upon reasonable suspicion, he must, in ordinary circumstances, inform the person arrested of the true ground of the arrest. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized". Arrest without giving reasons leads to a violation of Article 13(1) of the Constitution. The above case recognizes this safeguard as a right of the suspect who has been subjected to the arrest[42].

Moreover, when a suspect is taken into police custody, it is required to produce him to the magistrate within twenty-four hours.[43] Under section 2 of the Code of Criminal Procedure (Special Provisions) Act, No. 2 of 2013, police officers are given a chance to keep the suspected person for a maximum of forty-eight hours in police custody. In this situation, law enforcement officials are bound to show the need to keep the suspect for further investigation purposes. Yet, increasing the time might lead to the violation of the rights of the people in custody. In *Edirisuriya v. Nawarathnam*[44], it was held that, when the arrest is done according to the provisions of the Code, then it is considered a legal arrest. Section 37 of the Code contemplates that a person who has been taken into custody without a warrant should be produced before the learned Magistrate as

[40] Code of Criminal Procedure Act No. 15 of 1979, s 23(1).
[41] *Mariyadas Raj v. AG and others* (1983) 2 Sri LR 461.
[42] See *Muthusamy v. Kannagara* 52 NLR 324, *Ansalin Fernando v. Sarath Perera, OIC Chilaw* (1992) 1 Sri L.R. 411, and the *King v. Wannaku Tissahamy* (51 NLR 402)
[43] Code of Criminal Procedure Act No. 15 of 1979, s 37.
[44] *Edirisuriya v. Nawarathnam* (1985) 1 Sri L.R.100.

early as possible and without any unnecessary delay.[45] In *Kodithuwakkuge Nihal v. Police Sergeant Kotalawala,*[46] the court held that keeping a suspect for an unreasonable time would violate not only Section 37 but also his constitutionally recognized fundamental rights.

Further, when suspects are arrested without a warrant, it is a statutory requirement that a particular police officer has a duty to report such arrest to the relevant Magistrate in the district.[47] These reporting mechanisms are envisaged to limit the practice of arbitrary arrest and detention.

It is clear that these provisions safeguard the rights of the suspected person or accused while they are in custody. However, relevant provisions of the Code should be referred to along with the other appropriate legislative enactments in Sri Lanka.

3.1.2. Evidence Ordinance

Evidence Ordinance (The Ordinance) plays a substantial role in criminal as well as civil cases since evidence is mandatory to prove certain facts of a case. "There are three broad facets of this Ordinance: it determines what facts are relevant; it states how relevant facts may be proved in a judicial proceeding; and it governs the production and effect of different types of evidence".[48] According to Coomaraswamy, "without evidence, trials might be indefinitely prolonged to the great detriment of the public and the vexation and expense of suitors".[49] Therefore, these scholarly opinions mirror the need for evidence in any case.

[45] *Samarasekara v. Vijitha Alwis, OIC Ginigathhena* (2010) BLR 19.
[46] *Kodithuwakkuge Nihal v. Police Sergeant Kotalawala* (2000) 1 Sri L.R. 2017.
[47] Code of Criminal Procedure Act No. 15 of 1979, s 39.
[48] G L Peiris '*The Law of Evidence in Sri Lanka*,' (4th ed,Stamford Lake Publication, ,(2011) p. 3.
[49] E R S R Coomaraswamy, '*The Law of Evidence (with special reference to the Law of Sri Lanka)'*, (2nd ed, Stamford Lake Publication, (2012), p. 8.

In a criminal case, it is a well-established principle that the facts need to be proved beyond reasonable doubt. If the prosecution cannot establish the case beyond a reasonable doubt, then the case will be decided in favour of the suspect or accused. Section 101 of the Ordinance states that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist". Hence, the burden of proving the accuracy of one's statement falls on the person who made the statement. In other words, when a victim states that a suspect assaulted him, the burden of proving that fact falls on the victim.[50] However, if the suspect wants to come up with a defense in his favour, then the ordinance imposes the burden of proof on the suspected person or accused. This is shown by the illustration (a) of Section 105 of the Ordinance. In *Karunaratne v. the State*[51], Justice Sirimanne stated that "there was a burden on the accused to prove on a balance of probability their denial of the fact of the case". This indicates that the suspect or the accused need not prove the defense to a high degree. However, the application of Section 105 comes next to the role of the prosecution. Enabling the suspects to bring forth their defenses not only safeguard their rights but also upholds the concept of the presumption of innocence.[52]

Moreover, the ordinance renders inadmissible any confessions made by the suspects while in police custody.[53] During a criminal investigation, there is a high tendency for the inquiring officers to force the suspects into confessing or admitting guilt. Sometimes, inquiring officers could fabricate some facts and force the suspect to accept them through a confession.

[50] This is further elaborated by the illustrations (a) and (b) of Section 101 of the Evidence Ordinance.
[51] *Karunaratne v. the State* (1975), 77 NLR 527.
[52] See *Attorney-General v. Rahim* (1966) 69 NLR 51 and *Cornelis v. Inspector of Police Kamburupitiya* (1963) 66 NLR 185.
[53] This is an exception to Section 17(2) of the Evidence Ordinance.

Accordingly, when it appears to the court that the confession has been obtained by making a threat, promise or inducement to the suspected person, such a confession will become inadmissible.[54] Coomaraswamy identifies the principle of voluntariness as the underpinning principle in Section 24.[55] In *R. v. Thompson*[56]Justice Cave states that "to be admissible, confession must be free and voluntary. Hence if the confession has been obtained by the suspects using force, the confession is involuntary, and thereby inadmissible".

Section 25 of the Ordinance is yet another shield for the suspects while they are in police custody. No confession made to a police officer shall be proved against a person accused of any offense.[57] While suspects are in police custody, they may be compelled to accept the guilt, and due to their vulnerability, they might admit the guilt if they have no other option in such an atmosphere. However, the Ordinance does not accept those confessions as admissible unless they are made before a magistrate[58]. This protection discourages police officers from using force to extract confessions. In *King v.Kalu Banda*[59], Chief Justice Lascelles stated that "it was recognized that police officers in Ceylon, as in India, are not always proof against the temptation of deposing that the accused made some statement, the effect of which is to strengthen the case for the prosecution or to clinch the charge against the accused". This precedent was followed by many later cases in Sri Lanka. Therefore, the court recognizes the risk of using confessions in court. *The Queen v. Murugan Ramasamy*[60], *the*

[54] Evidence Ordinance, s 24.
[55] Coomaraswamy. E.R.S.R., '*The Law of Evidence (with special reference to the Law of Sri Lanka)*, 2nd ed, Stamford Lake Publication, (2012), p. 404.
[56] *R. v. Thompson* (1893), 2 Q.B. 12.
[57] Evidence Ordinance, s 25(1).
[58] Evidence Ordinance, s 26.
[59] *King v.Kalu Banda* (1912), 15 NLR 422.
[60] *Queen v. Murugan Ramasamy* (1964), 66 NLR 265.

Queen v. Gnanaseeha Thero[61], and *King v. Kiriwasthu*[62] are some later cases resonating with the same opinion.

These are the main safeguards available in the Ordinance, in favour of the suspects. These provisions prohibit police officers and other relevant officials from collecting evidence against the suspects by using force or coercion.

3.1.3. Bail Act No. 30 of 1997

Bail means "the release from the custody of the state of a person who is accused of having committed an act or acts which are considered offenses under a particular penal system".[63] Bail is a temporary relief for the suspect when such a person is arrested or in custody. Initially, the law relating to bail was operated under the Code of Criminal Procedure Act in Sri Lanka, and later, the Bail Act No. 30 of 1997 became the core legislation in this area. The preamble of the Bail Act states that :

> [T]his Act is to provide for release on bail of persons suspected or accused of being concerned in committing or of having committed an offense; to provide for the granting of anticipatory bail and for matters connected therewith or incidental thereto.

The preamble indicates that the guiding principle of this legislation is the release of suspects or accused by granting bail.[64] Bail is important since the longer the period in custody, there is a likelihood of violation of the rights of the suspects. Even though the Bail Act, applies to the offenses under the major penal laws in Sri Lanka it excludes certain legislation

[61] *Queen v. Gnanaseeha Thero* (1968) 73 NLR 154.
[62] *King v. Kiriwasthu* (1939) 40 NLR 289.
[63] Indatissa K., '*Law Relating to Bail in Sri Lanka and a Commentary on the Bail Act*,'(2nd ed, Author publication, (2008), 3.
[64] *Anuruddha Ratwatte v. AG* (SC Appeal No. 02/2003) S.N. de Silva J pointed out this principle by interpreting Section 2 of the Bail Act No. 30 of 1997.

including the Prevention of Terrorism Act and Regulations made under the Public Security Ordinance, etc.[65]

The applicability of the Bail Act depends on the nature of the offense, such as whether it is a bailable or a non-bailable offense. The suspect who is being suspected of a bailable offense can be granted bail.[66] A non-bailable offense does not mean that those suspects are not entitled to obtain bail. According to Section 5 of the Bail Act, suspects of such non-bailable offenses can be granted bail based on the discretion of the court. Further, when police officers are investigating a bailable offense, they can grant bail to a suspect when there is no evidence available against the suspect.[67] This is also called police bail.[68] However, in these cases, the police officers may exercise unfettered discretion. Even though the purpose of the provision is to provide some relief to the suspect, the police may not grant bail in certain instances, such as to maintain public security, to protect victims and to protect witnesses.

Another feature of the Bail Act is 'anticipatory bail'. This was introduced by Section 21 of the Bail Act. Anticipatory bail means:

> that a person who has reason to believe that the authorities require him for the purpose of an offense and that where there is material to believe that he may be arrested immediately, any such person could make an application to the relevant court to obtain bail prior to his arrest.[69]

[65] Bail Act No. 30 of 1997, s 3(1), the application of this provision was debatable decided in *Sumathipala v. AG* (CA 171/ 2004); *Mohomed Shiyam v. AG* (SC, Appeal 28/2005).
[66] Bail Act No. 30 of 1997, s 4.
[67] Bail Act No. 30 of 1997, s 6.
[68] Connect with Section 37 of the Code of Criminal Procedure Act No. 15 of 1979.
[69] Indatissa K., '*Law Relating to Bail in Sri Lanka and a Commentary on the Bail Act*, (2nd ed, Author publication, 2008), p. 117.

This provision gives an opportunity to a person to obtain bail when he or she has a suspicion of being arrested. Analysis of the Bail Act No. 13 of 1997 reveals suspects of criminal cases can enjoy certain rights by obtaining bail.

4. HUMAN RIGHTS COMMISSION ACT NO. 21 OF 1996

The main objective of the Human Rights Commission Act is the establishment of the Human Rights Commission in Sri Lanka (HRCSL).[70] The vision of the Commission is to ensure human rights for all and promote and protect the rule of law.[71] The leading role of the commission includes:

> inquir(ing) into and investigating, complaints regarding procedures, with a view to ensuring compliance with the provisions of the Constitution relating to fundamental rights and to promoting respect for and observance of fundamental rights, inquire into and investigate, complaints regarding infringements or imminent infringements of fundamental rights, and to provide for resolution thereof by conciliation and mediation in accordance with the provisions hereinafter provided, etc.[72]

Therefore, this commission works towards ensuring fundamental rights in Sri Lanka. Further, the Supreme Court may refer certain matters to the Commission.[73] When a matter thus directed to the Commission takes more than one month, then the computation of the one month under Article 126 of the Constitution will not factor in the investigation time of the

[70] Hereinafter, the Commission.
[71] HRCSL, <http://hrcsl.lk/english/> accessed on August 07, 2022.
[72] Human Rights Commission of Sri Lanka Act No. 21 of 1996, s 10.
[73] Ibid s 11.

Commission.[74] This provision shows the recognition of the Commission. Any person is entitled to make a petition to the commission when his or her fundamental rights are violated. Therefore, when the rights of the suspects are violated during the criminal investigation, they are also entitled to make a petition to the commission. The power to conduct an inquiry comes under Section 18 of the HRCSL Act. These powers include collecting evidence, examining witnesses and summoning people. The reports of the inquiries may be directed to the court, but these reports of the commission do not bind the Supreme Court. However, the commission can still make a strong impression on the court. Although there are many criticisms against the Commission, the establishment of such an institution should nevertheless be considered a progressive step. Compared to making a fundamental rights petition to the Supreme Court, the Commission has a less formal process. It is not time-consuming, not expensive and allows the complaint to be lodged even from outside of Colombo. These are some of the key benefits of having this commission. Therefore, when suspects' rights are adversely violated, they can seek relief through this commission before making a petition to the Supreme Court in Sri Lanka.

5. CONCLUSION

The Sri Lankan criminal justice process relies on many legislative provisions. It is essential to protect the rights of the people during the investigation. The suspect, being a vulnerable person in the police custodial atmosphere, can be subjected to ill-treatment. The Constitution of Sri Lanka recognizes some fundamental rights under Chapter III of the Constitution. Any person in the country is entitled to these rights. The Supreme Court of Sri Lanka grants relief for violation of such rights under

[74] Ibid s 13(1).

Article 126 of the Constitution. Similarly, any such victim can make a complaint to the Human Rights Commission of Sri Lanka.[75]

The bureaucratic practices and lack of binding force of the recommendations of the Human Rights Commission raise a reasonable question of whether we can consider it as an effective mechanism to protect the rights of the suspects. Having considered the shortfalls of the Human Rights Commission, it is appropriate to state that suspects rights are better protected under Chapter III of the Constitution.

The Code of Criminal Procedure and the Evidence Ordinance have laid down, certain mechanisms to protect suspects. These safeguards include eliminating confessions given to the police officers, the time limit to custody, investigations without undue delay, restricting arbitrary arrest and detention, and informing the public of the reason for the arrest.
The Bail Act enables suspects to be released from custody based on certain prerequisites. The Act introduces procedural mechanisms to grant bail not only for bailable offenses but also for non-bailable offenses. This Act is a progressive initiative to protect suspects from prolonged detention.

The above analysis reveals that Sri Lanka has adequate legislative provisions, institutional mechanisms, and judicial processes to safeguard suspects' rights in the criminal investigation process. Despite, the comprehensive mechanisms in place, the rights of suspects during criminal investigations may be violated due to various reasons. Therefore,

[75] According to the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka (2016) “In practice, the only effective avenues for complaints are filing a “fundamental rights” case before the Supreme Court or submitting the case to the National Human Rights Commission. However, fundamental rights applications involve costly, complex litigation and are therefore not accessible to all victims” (A/HRC/34/54/Add.2 December 2016) at 15. <https://digitallibrary.un.org/record/861186?ln=en > (accessed on 10, October 2023).

in order to strengthen the protection of the suspects, the officers and stakeholders involved in the criminal investigation processes need to have a firmer grasp of these legislative and other mechanisms.

A CRITICAL STUDY ON THE PESTICIDE CONTROLLING LEGAL REGIME IN SRI LANKA

Raja Goonaratne[#]

ABSTRACT

All chemical pesticides are imported either as ready-to-use products or technical grade material for local formulation. Although key activities from import to end-user should be regulated by laws, only a few main activities are regulated by a special legal regime in Sri Lanka. Hence, doubts have arisen that the inadequacy of the laws may have created a fertile environment for market forces to exploit the gaps in the laws to sell unregulated harmful pesticides to farming communities, especially those who are affected by chronic kidney disease of unknown causes. Therefore, a dire need exists to analyse the existing pesticide-controlling legal regime in Sri Lanka. The main objective of this article is to analyse selected aspects of the existing pesticide control legal regime in Sri Lanka. The main research problem investigated is whether the existing pesticide control legal regime in Sri Lanka adequately regulates pesticide use. This research falls within the area of doctrinal legal research. The significant finding is that the absence of a coordinated approach among multiple state entities in making pesticide-controlling laws tends to create gaps which are used by the market forces to jeopardize end-users'' health. Therefore, it is recommended for a complete revision of the existing legal regime which in turn may have a positive impact on the improvement of the health conditions of the people.

Keywords: pesticides control, health, Sri Lanka, regulatory overlapping

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1. INTRODUCTION

Mankind struggled with pest problems long before the commencement of organised farming and has used various traditional methods for pest control.[1] Generally, pesticides are substances used for destroying insects or other organisms harmful to plants, animals, and foods.[2] Chemical pesticides were first introduced in 1939 with the discovery of insecticide called dichlorodiphenyltrichloroethane (DDT). Since then, five major groups of chemical pesticides have been developed for pest control, i.e. Organochloride, Organophosphate, Carbamates, Pyrethroids, and Neonicotinoids. Even though all pesticides are toxic, considering the cost, benefit, and the health risk, pesticide use has been legalised around the world. Rachel Carson exposed the evil side of indiscriminate use of pesticides in her book 'Silent Spring' in 1962.[3] Scientific experiments conducted in multiple disciplines have confirmed that pesticides can cause death, chemical burns, cancer, congenital malformations, dermatitis, sterility, weakening of immune system, neurological toxicity, and endocrine disruption.[4] A leading international publication provides a vivid description of how law would contribute to poisoning human society through pesticides on one hand, and how law could find a solution to this man-made calamity on the other.[5]

The indiscriminate use of unregulated or poorly regulated pesticide and other developmental toxicants are considered to be one of the major causes of multiple non-communicable diseases, such as birth defects,

[1] J R M Thacker,., *An Introduction to Arthropod Pest Control* (Cambridge University Press 2002).
[2] World Health Organization 'Pesticide Residues in Food' <https://www.who.int/news-room/fact-sheets/detail/pesticide-residues-in-food>.accessed on 19 February 2018
[3] R Carson. *Silent Spring* (Mariner Books, Houghton Mifflin 2002).
[4] A D Jane 'Regulation of Pesticides in Developing Countries.' (2001) 32 Environmental Law Review 1045.
[5] C F Cranor, *Legally Poisoned How the Law Puts Us at Risk from Toxicants* (Cambridge, Harvard University Press 2013).

cardiovascular disease, diabetes, lowered IQ levels in children, carcinomatous tumors, Parkinson's disease, dementia etc.[6] Similarly, it is evident that indiscriminate use of poorly regulated pesticides is one of the major causes behind the much-debated public health issue relating to the Chronic Kidney Disease of unknown etiology (CKDu) in Sri Lanka.[7] All chemical pesticides are imported from overseas either as ready-to-use products or as technical grade material for local formulation in Sri Lanka. The importation, distribution, sale, use, and other key activities of pesticides are governed by specific laws. The studies on the effectiveness of laws controlling pesticides in Sri Lanka are scanty.[8] Therefore, this study aims to address this gap.

2. OBJECTIVE AND RESEARCH PROBLEM

The primary objective of this paper is to analyse the existing legal regime controlling pesticides in Sri Lanka and identify its weaknesses. The key research problem that was investigated is whether the existing pesticide control legal regime in Sri Lanka adequately regulates pesticide use ensuring public health. Accordingly, selected key aspects of the registration and licensing process of pesticides were analyzed for this purpose.

[6] Ibid.
[7] M A C S Jayasumana, *Vakugadu Satana* (1st edn., Sarasavi Publishers 2016), 37; M A C S Jayasumana, and others, 'Possible Links of Chronic Arsenic Toxicity with Chronic Kidney Disease of Unknown Etiology in Sri Lanka' (2013) 3 Journal of Natural Science Research., <https://www.iiste.org/Journals/index.php/JNSR/article/view/4193/4246> accessed 15 November 2023.
[8] M Ponnambalam, 'Occupational Exposure to Pesticides in Sri Lanka' (1983) 8 Economic Review 17 <https://dl.nsf.gov.lk/handle/1/14763?show=full> accessed 4 April 2018.

3. METHODOLOGY

For this research paper, a literature review-based methodology was adopted. Accordingly, relevant primary and secondary legislative sources were analysed. The official reports, views of researchers and writers, and scholarly journal articles were perused as secondary sources.

4.TRACING THE DEVELOPMENT OF PESTICIDES LAWS IN SRI LANKA

The development of laws controlling pesticides in Sri Lanka occurred through a slow but gradual process.[9] There are several milestones. First, Sri Lanka recognized that plants should be protected from pests and weeds as early as in 1924. Plant Protection Act, No.10 of 1924 (PPA) established a directorate to legalize the spraying, cleansing, and fumigation of plants. Second, it was adopted a liberal policy on importing pesticides before 1962. However, the country imposed import restrictions up to Rs. 5.23 million due to dwindling foreign reserves in 1962. Subsequently, due to stiff objections from the pesticide companies a committee was appointed to review the existing pesticide law. Third, a **'**Draft Act on Agricultural Pesticides' was submitted to the Attorney General's Department in 1964 but it did not become the governing law. Fourth, the importation of pesticides increased dramatically due to the liberal economic policy of 1977. It prompted the lawmakers to introduce new laws for controlling the pesticide trade. Fifth, in this context, a new draft was prepared with the assistance of the Food and Agriculture

[9] J Sumith, 'An Overview of Pesticide Regulation in Sri Lanka' <https://medicine.kln.ac.lk/depts/publichealth/Fixed_Learning/HEB/Media%20Seminar%20Presentation/Safe%20Use%20Of%20pesticide/pesticide_regulation.pdf> accessed 8 August 2021.

Organization (FAO). Later it was passed as 'Control of Pesticides Act, No. 33 of 1980' (CPA) and fully implemented from 1984.[10]

4.1. Directive Principles of the Constitution and their Impact on Pesticides Laws

Article 27(1) in the Constitution provides that the directive principles embodied in Chapter VI should be considered as guidance to Parliament, the President, and the Cabinet of Ministers in the enactment of laws and governance. Accordingly, some directive principles have direct relevance to pesticide laws. For example, Article 27(14) provides that the State is bound to protect, preserve, and improve the environment for the benefit of the community. Also, Article 28(f) casts fundamental duties of every person to protect nature and conserve its riches. Since the excessive and indiscriminate use of pesticides causes irretrievable harm not only to the physical environment but also to all living beings, the above-mentioned constitutional provisions provide guidance to lawmakers in the enactment of pesticide laws, there is a trend at present that the 'fundamental duties' of citizens are often cited by petitioners in public interest litigations to justify their *locus standi* to file environmental cases.

However, Article 29 expressly states that those directive principles in the Constitution do not confer or impose any legal rights or obligations and therefore they are not enforceable. Nevertheless, the environmental jurisprudence developed by the apex courts in exercising their interpretational jurisdiction has tied up those directive principles to the 'public trust doctrine'[11] and thereby conferred judicial enforceability and

[10] Nalini De Alwis, 'Pesticide Legislation in Sri Lanka' <http://dl.nsf.gov.lk/bitstream/handle/1/5742/VIDU%2011_1_13.pdf?sequence=1&isAllowed=y> accessed on 26 November 2023.

[11] The early applicability of 'public trust' doctrine in Sri Lanka can be traced to the Arhat Mahinda Thero's advice to King Devanampiyatissa. Further, the judiciary as recognized this principle in a series of judgments such as *De Silva v. Atukorala* (1993) 1 Sri L.R

justiciability to them. For example, in the celebrated case of *Bulankulama and Others v Secretary, Ministry of Industrial Development and Others* (popularly known as *Eppawela* Case)[12] it was held *inter alias that* there is an imminent danger of infringement of the fundamental rights of the villagers (petitioners) guaranteed in Articles 12(I), 14(1)(8) and 14(1)(h) of the Constitution due to the proposed phosphate extraction.[13]

In this judgment, referring to the directive principles in the Constitution the court upheld that:

> [T]he Constitution today recognizes duties both on the part of Parliament and the President and the Cabinet of Ministers as well as duties on the part of 'persons', including juristic persons like the 5th and 7th respondents. Article 27(14) states that 'The State shall protect, preserve and improve the environment for the benefit of the community.' Article 28(f) states that the exercise and enjoyment of rights and freedoms (such as the 5th and 7th respondents claimed in learned counsel's submissions on their behalf to protection under Article 12 of the Constitution relating to equal protection of the law)' is inseparable from the performance of duties and obligations, and accordingly every citizen in Sri Lanka protect nature and conserve its riches.[14]

283., *Bandara v. Premechandra* (1994) 1 Sri L.R 301, *Environmental Foundation Ltd v. Urban development Authority* SC FR Application No 47 – 2004.

[12] *Bulankulama and Others vs Secretary, Ministry of Industrial Development and Others* (2000) 3 Sri LR 243.

[13] The *ratio decidendi* of the Bulankulama case was followed by subsequent cases such as *Watte Gedera Wijebanda v. Conservator General of Forests and Others*, (2009) 1 SRI LR 337, *Environmental Foundation Ltd. And Others v.Mahawali Authority of Sri Lanka and Others*, (2010)1 Sri LR 1.

[14] Ibid p.257.

4.2 Existing Legal Regime on Pesticide Control

The existing legal regime on pesticide control consists of two types of legal sources i.e. principle legal sources (PLS) and secondary legal sources (SLS). However, it will be observed in the succeeding discussion that despite a constitutional duty placed on the lawmakers to toe in line with the directive principles in enacting laws, the legal principles and norms enshrined in the pesticide control enactments hardly fall in line with the directive principles of the Constitution. The Figure 1 demonstrates the current pesticide legal regime in Sri Lanka.

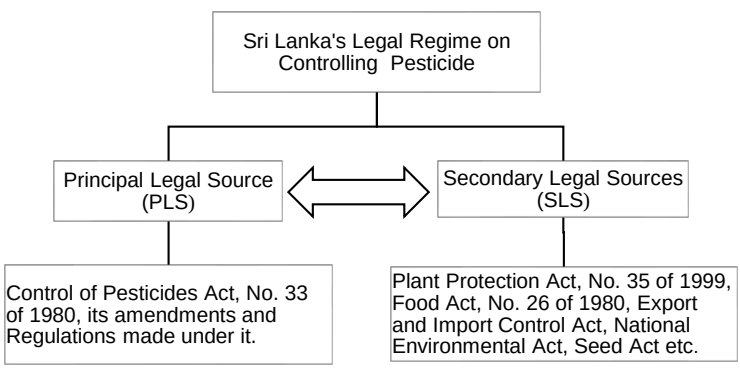

Figure 1 : Pesticide Controlling Legal Regime

Figure 1 shows PLS which is the major legislation that exclusively deals with pesticide control. It provides the main Regulatory Legal Framework (RLF). PLS consists of (a) the Control of Pesticide Act (CPA), (b) Amendments brought to CPA in 1994 and 2011, and (c) Regulations made under CPA and published in the Gazette.

SLS in general consists of laws that deal with the environment, seed protection, consumer affairs, pesticide research, agrarian services, import-export, etc. However, it contains particular legal provisions relevant to pesticide control. Table 1 below list out key SLS enactments.

Table 1: Secondary Legal Sources on Pesticide Control

S/N	Name of the Enactment	Provisions Relevant to Pesticide Control	Observations
1	National Environmental Act, No. 47 of 1980	Section 7- National Environment Council- This is the apex policy making body under NEA. Similar bodies exist under Seed Act and CPA.	There are no linking provisions in SA, CPA and NEA as regards the composition of apex bodies under these three legislations.
2	Seed Act, No. 22 of 2003	Section 22- definition of 'pest'	Seed Act definition on 'pest' is vastly different from CPA definition given in Section 27.
3	Plant Protection Act, No. 10 of 1924 and No 35 of 1999	Section 15-definition of 'pest'	This Act adopts the definition given in Seed Act. It is different from CPA definition.
4	Consumer Affairs Authority Act, No. 9 of 2003	Section 10 (10)- for the protection of consumers, the Authority has powers to issue general directions to manufacturers or traders regarding labeling, price marking, packaging, sale or	CPA under its regulation has issued direction on packaging, labeling etc., but no linking provisions to CAA regulations

		manufacture of any goods.	

Both primary and secondary legal sources can be further divided into pre-market and post-market control laws. In this study, due to space limitation, the main attention is focused on the PLS.

4.3. Principal Legal Source-Principal Legislation

CPA is the main legislation in the PLS and it consists of 27 sections. The department of Agriculture (DOA) is the state agency responsible for the enforcement of CPA and the Registrar of Pesticides (ROP) is the licensing authority under the Act. All purpose-pesticide products, such as those used in agriculture, public health, domestic, industrial veterinary, etc., fall under the regulatory mechanism of ROP.[15] Table 2 below summarizes the operative sections of CPA and some critical observations.

Table 2: Summary of the Operative Provisions of CPA and some Critical Observation

S/N	Section No	Matters Dealing With	Observations
01	Sections 2-5	Application of the Act, appointment of ROP, Pesticides Technical Advisory Committee (PeTAC).	This Act does not recognize local manufacturing of pesticides or promotion of traditional pest control methods. It focuses on importing of pesticides only. This one-sided market-policy stance of the

[15] Department of Agriculture, 'ROP – Home – Department of Agriculture Sri Lanka' <https://doa.gov.lk/rop-home-3/> accessed 25 November 2023.

02	Sections 6-13	Application to obtain license to import, package and reformulation of pesticides, issuance and cancellation of license, appeals against rejection or cancellation.	legislature is unacceptable. It has not only discouraged the potential local manufactures but also consumed a large amount of hard-earned foreign reserve for importation. According to the 2021 Performance Report of ROP, 6400 Mt of technical grade pesticides and formulations have been imported to Sri Lanka at a cost of more than USD$ 50, 909 M.[16]
03	Sections 14-20	Mandatory prohibitions on some key activities, i.e. manufacture, formulation, packaging, distribution, selling, adulteration, storage, advertising, time interval between application of pesticide and harvesting etc.	Regulations exist relating to some of those key activities, but they need drastic revision and new regulations and rules need to be introduced. For example, health and safety of employees[17] involved in those activities, selling of pesticides with approved sale certificate etc. For example, Pesticide Regulations (Sales and Supply), No. 1 of 1999 provides that no person should sell or offer to sell any restricted or general pesticide unless he is registered with the Registrar as an Agrochemical Sales and Technical Assistant. Also, ROP is obliged to give training to them. As per ROP's Performance Report

[16] Registrar of Pesticides, 'Performance Report 2021' (2022) <https://doa.gov.lk/rop-downloads/#1635744215554-f85cddad-7757> accessed 7 January 2024.
[17] ROP's Circular PPE/Saf/04/2016- Stewardship Initiatives and Mandatory Requirements for Personal Protective Equipment in Sri Lanka.

			2021, training has been conducted in 06 districts only in 2021.
04	Sections 21-22	Appointment of agricultural officers designated as 'authorized officers'	Refer to point 5 of Table 3
05	Section 23	Fees for registration and licensing	ROP charges fee on nine activities such as registration, re-registration, pesticide sales certification, pest control service licensing, renewals, import license, company registration, filing fees, agrochemical sales and technical assistant application.[18]
06	Sections 24-25	Criminal liability for contravention of CPA, penalty and forfeiture of any article belonging to offenders as punishment.	This aspect needs to be critically revisited to ensure the proper implementation of the law- Refer point 6 of table 2 below
07	Sections 26-27	Powers of minister to make regulations and interpretations of some key words and phrases	New regulations concerning compensation for victims of illegal pesticide sale and use and establishment of a fund for that purpose are some of the vital areas that need immediate attention, especially in the context of health issues arising from indiscriminate use of pesticides. Therefore,

[18] Registrar of Pesticides (n 16).

			ministerial powers for approving such finical relief needs to be introduced into the principal legislation.

Subsequently, the legislature introduced two amendments to CPA in 1994 and 2011. Some significant changes that were introduced via those amendments are summarized in Table 03 below.

Table 3: Changes Introduced by the Amendment Acts to CPA and Summery of Observations.

S/N	Changes Introduced by the 1994 and 2011 Amendments	Observations
01	Broadening the scope of CPA by including *adjuvants* to the definition of active ingredients.	Although the newly introduced changes have addressed some observations in Table 1 above, still more to be done. Given below are only a summary of few key observations. For example; (i)Recognition of traditional pest control methods, (ii) local manufacturing of pesticides, (iii) Compensation mechanism for the victims of pesticide use, (iv) Pre-market control strategies etc. need to be introduced to the local legislation. In the case of market testing, post- market testing is favored over pre-market testing due to multiple factors such as availability
02	Introduced a new schedule excluding certain non-toxic materials and *adjuvants from CPA, i.e.* naphthalene, paradichoroherine, pet care shampoo, non-toxic glues for pest control devices.	
03	PFC was replaced with PeTAC. Its membership was increased from 10 to 15 and given wide powers.	
04	Compulsory registration of pesticide control service providers (PeCSP) and obtaining of certificate of sale (CfS) for trading pesticides.	

05	Appointment of assistant ROPs and widening the definition of authorized officers by including such as food inspectors, public health inspectors, *Grama Niladhari* or village headman, inspector of labor or any public officer authorized by ROP.	of well-equipped laboratories and funding etc. In 2021, 974 import approvals have been granted by ROP to import pesticides checking only by prior verification of product origin. But only 152 samples have been tested via the central analytical laboratory Gannoruwa, and outsourced laboratories.[19] . (v) Removal of provisions from the principal and other related enactments of the clause which says "this law prevails over other laws" and to introduce a more rational linking provisions in the PLS and SLS relating to pesticides control legal regime. (vi) Introduction of a comprehensive Codification of all laws concerning pesticide life cycle
06	Definition of 'authorized analyst' broadened by including all grades of analysts in the Government Analyst Department i.e. additional government analysts, deputy government analyst, senior assistant government analysts, assistant government analyst, and chemist of central Agricultural Research Institute, etc.	
07	Enhancement of punishments by a fine not less than one hundred thousand rupees and not exceeding five hundred thousand rupees or two years simple or rigorous imprisonment or both.	

4.4. Key Activities Controlled by the CPA Regulatory Mechanism

In any legislation, a long title is considered an important parameter to understand the objective and intention of the legislature in passing the law.[20] According to the long title of CPA, a number of actions involved in the pesticide industry are subjected to the legislative regulatory

[19] Ibid
[20] Maxwell P B and P St J Langan, *Maxwell on the Interpretation of Statutes* (Tripathi 1993).

mechanism. Table 4 provides a glimpse of key activities controlled by the CPA.

Table 4: Key Activities Controlled by Legislative Intervention

S/N	Activities Regulated by CPA	Observations
01	Registration and licensing of pesticides	It is only 08 activities (i.e. from No.04 - 11) which are actually regulated by CPA. However, what is required is to address all stages of pesticides life cycle by the main legislation, i. e. market surveillance, environmental hazards, disposal of pesticide containers, training and education on handling of pesticides etc.[21]
02	Appointment of licensing authority	
03	Setting up pesticides technical advisory committee (PeTAC)	
04	Importation	
05	Packing	
06	Labeling	
07	Storing	
08	Formulation	
09	Transportation	
10	Sale	
11	Use	
12	Matters connected or incidental	

5. REGISTRATION PROCESS

The registration process consists of three stages i.e. Pre-registration, Registration, and Renewal of registration. The striking feature of this registration process is that, at each stage, an application can be rejected if it does not satisfy the relevant criteria or tests. It will discourage the potential abusers of the system while encouraging genuine applicants to

[21] Food and Agriculture Organization of the United Nations, 'International Code of Conduct on Pesticide Management Guidance on Pesticide Legislation (Second Edition, 2020) <https://www.fao.org/3/cb0916en/cb0916en.pdf> accessed 25 November 2023.

review their applications and supporting documentary evidence constantly. In the pre-registration and renewal stages, an applicant desirous of licensing any pesticide is required to apply in the prescribed form giving certain details. Figure 2 summarises the key stages in the registration process.

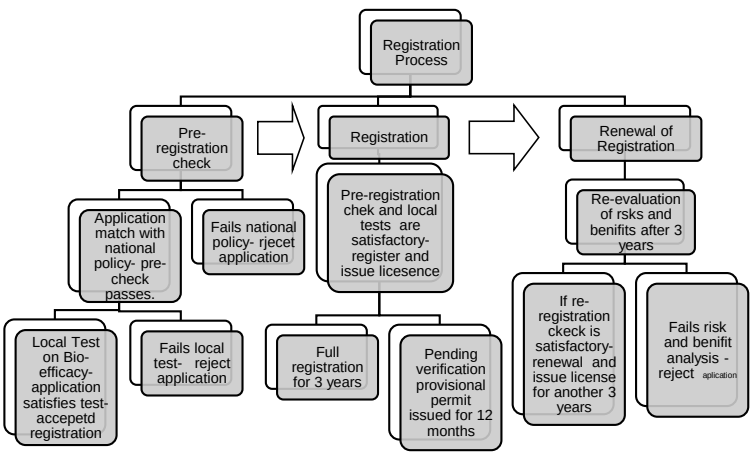

Figure 2- Pesticides Registration Process

6. LICENSING OF PESTICIDES

The main regulatory tool under CPA is compulsory licensing. Under CPA, ROP issues four types of licenses or permits.[22] They are (a) Full license (for 3 years)[23], (b) Provisional permit (for 12 months) for limited marketing pending issuance of license or instead of license[24], (c) Certificate for sale or offer to sale.[25] This certificate does not apply for domestic pesticides.

[22] CPA 1980 s7 and 8.
[23] CPA 1994 Amendment, Sub-section (a) of s 8.
[24] CPA 1994 Amendment, Sub-section (b) of s 8.
[25] CPA 1994 Amendment, s 21A.

(d) Pesticide Control Service Provider License (PeCSPL) for five years.[26] Accordingly, ROP is empowered to issue a full license for pesticides under three broad categories. They are Restricted Pesticide (RP)[27] Domestic Pesticide (DP)[28] and General Pesticide (GP). [29]

7. ANALYSIS

7.1. Definitional Ambiguity

The definition referred in the Section 6 above create further issues. For example, according to the definition relating to RP, it is evident that all pesticides qualify to be classified as RP as they have some adverse effects on human health and environment.[30] Therefore, if those classifications are based on generally accepted toxicity levels, as per the Acute Toxicity Hazard Categories from the Globally Harmonized System (GHS), it would have been more plausible.

7.2. Procedure for Granting Provisional Permits

The procedure for granting the provisional permits is not described. There are no clear guidelines both in CPA, its amendment, and the relevant regulations under what ground(s) such permit may be issued. It is clear that ROP has been given wide administrative discretion in this regard. As a result, the following issues may arise.

[26] Regulations issued under s 26 of CPA.
[27] RP is defined as any pesticide formulation, which may have adverse effects on human health, specific non-target organisms, and on the environment.
[28] DP is defined as a pesticide with low toxicity levels in active ingredients and is unlikely to be hazardous in normal use.
[29] s 27 (as amended in 1994).
[30] J Sumith, 'An Overview of Pesticide Regulation in Sri Lanka' <https://medicine.kln.ac.lk/depts/publichealth/Fixed_Learning/HEB/Media%20Seminar%20Presentation/Safe%20Use%20Of%20pesticide/pesticide_regulation.pdf> accessed 8 August 2021.

- On what grounds such provisional permits are issued to pesticide traders?
- Does the 'limitation of marketing' mean limiting the quantity of sales, limiting the number of customers (users) or limiting the geographical areas of sale?[31]

No satisfactory answers to the above questions can be found in the legislation. This omission in the CPA would lead interested parties to import harmful pesticides into the country.

7.3. Absence of Legislative Compulsion on Pre-market Test

Pre-market test is not pre-requisite on the licensing authority under governing law. This is an important preventive measure to ensure the quality and efficacy of chemical pesticide. Hence, it prevents high-toxicity pesticides in the market. The recent public notice issued by ROP has admitted that certain illegal pesticides have entered into the local market.[32] Although pre-market testing is costly, the continuous cumulative cost that may be incurred from toxic pesticide-related human and environmental damage may be higher than the initial cost. Further, the CPA does not regulate impurities and surfactants as they do not come under the CPA regulatory framework. As a result, any pesticide with heavy metals and toxic chemicals gets through the registration process and enters the market.[33] In the same manner, monitoring of pesticide formulation factories, storage facilities, detection of unauthorised activities, monitoring of pesticide use, etc. are not regulated effectively. The cumulative result

[31] ROP's Circular No. RP/PCS/02I202 1 Maintenance of Stock Records & Details of Marketing on All Restricted Pesticides- This circular applies to Restricted Pesticides only.
[32] Public Notice issued by ROP,https://drive.google.com/file/d/1KZCMft5yyVtpB7NBTR0J0GX3mWMmDRPI/view accessed 6 September 2019.
[33] ROP's Circular No. RP/202l/Biocides- make it compulsory to provide details of some of those chemicals.

of all these commissions and omissions is the entering of harmful pesticides freely into the local market and exposing the end-user, i.e. farmers and consumers, to unknown health hazards such as CKDu.

7.4. Absence of Promotion of Local Manufacturing and Traditional Pest Control Methods

Further, on a cursory glance at the long title of CPA, it is seen that lawmakers have focused attention on the regulation of *"imported"* pesticides only. This in a way which seems like indirectly promoting the importation of pesticides due to multiple grounds such as: regulatory function focuses on imported pesticides; potential local manufacturers get discouraged from initiating local manufacturing; local investors would not invest thinking that they would not get any tariff concessions and subsidies from the government for local pesticide industry.

Moreover, lawmakers have paid less attention to promoting traditional pest control methods. There are many traditional pest control methods.[34] The farming community through their intuitive knowledge and experience understands the efficacy and usefulness of the traditional methods. Traditional pesticides and pest control methods have been tested and used for many centuries. Further, research on traditional methods needs to be encouraged. The Parliamentary Consultative Committee on Agro-chemicals and Rapidly Spreading Kidney Disease has proposed to impose a 10 % health safety tax on all imported pesticide varieties and

[34] R Ulluwishewa, 'Indigenous Knowledge Systems for Sustainable Development: The Case of Pest Control by Traditional Paddy Farmers in Sri Lanka' (1992) 06 Vidyodaya Journal of Social Science 79. <http://www.dr.lib.sjp.ac.lk/handle/123456789/681> accessed 7 September 2019.

the amount of levy to be used for welfare of the kidney patients and research activities.[35] Thus, this proposal should be given due priority.

For the purpose of absorbing pest control methods, firstly, existing laws should recognize them giving legal validity. Studies reveal that harmful pesticides, which are banned in manufacturing countries, are exported to developing countries where knowledge of hazards level is non-existent or scanty.[36] In such situations, the promotion of eco-friendly and user-friendly traditional pesticide control techniques is extremely useful for developing countries like Sri Lanka.

7.5. Conflict in Laws between PLS and SLS

Apart from the omissions in the existing primary legal source as pointed out in the above paragraphs there are contradictions and confusions in the secondary legal sources. Since SLS consists of several enactments, an attempt is made below to pinpoint some salient disparities in the CPA and selected SLS viz. Seed Act (SA), Plant Protection Act (PPA), and National Environmental Act (NEA).

Firstly, there is a vast difference in the definition of 'pest' given in CPA and SA. CPA Section 27 defines pest as:

> An insect, rodent, bird, fish, mollusk, nematode, fungus, weed, micro-organism, virus, or another kind of plant or animal life which is injurious, troublesome, or undesirable to crops, stored products, processed foods, wood, clothes, fabric, or inanimate objects or which are objectionable from the viewpoint of public health, and hygiene, also includes ectoparasites of man and animals.

[35] Editor Sunday Times, 'Kidney Disease Spreads; Govt. To Ban Ads on Agro-Chemicals the Sundaytimes Sri Lanka' (*The Sunday Times,*13 August 2013) <https://www.sundaytimes.lk/130818/news/kidney-disease-spreads-govt-to-ban-ads-on-agro-chemicals-58562.html> accessed 7 January 2024.
[36] See Jane (n 4).

However, Section 22 of Seed Act, No. 22 of 2003 defines pest as 'any biotic agent capable of causing injury or damage or economic loss to plant or plant products and shall include weed seed'. Moreover, Section 15 of Plant Protection Act No 35 of 1999 also defines 'pest' as in SA. The above provisions highlight that there is no comprehensive and consistent definition of the meaning of pest in the primary and secondary legal sources in Sri Lanka. Therefore, it is appropriate to suggest revisiting the definition provided in PLS and SLS to accommodate modern definitions with consistency. For an example, the United States Code of Federal Regulations (CFR), a pesticide is any component or mixture of compounds intended for use as a plant regulator, defoliant, or desiccant.[37] Adopting one common and simple definition for Sri Lanka would be one of the progressive steps among other measures.

Secondly, a major weakness in the existing legal regime is that there is no proper connectivity between PLS and SLS. As a result, pesticide users of all sorts may be confused in getting approvals for their activities. For example, CPA empowers PeTAC with a wide range of advisory functions. PeTAC is the most authoritative national consultative and advisory body on pests and pesticide control. PeTAC has the power to advise ROP on registration, approval of containers, storage, formulation, import, sale, and use of pesticides. SA also contains a general policy context on pest control in seeds. The main purpose of this law is to regulate the quality of seed and planting materials. For that, it establishes a Seed Council. Its main functions include to establish appropriate minimum limits for germination viability, genetic purity for genetic impurities, water content, and pests allowed in seeds available in the market.

[37] V T Pthak etal, 'Current Status of Pesticide Effects on Environment, Human Health and It's Eco-Friendly Management as Bioremediation: A Comprehensive Review' 13 (2022) Frontiers in Microbiologiy 1 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9428564/> accessed 7 January 2024.

For this, the Seed Council should seek guidance from PeTAC because it is the principal governmental body in pest and pesticide control. However, PeTAC is not a member of the Seed Council and *vice versa*. Therefore, perhaps advice given by the Seed Council on seed-related pest control may not be compatible with the overall guidelines of PeTAC on pest and pesticide control and *vice versa*. Further, under the NEA, a similar decision-making body has been established namely, the National Environmental Council (NEC). NEC has wide powers to recommend national environmental policies and criteria for the protection of the environment. The NEC has 22 members drawn from various government departments and agencies, which had direct or indirect roles in the protection of the environment. Here again, as in Seed Council, ROP is not a member.

In this context, regulations, and guidelines prepared by these three bodies regarding pest and pesticide control, and environmental protection may not be consistent and therefore may become confusing. For example, regulations published at GOSL Extraordinary Gazette No 1533/16 by the minister of environment state that all factories engaged in the formulation, re-mixing, and manufacturing of pesticides, insecticides, fungicides, and herbicide must obtain a license for that purpose.

Now the question is 'does this mean that a formulator who has already obtained a license under CPA for a particular pesticide, should obtain another license from the National Environmental Authority (NEA)?'. This situation is made worse by the provisions in section 29 of the NEA. It states:

> The provisions of this Act shall have an effect notwithstanding anything to the contrary in the provisions of any other written law and accordingly, in the event of any conflict or inconsistency between the provisions of this Act and the provisions of such other

written law, the provisions of this Act shall prevail over the provisions of such other written law.

According to the above provision, any pesticide formulator who has not obtained a license under NEA cannot argue saying that it is not necessary because he has already obtained a license under CPA. When there is an inconsistency in any written law and NEA, NEA must prevail. This means such a formulator must obtain another license from NEA and if not, he is liable to be punished for violation of NEA Act. Additionally, a similar provision can be found in the Factories Ordinance. This law is provided for the registration of factories. It provides that if any conflict arises between 'this law' i.e. Factories Ordinance and any other written law, this law should prevail (Factories Ordinance No 45 of 1942). It is seen, therefore, that this contradiction and mismatch in law has created confusion as to the proper law governing those matters. Unscrupulous pesticide dealers and venders may capitalize those weaknesses for their benefit. There are similar mismatches between CPA and other enactments mentioned in SLS above.

7.6. Absence of mechanism for paying compensation to the victims of unauthorised pesticide use

It is of common knowledge that unauthorised pesticides are available in the global and local markets.[38] Farming community and general public purchase those pesticides for farming and domestic purposes. The ongoing debate in Sri Lanka and elsewhere as to the cause of CKDu suggests that multiple exposure to pesticides may be a possible cause of

[38] See Ulluwishewa (n 34).

CKDu.[39] A large number[40] of CKDu patients are living in Sri Lanka under trying circumstances with a meager financial and other type of relief currently received from certain governmental and non-governmental agencies.

8. CONCLUSION AND RECOMMENDATIONS

In conclusion, it should be emphasized that although the main Regulatory Legal Framework is provided in Control of Pesticide Act, no corresponding provisions between primary and secondary legal sources. This omission may lead the government bodies to deviate from their official responsibility and attribute fault to others. The main cause for the absence of coordination among different government bodies dealing with pests and pesticides is due to the hasty and piecemeal manner of legislation. Therefore, a complete overhaul of PLS and SLS is a must to enhance the effectiveness of the existing legal regime. In that process, attention should be focused on introducing new legal provisions in the CPA making pre-market testing compulsory; monitoring of factories manufacturing; and formulating pesticides. The Factories Ordinance should be amended creating specific obligations on the owners regarding workers' safety in dealing with toxic substances including pesticides.

Further, new laws and regulations should be introduced or updated to the existing regulations and rules about the transport, distribution, handling, and storing of pesticides. In addition, the pesticide selling process should

[39] Channa , G Sarath and Priyantha, 'Glyphosate, Hard Water and Nephrotoxic Metals: Are They the Culprits behind the Epidemic of Chronic Kidney Disease of Unknown Etiology in Sri Lanka' (2014) Int.J.Environ.Res.Public Health 2125. <https://www.researchgate.net/publication/260375117_Glyphosate_Hard_Water_and_Nephrotoxic_Metals_Are_They_the_Culprits_Behind_the_Epidemic_of_Chronic_Kidney_Disease_of_Unknown_Etiology_in_Sri_Lanka> accessed 6 January 2024.

[40] C Rohana and others, 'Chronic Kidney Diseases of Uncertain Etiology (CKDue) in Sri Lanka: Geographic Distribution and Environmental Implications' (2010) 33 Environmental Geochemistry and Health 267.

be strictly regulated. Current provisions for requiring certificates for sale and registration of pesticide service providers would be meaningful only if this is done. For that, farmer identification, need verification, and prescription of pesticides should be made compulsory through legal provisions in the CPA itself rather than through regulations or administrative circulars.

It is necessary to review CPA to include mandatory provisions for researching and promotion of traditional pest control methods and establishment of National Research Fund for that purpose. Further, introducing mandatory provisions in the CPA would be beneficial to grant compensation to victims affected by pesticide. Currently, there is only criminal liability for the offenders who violate the law. Punishing offenders would deter future violators but would not relieve victims of their agony and economic hardships. Therefore, a comprehensive compensatory mechanism should be introduced in the CPA whereby the pesticide importers could be made liable to pay compensation. Therefore, in this context, it is suggested to apply a similar policy used in the environmental jurisprudence such as 'polluter pays principle' in the pesticide legal regime. In summing up, it is reiterated that the pesticides controlling legal regime in Sri Lanka needs drastic overhauling in the interests of the farming community in particular and the public in general.

EXAMINING THE RIGHTS OF CHILDREN: A COMPARATIVE ANALYSIS OF CORPORAL PUNISHMENT IN SRI LANKA AND INDIA

Danushka Manoj[#]

ABSTRACT

Corporal punishment, the use of physical force as a disciplinary measure against children, remains deeply entrenched and widespread in societies globally, exerting profound and far-reaching effects on children's physical, emotional, and psychological well-being. Recognizing the gravity of this issue, this research article endeavours to conduct an extensive comparative analysis of the existing legal frameworks pertaining to corporal punishment in two South Asian nations, Sri Lanka, and India. The central research problem revolves around understanding the complex dynamics that perpetuate corporal punishment within these two countries and formulating necessary recommendations to overcome the challenges faced by Sri Lanka in effectively addressing this pressing issue. The approach of this study involves conducting a qualitative analysis primarily based on an examination of existing literature. This analysis encompasses the scrutiny of primary legal sources, including constitutional provisions, Acts and Ordinances, conventions, and precedential case laws. In addition, secondary sources such as journal articles, books, and policy papers are incorporated to augment and enrich the research findings. The research outcomes indicate that, notwithstanding the legal ban, the practice of corporal punishment which persists in Sri Lanka is primarily influenced by a complex interplay of socio-cultural and economic factors. In conclusion, the article underscores the immediate necessity for the robust enforcement

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of existing laws, coupled with awareness campaigns, teacher training, parental education, and enhanced monitoring mechanisms, to protect the rights of children and promote non-violent disciplinary methods in these diverse cultural landscapes

Key words: ***Child Rights, Corporal Punishment, Legal Perspectives, Sri Lanka & India***

1. INTORDUCTION

"A curry that is not stirred and a child that is not hit are both spoilt."
This age-old Sri Lankan proverb, laden with cultural significance, offers a glimpse into a deeply ingrained and persistent issue within Sri Lankan society: the normalization of corporal punishment. It is characterized by the use of physical force as a disciplinary measure against children, transcends borders and is, unfortunately, a global concern. Its impact, however, extends far beyond the immediate physical sensations it inflicts. Instead, it reaches deep into the physical, emotional, and psychological well-being of children, shaping their development and leaving lasting imprints on their lives.[1]

In light of the seriousness of this matter, this research article aims to conduct a comprehensive comparative analysis, delving into the intricate legal frameworks that surround corporal punishment in two prominent South Asian nations: Sri Lanka and India. These two nations, while sharing a geographical proximity, exhibit unique socio-cultural landscapes that shape their approaches to disciplining children. This study's central research problem revolves around deciphering the complex dynamics that

[1] C Aloysius, 'Corporal Punishment Causes injuries and physical impairments', *Sunday Observer*, 28 November 2021, available at: https://www.sundayobserver.lk/2021/11/28/health/corporal-punishment-causes-injuriesandphysicalimpairments#:~:text=Corporal%20punishment%20includes%20any%20action,form%20of%20violence%20against%20children (Accessed 1 August 2023).

sustain the practice of corporal punishment within these respective countries, while also crafting essential recommendations to overcome the multifaceted challenges faced by Sri Lanka in effectively addressing this pressing issue.

2. RESEARCH OBJECTIVES

The research objectives for the study on corporal punishment in Sri Lanka and India can be framed as follows:

- To critically examine and compare the legal frameworks related to corporal punishment in Sri Lanka and India.
- To assess the effectiveness of existing legal prohibitions on corporal punishment in ensuring children's rights and well-being.
- To propose recommendations for strengthening the law enforcement mechanisms aimed at safeguarding children from corporal punishment in Sri Lanka.

These objectives will guide the research and help in achieving a thorough understanding of corporal punishment issues in Sri Lanka and India. The author expects that this study will serve as a source of enlightenment and consciousness, offering valuable guidance to policymakers and educators, with the ultimate aim of nurturing the forthcoming generations of Sri Lanka.

3. METHODOLOGY

The study's methodology involves a qualitative analysis, primarily based on a meticulous examination of existing literature. This analysis encompasses the critical review of primary legal sources, including constitutional provisions, Acts and ordinances, international conventions, and case law. Furthermore, secondary sources, such as journal articles,

books, and policy papers, are thoughtfully incorporated to complement and enrich the research findings.

4. INTERNATIONAL HUMAN RIGHTS STANDARDS ON CORPORAL PUNISHMENT OF CHILDREN

The protection of children has been a matter of global concern dating back to the early twentieth century when there were no established standards for safeguarding children, particularly in industrialized nations. During this era, it was commonplace for children to toil alongside adults in unsanitary and perilous conditions. However, as a deeper comprehension, the children's developmental needs, coupled with a growing recognition of the inherent injustice in their circumstances, emerged as a movement advocating for their improved protection which (gained momentum) was phenomenal. The United Nations Human Rights Commission identified the imperative need for a convention aimed at the welfare and protection of children. This culminated in the adoption of the Convention on the Rights of the Child (CRC) in 1989.[2] Prior to this momentous convention, the foundational framework of international human rights, encompassing the Universal Declaration of Human Rights (UDHR) from 1948, as well as the two International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social, and Cultural Rights (ICESCR) established in 1966, Convention Against Torture (CAT) emphasized the inherent entitlement of all individuals to equal protection under the law and stressed the paramount significance of preserving human dignity and physical well-being. The subsequent implementation of the CRC further required the states to prohibit and eradicate all forms of cruel or degrading punishment, including corporal punishment, grounded in the fundamental principle of

[2] Considered the importance of providing special attention to children, as emphasized in both Geneva Declaration of the Rights of the Child in 1924 and the Declaration of the Rights of the Child passed by the General Assembly on November 20, 1959.

respecting the dignity of every person. This principle remains a cornerstone within the realm of international human rights law.

CRC recognizes[3] the necessity of maintaining discipline in schools when required and explicitly affirms:

> States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

It is imperative to interpret this provision in conjunction with CRC Article 19. Article 19 stipulates that:

> States Parties shall take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury, or abuse, neglect, or negligent treatment, maltreatment, or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has the care of the child.

Essentially, while Article 28 focuses on school discipline, it should not be considered in isolation but rather in tandem with the comprehensive framework outlined in Article 19. This provision emphasizes the important obligation to safeguard children from any type of physical or psychological harm, regardless of whether it occurs within the educational system or while under the care of parents, legal guardians, or other caregivers.

CRC Article 19 is further reinforced and expanded upon by the provisions of Article 37, which explicitly states that:

[3] Convention on the Rights of the Child, 1989, Art 28.

'No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.'

In 2006, during its 42nd Session, the Committee on the Rights of the Child highlighted on safeguarding children from corporal punishment and other forms of punishment considered cruel or degrading. This Commentary predominantly centred its analysis on the provisions outlined in Articles 19, 28(2), and 37 of the CRC. The paragraph 11 of the general Comment No.8 offers the following definition and description of corporal punishment:

> Any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.[4]

[4] The Committee on the Rights of the Child, 42 Session, General Comment No. 08, para. 11,2006.

According to the above observation, there is no doubt in the statement that "all forms of physical or mental violence" do not permit any degree of lawful violence against children. corporal punishment and other types of cruel or humiliating punishments are forms of violence that countries must abolish through suitable legal, administrative, social, and educational measures. It is evident that the CRC does not tolerate any form of support for corporal punishment. Nevertheless, it is essential to acknowledge that the denial of corporal punishment does not equate to a refusal of the concept of discipline itself. It is crucial to recognize that fostering the healthy development of a child relies on parents and adults providing the requisite guidance, aligning with the child's evolving capacities, to aid their progression toward responsible citizenship. The nurturing of an individual's appreciation of discipline, respect for rules, and the cultivation of a positive attitude towards a non-violent society are fundamental qualities that should be instilled from an early age. However, within a civilized society, these objectives should be achieved through alternative forms of discipline that avoid causing physical or psychological harm.

Moreover, it's important to highlight that across major international instruments concerning human rights, there is a consistent prohibition against not only torture but also any treatment or punishment deemed cruel, inhuman, or degrading. These terms appear in various articles, including Article 5 of the UDHR, Article 7 of the ICCPR, and Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In addition to International Human Rights regime, regional human rights initiatives also given importance on the issue of corporal punishment. For an example, the European Court of Human Rights has taken a stance against the practice through a series of progressive judgments. Initially, the court scrutinized corporal punishment within penal systems, extending

its condemnation to educational settings, including private schools, in subsequent rulings. Most recently, in the case of *Tyrer v. UK*[5], the court went a step further by unequivocally condemning corporal punishment even within the confines of one's home. Furthermore, the European Committee of Social Rights, responsible for monitoring Council of Europe member states' adherence to the European Social Charter and Revised Social Charter, has made a crucial determination. It underscores that compliance with these Charters entails the unequivocal prohibition of any type of violence directed at children. This prohibition must be formally codified within national legislation and extends across all contexts, encompassing educational institutions, institutions, households, and other relevant settings.[6]

5. INDIAN INITIATIVES ON CORPORAL PUNISHMENT

Corporal punishment is a form of abuse that erodes a child's autonomy and self-respect. Moreover, it hampers a child's access to education because those who fear corporal punishment are at a higher risk of either quitting school or leaving it precipitously. Consequently, corporal punishment infringes upon the right to live with dignity. Article 21 of the Indian Constitution, which protects the fundamental right to life and dignity, encompasses the entitlement to education for children under 14 years of age.[7] Further, Article 39(e) of the Indian Constitution necessitates that the state work progressively to ensure the protection of children from

[5] *Tyrer* v *UK* (1978) 4 WLUK 119, available at: https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-57587&filename=CASE%20OF%20TYRER%20v.%20THE%25UNITED%20KINGDOM.pdf Accessed on 1st August 2023.

[6] Council of Europe '*Eliminating Corporal Punishment: A Human Rights Imperative for Europe's Children*', (Council of Europe Publishing , 2005).

[7] As per Article 21-A of the Indian Constitution, the government is obligated to offer free and mandatory education to children under the age of fourteen years. This particular entitlement was established as a fundamental right through the 86th Constitutional Amendment Act of 2002.

exploitation during their formative years. Furthermore, Article 39(f) of the Indian Constitution instructs the state to progressively facilitate the holistic development of children in a healthy environment, safeguarding their dignity and freedom from any form of maltreatment.[8]

In addition, in the Right to Education Act of 2009, corporal punishment is broadly categorized as physical punishment, mental torment, and discrimination. Section 17 of this Act explicitly prohibits subjecting a child to physical punishment and mental harassment, ensuring that no child is subjected to either form of abuse. This section stipulates that anyone who violates this provision may face disciplinary action in accordance with the relevant service rules.[9]

Additionally, Sections 8 and 9 of the Right to Education Act place a responsibility on both the government and educational institutions to guarantee that children from disadvantaged backgrounds, including those belonging to weaker sections and deprived communities, are not subjected to discrimination. These sections emphasize the importance of ensuring that all children have the opportunity to pursue and successfully complete their elementary education without facing any form of discrimination.

The Juvenile Justice (Care and Protection of Children) Act of 2000 provides for the discipline of juveniles or infants in cases of cruelty.[10] Anyone who has actual authority or control over a juvenile or child and engages in actions such as assaulting, abandoning, exposing, or wilfuly neglecting the juvenile in a manner likely to cause unnecessary mental or physical distress shall be subject to punishment. This punishment may

[8], The Constitution of India, Directive principles of state policy 26 January 1950, available at: https://www.refworld.org/docid/3ae6b5e20.html accessed on 9th January 2024.
[9] Right to Education Act of 2009, s.17.
[10]Juvenile Justice Act of No. 56 of 2000. s. 23.

involve imprisonment for up to six months, a fine, or both. It is important to note that there are no exceptions in this provision to exclude parents or teachers. This means that the law is designed not only to penalize those in positions of authority for acts of cruelty but also extends to encompass parents and teachers. This comprehensive approach aims to discourage corporal punishment, aligning with the overarching goal of the Juvenile Justice Act of 2000, which is to interpret and uphold the principles and protections outlined in the Convention on the Rights of the Child.

Furthermore, the Protection of Children from Sexual Offenses (POCSO) Act of 2012 explicitly prohibits all forms of sexual abuse against children, including physical punishment. Accordingly, the Juvenile Justice (Care and Protection of Children) Act, 2015 a child is defined as any individual under the age of 18 years. The Act outlines corporal punishment as the act of subjecting a child to physical punishment, which includes intentionally causing pain as a penalty for an offense or as a means of disciplining or reforming the child. The Act addresses the provision of corporal punishment in Section 82, which specifies that any person responsible for or employed by a childcare institution who administers corporal punishment to discipline a child will be subject to penalties.

Moreover, the Indian Penal Code (IPC) encompasses legislation that deems causing harm to a child as a criminal offense. Such actions can render a person liable for various charges, including voluntarily causing hurt or grievous hurt under Sections 323 or 325 of the IPC, assault or criminal force under Section 352 of the IPC, criminal intimidation under Section 506 of the IPC. If the child is subjected to such severe humiliation that it leads to suicide, then the person may also be charged under Section 305 of the Indian Penal Code for child abetment of suicide.

In the case of *Parents Forum for Meaningful Education* vs. *Union of India and Another*[11], a petition was filed by the Parents' Forum for Meaningful Education and its President, Kusum Jain. The petition contested the legality of corporal punishment in schools, as outlined in the Delhi School Education Rules of 1973, on the grounds that it violated the Constitution. The petition was successful, and on December 1, 2000, the Court issued a judgment directing the State to ensure that 'children are not subjected to corporal punishment in schools, and they receive education in an environment of freedom and dignity, free from fear.'[12]

6. LAWS AND POLICIES RELATED TO CORPORAL PUNISHMENTS IN SRI LANKA

Sri Lanka officially became a signatory to the CRC on January 26, 1990, and subsequently ratified it on July 12, 1991. In a concerted effort to support the principles outlined in the CRC, the Sri Lankan government introduced the Children's Charter in 1992. This marked the beginning of a journey where Sri Lanka progressively embraced various international agreements and updated its national legislation to advance children's rights, aligning itself with the responsibilities of a CRC signatory.

As a party to the CRC, Sri Lanka recognizes the imperative to curtail the prevalent use and acceptance of corporal punishment. This shift in perspective is clearly discernible through the introduction of new legislative measures, amendments to existing laws, the issuance of circulars by the Ministry of Education, and evolving judicial interpretations and opinions concerning the utilization of corporal punishment.

According to Article 341 of the Penal Code, it is stipulated as follows:

[11] *Parents Forum for Meaningful Education vs. Union of India and Another* (2001) AIR Delhi 212.
[12] *Parents Forum for Meaningful Education* vs. *Union of India AIR* (2001) Delhi 212.

> Whoever intentionally uses force to any person, without that person's consent, in order [1]to the committing of any offense or intending illegally by the use of such force to cause, or knowing it to be likely that by the use of such force he will illegally cause injury, fear, or annoyance to the person to whom the force is used, is said to use "criminal force" to that other.

In relation to corporal punishment, it is important to draw attention to Illustration (i) in Section 341, which elaborates on the following scenario:

> A, a schoolmaster, in the reasonable exercise of his discretion as master, flogs B, one of his scholars. A does not use criminal force to B, because, although A intends to cause fear and annoyance to B, he does not use force illegally.

Section 71 of the Children and Young Persons Ordinance (1939) addresses acts of cruelty to children and young persons as an offense. Section 71(1) states:

> If any person who has attained the age of sixteen years and has the custody, charge, or care of any child or young person, wilfuly assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of an offense and shall be liable to a fine not exceeding one thousand rupees or to

> imprisonment of either description for a term not exceeding three years, or to both such fine and imprisonment.

Furthermore, Section 71(6) clarifies that:

'Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person having lawful control or charge of a child or young person to administer punishment to him.'

However, despite the continued existence of these regulations and examples, they are considered outdated when concerning the current practices. Following the ratification of the CRC, it was acknowledged that the Penal Code required modification, leading to the enactment of the Penal Code (Amendment) Act, No. 22 of 1995. This Amendment introduced a new provision, Section 308A, which became effective and was incorporated into the primary legislation. It reads as follows:

> (1) Whoever, having the custody, charge, or care of any person under eighteen years of age, wilfully assaults, ill-treats, neglects, or abandons such person or causes or procures such person to be assaulted, ill-treated, neglected, or abandoned in a manner likely to cause suffering or injury to health (including injury to or loss of sight, hearing, limb, organ of the body, or any mental derangement), commits the offense of cruelty to children.
>
> (2) Whoever commits the offense of cruelty to children shall, on conviction, be punished with imprisonment of either description for a term not less than two years and not exceeding ten years and may also be punished with a fine and ordered to pay compensation of an amount determined by the court to the person in respect of whom

the offense was committed for the injuries caused to such person.

Additionally, the Penal Code (Amendment) Act, No. 16 of 2006 provided the following clarification for the aforementioned section:

“Explanation: 'Injuries' includes psychological or mental trauma.”

Hence, the instances mentioned above illustrate the evolving approach adopted by lawmakers in the 20th and 21st centuries. It demonstrates a gradual recognition of the illegality of physical punishment in 1995, followed by acknowledging the mental distress associated with violence in 2006. This prohibition of corporal punishment represents a significant departure from the approach taken by the primary legislation in 1883.

The Ministry of Education in this context demonstrates a keen understanding of the issue of corporal punishment within the educational system and is proactive in addressing it. Given its overarching responsibility for the education of all students across the country, with a particular focus on those attending public schools, the Ministry of Education has taken several measures to address the issue of corporal punishment. These measures are primarily communicated through official circulars.

One such significant circular is Circular number 12/2016, which was issued by the Ministry on 29th, April 2016, and officially came into effect on 2nd May, 2016. This circular serves as the prevailing guidance and regulation for the use of corporal punishment in schools. It is important to note that Circular number 12/2016 replaces the provisions of a prior circular, Circular No. 17/2005, which was previously in place to maintain discipline within educational institutions.

While the latest circular shares similarities with its predecessor in terms of its core content related to corporal punishment, it also introduces several

additional provisions that pertain specifically to the functioning and role of the Disciplinary Board within a school. These additional provisions signify an evolving approach by the Ministry to address the issue of corporal punishment more comprehensively and effectively within the educational framework.

The circular recognizes that teachers share a duty and responsibility toward children akin to that of parents, commonly referred to as "loco parentis. Consequently, teachers are entrusted with the task of ensuring the safety, education, and overall well-being of children. Furthermore, the circular references the perspectives of medical professionals, psychologists, and humanitarians who have defined corporal punishment as a form of physical chastisement that inflicts pain. These experts have also observed that such punitive measures can detrimentally affect students' learning processes, potentially exacerbating their inclination toward anti-social behaviour and causing severe distress. Given the limited empirical evidence supporting the efficacy of corporal punishment in shaping student behaviour, the practice is regarded as ineffective.

In paragraph 2.2.1 of the circular, a comprehensive overview is provided regarding the negative outcomes associated with the practice of corporal punishment. These negative consequences have been substantiated through an array of empirical studies. The circular emphasizes the importance of addressing this issue by mandating the establishment of a Board of Discipline within educational institutions. Section 2.3 of the circular further delineates the specific responsibilities entrusted to this Disciplinary Board, thereby ensuring its effective operation.

Likewise, the circular expounds upon the gravity of potential legal ramifications in section 2.4, even when teachers employ corporal punishment with the intention of maintaining discipline. Anyone, subject to violation of Section 2.4 of the Circular would be able to seek constitutional

remedy for the violation of Article 11 of the Constitution. The circular explicitly states that the transgression of the offense of cruelty to children and young persons, as defined under Section 3 of the Penal Code (Amendment) Act (No. 22 of 1995), as well as Section 308A of the Penal Code, could punish the perpetrators. By highlighting these legal provisions, the circular serves as a critical guide for educational institutions, educators, and stakeholders, emphasizing the need for the utmost caution and adherence to both constitutional and statutory regulations in the disciplinary process. This comprehensive approach ensures that the issue of corporal punishment is addressed within a legally rigorous framework, safeguarding the rights and welfare of students while promoting a culture of discipline that is consistent with established legal standards.

The case of *Bandara* vs. *Wickremasinghe*[13] played a pivotal role in shaping the legal discourse surrounding corporal punishment in Sri Lanka, predating legislative amendments that recognized corporal punishment as a criminal offense and acknowledged its potential for causing mental trauma in 2006. This case is particularly significant due to its interpretation of Article 11 of the Sri Lankan Constitution, which safeguards citizens from cruel and degrading treatment. It sets a legal precedent that positions corporal punishment as a possible violation of constitutional rights when used excessively by educators and administrators.

Sri Lanka's practice of corporal punishment is subjected to legal scrutiny, primarily questioning its compatibility with Article 11 of the Constitution. Sri Lanka's Constitution is the supreme legal document, guaranteeing fundamental rights to its citizens, and Article 11 specifically enshrines the right to be free from torture, cruel, inhuman, or degrading treatment. The

[13] *Bandara vs. Wickremasinghe* (1995) 2 Sri LR 167.

ambiguity surrounding corporal punishment's alignment with this constitutional provision has fuelled ongoing legal debate.

Bandara vs. *Wickremasinghe*[14] case marked a significant turning point in Sri Lanka's legal discourse on corporal punishment. It predated the legislative changes of 2006[15], which recognized corporal punishment as a criminal act and acknowledged its potential to inflict psychological trauma. In this landmark case, the Sri Lankan Supreme Court issued a precedent-setting ruling.

The case revolved around allegations of corporal punishment against teachers and administrators within an educational institution. The appellant contended that the use of excessive force by educators amounted to cruel and degrading treatment, violating their constitutional rights. In its judgment, the Supreme Court held that the use of excessive force by educators and administrators to maintain discipline could indeed be considered cruel and degrading treatment. This ruling underscored the importance of interpreting Article 11 expansively to protect citizens from both physical and psychological harm. This case laid the foundation for subsequent legal developments regarding corporal punishment in Sri Lanka. It emphasized the necessity of safeguarding students from any form of cruel or degrading treatment, including physical punishment. In 2006, the legal landscape underwent significant changes with the introduction of legislative amendments that explicitly criminalized corporal punishment and recognized its potential for causing mental trauma. These amendments reflected the alignment of domestic law with the principles established in the *Bandara* vs. *Wickremasinghe*[16] case, further solidifying

[14] ibid.
[15] Penal Code Amendment Act No. 16 of 2006.
[16] ibid.

the legal stance against corporal punishment in Sri Lanka. While delivering the judgment, Justice Kulatunga articulated that;

> discipline of students is a matter within the purview of School teachers. It would follow that whenever they purport to maintain discipline, they act under the colour of office. If in doing so they exceed their power, they may become liable for infringement of fundamental rights by Executive or Administrative action.[17]

Additionally, in accordance with Judge Kulatunga's viewpoint;

> this court must by granting appropriate relief reassure the Petitioner that the humiliation inflicted on him has been removed and his dignity is restored. That would in some way guarantee his future mental health which is vital to his advancement in life.[18]

In a landmark judgment delivered on February 12, 2021, in the case of *Hewa Maddumage Karunapala and others* v *Jayantha Prema Kumara Siriwardhana and others*[19] , the Supreme Court of Sri Lanka unequivocally prohibited the use of corporal punishment against children within the school system. This case underscored that corporal punishment constitutes a blatant infringement of Article 11 of the Sri Lankan Constitution. This decision emphasised that as minors are vulnerable and impressionable members in the society, they are entitled to higher degree of protection.

In the comparative analysis of Indian and Sri Lankan approaches to addressing corporal punishment, notable distinctions and shared

[17] ibid, p. 167.
[18] ibid, p.168.
[19] *Maddumage Karunapala and others v Jayantha Prema Kumara Siriwardhana and others* SC/FR/97/2017.

principles emerge. India's legal framework is deeply rooted in its constitution, with Article 21 guaranteeing the fundamental right to life and dignity, encompassing children's entitlement to education, while Sri Lanka, as a signatory to the Convention on the Rights of the Child, places emphasis on the right to be free from cruel, inhuman, or degrading treatment under Article 11 of its Constitution. Legislative provisions in both countries explicitly prohibit corporal punishment, with India's Right to Education Act of 2009 and Sri Lanka's Penal Code providing legal backdrops for the protection of children. Additionally, judicial precedents such as the 'Parents Forum for Meaningful Education' case in India and the *'Bandara vs. Wickremasinghe'* case in Sri Lanka highlight the significance of constitutional safeguards against cruel treatment, while both countries rely on the Ministry of Education circulars to ensure non-violent educational environments. This analysis underscores the diverse approaches employed by these nations to protect child rights, contributing to a deeper understanding of their effectiveness in promoting the well-being of children.

7. CONCLUSION AND RECOMMENDATIONS

The issue of corporal punishment is deeply ingrained in the fabric of Sri Lankan society, bearing significant cultural relevance. Corporal punishment not only inflicts immediate physical pain but also leaves enduring emotional and psychological scars on children. To address this critical concern, the author's comparative analysis delved into the legal frameworks surrounding corporal punishment in Sri Lanka and India. Author aimed to unravel the intricate dynamics sustaining corporal punishment practices in both nations and provide recommendations based on research findings.

International human rights standards, notably CRC, serves as a foundational framework for protecting children from all forms of violence, including corporal punishment. The CRC underscores children's right to education and safeguarding them from physical and mental harm. Regional human rights bodies, such as the European Court of Human Rights, have clearly condemned corporal punishment.

In India, legal provisions, including Article 21 of the Constitution and the Right to Education Act (2009), explicitly prohibit corporal punishment. Additionally, the Juvenile Justice Act (2000) ensures protection from cruelty, including corporal punishment, within both homes and schools. These laws reflect a steadfast commitment to child protection. In Sri Lanka, as a CRC signatory, legislative amendments were made to address corporal punishment. The Penal Code was amended in 1995 to recognize corporal punishment as an offense, and in 2006, further amendments acknowledged the psychological trauma inflicted by corporal punishment. The Ministry of Education has issued circulars to regulate corporal punishment within schools, underscoring the legal consequences for violators.

The landmark case, *Bandara vs. Wickremasinghe*[20] in Sri Lanka sets a significant precedent by establishing that excessive force by educators could be considered cruel and degrading treatment. This case played a pivotal role in shaping subsequent legal developments, including legislative amendments that criminalized corporal punishment. A more recent decision in Sri Lanka, the *Hewa Maddumage Karunapala case*[21], reaffirmed the prohibition of corporal punishment and highlighted the imperative need to protect children's dignity.

[20] *Bandara vs. Wickremasinghe* (1995) 2 Sri L.R. 167.
[21] *Hewa Maddumage Karunapala case*, SC/FR/97/2017.

To comprehensively address the issue of corporal punishment in Sri Lanka, the findings of the study recommends a multifaceted approach grounded in the research findings. This approach involves enacting legislative reforms to explicitly ban corporal punishment in all settings, enhancing teacher training programs to promote non-violent discipline, launching public awareness campaigns to educate communities about the harm caused by corporal punishment, and strengthening enforcement mechanisms to ensure accountability for violators. Incorporating the basic principles of CRC into domestic law, promoting positive discipline in schools, awareness creation among the students, establishing independent monitoring and reporting bodies, conducting research on corporal punishment's prevalence and its impact, engagment of civil society organizations, and fostering international cooperation with countries like India that have made significant strides in child protection are vital steps towards safeguarding children's rights and well-being in Sri Lanka. In the wise words of Kofi Annan, 'There is no trust more sacred than the one the world holds with children'[22] it is our paramount duty to ensure that their rights are upheld, their welfare is safeguarded, and they can grow up in an environment free from fear and want.

[22] K Abrahams, T Matthews, *Promoting Children's Rights in South Africa ; A Handbook for Members of Parliament* (Parliament of Republic of South Africa,2011) Available at: https://www.unicef.org/southafrica/media/1406/file/ZAF-promoting-childrens-rights-in-South-Africa-2011.pdf .(Accessed on 1st August 2023).

CURRENT TRENDS IN THE UNITED NATIONS HUMAN RIGHTS-BASED NATURAL RESOURCES GOVERNANCE THROUGH SOCIO-LEGAL INSTRUMENTS: AN APPRAISAL

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ABSTRACT

Natural resources are the source of wealth for many countries in the world. The management of such sources is determined by the government of the countries through governance. Natural resources are used to make food, fuel, and raw materials to produce goods. Food comes from plants, animals, and other natural resources. There is inequality in the sharing of these natural resources. This explains the concern of the United Nations on natural resources from a human rights-based approach, this brought about the Declaration of the International Conference on Agrarian Reform and Rural Development (ICARRD), 2006, the United Nations Declaration on the Rights of Indigenous Peoples, 2007, the United Nations Resolution 64/292 on the right to water and sanitation, 2010, Voluntary Guidelines on responsible governance of tenure of land, fisheries and forests in the context of national food security, 2012 and Voluntary Guidelines for Securing Sustainable Small-scale Fisheries in the Context of Food Security and Poverty Eradication, 2014. The issue this article seeks to address is that despite the efforts of the United Nations, there is still inequality in the governance of natural resources. This article adopts doctrinal research methodology and places reliance on primary and secondary sources. It relied on international statutes, articles in journals, and online materials among others. This article observes that most of the international

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instruments on natural resources governance are voluntary in nature and this makes enforcement unattainable. It concludes that the United Nations should come up with binding international legal instruments for natural resources governance to ensure just and equitable distribution.

Keywords: ***United Nations, Human Rights, Natural Resources, Governance, Socio-Legal Instruments***

1. INTRODUCTION

The terms 'human rights, natural resources, and governance' are familiar words in our day-to-day activities. Using natural resources governance to ensure that the fundamental human rights of citizens are upheld is a task that involves more than simple dialogue. It involves using legal instruments as a tool for social re-engineering to ensure equitable distribution of natural resources. There is inequality in the distribution of natural resources; the duty of the government is to ensure equal distribution. The human rights-based approach is a framework for human development. It seeks to analyse the inequalities that lie at the heart of development and address them. Further, it is based on international human rights standards. The whole aim of this approach is to encourage and protect human rights, especially vulnerable and marginalised people. Thus, this article investigates these issues through the appraisal of international legal instruments.

2. UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights was proclaimed by the United Nations General Assembly in Paris on 10th December 1948 through General Assembly resolution 217A as a common standard of

achievements for all people and all nations.[1] It sets out, for the first time, for fundamental human rights to be universally protected.[2] These rights are recognised all over the world. This UN document has thirty articles, and the most relevant provisions of the Declaration are discussed below:

Article 1 recognises equality when it provides that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2 of the instruments provides that:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing, or under any other limitation of sovereignty.

Article 3 provides that everyone has the right to life, liberty, and security of person while Article 4 provides that no one shall be held in slavery or servitude and that slavery, and the slave trade shall be prohibited in all their forms.

Article 5 provides that no one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment and Article 6 provides

[1] United Nations, 'Universal Declaration of Human Rights, History of the Declaration' <https://www.un.org/en/about-us/udhr/history-of-the-declaration> Accessed on 6 April 2022.
[2] The preamble of the United Nations Universal Declaration of Human Rights.

that everyone has the right to recognition everywhere as a person before the law.

Article 7 in reiterating equality before the law provides that all are equal before the law and are entitled without any discrimination to equal protection of the law. Moreover, all are entitled to equal protection against any discrimination in violation of the UN Declaration and against any incitement to such discrimination.

Article 8 provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law and Article 9 provides that no one shall be subjected to arbitrary arrest, detention, or exile. On equal and fair hearing, Article 10 provides that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him.

On the right to own property, Article 17 provides that everyone has the right to own property solely or jointly and no one should be deprived of his property without recourse to law.

On the provision of the right to social security, Article 22 provides that every citizen 'is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'. Economic, social, and cultural rights involve natural resource governance for equitable distribution to the citizens.

On the right to the right standard of living, Article 25 provides that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

The above provision emphasises the fact that the standard of living of citizens is non-negotiable. The government must ensure that all its citizens are well always taken care of, especially the vulnerable persons.

Article 28 provides that everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised.

The final section of the Declaration which is Article 30 provides that nothing in the Declaration may be interpreted as implying for any State, group, or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms outlined in the Declaration. This year, 2023 marks the 75th anniversary of the Universal Declaration of Human Rights. A world free of human rights abuse in all ramifications is now achievable.

3. NATURAL RESOURCES

Natural resources can be described as any biological, mineral, or aesthetic asset afforded by nature without human intervention which can be used for some form of benefit, whether economical or otherwise.[3]

According to Fisher, Natural resources are elusive terms, because of the resistance to framing the concept or giving it a broad definition.[4] He opines further that it cannot be enough to state that natural resources are land, water, forests, and minerals. He elaborates on the above in terms of the economic value of natural resources when he states:

> It would appear that a natural resource is a growing thing that may move from a stage in which men become increasingly aware of possible economic significance to a stage in which labour and capital are applied to it, and it can command a price. The precise point at which one should cease calling the resource a natural resource and start calling it capital or something else is difficult to determine.[5]

Fisher states that natural resource in their raw form is the real natural resource but when it is transformed into economic value through labour and capital, they can no longer be called 'natural resource'.

In contrast, Soukar points out natural resource endowment and its impacts on general economic aspects are important issues from academic and political perspectives. He opines further that they are indispensable

[3] 'Natural Resource'. Encyclopedia Britannica, 21 Jun. 2023, https://www.britannica.com/science/natural-resource. Accessed on 9 July 2023.
[4] J. L Fisher, 'Natural Resources and Technological Change' 29(1)(1953) Land Economics 57,58.
[5] ibid.

factors for the production and maintenance of a high standard of living.[6]As Soukar stated:

> In my view, a natural resource will always be a natural resource no matter the level of transformation that goes into making it economically valuable. The concept of natural resources is that the raw form cannot be created by humans. For instance, no matter the level of labour and capital that goes into water or land, it will continue to be a natural resource.[7]

4. GOVERNANCE

This section aims to provide an explanation elucidating the fundamental essence and intricacies encompassing the concept of governance. It is a conceptual clarification that analyses the governance concept in relevance to this article. The concept of 'Governance' is not novel, but rather a historically rooted and enduring principle. It means the process of decision-making and the process by which decisions are executed. Governance is used in several contexts such as corporate governance, international governance, national governance, local governance, and natural resources governance. It focuses on the formal and informal actors who are involved in decision-making and implementation. Thus, the government is the major actor in governance.[8]

Briassoulis conducted a comprehensive analysis elucidating the multifaceted dimensions and components inherent within the concept of

[6] L Soukar. 'Natural Resources Endowment and WTO' 34(3) (2019) Journal of Economic Integration, 546.
[7] Ibid.
[8] D Singh., Ansari, N. A., & Singh, S. 'Good Governance & Implementation in Era of Globalization'. *The Indian Journal of Political Science*, *70*(4)(2009) 1109–1120, 1111.

governance. He analysed different ways governance is used.[9] In his analysis, he stated as follows:

> Governance is a concept that has captured the attention and interest of academics, politicians, and laypersons since the late 1980s. It has diffused in a broad range of scientific disciplines beyond the Political and Policy Sciences and is being empirically explored in numerous applications on a variety of subjects worldwide. The common, cross-cutting understanding is that it is the process of steering for collective action with respect to an issue in private and public affairs. The prefixes and modifiers that usually accompany it denote either a subject area (urban, regional, rural, tourism, migration, environmental, coastal, energy, etc.), or a spatial level (local, regional, multi-level, global), a mode of governance (hierarchical, market, corporate, self-governance), a style of governance (authoritarian, interactive, deliberative, discursive, adaptive), an issue (carbon forestry, natural gas transit, biological economies, housing, global crisis, preparedness) or its quality (good, sustainable, inclusive).[10]

Thus, according to Briassoulis, governance is a universal process that occurs in every aspect of human endeavours.[11] This position is correct because good governance ensures the proper organisation of the universe.

[9] H Briassoulis, 'Governance as Multiplicity: the Assemblage Thinking Perspective' 52(3) (2019) Policy Sciences, 419, 420.
[10] ibid.
[11] Ibid.

5. CONCEPT OF NATURAL RESOURCES GOVERNANCE

This research remains incomplete without a comprehensive discussion about natural resources governance. Natural resource governance can be defined as the norms, institutions, and processes that determine how power and responsibilities over natural resources are exercised, and how decisions are taken and implemented. It also involves how citizens, including women, men, youth, indigenous people, and local communities participate and benefit from the management of natural resources.[12]

According to the Natural Resource Governance Framework of the International Union for the Conservation of Nature,[13] it comprises the norms, institutions, and processes that determine the exercise of power and responsibilities over natural resources, as well as the decision-making and citizen participation process in benefitting from resource management.[14]

This framework contains a set of ten principles for equitable, effective governance and conditions that are important for the implementation of each of the principles. The interrelated values in this framework include sustaining nature and realising social equity and human rights. The ten principles are inclusive decision making, recognition and respect for

[12] J Graham, B Amos, and T Plumtree, 'Governance Principles for Protected Areas in the 21st Century'. Prepared for the Fifth World Parks Congress 2003 (Durban, South Africa). (2003) Ottawa: Institute on Governance, Parks Canada, and Canadian International Development Agency.
https://www.files.ethz.ch/isn/122197/pa_governance2.pdf (accessed 7 July 2023).
[13] Created in 1948, IUCN is now the world's largest and most diverse environmental network, harnessing the knowledge, resources, and reach of more than 1,400 Member organisations and some 18,000 experts. It is a leading provider of conservation data, assessments, and analysis. Its broad membership enables IUCN to fill the role of incubator and trusted repository of best practices, tools, and international standards.
[14] Springer, J., Campese, J. and Nakangu, B. 'The Natural Resource Governance Framework – Improving governance for equitable and effective conservation' (2021) Gland, Switzerland: IUCN.iv.
https://portals.iucn.org/library/sites/library/files/documents/2021-031-En.pdf (accessed 7 July 2023).

tenure rights, recognition of and respect for diverse cultures, knowledge, and institutions, devolution, strategic vision, direction, and learning, coordination and coherence, sustainable and equitably shared resources, accountability, fair and effective rule of law, access to justice and conflict resolution.

According to Okpaleke and Abraham-Dukuma, many resource-rich countries expect the blessing and abundance of natural resource wealth to bring forth meaningful development, but the incidences of corruption and weak resource management have discontinued this expectation. This trend can be linked to a lack of effective and transparent natural resource governance frameworks.[15] Frequently, policies based on property rights, although effective in some cases, have highlighted that the primary challenge lies in the practical execution aspects [16]

6. UNSOCIO-LEGAL INSTRUMENTS

This section discusses the United Nations' socio-legal instruments on natural resource governance. The instruments are referred to as socio-legal instruments because they are voluntary guidelines. They are however important documents worthy of discussion.

6.1. Declaration of the International Conference on Agrarian Reform and Rural Development (ICARRD), 2006

The International Conference on Agrarian Reform and Rural Development (ICARRD) which was held in Porto Alegre from 7th to 10th March 2006 was jointly organised by the Food and Agriculture Organization of the United

[15] F N Okpaleke, , M Abraham-Dukuma, 'Dynamics of Resource Governance, Climate Change, and Security: Insights from Nigeria and Norway'. 13(4)(2020), *Journal of Strategic Security*,123.
[16] G P Shivakoti, M A Janssen, N B Chhetri, 'Agricultural and Natural Resources Adaptations to Climate Change: Governance Challenges in Asia'. *13*(2) (2019). *International Journal of the Commons*, 827, 828.

Nations along with the Government of Brazil to investigate new development opportunities to improve rural communities worldwide.[17]

The ICARRD emphasizes the importance of agrarian reform for the realisation of basic human rights. The final declaration of the conference reiterates the crucial role of agrarian reforms in fighting hunger, improving sustainable development models, and implementing human rights. It adopts an approach based on economic, social, and cultural rights for the equitable management of land, water, forest, and other natural resources especially for women, and marginalised and vulnerable groups. Especially in regions marked by pronounced social disparities, poverty, and food insecurity, agrarian reform seeks to expand and ensure equitable access to land and other resources. Consequently, governments bear the responsibility for executing agrarian reform initiatives within these contexts.[18]

In paragraph 28 of the ICARRD declaration, its vision was captured as follows:

> We propose that rural development policies, including those on agrarian reforms, should be more focused on the poor and their organizations, socially driven, participatory, and respectful of gender equality, in the context of economic, social, and environmentally sound sustainable development. They should contribute to food security and poverty eradication, based on secure individual, communal, and collective rights, and equality, including, inter alia, employment, especially for the landless,

[17] Access to Land, 'Final Declaration of the International Conference on Agrarian Reform and Rural Development' (2006) https://www.accesstoland.eu/Final-declaration-of-the-International-Conference-on-Agrarian-Reform-and-Rural (accessed 28 June 2023).
[18] ibid.

> strengthening local and national markets, income generation, in particular through small and medium-sized enterprises, social inclusion and conservation of the environmental and cultural assets of the rural areas, through a sustainable livelihood perspective and the empowerment of vulnerable rural stakeholder groups. These policies should also be implemented in a context that fully respects the rights and aspirations of rural people, especially marginalized and vulnerable groups, within the national legal frameworks and through effective dialogue.[19]

Paragraph 29 of the Declaration outlines the principles agreed upon among which is the "strengthening the role of the State to develop and implement more just and people-centred development policies and programmes to ensure food security and the wellbeing of all citizens, particularly programmes aimed at addressing the impact of HIV/AIDS and other diseases on rural communities and livelihoods".[20]

There was a discussion on the agrarian reform and rural development outcome and follow-up at the twenty-fifth regional conference for Africa held in Nairobi, Kenya between 16th – 20th June 2008. The key areas that needed attention at the time are in the areas of financial and human constraints, lack of awareness and understanding, absence of representative rural institutions to strengthen group tenure rights, and non-harmonisation of gender policies with customary laws on property

[19] International Conference on Agrarian Reform and Rural Development Final Declaration p.4. https://www.accesstoland.eu/IMG/pdf/2006_03_finaldeclaration_fao_conference_en-1-3.pdf (accessed 28 June 2023).
[20] ibid. p.5.

and inheritance.[21] The discussion regarding this matter continues to be relevant even in contemporary times.

6.2. United Nations Declaration on the Rights of Indigenous Peoples, 2007

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly on Thursday, 13 September 2007.[22] Today, it is the most detailed international instrument on the rights of Indigenous Peoples. It births a universal framework of minimum standards for the survival, dignity, and well-being of the Indigenous Peoples of the world and it expatiates on existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous Peoples.[23]

The preamble of the Declaration emphasises the importance of the rights of the indigenous people: "that indigenous peoples are equal to all other peoples while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such." Article 1 provides that the indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights, and international human rights law.

[21] Twenty-Fifth Regional Conference for Africa, Nairobi, Kenya, 16 – 20 June 2008. 'Agrarian Reform And Rural Development Outcome and Follow-Up' ARC/08/INF/7 p.10 https://www.fao.org/3/k1821e/k1821e.pdf (accessed 28 June 2023).
[22] United Nations, 'United Nations Declaration On The Rights Of Indigenous Peoples' https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples#:~:text=The%20United%20Nations%20Declaration%20on,%2C%20Bangladesh%2C%20Bhutan%2C%20Burundi%2C (accessed on 28 June 2023).
[23] ibid.

All the rights granted to the indigenous people apply to both males and females.[24] It is important to note here that the instrument did not confer special human rights on the indigenous people, but it emphasises that the indigenous people are also guaranteed fundamental rights as every other citizen. The rights recognised in the instrument constitute the minimum standards for the survival, dignity, and well-being of the indigenous peoples of the world.[25] The implementation of above rights is provided under Articles 41 and 42.[26]

6.3. United Nations Resolution 64/292 on the Right to Safe and Clean Drinking Water and Sanitation

The UN General Assembly on July 28, 2010, adopted resolution 64/292 recognising "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights".[27] However, the Human Rights Council, in September 2010, affirmed this paragraphs, and clarified that the right is

[24] The United Nations Declaration on the Rights of Indigenous Peoples, 2007, art. 44.
[25] The United Nations Declaration on the Rights of Indigenous Peoples, 2007, art. 43
[26] Ibid art. 41 provides that:
The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring the participation of indigenous peoples on issues affecting them shall be established.
While art, 42 provides that:
The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.
[27] UN, '10th anniversary of the UNGA resolution on the human rights to water and sanitation' https://www.unwater.org/news/10th-anniversary-unga-resolution-human-rights-water-and-sanitation (accessed 28 June 2023).

derived from the right to an adequate standard of living.[28] The resolution has three paragraphs and it provides that the UN General Assembly:[29]

1. Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.
2. Calls upon States and international organizations to provide financial resources, capacity-building, and technology transfer, through international assistance and cooperation, in particular to developing countries, to scale up efforts to provide safe, clean, accessible, and affordable drinking water and sanitation for all.
3. Welcomes the decision by the Human Rights Council to request that the independent expert on human rights obligations related to access the safe drinking water and sanitation submit an annual report to the General Assembly, and encourages her to continue working on all aspects of her mandate and, in consultation with all relevant United Nations agencies, funds and programmes, to include in her report to the Assembly, at its sixty-sixth session, the principal challenges related to the realization of the human right to safe and clean drinking water and sanitation and their impact on the achievement of the Millennium Development Goals.

[28] Resolution adopted by the Human Rights Council on 6 October 2010, 15/9 Human rights and access to safe drinking water and sanitation The Human Rights Council.
[29] Resolution 64/292 adopted by the General Assembly on 28 July 2010 [without reference to a Main Committee (A/64/L.63/Rev.1 and Add.1)]United Nations,*The Human Right to Water and Sanitation'*< The human right to water and sanitation : (un.org)> (accessed 28 June 2023).

The year 2020 marked the tenth anniversary of the adoption of the resolution by the UN General Assembly recognising the human rights to water and sanitation. Throughout 2020, the Special Rapporteur on the human rights to safe drinking water and sanitation organised a campaign to celebrate 10 years of work and advocacy for the human rights to water and sanitation with different themes from January to October 2020.[30]

The United Nations continues to monitor the implementation of the right to water and sanitation through an annual data drive. For instance, the 2023 Data Drive is part of the UN-Water Integrated Monitoring Initiative for Sustainable Development Goal 6 (IMI-SDG6): 'Ensure availability and sustainable management of water and sanitation for all'. Adoption of the SDGs by countries enables them to commit their data report on SDG indicators to the UN to track progress and ensure accountability.[31]

6.3.1. Voluntary Guidelines on responsible governance of Tenure of Land, fisheries, and Forests in the Context of national food security, 2012

The Voluntary Guidelines on responsible governance of tenure of land, fisheries, and forests in the context of national food security originated into existence in 2012. The Guidelines had however been replaced with the 2022 edition.[32]

The guidelines promote responsible governance of tenure of land, fisheries, and forests, for all forms of tenure: public, private, communal, indigenous, customary, and informal. The aims are to achieve food

[30] United Nation, '10th anniversary of the UNGA resolution on the human rights to water and sanitation'.
[31] United Nations, UN-Water, '2023 Data Drive' https://www.unwater.org/news/2023-data-drive (accessed 28 June 2023).
[32] Food and Agriculture Organization of the United Nations, 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security 2022 ' Revised Edition https://www.fao.org/3/i2801e/i2801e.pdf (accessed 28 June 2023).

security for all and support the successful realisation of the right to adequate food in the context of national food security.[33]

While promoting efforts in the eradication of hunger and poverty, the guidelines are also intended to contribute to achieving sustainable livelihoods, social stability, housing security, rural development, environmental protection, and sustainable social and economic development. The guidelines are developed to benefit all people in all countries; however, there is an emphasis on vulnerable and marginalised people as well.[34]

Part of the objectives of the guidelines is to:[35]

1. improve tenure governance by providing guidance and information on internationally accepted practices for systems that deal with the rights to be used, managed, and controlled land, fisheries, and forests.
2. contribute to the improvement and development of the policy, legal, and organizational frameworks regulating the range of tenure rights that exist over these resources.
3. enhance transparency and improve the functioning of tenure systems.
4. strengthen the capacities and operations of implementing agencies; judicial authorities; local governments; organizations of farmers and small-scale producers, fishers, and forest users; pastoralists; indigenous peoples and other communities; civil society; private sector;

[33] Food and Agriculture Organization of the United Nations, 'Governance of Tenure' https://www.fao.org/tenure/en (accessed 28 June 2023).
[34] ibid.
[35] Food and Agriculture Organization of the United Nations, 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security 2022.

academia; and all persons concerned with tenure governance as well as to promote the cooperation between the actors mentioned.

The guidelines are divided into 7 parts as preliminary, general matters, legal recognition and allocation of tenure rights and duties, transfers and other changes to tenure rights and duties, administration of tenure, responses to climate change and emergencies, and promotion, implementation, monitoring, and evaluation.

The guidelines place the governance of tenure within the context of national food security and contribute to the progressive realisation of the right to adequate food, poverty eradication, environmental protection, and sustainable social and economic development.[36]

6.3.2 Voluntary Guidelines for Securing Sustainable Small-scale Fisheries in the Context of Food Security and Poverty Eradication, 2014

The principles in the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines) address policies, strategies, and legal frameworks relating to small-scale fisheries including other matters affecting lives and livelihood in fishing communities. The principles have a clear human rights-based approach, and they put people, rather than fish, in perspective. The SSF Guidelines are global in scope, and they guide dialogue, policy processes, and actions at national, regional, and international levels.[37]

[36] ibid. p.44.
[37] Food and Agriculture Organization of the United Nations, 'Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines)', https://www.fao.org/voluntary-guidelines-small-scale-fisheries/en (Accessed 28 June 2023).

The major issues in the guidelines involve managing resources and allocating tenure rights responsibly, supporting social development and decent work, looking at fish workers along the entire value chain from catching through processing to trading fish, promoting gender equality, and considering climate changes and disaster risks.[38]

The Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines) are the first international instrument dedicated entirely to the small-scale fisheries sector.[39] The Voluntary Guidelines for Securing Sustainable Small-scale Fisheries in the Context of Food Security and Poverty Eradication are important because they go beyond fisheries and emphasise the rights of fishers and fish workers. The guidelines encompass not only aspects related to fish but also consider the welfare and involvement of the individuals associated with fishing, namely the fishermen and women.

7. CURRENT STATUS OF THE INTERNATIONAL INSTRUMENTS

The international instruments on natural resources governance are attractive sets of rules that seek to ensure equality and justice for the people in the society. As attractive as these rules are, certain factors affect their effectiveness. These factors are discussed under each instrument.

The Declaration of the International Conference on Agrarian Reform and Rural Development (ICARRD), 2006 aimed to investigate new development opportunities to improve rural communities worldwide. The declaration is a soft law that do not create a binding role. Till today, up to

[38] ibid.
[39] Food and Agriculture Organization of the United Nations, 'Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication'
https://www.fao.org/voluntary-guidelines-small-scale-fisheries/background/en/ (accessed 28 June 2023).

the present day, the level of awareness of this declaration is not wide enough and the financial capability to implement the declaration is absent among the nations.

The United Nations Declaration on the Rights of Indigenous Peoples, 2007 creates a universal framework of standards required for the survival, dignity, and well-being of the Indigenous Peoples of the world and it expatiates on existing human rights standards and fundamental freedom as they apply to the specific situation of Indigenous Peoples.

The UN Declarations are not legally binding but represent the continuous development of international legal norms which reflect the commitment and desire of states to abide by certain principles.[40] So, Consequently, the Declaration on the Rights of Indigenous Peoples, 2007 is not legally binding on the states until it is adopted by them.

In 2010, the United Nations Resolution 64/292 on the right to water and sanitation was adopted. The resolution made "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights". Access to safe drinking water and sanitation are recognised as international human rights, and derived from the right to an adequate standard of living under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights which provides that:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living

[40] United Nations Permanent Forum on Indigenous Issues, 'Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples' https://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf (accessed 11 July 2023).

> conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing the essential importance of international cooperation based on free consent.

A General Assembly resolution that is adopted by a large majority, done in a specific language which reflects the opinion of the international community, may be considered as being of a nature to be legally binding but may not be enforceable.

The voluntary guidelines on responsible governance of tenure of land, fisheries, and forests in the context of National Food Security 2022 are a set of rules that do not have any legal force. They are mere rules to guide proper governance of the tenure of land and other natural resources.

In the same vein, the voluntary guidelines for securing sustainable small-scale fisheries in the context of food security and poverty eradication 2014 are mere guidelines for the States to exercise their discretions. Similarly, the voluntary guidelines established in 2014 for ensuring sustainable small-scale fisheries within the framework of addressing food security and poverty eradication serve as recommendations for nation-states to utilize their discretion in implementation.

8. CONCLUSION AND RECOMMENDATION

All the international instruments discussed above are crucial for the management and implementation of natural resources governance. It is, however, important to state that the Declaration of the International Conference on Agrarian Reform and Rural Development (ICARRD), 2006, the United Nations Declaration on the Rights of Indigenous Peoples, 2007, the voluntary guidelines on responsible governance of tenure of land, fisheries and forests in the context of national food security 2022,

and the voluntary guidelines for securing sustainable small-scale fisheries in the context of food security and poverty eradication 2014 are set of attractive rules that are not legally binding but suitable to be adopted for natural resources governance.

The initial step is to transform the declarations from the International Conference on Agrarian Reform and Rural Development (ICARRD) in 2006, the United Nations Declaration on the Rights of Indigenous Peoples in 2007, the voluntary guidelines on responsible land, fisheries, and forests governance for national food security in 2022, as well as the guidelines for sustainable small-scale fisheries in the context of food security and poverty alleviation in 2014, into globally binding rules for governing natural resources.

Conclusively, a more comprehensive approach to addressing the inequalities in natural resource governance and the realisation of human rights should also be adopted. By taking these steps, we can actualise a world where the rights of all individuals are upheld, and the equitable distribution of natural resources becomes a reality.

RESOLVING SKIES OF CONFLICT: ANALYSING ICAO COUNCIL'S JURISDICTION IN THE GULF CRISIS (*QUARTET V. QATAR* CASE)

Gursimran Kaur Bakshi[#] & Harsh Mahaseth[#]

1. FACTS

On June 5, 2017, four Arab countries: Bahrain, Egypt, the United Arab Emirates (UAE), and Saudi Arabia ("the Quartet"), severed their diplomatic and economic relations with Qatar.[1] They adopted a series of restrictive measures relating to terrestrial, maritime and aerial lines of communication against Qatar, including aviation restrictions. Pursuant to this, Qatar-registered aircraft and some non-Qatar-registered aircraft were denied the right to overfly the respective territories of Quartet. All the Qatar-registered flights were barred from landing at or departing from their airports, while prior permission was required for some non-Qatar registered aircraft.[2]

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[1] J Kinninmont, 'The Gulf Divided The Impact of the Qatar Crisis' (2019) Chatham House The Royal Institute of International Affairs < https://www.chathamhouse.org/sites/default/files/publications/research/2019-05-30-Gulf%20Crisis_0.pdf> accessed 15 October 2023; 'Qatar regrets the decision by Saudi Arabia, the United Arab Emirates and Bahrain to sever relations' (2017) Ministry of Foreign Affairs <https://www.mofa.gov.qa/en/all-mofa-news/details/2017/06/04/qatar-regrets-the-decision-by-saudi-arabia-the-united-arab-emirates-and-bahrain-to-sever-relations> accessed 15 October 2023.

[2] 'Qatar Airways seeks $5bn compensation from blockading quartet' *Al Jazeera* (22 July 2020) < https://www.aljazeera.com/news/2020/7/22/qatar-airways-seeks-5bn-compensation-from-blockading-quartet> accessed 15 October 2023; 'Qatar Airways Middle East

Quartet justified these measures, stating that the same was a consequence of "multiple, grave and persistent breaches of its [Qatar's] international obligations relating to matters essential to [their] security]" under the 2014 Riyadh Agreements.[3] The Riyadh Agreements were signed in the backdrop of the Arab Spring, a series of anti-government uprisings that started in late 2010. The agreements are based on the principle of non-intervention in the nations' internal affairs. The Quartet alleged Qatar's interference in internal affairs by violating its obligation under the Riyadh Agreements to "cease supporting, financing or harbouring persons or groups presenting a danger to national security, in particular terrorist groups".

The Quartet reiterated these obligations through 13 demands it posed on Qatar to save itself from the countermeasures.[4] It demanded a ban on Muslim Brotherhood organisation should and restrictions to be imposed on *Al-Jazeera* news network because they were linked to radical Islam and perpetuated terrorism.

Qatar categorically rejected all the demands. On numerous occasions, Qatar denied its association with terrorist organisations. Despite that, the aviation restrictions were not uplifted, and Qatar's airline investment suffered a significant loss. Subsequently, Qatar invoked Article 84 of the

Landing & airspace restrictions; wider ramification for global aviation' (05 June 2017) *CAPA Centre for Aviation* < https://centreforaviation.com/analysis/reports/qatar-airways-middle-eastlanding--airspace-restrictions-wider-ramifications-for-global-aviation-348493> accessed 15 October 2023.

[3] C D Gaver, 'What are the Riyadh Agreements?' (2020) EJIL: Talk! < https://www.ejiltalk.org/what-are-the-riyadh-agreements/> accessed 15 October 2023; Richard Nephew, 'The Qatari Sanctions Episode: Crisis, Response, and Lessons Learned' (2020) Colombia: SIPA Centre on Global Energy Policy < https://www.energypolicy.columbia.edu/wp-content/uploads/2020/10/QatariSanctions_CGEP_Report_111522.pdf> accessed 15 October 2023.

[4] P Wintour, 'Qatar given 10 days to meet 13 sweeping demands by Saudi Arabia' *The Guardian* (23 June 2017) <https://www.theguardian.com/world/2017/jun/23/close-al-jazeera-saudi-arabia-issues-qatar-with-13-demands-to-end-blockade> accessed 15 October 2023.

1944 Convention on International Civil Aviation ("Chicago Convention") against the Quartet before the International Civil Aviation Organisation Council ("Council").

Article 84 read with Article 2 subparagraph (g) of the International Civil Aviation Organisation Rules for the Settlement of Differences ("ICAO Rules") states that any disagreement on the interpretation and application of the Convention and its Annexes could be referred to the Council, provided parties made an attempt at 'negotiation'. This precondition is satisfied if the negotiations reach a point of futility or deadlock. Qatar claimed that any genuine attempt at negotiation would be futile in this case because of the severed diplomatic ties and unwillingness of the Quartet address the dispute between them. Thus, Qatar argued that the precondition of negotiation under Article 84 of the Chicago Convention is fulfilled.

2. A SUMMARY OF THE LEGAL PROCEEDINGS

On October 30, 2017, Qatar initiated proceedings before the Council under Article 84 of the Chicago Convention and the 1944 International Air Service Transit Agreement ("IASTA"). Qatar alleged that Quartet violated fundamental principles of the Chicago Convention, its Annexes and other rules of international law. It requested the Council to urge the Quartet to withdraw, without any delay, all aviation restrictions on Qatar-registered aircraft and comply with its obligations under Article 2[5], Article 3*bis*[6], Article 4[7], Article 5[8], Article 6[9], Article 9[10], Article 37[11] and Article 89[12] of

[5] Chicago Convention art. 2.
[6] Ibid art. 3*bis*.
[7] Ibid art. 4.
[8] Ibid art. 5.
[9] Ibid art. 6.
[10] Ibid art. 9.
[11] Ibid art. 37.
[12] Ibid art. 89.

the Chicago Convention and its Annexes. It sought from them to negotiate in good faith the future harmonious cooperation in the region of international civil aviation.

On March 19, 2018, the Quartet raised two preliminary objections before the Council. First, the Council lacked jurisdiction. It contended that the issue was regarding Qatar's breach of counter-terrorism obligations and the obligation to not interfere in Quartet's internal affairs, which arose in a wider international law context, including whether the aviation measures could be characterised as lawful countermeasures.

Second, Qatar must fulfil the pre-condition of negotiation under Article 84 of the Chicago Convention read with the ICAO Rules. By majority, the Council rejected all preliminary objections on June 29, 2018. The Quartet instituted two appeals against the Council's decision on preliminary objections before the International Court of Justice ("ICJ") on July 4, 2018. As per Article 84, an appeal against the Council's decision must be submitted before ICJ.

2.1. Arguments of the parties

Quartet filed the first appeal on procedural irregularity, the Council's incompetence, and on the non-fulfilment of the precondition of negotiation. Bahrain, Egypt, and UAE jointly filed another appeal under Article II, Section 2 of the IASTA, as Saudi Arabia is not a party to IASTA.

The Quartet raised three grounds of appeal. First, the Quartet challenged the procedure adopted by the ICAO Council. Second, the Quartet asserted that the Council 'erred in fact and in law' by rejecting the first preliminary objection on the Council's lack of competence to hear the dispute. They argued that the real issue was "Qatar's long-standing violations of its obligations under international law other than under the Chicago Convention". Further, they claimed that the countermeasures

were lawful under international law. Countermeasures are circumstances that are capable of precluding the wrongfulness of an act that is otherwise unlawful.[13] In contrast, Qatar contended that the dispute is a 'disagreement' under Article 84, even if it arose in a wider context because it relates to the interpretation and the application of the Chicago Convention.

On the third ground of appeal, the Quartet argued that the precondition of negotiation is only met when the negotiations are attempted and become futile or deadlocked. Qatar countered this argument and stated that it made genuine attempts to negotiate with the Quartet, not just within the framework of the Chicago Convention but also within the World Trade Organisation's ("WTO") framework and sought intervention from Kuwait to resolve the dispute, among other things. Alternatively, Qatar claimed that it has no obligation to attempt to negotiate if the other party is unwilling to negotiate, as such an attempt would be futile. Thus, per Qatar, the condition under Article 84 of the Chicago Convention was fulfilled.

2.2. Summary of the Judgment

On July 14, 2020, the ICJ pronounced its judgment in favour of Qatar by rejecting all grounds of appeal. On the second ground of appeal, the ICJ held that the dispute between the parties was a disagreement concerning the interpretation and the application of the Chicago Convention and its Annexes and falls within the scope of Article 84 of the Chicago Convention. It stated that a disagreement arising in a larger political context does not deprive the Council from exercising its jurisdiction under

[13] *Gabčíkovo-Nagymaros Project* (*Hungary vs. Slovakia*), Judgment, ICJ. Reports 1997, p. 55, para. 82

Article 84.[14] It relied on the court's reasoning in *United States of America v. Iran*, where it was held that "legal disputes between sovereign States by their very nature are likely to occur in political contexts…"[15]Further, the court added that even if aviation measures are to be characterised as lawful countermeasures under international law, this in itself did not preclude the jurisdiction of the Council.

The ICJ rejected the third ground of appeal and stated that Qatar made genuine attempts at negotiation. It referred to a series of communications and attempts by Qatar before and outside the Council's framework to solve the dispute. On whether the negotiations reached a point of futility or deadlock, the court stated the threshold of this must be assessed not from the "theoretical impossibility of reaching a settlement*"* but that "no reasonable probability exists that further negotiations would lead to a settlement".[16]

3. ANALYSIS

In January 2021, the Gulf blockade was finally resolved after four years of impasse when the Quartet signed a 'solidary and stability' deal with Qatar, facilitated by Kuwait and the United States. Qatar Airways sought compensation against the Quartet for destroying its airlines' investment through arbitration.[17]Although the parties ultimately reached a political

[14] *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (*Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar*), Judgment, ICJ. Reports 2020, p. 81.
[15] *United States Diplomatic and Consular Staff in Tehran* (*United States of America v. Iran*), Judgment, ICJ. Reports 1980, p. 20, para. 37.
[16] *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), Judgment, ICJ. Reports 2012 (II), p. 446, para. 57.
[17] T Jones, 'Qatar Airways launches treaty claims over blockade' *GAR* (22 July 2020) <https://globalarbitrationreview.com/qatar-airways-launches-treaty-claims-over-blockade>.

consensus,[18] a question still remains: How do parties fulfil the precondition of negotiation in such disputes of a political nature?

Pre-negotiation conditions are present in agreements through a 'compromissory clauses'.[19] But what meaning must be given to the term negotiation is a question of fact that should be determined on a case-to-case basis. For instance, in the present case, Qatar made numerous attempts at negotiation through various communications, meetings and discussions before the Council. Qatar approached Kuwait in an attempt to negotiate the dispute. It made press statements before various United Nations bodies. Qatar attempted to negotiate outside the framework of the Chicago Convention through the WTO. It contacted Saudi Arabia with the facilitation of the United States of America.

Unlike Qatar's case, where it attempted to address the dispute in 1952, the Council facilitated negotiations between the parties in the Disagreement between India and Pakistan. As per the brief facts, India complained to the Council against Pakistan for barring Indian commercial aircraft from India to Afghanistan to fly over West Pakistan. Pakistan considered its western part a prohibited area where aircraft could not land or the air space could not be used for non-traffic purposes. India was ready to invoke Article XI (on dispute settlement) of the 1948 Air Service Agreement between India and Pakistan.[20]

[18] Steve Holland & Aziz El, 'Breakthrough reached in Gulf dispute with Qatar' *REUTERS* (05 January 2021) https://www.reuters.com/article/us-gulf-qatar-usa-idUSKBN29924S/> accessed 15 October 2023; Ali Harb, 'Saudi Arabia agrees to end blockade on Qatar, opens airspace and land border' *MEE* (Washington, 04 January 2021) < https://www.middleeasteye.net/news/saudi-arabia-qatar-end-blockade> accessed 15 October 2023.

[19] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I),* p. 128, para. 140; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (II),* p. 445, para. 56.

[20] Agreement between the Government of India and the Government of Pakistan relating to the Air Services 1948.

The Council intervened and instituted a working group for the parties to resolve the dispute amicably. The Council requested that Pakistan allow Indian aircraft to separate its international air service over the Delhi-Peshawar-Kabul route. To this, Pakistan suggested opening two alternate corridors, one on the direct line between Lahore and Kandahar for the aircraft operating between Delhi and Kabul and the other on the direct line between Karachi and Kandahar for aircraft operating between Bombay or Ahmedabad and Kabul. It stated that the government cannot reopen the original route due to national security, military necessity and administrative issues. Hence, this suggestion was considered by the working committee as a possibility that the negotiations between the parties have yet to reach the deadlock.

The working group sent a report to the Council in January 1953 on the solution they had reached. Subsequently, Pakistan proposed in good faith that the government would release the required quantity of aviation fuel needed by the Indian airlines in Afghanistan and provide additional operational facilities in the proposed route. In the end, India accepted the offer, and both parties informed the Council that they had amicably reached a peaceful settlement.[21]

In both these cases, it could be seen that there should be a willingness to address the dispute, and it's not relevant whether the parties themselves make an attempt or whether the attempt at negotiation is facilitated by the Council or a third State. The same criteria could be applied to determine whether the negotiations have reached a point of deadlock or futility.

This could also be assessed as whether the basic position of parties has subsequently evolved through diplomatic channels and other routes.[22] In

[21] Report of the ICAO Council, 1952.
[22] *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), Judgment, ICJ Reports 2012 (II), p. 446, para. 59; Immunities and Criminal Proceedings

the present case, before the Council, Qatar called for the Quartet to consider lifting the 'unjust air blockade'. Quartet claimed that Qatar never directly addressed the dispute's subject matter within the Chicago Convention's framework. Despite that, the ICJ held that Qatar may not have directly addressed the issue because of the hostilities, but it tried to touch upon the essence of the Chicago Convention when it requested Quartet to lift the unjust air blockade. Before the Council, the Quartet defended the legality of the countermeasures and asserted that the Council must limit its discussion to the matter before it. This showed the unwillingness of the Quartet to give any opportunity to Qatar, and it realistically made it impossible for the latter to address the dispute.

Similarly, in 1972, ICJ witnessed a case where India and Pakistan reached a deadlock in their negotiations. According to the facts, a dispute arose when India suspended Pakistan's commercial aircraft from flying over its territory after the 1971 hijacking incident, where an Indian aircraft was diverted to Pakistan by a terrorist organisation. Pakistan approached the ICAO Council under Article 84 for the alleged breach of the provisions of the Chicago Convention and the IASTA. According to Pakistan, the negotiations could not occur between the two countries as there were hostilities after the hijacking incident.

India rejected these allegations by stating that the Chicago Convention and the IASTA were suspended during hostilities, and the aviation restrictions imposed were governed through the 1966 Special Agreement.[23] The ICAO Council ordered in its preliminary objections against India. An appeal was filed against this decision to the ICJ, which Pakistan challenged. The ICJ passed a judgment purely on the

(Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), p. 317, para. 76).

[23] Tashkent Declaration 1966.

jurisdictional issue. The court stated that the Council was competent to hear the issue that this was a disagreement between the parties under Article 84 which had reached a deadlock due to the hostilities between the parties.[24]

4. CONCLUSION

While the ICJ judgment on *Quartet v. Qatar* addressed certain issues pertaining to the precondition of negotiations under Article 84 of the Chicago Convention, which gave some academic clarity, the judgment could not solve the dispute. It could only be sorted when the parties reached a political consensus. Regarding the threshold of negotiation, it is now clear that the attempts at solving the dispute must be considered from the standard of whether the parties are willing to solve the dispute. If the parties are unwilling, this could indicate that the negotiations have become futile or deadlocked.

[24] Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, ICJ Reports 1972, p. 46.

INTELLECTUAL ORIGINS OF NEOLIBERAL HUMAN RIGHTS: A REVIEW OF THE MORALS OF THE MARKET: HUMAN RIGHTS AND THE RISE OF NEOLIBERALISM BY JESSICA WHYTE

Ramindu Perera[#]

1. INTRODUCTION

The 2009 global economic crisis that unveiled the fragile foundations of the neo-liberal economic order, which was hegemonic in the imperial heartlands for more than three decades, has also led to a revival of scholarly interest in the questions of wealth inequality, neo-liberalism, and human rights. This problem was forcefully raised by renowned human rights scholar Philip Alston in his capacity as the United Nations Special Rapporteur on extreme poverty in 2015 in a report where he criticized the failure of human rights to address the grave impact widening wealth inequality is having on the realization of human rights.[1] In recent years, there have been many contributions from different writers on the question of inequality and human rights, or more broadly, the relationship between human rights and the hegemonic neo-liberal formation that has increased inequality.[2] In 'The Morals of the Market', Jessica Whyte offers a

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[1] United Nations Human Rights Council, 'Report of the Special Rapporteur on extreme poverty and human rights' (Un. Doc. A/HRC/29/31, 27 May 2015)

[2] See Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press, 2019), Umut Ozsu, 'Neoliberalism and Human Rights: The Brandt Commission and the Struggle for a New World' 81(2018) Law and Contemporary Problems 139, Julia Dehm, 'Righting Inequality: Human Rights Responses to Economic Inequality in the United Nations 10(3) (2019) Humanity 443, Gillian MacNoughton and Diane F. Frey (eds), *Economic and Social Rights in a Neoliberal World* (Cambridge University Press, 2008).

compelling historical account of the rise of neo-liberalism and the complex interconnections between the neo-liberal project and the human rights discourse.[3]

The main focus of Whyte's historical account is the intellectual and conceptual history of neo-liberal thought and how neo-liberals approached the question of human rights. Since the publication of Samuel Moyn's 'The Last Utopia', which problematized the textbook narration of human rights suggesting a linear trajectory of progress, a more deconstructivist understanding that is mindful of disconnections between the contemporary human rights discourse and earlier manifestations of the rights tradition has become a part of human rights literature[4]. The contemporary human rights discourse that became prominent in the late 1970s—defined by an individualist framing, attributing prominence to civil and political liberties, being sceptical of state sovereignty, and comprising a transnational 'activist' network aiming to hold nation-states accountable for their human rights violations—has been described as a relatively novel phenomenon, having come 'seemingly from nowhere'[5].

Writers disagree about the nature of the relationship between the neo-liberal discourse, which also rose to prominence in the late 1970s, and the contemporary human rights discourse. Some indicate a greater association[6], while others think the links are overdrawn[7]. The nuance Whyte brings to this debate is to draw our attention further towards the

[3] This is a review of the book J Whyte, *The Morals of the Market; Human Rights and the Rise of Neo-Liberalism* (London Vrso Books,2019)
[4] S Moyn, '*The Last Utopia: Human Rights in History*' (Harvard University Press, 2012).
[5] Ibid, 3.
[6] W Brown, 'The Most We Can Hope For': Human Rights and the Politics of Fatalism'(2004) 103:2 South Atlantic Quarterly 452; Susan Marks, 'Human Rights and Root Causes' 74(1) (2011) MLR 57, Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 2008).
[7] See Moyn (n 2). Also see Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' 77(4) (2014) Law and Contemporary Problems 147.

past, to highlight the formative years of a distinct neo-liberal approach to human rights starting from the end of the Second World War, and to demonstrate possible conceptual links between this neo-liberal framing and today's hegemonic human rights narrative.

2. MONT-PELERIN SOCIETY AND HUMAN RIGHTS

'The Morals of the Market' comprises two parts. The first part, consisting of three chapters, focuses on ideas developed by early thinkers of the neo-liberal tradition. These chapters tell us the story of how these thinkers—notable figures like Austrian philosopher Friedrich Hayek, Austrian economist Ludwig Von Mises, Swiss academic William Rappard, German Ordoliberals Wilhelm Ropke, and Alexander Rustow—framed the 'neo-liberal' project, which was a response to the rise of social democracy, socialism, and anti-colonialism in the late 1940s. These thinkers of the neo-liberal Mont-Pelerin Society (MPS) saw the rise of these movements, which they dubbed 'collectivist' movements, as a threat to individual liberty and 'Western civilization'.

Neo-liberals thought that the ascendency of different forms of collectivism that achieve social justice and greater collective good inevitably leads to totalitarianism that suppresses the individual. A main theme running throughout the book is the refusal of the idea that neo-liberalism is a crude economic doctrine that reduces man to *homo economicus*. Whyte shows that for Hayek and his MPS colleagues, morality was an important concern. They believed a competitive market society required a moral foundation and envisioned morality in individualist, anti-collectivist terms.

The founding of the MPS historically coincided with the deliberations for the adoption of the UDHR in the late 1940s. As Whyte explains, during these early days, there were more divergences between the neo-liberal and human rights discourses. The first part of the book sheds light on

three areas of contestation: the notion of a civilizational hierarchy, the status of social rights, and the anti-colonial use of human rights. Thus, the book demonstrates that despite their initial suspicion of the UDHR, neo-liberals later saw human rights as a useful language in advancing their vision of individual liberty, engaging in developing a distinct neo-liberal version of human rights.

The first chapter of the book surveys how neo-liberals depicted the advent of collectivism as a civilizational regression and debates on standards of civilization at UDHR discussions. While delegates from the non-western world at UDHR deliberations were arguing against the hierarchical notion of 'standard of civilization', MPS thinkers, on the other hand, considered individual freedom, which they held as the supreme virtue, as a trait of Western civilization. Mises depicted 'Asiatics' as 'apathetic inhabitants of stagnant societies[8]', and Hayek considered the Christian emphasis on freedom of conscience as a foundation for individual choice required by a market society. Drawing on his experience in working at the United Nations mandate system, Rappard believed that a civilizational ethos, such as considering work as a virtue, should be inculcated in non-western societies.

On the other hand, the racial notion of the standard of civilization made a complex appearance in UDHR deliberations. Whyte explains how French and British representatives defended references to civilization, while delegates from former colonized countries backed by the socialist bloc contended. The compromised position offered by the drafting committee chair, Elanor Roosevelt, coming from a less invested country in colonialism, reformulated the difference between western and peripheral

[8] Whyte (n,2) ch.7.

nations as a matter of 'development' —laying foundations for a civilizational discourse 'adequate to a new era of universal rights'.

Turning to the question of social rights in the second chapter, Whyte presents an interesting account of the attack of neo-liberals on what they saw as 'weakening the concept of rights' by introducing 'positive claims for benefits[9]'. For Hayek, social rights were problematic not only because they are unenforceable through courts but also because they denote a deviation from the liberal rights tradition, which focuses on delimiting the individual domain in which private initiative, entrepreneurialism, and personal responsibility can flourish. The notion of social rights was seen as allowing the state to organize society, treating it as a single organization. Hayek saw this as leading to totalitarianism.

Social rights entered the UDHR domain through the triumph of the post-World War II welfare state across the world. Franklin Roosevelt's New Deal, which marked a rupture from *laissez-faire* economics, led to the consolidation of embedded liberalism in the United States. On the other hand, the domestic social rights traditions of Latin American countries and the intervention of the socialist bloc also influenced the inclusion of social rights. While Hayek condemned this as fusing the rights of the Western liberal tradition with ideas derived from the Marxist Russian revolution, German Ordoliberals like Ropke added a conservative flavor to the critique by denouncing the 'mass rebellion' that has produced the welfare state.

However, Whyte also draws our attention to the limitations of the social rights paradigm the UDHR envisioned. She demonstrates how United States delegates intervened to frame social rights as flexible standards rather than legal obligations, offering them a minimalist outlook and

[9] Whyte (n,2) ch.2.

ensuring that inequality in the class society is not threatened by social rights. Following mass unemployment and the intensification of the 'social question' aftermath of the 1929 Great Depression, even neo-liberal thinkers—except for a handful of extreme examples like Von Mises, who argued against any poverty assistance scheme—recognized the legitimacy of minimal state provisioning on welfare. Ropke stood for the abolition of the welfare state 'except for an indispensable minimum[10]'. Hayek acknowledged the need for a minimum, market-confirming welfare policy. Whyte shows how this minimalist approach to welfare informed the ascendancy of neo-liberal poverty management strategies, which have become dominant in our times. The thought-provoking question she raises is whether drafters of the UDHR were complicit in this convergence by framing social rights in minimalist terms.

The third historical scenario presented in the book is the anti-colonial endeavour of using human rights language to further the struggle for economic self-determination, and how neo-liberals responded. Unlike writers like Samuel Moyn[11] or Jan Eckel[12] who are reluctant to identify the post-colonial sovereign project as a movement concerning human rights, Whyte acknowledges the presence of a post-colonial human rights project aiming to link human rights language with anti-colonial aspirations. Post-colonial leaders like Kwame Nkrumah of Ghana advanced a profound critique of the neo-colonial economic order that retained the international division of labour established through imperial conquest. Unlike the UDHR process, where the majority of third-world populations were still living under the yoke of colonialism and did not participate in deliberations, the drafting of the ICCPR and the ICESR in the 1960s involved third-world

[10] Ibid.
[11] See Moyn, Last Utopia (n 4)
[12] Eckel J, '*The Ambivalence of Good: Human Rights in International Politics since the 1940s*'(Oxford University Press, 2019).

voices. Thus, the right to self-determination was enshrined as a human right, and ideas such as permanent sovereignty over natural resources were pushed through United Nations forums as principles of international law.

Whyte narrates how the idea of 'enlightened imperialism' advocated by certain social democrats in the West at the onset of the decolonization process was seen as inadequate by neo-liberals who saw the advent of the post-colonial project as a threat to the right of white people to access resources in the third world. This was seen as disturbing the prevailing international division of labour. In response to the Marxist-influenced thesis suggesting that imperialism is an outcome of capitalism, neo-liberals introduced a dichotomy between politics, which they depicted as a realm of violence, and commerce, which they saw as a realm of peaceful, mutually beneficial relations. Whyte explains how neo-liberal economists like William Schumpeter, Lionel Robbins, and Ropke advanced the 'sweetness of commerce' thesis, arguing that imperialism was the result of the politicization of the economy that deviated from the free trade tradition of classical liberalism.

MPS was a harsh critic of the post-colonial quest for greater independence. Whyte provides some striking examples showing the racialist attitude that the fathers of neo-liberalism shared towards people in the third world. To counter the post-colonial project, neo-liberals developed a competing human rights narrative, defining human rights in market and trade-friendly terms. Since third-world people lacked the morality that is conducive to a competitive international market system, such values were to be introduced from the outside.

3. NEO-LIBERAL HUMAN RIGHTS IN PRACTICE

Having surveyed the historical origins of the neo-liberal human rights discourse in the first part, the second part of the book turns into two episodes from more recent history. The first scenario concerns the 1973 Chilean coup that toppled Salvador Allende's socialist government. Whyte explains how prominent neo-liberals like Hayek and Milton Freidman hailed Augusto Pinochet's dictatorship as a 'transitionary dictatorship'. For them, human rights were about individual freedom that could only be ensured in a free market society. Therefore, the free market was seen as something that should be defended from egalitarian political movements. On this basis, neo-liberal economists like Freidman became apologists for the repressive regime of Pinochet, since the junta was eliminating collectivism from Chilean society. Thus, we see how the market-friendly notion of human rights theorized in earlier years is employed in a concrete historical context.

Furthermore, the author problematizes the involvement of human rights organizations like Amnesty International in reporting human rights abuses that happened in Chile. Having origins in the 1970s, organizations like Amnesty International and Human Rights Watch represented a new form of activism — claiming political neutrality and 'naming and shaming' governments from outside to condemn atrocities. The role of the Amnesty International, which reported disappearances and torture under Pinochet but did not speak of the neo-liberal shock therapy that made such repression necessary, has been raised before by writers like Naomi Klein[13]. Whyte brings in a more nuanced argument suggesting that the overlooking of the economic causes of repression amounts to a

[13] N Klein, The Shock Doctrine: The Rise of Disaster Capitalism (Picador, 2008).

reproduction of the neo-liberal logic that separates the (violent) political sphere from the (peaceful) sphere of civil society.

Whyte does not make a reductionist argument that depicts the transnational human rights movement as a mere tool of rising neo-liberalism. However, she also does not concede to the view that the movement was a simple bystander, a 'powerless companion' of neo-liberalism lacking conceptual imagination to challenge the former's ascendancy[14]. This insight is further developed in the final chapter, which sheds light on the case study of the workings of *Liberté sans Frontières* (LSF), an organization founded by the French chapter of Doctors Without Borders. Whyte offers a vivid account of how LSF, in a conscious manner, invoked human rights language to counter the third-world project that at the time was fighting for a New International Economic Order (NIEO). For Whyte, LSF reflects a more general phenomenon of human rights NGOs adopting neo-liberal ideas. Contesting structuralist readings of third-world poverty, which were championed by the post-colonial human rights project, LSF depicted third-world poverty as a result of internal failures. Anti-totalitarian arguments were employed to discredit post-colonial states and to initiate a split in progressive opinion in Western countries. Whyte juxtaposes the 'utopia' envisioned by the third wordlist NIEO project, which also referred to human rights, against the individualist, anti-structuralist version of human rights propagated by major human rights NGOs.

4. BEYOND REDUCTIONISM

In a broader sense, ‘The Morals of Market’ compels the reader to carefully consider the interlinkages between the dominant human rights discourse and neo-liberalism. The narrative of the book is sober and does not make sweeping generalizations or crude reductionist claims. The author has

[14] See Moyn (n 6).

also been mindful to avoid the pitfall of determinism, which might refuse to acknowledge the possibility of having different understandings of human rights.

While acknowledging that there can be different forms of human rights discourses, Whyte advances a narrative that raises substantive questions about the 'powerless companion' thesis that absolves the mainstream human rights discourse of the charge of complicity with neo-liberalism. While being careful not to make an instrumentalist claim about the role of the human rights mainstream, a claim that might look like a conspiracy theory depicting the whole discourse as a device of neo-liberalism, the book presents a more refined argument highlighting convergences at the discursive level. The most powerful insight is highlighting the convergence between detaching politics from civil society, which is the main thrust of contemporary human rights activism, and the dichotomy neo-liberals create between the violence of politics and the 'sweetness of commerce'.

Furthermore, Whyte situates her consideration in the broader international context, highlighting the significance of the contradiction between the Global North and South in understanding both neo-liberalism and mainstream human rights. As she vividly shows, neo-liberalism, from its inception, has been a racial project, involving an imperial dimension in the sense that it saw the advent of the post-colonial sovereign project as a threat to Western dominance over the world economy. Neo-liberals aimed to contain post-colonial ascendancy by transforming third-world subjectivity and inculcating values of economic freedom from the outside.

How neo-liberal human rights emerged as a counter-project to the post-colonial project for economic independence offers fresh insights to understand the role Western-dependent NGOs play in the Global South. In countries like Sri Lanka, unfortunately, the dominant trend of criticism

of the functioning of such entities has been the nationalist critique premised on cultural essentialism. Whyte's critique belongs to a different strand. The progressive, left-leaning critique of human rights that Whyte represents tends to avoid cultural reductionism and draws our attention towards the larger economic and political structures at the international level associated with the hegemonic version of human rights.

Thus, we are invited to see the mainstream human rights discourse as a historical phenomenon that was invoked in opposition to the third-world demand for reforms in the international economic order. The mainstream international human rights discourse attributes the sufferings of third-world countries to internal factors in those societies, obscuring structural factors in the international political economy that perpetuate third-world impoverishment. Local NGOs funded by international (western) capital tend to act as associates of this larger global project, advancing an individualist, apolitical, moralist discourse of moral rights, which is potent in displacing more politically informed local discourses of emancipation and social change. To understand the complexity of this phenomenon, one has to go beyond cultural considerations and have a holistic understanding of international economic and political dimensions.

As the epilogue of the book demonstrates, Whyte is not confident about recent attempts at the United Nations level (like the Philip Alston report mentioned earlier in the article) to 'reform' the human rights discourse in a way that takes the inequality problem more seriously. Though it would have been interesting to hear more from the author about the possibility of rejuvenating the human rights discourse, she does not dedicate much space in the epilogue to discuss the matter in detail. This is understandable because the scope of the book is historical, and the epilogue is a brief reflection on contemporary discussions. Certain writers, like Manfred Nowak, have argued about the potential of such rejuvenation

by contrasting the UDHR framework, reflecting the logic of the social-democratic welfare state, with the free market logic of neo-liberalism.[15] In terms of distributive justice at the international level, we are yet to see a theorization of contemporary initiatives of the Global South linking human rights with their distinct interests.

These contemporary considerations are beyond the scope of Whyte's book. However, her well-researched account of the historical connections between neo-liberalism and human rights and the post-colonial and neo-liberal contestation to define human rights in the past, might offer some stimulating insights into contemporary questions from a more historically informed perspective.

[15] M Nowak, Human Rights or Global Capitalism: The Limits of Privatization (University of Pennsylvania Press, 2017).

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