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**CENTRE FOR THE STUDY OF HUMAN RIGHTS
FACULTY OF LAW, UNIVERSITY OF COLOMBO**



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Support to Justice Sector Project



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SRI LANKA JOURNAL OF HUMAN RIGHTS

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THE CENTRE FOR THE STUDY OF HUMAN RIGHTS

The Centre for the Study of Human Rights (CSHR) is an educational and research institution affiliated to the Faculty of Law, University of Colombo for the past 3 decades. Being attached to the highest-ranking University in Sri Lanka, and as per its mandate, the CSHR is committed to multidisciplinary research related to Human Rights, at international, national, and sub-national levels, in partnership with diverse stakeholders, including State agencies, civil society organizations, and international non-governmental organizations.

SUPPORT TO JUSTICE SECTOR PROJECT (JURE)

The Support to Justice Sector Project (JURE), is funded by the European Union and jointly implemented by UNDP and UNICEF Sri Lanka, facilitated by the Ministry of Justice. JURE takes a three-pronged approach to building a modern, efficient, and inclusive justice sector focused on accountability, transparency, efficiency and quality. Falling under UNDP's flagship portfolio, JURE contains a holistic package of support to the justice sector in Sri Lanka and is being implemented in close consultation and partnership with key justice sector institutions and stakeholders. This publication by CSHR is supported by JURE.

ABOUT SRI LANKA JOURNAL OF HUMAN RIGHTS

Sri Lanka Journal of Human Rights aims to expand the Human Rights agenda in Sri Lanka, by highlighting important and contemporary aspects of Human Rights. It is a bi-annual publication that is reviewed by an eminent panel of reviewers; and the contributors range from academics, legal practitioners, state officials, activists, and members of

civil society. The journal has an international focus and does not restrict itself to any regional or local jurisdiction.

Sri Lanka Journal of Human Rights invites unpublished research papers based on theoretical analysis and debates, policy analysis, and critiques on contemporary issues related to Human Rights and Social Sciences. It provides a forum for both junior and senior researchers in the discipline of Human Rights to share their latest research findings for policymaking concerning Human Rights, law and justice, and society through innovative and advanced methodology.

OBJECTIVE AND THE SCOPE OF THE JOURNAL

OBJECTIVES

The objective of publishing the Sri Lanka Journal of Human Rights is to facilitate research on Human Rights, in particular for scholars attempting to create a positive impact on the promotion and protection of Rights or those who aspire to pursue an academic career in the promotion and protection of Rights. It provides a space for academics and researchers to publish their findings. The Sri Lanka Journal of Human Rights aims to document and analyse Human Rights issues occurring globally.

The journal seeks to raise awareness about challenges to Human Rights and advocate for their transformation into positive changes. By in-depth analysis of the issues, the Sri Lanka Journal of Human Rights contributes to the global dialogue on human rights. It serves as a platform for scholarly research on various aspects of Human Rights, including legal, ethical, social, and cultural dimensions.

SCOPE

The Sri Lanka Journal of Human Rights encompasses a wide range of disciplines, including law, political science, sociology, anthropology, history, and more. This multidisciplinary approach of the journal helps to provide a comprehensive understanding of Human Rights issues. Moreover, the journal endeavors to address issues from various regions and highlight the interconnectedness of Human Rights challenges worldwide. The diversity of the topics covered in the journal reflects the complexity of the human landscape.

Sri Lanka Journal of Human Rights explores practical solutions to Human Rights challenges, incorporating case studies, best practices, and successful interventions. These insights can inform individuals and organizations working in the field of Human Rights. The journal actively promotes critical thinking and debate by publishing articles that offer different perspectives on Human Rights issues including critiques of existing frameworks and discussions about the cultural relativism of Human Rights

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**MESSAGE FROM THE DIRECTOR OF THE
CENTRE FOR THE STUDY OF HUMAN
RIGHTS AND EDITOR-IN-CHIEF**



It is with great pleasure that I, in my capacity as Director of the Centre for the Study of Human Rights and Editor-in-Chief of the Sri Lanka Journal of Human Rights, present this message for the inaugural issue of Volume Five, published in 2023. The theme of this volume is "Challenges to Upholding Human Rights in Sri Lanka," and it explores the following sub-themes:

- (a) State Obligation on Protecting Socio-Economic Rights in a Crisis
- (b) Challenges to Democracy in a Crisis
- (c) Sexual and Gender-Based Violence in a Crisis
- (d) Public Security and Human Rights in a Crisis
- (e) Protection and Wellbeing of Children in a Crisis
- (f) Facilitating Access to Justice in a Crisis

The Sri Lanka Journal of Human Rights is a multidisciplinary, annual, peer-reviewed research journal published by the Centre for the Study of Human Rights, Faculty of Law, University of Colombo. It seeks to publish high-quality research papers addressing issues related to human rights, law, justice, and their relevance to societies throughout the world.

Issue One of the Sri Lanka Journal of Human Rights features 13 articles based on the aforementioned sub-themes. The authors include distinguished national and international academics, graduates, and

professionals in the field of human rights, who share their latest research findings within the pages of this journal.

I take this opportunity to congratulate all the authors who have successfully presented their research on the chosen sub-themes. Through their contributions, they have demonstrated their knowledge, skills, and commitment to the field of human rights. The diverse group of authors includes practicing lawyers, academics, government and non-government officials, scholars, human rights activists, postgraduate students and other individuals passionate about human rights. Their participation enriches the journal and reflects the broad range of perspectives within the human rights field.

As the Editor-in-Chief of the Sri Lanka Journal of Human Rights 2023, I would like to express my sincere gratitude to all the authors who contributed to the publication. I am confident that they will continue to actively participate in the field of human rights and contribute to improving the human rights situation not only within Sri Lanka but across borders as well. I also wish to extend my deepest appreciation to the reviewers, editorial board, language editor, and CSHR staff members for their dedication and hard work in bringing this publication to life.

Professor Wasantha Seneviratne

*Chair Professor of the Department of Public and International Law
Faculty of Law
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*Director, Centre for the Study of Human Rights
Editor-in-Chief, International Journal of Human Rights*

MESSAGE FROM THE DEPUTY DIRECTOR



The Centre for the Study of Human Rights (CSHR) of the University of Colombo is the leading institution for human rights education programmes and researches in Sri Lanka. The objective of the journal publishing by the CSHR is to provide an opportunity to research human rights, to those whose activities will have a positive impact on the promotion and protection of Rights or those who wish to pursue a career in the promotion and protection of Rights.

As the Deputy Director of the CSHR, I take this opportunity to record my wishes and appreciation for all authors and editors for their contributions and commitments and successful completion of the above Journal. Also, I take this opportunity to appreciate the teamwork of the staff of CSHR.

I congratulate all the authors of the papers for the academic excellence of the research. I wish them well and hope and expect that their active and now-empowered participation in the field of human rights will not only contribute to improving the human rights situation in this country but beyond our borders as well.

M. A. M Hakeem

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*Deputy Director, Centre for the Study of Human Rights
University of Colombo*

**Sub-Theme (a):
State Obligations
on Protecting
Socio-Economic Rights
in a Crisis**

PROTECTING SOCIO-ECONOMIC RIGHTS: AN ANALYSIS OF OBLIGATION OF STATE IN A CRISIS SITUATION

Yumna Azeez*

ABSTRACT

The economic crisis in Sri Lanka has taken a toll on its citizenry, with those representing the low and middle classes bearing the brunt of it. The COVID-19 pandemic has exacerbated existing vulnerabilities and inequalities within the island, leaving many struggling to have their basic needs met. In the wake of the crisis, though discussions on protecting human rights were being revisited, it mainly served as lip service, and genuine change was unseen. This paper identifies the significant challenges faced by the State to uphold socio-economic rights, also known as the 'quality of life' rights of its people during a time of crisis, and the scope of its obligations in the protection of such rights. By resorting to secondary data explored predominantly via desk research on the right to education, food, and health, the findings showcase that despite having international and national laws in place - due to a lack of funding and coordination, mismanagement of resources and political instability - the socio-economic rights of the people are hampered with. Moreover, the country's reliance on foreign aid and loans has created a debt burden that further limits its ability to invest in socio-economic welfare programs.

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The paper recommends reforms to the substantive and procedural law associated with the human rights framework of the island to overcome these shortcomings and urges the Sri Lankan government and relevant authorities to take a prompt, comprehensive, and coordinated response to ensure that the needs of the most vulnerable groups of the population are prioritized. Failure to uphold the required standards results in a violation of human rights under international law.

Keywords: Economic crisis, Sri Lanka, Human rights, Socio-economic rights, international law

1. INTRODUCTION

Beginning in 2019, termed the ‘worst economic crisis since 1948’, Sri Lanka’s economic crisis is a consequence of multiple internal and external factors.¹ Though no single, uniformly accepted reason for the crisis can be attributed, the COVID-19 pandemic, in particular, struck the country hard, reducing remittances from the tourism industry. Other reasons included the 2019 Easter bombings, policy decisions of the Rajapakse administration,² and the Russian-Ukrainian conflict.³ In a comprehensive report released by the United Nations in September 2022, which discusses

¹ ‘Sri Lanka Declares Worst Economic Downturn in 73 Years’ (*France 24*, 30 April 2021). <<https://web.archive.org/web/20211015180503/https://www.france24.com/en/live-news/2021-04-30-sri-lanka-declares-worst-economic-downturn-in-73-years>> accessed 1 July 2023.

² ‘The Powerful Rajapaksa Dynasty Bankrupted Sri Lanka in Just 30 Months’ (*NDTV.com*, 28 April 2022) <<https://www.ndtv.com/world-news/the-powerful-rajapaksa-dynasty-bankrupted-sri-lanka-in-just-30-months-2927466>> accessed 1 July 2023.

³ ‘What Lies behind Sri Lanka’s Collapse?’ (*LSE Business Review*, 19 July 2022) <<https://blogs.lse.ac.uk/businessreview/2022/07/19/what-lies-behind-sri-lankas-collapse/>> accessed 1 July 2023.

the situation of human rights in Sri Lanka due to the crisis, the UN experts stated that the ongoing crisis is a result of officials' impunity for human rights abuse and urged the government to take more concrete measures in accountability.⁴ In June 2022, Ranil Wickremesinghe, then Prime Minister stated in parliament that the economy had collapsed, leaving it unable to pay for essentials.⁵ Teetering on the edge of financial insolvency, the country has halted the payment of its international debts.⁶ Regardless of the reasons, dire circumstances have left people struggling to make ends meet, the already poverty-stricken families bearing the brunt of the crisis. Commencing with an exposition of the crisis and briefly discussing the Economic, Social and Cultural Rights (ESCR), the paper identifies the effect an economic crisis has on this set of human rights and aims to discuss how it has exacerbated the existing challenges in upholding them. Despite the crisis posing a threat to the survival of many, it has also allowed rethinking of how states are held accountable for the fulfillment of their socio-economic rights obligations. Placing less emphasis on statistics, an examination of the State's obligation to preserve ESCR amidst the economic crisis is undertaken, posing the question as to the degree of state accountability when they fail to stand by their obligation. The paper ultimately presents recommendations for the appropriate

⁴ 'Sri Lanka at Critical Juncture: UN Report Urges Progress on Accountability, Institutional and Security Sector Reforms' (*OHCHR*, 2022). <<https://www.ohchr.org/en/press-releases/2022/09/sri-lanka-critical-juncture-un-report-urges-progress-accountability>> accessed 28 June 2023.

⁵ Marris S, 'Sri Lankan Economy Has "Completely Collapsed", Leader Says' (*Sky News*, 22 June 2022) <<https://news.sky.com/story/sri-lankas-pm-says-its-debt-laden-economy-has-collapsed-12638-329>> accessed 28 June 2023.

⁶ Bharatha Mallawarachi, 'Sri Lanka Foreign Reserves at Record Low, Politics in Crisis' (*AP News*, 4 May 2022) <<https://apnews.com/article/covid-business-health-economy-sri-lanka-a742a0ebe7a7e0734960-d68e49bed69a>> accessed 28 June 2023.

conduct of Sri Lanka in alignment with its international commitments pertaining to ESCR during post-crisis recovery.

2. SOCIO-ECONOMIC RIGHTS: AN OVERVIEW

This section highlights the legal framework of the ESCR, in the international and domestic contexts while analysing the nature and scope of them. The paper then presents the importance of this set of rights and the impact the economic crisis had on them by providing examples of the struggles faced by the people. Finally, the section discusses the challenge of upholding ESCR during a crisis and how existing difficulties are aggravated during such a time.

2.1 THE RIGHTS AND STANDARDS

ESCR includes the rights to adequate food, adequate housing, education, health, social security, taking part in cultural life, water and sanitation, and work.⁷ As per the Vienna Declaration and Program of Action (1993), all human rights are declared to be ‘universal, indivisible and interdependent and interrelated.’ They function in the same vein as the more widely publicised civil and political rights, which enshrine the conditions for full, free, and democratic societies. It has been argued that fulfilling ESCR is vital to fulfilling civil and political rights⁸, and is viewed through two lenses, freedom from the state and freedom through the state.⁹ Without

⁷ ‘Economic, Social and Cultural Rights’ (*OHCHR,2023*) <<https://www.ohchr.org/en/human-rights/economic-social-cultural-rights>> accessed 20 June 2023.

⁸ Constitutional Advisory Panel New Zealand's Constitution: A Report on a Conversation (2013) 50.

⁹ ‘The Role of States | Icelandic Human Rights Centre’ (*Icelandic Human Rights Centre,2023*) <<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas- and-fora/human-rights-actors/the-role-of-states>> accessed 20 July 2023.

respecting both sets of rights, a society cannot claim to treat individual lives as being of equal importance.¹⁰

There are multiple principal international instruments detailing ESCR; the most notable being the Universal Declaration of Human Rights (1948). While UDHR made no distinction between socioeconomic rights and civil and political rights, the distinction appeared in the context of the deepening Cold War tensions between the East and the West. The market economies of the West tended to put greater emphasis on the latter, while the centrally planned economies of the Eastern bloc highlighted the importance of the former. This led to the adoption of two separate Covenants.

for each set of rights.¹¹ The United Nations International Covenant on Economic, Social, and Cultural Rights (1966) has been an important instrument in detailing the rights, their scope, and the obligations of states. In 2008, an Optional Protocol to the covenant was introduced. The Limburg Principles on the Implementation of the ESCR (1986) and the Maastricht Guidelines on Violations of ESCR (1997) have been powerful tools for international legal experts in the area as well. More recently, the Maastricht Principles on Extraterritorial Obligations of States on these rights were adopted to define the scope and nature of State obligations to individually and jointly respect, protect and fulfill ESCR beyond their

¹⁰ David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press, 2007) 57–74.

¹¹ ‘Key Concepts on ESCRs - Are Economic, Social and Cultural Rights Fundamentally Different from Civil and Political Rights?’ (*OHCHR2023*).
<<https://www.ohchr.org/en/human-rights/economic-social-cultural-rights/escr-vs-civil-political-rights>> accessed 15 November 2023.

borders.¹² There has been renewed attention to the importance of ESCR, particularly in the context of the 2030 Agenda for Sustainable Development and the Covid-19 pandemic and resulting crises worldwide.¹³

Sri Lanka ratified the Covenant on ESCR in 1980 but has not adopted enabling legislation in its effect, unlike the International Covenant on Civil and Political Rights Act No. 56 of 2007 which the country introduced after ratifying the Covenant on Civil and Political Rights in 1980.¹⁴ Though the country recognizes some scope of socioeconomic rights under Directive Principles of State Policy, vide Article 27, they are nonjusticiable. Though the ESCR are a justiciable set of rights,¹⁵ being a dualist country, mere ratification of international treaties does not allow the automatic incorporation of such standards into the domestic legal framework in the absence of enabling legislation.

2.2 IMPORTANCE OF ESCR AND THE EFFECT OF AN ECONOMIC CRISIS ON ESCR

Being central to human survival and development, the ESCR are also known as the ‘quality of life’ rights, protecting the vital interests of individuals in their autonomy and well-being. In the recent renaissance of the philosophy of human rights, these rights have found a secure place as

¹² Constitutional Advisory Panel New Zealand's Constitution: A Report on a Conversation (2013) 50.

¹³ ‘Home - the Geneva Academy of International Humanitarian Law and Human Rights’ (*Geneva Academy*) <https://www.geneva-academy.ch/joomlatools-files/docman-files/Research%20Brief%20Economic>.

¹⁴ Jayasekera B and Edirisinghe A, ‘Implementation of ICCPR in Sri Lanka: Impediments and Prospects’ Proceedings in law, 9th International Research Conference-KDU, Sri Lanka (2016) 70-71.

¹⁵ Shivani Verma, Justiciability of Economic Social and Cultural Rights Relevant Case Law (2005) 13-15.

ideas of freedom, dignity and moral justice being offered as justifications.¹⁶ Since human rights are indivisible, interdependent, and interrelated, setbacks in any of these rights leading to low scores are intimately interconnected and have compound effects on individuals. According to Frank Michelman, the importance of socio-economic rights is rooted in the Rawlsian notion of legitimacy which flows from a system in which free, equal, and diverse individuals could reasonably assent to a political system. Without protections for socio-economic rights, such a legitimacy test cannot be met as it is unlikely individuals so conceived would have reason to assent to any polity in which their most basic interests in living a decent life may be abrogated.¹⁷

Regardless of the origin, crises feature combinations of adverse conditions; slump in investments, a falling GDP, high deficits and debt ratios, loss of income, unemployment, shrinkage of state provisions and poverty.¹⁸ Taking into account the crisis from the Sri Lankan context, as the country was plunged into economic downfall, citizens experienced crippling shortages of basic amenities such as fuel, gas, medicines and painfully long power outages. At least five individuals have died while standing in line for essentials, and to date, a total of 75 individuals have reached Tamil Nadu in India seeking economic refuge.¹⁹ As a result,

¹⁶ Langford M, "Socio-Economic Rights: Between Essentialism and Egalitarianism" in Reidar Maliks and Johan Karlsson Schaffer (eds), *Moral and Political Conceptions of Human Rights: Implications for Theory and Practice* (Cambridge University Press 2017) 258.

¹⁷ Frank Michelman, Socio-economic Rights in Constitutional Law: Explaining America Away, 6 *Int'l J. Const. L.* 1 (2008) 11–13.

¹⁸ Sapountzaki K, 'The Interplay between Socio-Economic Crises and Disaster Risks: Examples from the Developed and Developing World' Contributing Paper to Global Assessment Report (2019) 1-31.

¹⁹ 'Sri Lanka: Rights under Attack during Economic Crisis' (*Amnesty International*, 6 May 2022) <<https://www.amnesty.org/en/latest/news/2022/05/sri-lanka-rights-under-attack-during-economic-crisis/>> accessed 27 July 2023.

citizens have been facing multiple challenges at various levels and to various degrees, their socio-economic rights being jeopardized at every turn. The number of people affected by the socio-economic crisis and the extent of its impacts are still unknown. While some assessments on the extent of the crisis and how it is affecting the population exist, the information available to understand the scale of what is happening is limited. The economic crisis is disproportionately impacting the rights of specific groups of people, particularly the poorest and most marginalized, who are the most vulnerable because they already suffer from discrimination, abuses of power and other existing inequities.²⁰ Inflation rose to 73.7% in September 2022, and a staggering 94.9% for food, gravely impacting access to food, healthcare, earning capabilities and education while existing social security programmes were deemed to be inadequate.²¹ With the rising cost of living, 86% of households were forced to reduce their food intake or nutritional food items, leading to concerns being raised among medical practitioners regarding the nutrition levels of the country as almost 17% of children under five are facing malnutrition, with signs of wasting and stunting.²² Moreover, many were struggling to buy essential medicines, which the government had previously provided. While education had been disrupted due to the pandemic, the fuel shortages led to the closure of schools for further duration. Although online sessions were provided, internet access and

²⁰ 'Human Rights and the Global Economic Crisis Consequences, Causes and Responses' (CESR, 2009) <http://www.cesr.org/sites/default/files/CESR-Human_Rights_and_the_Global_Economic_Crisis.pdf>.

²¹ Ermiza Tegal & Niyanthini Kadirgamar, 'The Crisis in Sri Lanka: Human Rights in Peril' (HRP, 16 November 2022) <<https://hrp.law.harvard.edu/the-crisis-in-sri-lanka-human-rights-in-peril/>> accessed 28 July 2023.

²² 'Sri Lanka: Economic Crisis Puts Rights in Peril' (Human Rights Watch, 17 August 2022) <<https://www.hrw.org/news/2022/08/16/sri-lanka-economic-crisis-puts-rights-peril>> accessed 5 August 2023.

electronic devices could not be afforded by low-income families. With costs increasing with a stagnant income, many parents had to make the difficult decision of stopping their children's education midway.²³ The crisis has forced people to adapt to a new reality where prospects for a good job are limited, incomes are lowered and eroded by inflation, and opportunities for a better future are becoming increasingly rare.²⁴

2.3 CHALLENGES IN UPHOLDING ESCR IN A CRISIS

Upholding human rights has been a challenge in law and implementation even in ordinary circumstances. Resource constraints, lack of initiative, balancing competing rights and interests, and lack of cooperation and coordination to ensure vulnerable populations are protected serve as a few challenges that governments face. In a crisis, upholding socio-economic rights becomes even more challenging due to the existing difficulties arising from the lacunae in the substantive and procedural laws but also since some are inclined to regard socioeconomic entitlements as dispensable against the urgent task of rescuing the economy from the brink of collapse. Moreover, in hopes of remedying the crisis, governments tend to adopt and pursue restrictive approaches (austerity measures) predominantly based on budgetary cuts in social expenditure. This often leads to a chain reaction whereby cutting off social services increases poverty and existing structural inequalities and makes it more difficult for people to exercise their violation of ESCR resulting in increased discrimination and marginalization. Often running the risk of further

²³ Buddhika Samaraweera, 'School Dropouts Rise amidst Crisis' (*The Morning*, 2023) <<https://www.themorning.lk/articles/212770>> accessed 20 July 2023.

²⁴ Martin Raaiser, 'Sri Lanka's Crisis Offers an Opportunity to Reset Its Development Model' (*World Bank Blogs*, 27 February 2023). <<https://blogs.worldbank.org/endpovertyinsouthasia/sri-lankas-crisis-offers-opportunity-reset-its-development-model>> accessed 20 July 2023.

deepening the crisis and undermining social rights, the effect of such measures has been considered a challenge in upholding human rights during a crisis.²⁵

3. CONCEPT OF STATE OBLIGATION

The concept of state obligation is discussed first through its nature and scope and then answers the question of whether a state is excused from its international obligations when a crisis occurs. The paper also comments on the obligation of wealthier states and their role, bounded on good faith to aid countries struggling during crisis situations.

3.1 NATURE AND SCOPE

In a nutshell, States must respect, protect and fulfil the ESCR of their people, but the obligations of states are expressed differently from treaty to treaty.²⁶ The covenant on ESCR identifies three specific obligations; progressive realization,²⁷ three core obligations that are immediate such as ensuring the minimum essential levels of enjoyment;²⁸ prohibition of retrogression,²⁹ prohibition of discrimination³⁰ and the use of maximum

²⁵ Hunko, A., *Austerity Measures—A Danger for Democracy and Social Rights*. Parliamentary Assembly Doc 12 (2012) 948.

²⁶ Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (2013) 50.

²⁷ Article 2 para 1 of the International Covenant on ESCR, General Comment No. 3 para 9, *The Nature of States Parties Obligations*, UN Doc. E/1991/23(SUPP) (1991).

²⁸ General Comment No. 3 *The Nature of States Parties Obligations*, para. 10.

²⁹ General Comment No. 14, para. 32; CESCR General Comment No. 15, para. 42; CESCR General Comment No. 17, para. 42; CESCR General Comment No. 19, para. 64.

³⁰ Ignacio Saiz, "Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis", *Journal of Human Rights Practice* 1:2 (2009) 277-283.

available resources^{31,32} To clarify the scope of the state's obligations, they are considered under three limbs, namely: respect, protect and fulfil.³³ The first limb urges governments to refrain from interfering with the enjoyment of rights,³⁴ the second directs governments to prevent others from interfering with the enjoyment of the right³⁵ while the final limb instructs states to adopt appropriate measures towards the full realization of these rights.³⁶ Any failure to meet the minimum core obligations is assumed to be a *prima facie* violation, unless the state can demonstrate that “every effort has been made to use all resources that are at its disposition to satisfy, as a matter of priority, those minimum obligations.”³⁷ Moreover, to protect these rights, States must manage their fiscal affairs accordingly and adopt economic policies to ensure that the citizenry is not barred from exercising their human rights even during times of economic crisis.³⁸

³¹ CESCR General Comment No. 13, para. 45; CESCR General Comment No. 19, para. 42.

³² Radhika Balakrishnan, Diane Elson, James Heintz and Nicholas Lusiani, “Maximum Available Resources & Human Rights”, Center for Women’s Global Leadership, Rutgers University (2011) 5-19.

³³ Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2010) 242.

³⁴ SERAC and CESR v. Nigeria (2001) AHRLR 60.

³⁵ Case of the Mapiripán Massacre vs Colombia, Series C No. 122, Inter-American Court of Human Rights (IACrHR), 15 September 2005.

³⁶ R.K.B. v. Turkey (Communication No. 28/2010).

³⁷ Robert E Robertson, *Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social, and Cultural Rights*, *Human Rights Quarterly* 16:4 (1994) 693-714.

³⁸ ‘About Human Rights and Foreign Debt’ (OHCHR,2019) <<https://www.ohchr.org/en/special-procedures/ie-foreign-debt/about-human-rights-and-foreign-debt>> accessed 20 July 2023.

3.2 DOES A CRISIS AFFECT THE SCOPE OF STATE RESPONSIBILITY?

Under international law, there is no express permission for States to derogate from their ESCR obligations during emergencies, disasters or armed conflicts,³⁹ implying the continued application of these rights in times of economic growth and stagnation, or the present case, an economic and/or financial crisis. For example, the reference to “resource availability” reflects a recognition that the realization of these rights and a state’s compliance with its obligation to take appropriate measures are assessed in the light of the resources—financial and others—available to it. A lack of resources cannot justify inaction or indefinite postponement of measures in the implementation of these rights as states are expected to undertake every effort to improve the enjoyment of ESCR even when resources are scarce.⁴⁰ This has been established under South African and Indian jurisprudence – especially in the cases of *Grootboom*,⁴¹ *Mazibuko*⁴² and *Francis Coralie Mullin*⁴³ - that States cannot evade their ‘basic’ or ‘minimum’ obligations by pleading a lack of resources.⁴⁴ While socioeconomic rights entail the expenditure of resources, they also entail a threshold level below which state conduct cannot sink. The question is

³⁹ Giacca, Gilles, 'Limitations on Conventional Economic, Social, and Cultural Rights on Security Grounds', *Economic, Social, and Cultural Rights in Armed Conflict* (Oxford University Press, 2014) 67-104.

⁴⁰ Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights* (Fact Sheet No. 33, 2008) 14.

⁴¹ *Government of the Republic of South Africa. & Ors v Grootboom & Ors* 2000 (11) BCLR 1169 (CC).

⁴² *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).

⁴³ *Francis Coralie Mullin vs The Administrator, Union of India* 1981 SCR (2) 516.

⁴⁴ Mario Gomez, Dinesha Samararatne and Conor Hartnett, ‘Constitutionalizing Economic and Social Rights in Sri Lanka (CPA Working Papers On Constitutional Reform No. 7, 2016) 9.

whether this expectation remains even in a crisis, and if so, to what degree would a state be accountable in the event of failing to uphold the obligations set upon them?

Protection of socio-economic rights often becomes most important during times of crisis as further erosion and retrogression of these rights and the disproportionate impacts of austerity measures need to be avoided. Difficulties in meeting government obligations in relation to ESCR indeed become particularly acute in cases of structural—and, even more so, in cases of foundational—crises.⁴⁵ Article 4 (1) of the Covenant on ESCR stipulates that State Parties may take measures derogating from their obligations under the present Covenant to a certain extent. However, derogation cannot be inconsistent with the state's other obligations under international law and should be non-discriminatory. The Covenant allows for derogation only so that States can work towards the restoration of normalcy where full respect for the ESCR are secured once again. This must be the predominant objective of a state party that relies on this general limitation clause. However, there have been instances where states have clung to Article 4, and not terminated the derogations as soon as the situations have ceased.⁴⁶ Such actions by State Parties also raise the question of whether states can derogate from ESCR in times of emergencies that threaten the life of the nation in the first place, although the ICESCR does not contain a derogation clause specifically.⁴⁷ In this regard, it is necessary to consider certain conceptual features of the

⁴⁵ Nicholas Lusiani and Sergio Chaparro. "Assessing Austerity: Monitoring the Human Rights Impacts of Fiscal Consolidation." Center for Economic and Social Rights (2018) 9-12.

⁴⁶ Amrei Müller, Limitations to and Derogations from Economic, Social and Cultural Rights, 9:4 Human Rights Law Review (2009) 557-601.

⁴⁷ *ibid.*

obligations that such rights entail in order to address how these duties may shift in times of crisis. For example, the doctrine of proportionality could assist in determining under what conditions the obligations to realize socio-economic rights may justifiably be limited.

When the UN Committee on Economic, Social and Cultural Rights (CESCR) released an open letter in early 2012 addressing the global financial and economic crises of 2008 in relation to the protection of covenant rights, it was considered long overdue. Being a brief but highly significant intervention, the letter noted that State parties should avoid implementing policy decisions which might lead to the denial or infringement of the covenant rights and proposed guidelines that the state should follow in policy proposals.⁴⁸ Apart from being contrary to the obligations under the covenant, the denial of such rights may lead to social insecurity and political instability.

Ben Warwick, in his examination of the open letter, provides critical insight in '*Socio-economic Rights During Economic Crises: A Changed Approach to Non-retrogression.*' Though the letter did offer some insight as to how states should act, the content of guidance given had largely neglected the Committee's work which spanned over two decades.⁴⁹ The letter substantially recast the state's obligations attached to ESCR and set down altered tests and new rhetoric. This marked a radical departure from the CESCR's traditional position, being to afford States general flexibility in protecting Covenant rights but not permit exceptional powers or the

⁴⁸ UNHR Office of the High Commissioner CESCR/48th/SP/MAB/SW.

⁴⁹ A Nolan, NJ Lusiani and C Courtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression In Economic, Social and Cultural Rights in a Nolan (Ed), Economic and Social Rights after the Global Financial Crisis (CUP 2014) 121,132.

authority to substantially weaken rights protection in times of crisis. To what extent this new attitude of the committee can be translated to the current economic crisis, is the question.

Traditionally situations of emergency can be addressed either by employing the standard 'everyday' system of rules or by allowing some emergency exceptions to those rules.⁵⁰ These approaches have respectively been termed the 'business as usual/strict enforcement model' and 'accommodation' models. Such theories, although developed in the context of security emergencies, have also been applied to emergencies of an economic nature.⁵¹ The former demands that ordinary legal norms and rules continue to be followed strictly and adhered to with no substantive change or modification,⁵² not envisaging measures of derogation, claiming special emergency powers, or suspending normal legal framework.⁵³ The latter can broadly be thought of as allowing the relaxation or suspension of legal rules and norms. Determining which approach is 'best' has been a matter of extensive debate.

Despite the strict enforcement model being drilled into the ICESCR, the 2008 crisis had set the committee in favour of a framework of accommodations. There now seems to be significant latitude given to States in times of economic crisis, and the level of State obligations during such crises appears to have shifted as well. However, it is noteworthy that though States were granted significant additional flexibility, the

⁵⁰ EA Posner and A Vermeule, 'Accommodating Emergencies' *Stanford Law Review* (2003) 60.

⁵¹ WE Scheuerman, 'The Economic State of Emergency' 21 *CardozoLR* (1999) 1869.

⁵² O Gross and F Ni Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006) 485.

⁵³ Gross, O. and Aolain, F.N., 'To Know Where We Are Going, We Need To Know Where We Are: Revisiting States Of Emergency. *Human Rights: An Agenda for the Twentieth-First Century* (1999) 79-114.

Committee had not given greater attention to monitoring their actions. Thus, there is little clarity on the manner in which States may take advantage of this additional leeway in times of crisis. While a 'conceptual shift' may not threaten the advancement of socio-economic rights, the general applicability of, and substantial freedom afforded by the changes should raise concerns.

3.3 OBLIGATION OF WEALTHIER STATES

Sri Lanka being a small state is particularly vulnerable to exogenous shocks. Though the country has its individual set of obligations towards its people, the crisis also manifested the need and potential for a profound shift in mindset around transnational human rights obligations – that is, the obligations of wealthier states to respect, protect, and contribute to the fulfilment of these rights beyond their borders.⁵⁴ The question that needs to be asked is not whether developed nations should help smaller states, but what the best ways are in which developed states can help.⁵⁵ The impact of the 2008 crisis was transnational, highlighting the need to frame accountability in global terms and to assert more vigorously the notion of state responsibility. It was a stark reminder that the protection and fulfilment of socio-economic rights do not stop at national borders.

4. RECOMMENDATIONS

Throughout the ongoing recovery process from the COVID-19 pandemic, Sri Lanka, like all nations, faces significant challenges. The effects of the economic crisis on the mix have left people forgoing the enjoyment of

⁵⁴ International Solidarity and the Extraterritorial Application of Human Rights: Prospects and Challenges' (*OHCHR*,2022).
<<https://www.ohchr.org/en/documents/thematic-reports/ahrc5037-international-solidarity-and-extraterritorial-application-human>> accessed 12 July 2023.

⁵⁵ David Hulme, *Should Rich Nations Help the Poor?* (John Wiley & Sons, 2016).

their ESCR immensely. Being a state bound by international law to respect, protect, and fulfill its citizens' ESCR, Sri Lanka must undertake necessary measures to uphold these rights while addressing the economic crisis. This paper proposes that Sri Lanka prioritizes constitutionalizing of ESCR, adopts austerity measures that are considerate of ESCR, and evaluates economic stimulus packages that comply with ESCR during the nation's rebuilding efforts.

4.1 LEGISLATIVE INTERVENTION OF ECSR

For the fresh and bold articulation of the transformative principles of ESCR, these rights need to be taken beyond the courts and into the legislature if they are to be an effective instrument for accountability, as well as a mobilizing language that speaks to people's rightful anger and discontent.⁵⁶ To ensure that socio-economic rights are protected via judicial means⁵⁷ and that States are held accountable, international legal experts have urged for the constitutionalizing of the ESCR arguing that constitutional commitment to social justice is required to bring about political stability and instill credibility in governance.⁵⁸ According to Cecile Fabre, transforming a moral right into a constitutional right means that the interest protected by the moral right is important enough to legally disable legislators from enacting laws which violate such moral rights.⁵⁹

⁵⁶ M Heywood, 'South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health', 1(1) *Journal of Human Rights Practice* (2009) 14–36.

⁵⁷ Walter Kälin & Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press, 2009) 117-18.

⁵⁸ Mario Gomez, Dinesha Samararatne and Conor Hartnett, 'Constitutionalizing Economic and Social Rights In Sri Lanka (CPA Working Papers On Constitutional Reform No. 7, 2016) 9.26-30.

⁵⁹ Eckart Reidegeld & Cécile Fabre: *Social Rights under the Constitution* 42(1) *Politische Vierteljahresschrift*, (2001) 144-145.

Moreover, the ongoing economic crisis warrants constitutional theory and jurisprudence to explore new avenues to protect social rights, as it once did in 2008 during the global economic crisis.⁶⁰ According to the detailed report of the Public Representations Committee on Constitutional Reform in 2016, experts emphasized human rights discourses moving onto new frontiers and the need to incorporate fully-fledged socio-economic rights. It was further noted the economic development model of the State cannot be used as an excuse for discharging its obligations and demonstrating results.⁶¹ Lastly, monitoring and giving flesh to the principles associated with state obligations to fulfil ESCR requires interdisciplinary tools of analysis⁶², apart from constitutional reform. It would be prudent for Sri Lanka to draw inspiration from the 1996 South African Constitution where a series of socio-economic rights that impose obligations upon the state to uphold human rights are contained in Sections 26 and 27. Despite constitutional inclusion, structural impediments will remain, and it is naive to think otherwise. However, cementing human rights in the supreme law of the land is the first step on the long road to achieving “dignity, equality and freedom” for all.

4.2 ADOPTION OF ESCR-FRIENDLY AUSTERITY MEASURES

To protect the already dwindling rights of the people, the state must be mindful when implementing austerity measures intended to combat budget

⁶⁰ X Contiades and A Fotiadou, Social rights in the age of proportionality: Global economic crisis and constitutional litigation 10(3) International Journal of Constitutional Law (2012) 660-686.

⁶¹ The Need to Incorporate Economic, Social and Cultural Rights in the Future Constitution of Sri Lanka the Human Rights Commission of Sri Lanka (HRCSL) <<https://hrsl.lk/wp-content/uploads/2020/02/Need-to-Incorporate-Economic-Social-and-Cultural-Rights-in-the-Future-Constitution-of-Sri-Lanka-E.pdf>>.

⁶² UN Office of the High Commissioner for Human Rights, Training Manual on Human Rights Monitoring (2001) Chapter 8.

deficits that had been augmented by the crisis since they often have the effect of causing retrogression in the enjoyment of socio-economic rights. Not only is the ability of individuals to exercise their human rights diminished, but that of States to fulfill their obligations to protect those rights as well. In the adoption of such measures, the burden of proof shifts to the implementing State to provide justification for it.⁶³ States should demonstrate the existence of a compelling State interest; the necessity, reasonableness, temporariness, and proportionality of the austerity measures;⁶⁴ the exhaustion of alternative and less restrictive measures;⁶⁵ the non-discriminatory nature of the proposed measures;⁶⁶ the protection of minimum core content of the rights;⁶⁷ and the genuine participation of affected groups and individuals in decision-making processes,⁶⁸ to ensure compliance with their human rights obligations when adopting austerity measures.⁶⁹ To comply with their human rights obligations, States parties to the International Covenant on Economic, Social and Cultural Rights must justify austerity measures by demonstrating that such measures actually protect the rights outlined in the Covenant particularly the rights of the most vulnerable. This requires States to demonstrate that all other alternatives have been exhausted and that the measures are necessary,

⁶³ O.P Vasylychenko and O.S. Lotiuk. Topical Issues of The Impact of Austerity Measures On Human Rights: The Case Of Europe (2018) *Financial & Credit Activity: Problems of Theory & Practice* 3(26) 479-482.

⁶⁴ Ariranga G. Pillay, Chairperson, Committee on Economic, Social and Cultural Rights, Letter to States Parties, 16 May 2012.

⁶⁵ CESCR General Comment No. 13, para. 45; CESCR General Comment No. 19, para. 42.

⁶⁶ CESCR General Comment No. 19, para. 42.

⁶⁷ Committee on Economic, Social and Cultural Rights, concluding observations on the fifth report of Spain, adopted by the Committee at its 48th session (E/C.12/ESP/CO/5).

⁶⁸ CESCR General Comment No. 19, para. 42.

⁶⁹ N Pillay, Report on Austerity Measures and Economic and Social Rights (Geneva: Office of the High Commissioner for Human Rights, 2013) 12-13.

proportionate, respectful of minimum core obligations and non-discriminatory.⁷⁰ To balance state interests and human rights, it is imperative that austerity measures introduced to the country be based on a human rights assessment, be open for public scrutiny and feedback in an inclusive and participatory process, and all alternatives be explored. Unfortunately, Sri Lanka seems to have disregarded the impact of austerity measures on people's rights when it approved a four-year, USD 2.9 billion extended fund facility arrangement from the International Monetary Fund. The subsequent implementation of these unpopular measures - including further tax and energy tariff increases, reducing public spending (including cutting subsidy programs), and efforts to privatize SOEs is likely seen to exacerbate civil unrest.⁷¹

4.3 ADOPTION OF ECONOMIC STIMULUS PACKAGES WHICH RESPECT ECSR

The outline of a human rights approach to the crisis would not be complete without reference to the very particular role that human rights standards should play in domestic economic stimulus packages. Particularly relevant in this regard are the aforementioned principles of non-discrimination, transparency, accountability and participation. Economic stimulus packages must not in any way discriminate. Governments should evaluate the distributional consequences of the packages across society to ensure that equitable benefits are experienced across lines of gender, ethnicity,

⁷⁰ CESCR General Comment No. 13, para. 45; CESCR General Comment No. 19, para. 42.

⁷¹ Lam A and Cotillon H, 'Sri Lanka Secures IMF Funding; Austerity Measures Likely to Worsen Civil Unrest Risks' (*IHS Markit*, 24 March 2023). <<https://www.spglobal.com/marketintelligence/en/mi/research-analysis/sri-lanka-secures-imf-funding-austerity-measures-likely-to-wor.html>> accessed 14 November 2023.

sexual orientation and class. Extra measures may need to be taken to promote substantive equality for those historically marginalized and especially vulnerable. Gender-sensitive policies, for example, require women's participation in the design and implementation of stimulus packages. In response to COVID-19, Sri Lanka put in place social protection remarkably quickly and reached a majority of the population with fiscal stimulus. Yet, many people missed out on support due to the current design of Sri Lanka's social protection system, which was already failing to reach much of the vulnerable population even before this crisis.⁷²

It is because of such possibility decisions throughout the life of the stimulus must also be open to question and based on participation and transparency to strengthen public accountability. One particular area of priority for governments in their fiscal stimulus packages should be the stabilization and strengthening of social protection systems for all, especially the most vulnerable. The right to social security recognizes the state's obligation to immediately establish a basic social protection system and progressively expand it over time according to the country's available resources. The strengthening of such systems both fulfils the short-term duty to protect people from an economic downturn and contributes to the longer-term economic priority of investing in people. Yet at present, not all countries have the ability to invoke economic stimulus packages to avoid regressive measures in the fulfilment of rights and to boost their national economies. While guaranteeing that such packages meet basic

⁷² Anotnio Bubbico and Louise Moreira Daniels, 'How Has COVID-19 Impacted Sri Lanka, and How Could Emergency Universal Lifecycle Transfers Help?' (*Development Pathways*, 13 November 2020) <<https://www.developmentpathways.co.uk/blog/protecting-people-and-the-economy-from-the-worst-and-the-role-of-emergency-universal-lifecycle-transfers-a-could-be-story-from-sri-lanka/>> accessed 14 November 2023.

human rights standards at home, governments should likewise uphold their obligation to international cooperation by filling the finance gap in the global South. It is important that, in an effort to stabilize employment and livelihoods, stimulus packages do not expand demand along patterns of consumption that are outdated and untenable in both rich and poor countries alike.⁷³

5. CONCLUSION

A major responsibility is attached when a state ratifies international treaties and undertakes to respect, protect and fulfill the socio-economic rights of its people. The circumstances in which the state is expected to uphold their obligation are irrelevant and only the exercise of rights can be derogated, not the state's responsibility. Thus, crisis or no crisis, the 'quality of life' rights of the population ought not to be disregarded. There exists an urgent need for legislative reform, and measures taken to counter the effects of the crisis must encompass a human rights approach. It is true that the introduction of new measures, amendment of existing legislation or revisiting the interpretation of existing legislation, in the framework of an overall policy goal of economic recovery and restoration of sound public finances, may put the human rights system under serious stress, especially in the current situation despite its requirement being fervent.⁷⁴ Thus, to wade through dangerous waters, the collaborative efforts of the Sri Lankan authorities, and non-state actors along the international community are vital to mitigate the impact of the economic crisis which

⁷³ Aldo Calidari, A human rights-based response to the financial and economic crisis, Social Watch Report (2009) 16.

⁷⁴ Conseil de l'Europe, 'The Impact of the Economic Crisis and Austerity Measures on Human Rights in Europe' (2016) 38.

has cruelly stripped away people's access to their rights so that we may venture into a brighter future.⁷⁵

REFERENCES

Journal articles printed:

Balakrishnan, R, Elson, D, Heintz, J, & Lusiani, N, 'Maximum Available Resources & Human Rights' (2011) Center for Women's Global Leadership, Rutgers University, 5-19.

Contiades, X and Fotiadou, A (2012): 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) *International Journal of Constitutional Law* 10(3) 660-686.

Gross, O. and Aolain, F.N (1999): 'To Know Where We Are Going, We Need to Know Where We Are: Revisiting States Of Emergency' in *Human Rights: An Agenda for the Twentieth-First Century*, 79-114.

Heywood, M (2009): 'South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health' (2009) *Journal of Human Rights Practice* 1(1) 14-36.

Lusiani, N and Chaparro, S (2018): 'Assessing Austerity: Monitoring the Human Rights Impacts of Fiscal Consolidation' (2018) Center for Economic and Social Rights, 9-12.

Michelman, F (2008): 'Socio-economic Rights in Constitutional Law: Explaining America Away' (2008) *Int'l J. Const. L.* 6(1) 11-13.

Müller, A (2009): 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) *Human Rights Law Review* 9(4) 557-601.

Posner, EA and Vermeule, A (2003): 'Accommodating Emergencies' (2003) *Stanford Law Review* 60.

Reidegeld, E & Fabre, C (2001): 'Social Rights under the Constitution' (2001) *Politische Vierteljahresschrift* 42(1) 144-145.

⁷⁵ 'Sri Lanka: Human Rights Compliant Recovery Measures Critical to Stop Spiraling Hunger and Poverty' (*Amnesty International*, 4 October 2022) <<https://www.amnesty.org/en/latest/news/2022/10/sri-lanka-human-rights-compliant-recovery-measures-critical-to-stop-spiraling-hunger-and-poverty/>> accessed 5 August 2023.

Robertson, RE (1994): 'Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social, and Cultural Rights' (1994) *Human Rights Quarterly* 16(4) 693-714.

Saiz, I (2009): 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis' (2009) *Journal of Human Rights Practice* 1(2) 277-283.

Scheurman, WE (1999): 'The Economic State of Emergency'' (1999) *Cardozo Law Review* 1869.

Vasylchenko, OP and Lotiuk, OS (2018): 'Topical Issues of The Impact of Austerity Measures On Human Rights: The Case Of Europe' (2018) *Financial & Credit Activity: Problems of Theory & Practice* 3(26) 479-482.

Conference proceedings paper printed:

Jayasekera B.K.M and Edirisinghe A (2016): 'Implementation of ICCPR in Sri Lanka: Impediments and Prospects' in *Proceedings in Law, 9th International Research Conference-KDU, Sri Lanka*, 70-71.

United Nations Human Rights Office of the High Commissioner (2012): 'Committee on Economic Social and Cultural Rights, 48th Session' /SP/MAB/SW.

Verma S (2005): 'Justiciability of Economic Social And Cultural Rights Relevant Case Law' in *The International Council On Human Rights Policy, Review Meeting, Rights and Responsibilities of Human Rights Organizations Geneva*, 13-15.

Case Law

Case of the Mapiripán Massacre vs Colombia, Series C No. 122, Inter-American Court of Human Rights (IACrtHR), 15 September 2005.

Francis Coralie Mullin vs The Administrator, Union of India (1981) SCR (2) 516.

Government of the Republic of South Africa. & Ors v Grootboom & Ors (2000) 11 BCLR 1169 (CC).

Mazibuko and Others v City of Johannesburg and Others (2010) 4 SA 1 (CC).

R.K.B. v. Turkey (Communication No. 28/2010).
SERAC and CESR v. Nigeria (2001) AHRLR 60.

International Conventions:

International Covenant on Economic, Social and Cultural Rights (1966).

Books:

Bilchitz, D (2007): 'Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights' Oxford University Press.

De Schutter, O (2010): 'International Human Rights Law: Cases, Materials, Commentary' Cambridge University Press, 242.

Gilles, G (2014): 'Limitations on Conventional Economic, Social, and Cultural Rights on Security Grounds' in Economic, Social, and Cultural Rights in Armed Conflict, Oxford University Press, 67-104.

Gross, O and Aolâin, FN (2006): 'Law in Times of Crisis: Emergency Powers in Theory and Practice' Cambridge University Press, 485.

Hulme, D (2016): 'Should Rich Nations Help the Poor?' John Wiley & Sons, 136.

Kälin, W & Künzli, J (2009): 'The Law of International Human Rights Protection' Oxford University Press, 117-18.

Langford, M (2017): 'Socio-Economic Rights: Between Essentialism and Egalitarianism' in Reidar Maliks and Johan Karlsson Schaffer (eds), Moral and Political Conceptions of Human Rights: Implications for Theory and Practice, Cambridge University Press, 258.

Lusiani, NJ and Curtis, C (2014): 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic, Social and Cultural Rights' in Nolan, A. (ed), Economic and Social Rights after the Global Financial Crisis, Cambridge University Press, 121, 132.

Cooperate Author printed publication or report:

Calidari, A (2009): 'A human rights-based response to the financial and economic crisis' in Social Watch Report, 16.

Chairperson, Pillay, AG (2012): 'Committee on Economic, Social and Cultural Rights, Letter to States Parties' 2.

Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the Fifth Report of Spain' adopted by the Committee at its 48th session (E/C.12/ESP/CO/5).

Conseil de l'Europe (2016): 'The Impact of the Economic Crisis and Austerity Measures on Human Rights in Europe', 38.

Gomez, M; Samararatne, D and Hartnett, C (2016): 'Constitutionalizing Economic and Social Rights In Sri Lanka' in Center for Policy Alternatives, Working Papers On Constitutional Reform No. 7, 9.

Office of the United Nations High Commissioner for Human Rights (2008): 'Frequently Asked Questions on Economic, Social and Cultural Rights' Fact Sheet No. 33, 14.

Pillay, N (2013): 'Report on Austerity Measures and Economic and Social Rights' Geneva: Office of the High Commissioner for Human Rights, 12-13.

Sapountzaki K. (2019): 'The Interplay between Socio-Economic Crises and Disaster Risks' in Contributing Paper to Global Assessment Report, 1-31.

UN Office of the High Commissioner for Human Rights (2011): 'Training Manual on Human Rights Monitoring' Chapter 8.

Government reports and acts of parliament:

Hunko A, UK (2012): 'Austerity Measures—A Danger for Democracy And Social Rights' Parliamentary Assembly Document 12, 948.

The Human Rights Commission, Sri Lanka: 'The Need to Incorporate Economic, Social and Cultural Rights in the Future Constitution of Sri Lanka' Available at: <<https://hrcls.lk/wp-content/uploads/2020/02/Need-to-Incorporate-Economic-Social-and-Cultural-Rights-in-the-Future-Constitution-of-Sri-Lanka-E.pdf>> accessed on 25.07.2023.

Websites

‘International Solidarity and the Extraterritorial Application of Human Rights: Prospects and Challenges’ (OHCHR, 2022) Available: <<https://www.ohchr.org/en/documents/thematic-reports/ahrc5037-international-solidarity-and-extraterritorial-application-human>> accessed 12 July 2023.

‘About Human Rights and Foreign Debt’ (OHCHR, 2019) Available: <<https://www.ohchr.org/en/special-procedures/ie-foreign-debt/about-human-rights-and-foreign-debt>> accessed 20 July 2023.

‘Economic, Social and Cultural Rights’ (OHCHR, 2023) Available: <<https://www.ohchr.org/en/human-rights/economic-social-cultural-rights>> accessed 20th June 2023.

‘Human Rights and the Global Economic Crisis Consequences, Causes and Responses’ (CESR, 2009) Available: <http://www.cesr.org/sites/default/files/CESR-Human_Rights_and_the_Global_Economic_Crisis.pdf> accessed 20 July 2023.

Lam A and Cotillon H, ‘Sri Lanka Secures IMF Funding; Austerity Measures Likely to Worsen Civil Unrest Risks’ (IHS Markit 24 March 2023) <<https://www.spglobal.com/marketintelligence/en/mi/research-analysis/sri-lanka-secures-imf-funding-austerity-measures-likely-to-wor.html>> accessed 14 November 2023.

‘Sri Lanka Declares Worst Economic Downturn in 73 Years’ (France 24, 30 April 2021).

‘Sri Lanka: Economic Crisis Puts Rights in Peril’ (Human Rights Watch, 17 August 2022).

‘Sri Lanka: Human Rights Compliant Recovery Measures Critical to Stop Spiraling Hunger and Poverty’ (Amnesty International, 4 October 2022) Available: <<https://www.amnesty.org/en/latest/news/2022/10/sri-lanka-human-rights-compliant-recovery-measures-critical-to-stop-spiraling-hunger-and-poverty/>> accessed 5 August 2023.

‘Sri Lanka: Rights under Attack during Economic Crisis’ (Amnesty International, 6 May 2022).

‘The Powerful Rajapaksa Dynasty Bankrupted Sri Lanka in Just 30 Months’ (NDTV.com, 28 April 2022) Available: <<https://www.ndtv.com/world-news/the-powerful-rajapaksa-dynasty->

[bankrupted-sri-lanka-in-just-30-months-2927466](#)> accessed 1st July 2023.

‘The Role of States | Icelandic Human Rights Centre’ (Icelandic Human Rights Centre, 2023).

‘What Lies behind Sri Lanka’s Collapse?’ (LSE Business Review, 19 July 2022) Available:
<<https://blogs.lse.ac.uk/businessreview/2022/07/19/what-lies-behind-sri-lankas-collapse/>> accessed 1st July 2023.

Available: <<https://blogs.worldbank.org/endpovertyinsouthasia/sri-lankas-crisis-offers-opportunity-reset-its-development-model>> accessed 20 July 2023.

Available: <<https://hrp.law.harvard.edu/the-crisis-in-sri-lanka-human-rights-in-peril/>> accessed 28 July 2023.

Available: <<https://web.archive.org/web/20211015180503/>>
<<https://www.france24.com/en/live-news/2021-0430-sri-lanka-declares-worst-economic-downturn-in-73-years>> accessed: 1st July 2023.

Available: <<https://www.amnesty.org/en/latest/news/2022/05/sri-lanka-rights-under-attack-during-economic-crisis/>> accessed 27 July 2023.

Available: <<https://www.geneva-academy.ch/joomlatools-files/docman-files/Research%20Brief%20Economic>> accessed 20th July 2023.

Available: <<https://www.hrw.org/news/2022/08/16/sri-lanka-economic-crisis-puts-rights-peril>> accessed 5 August 2023.

Available: <<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas- and-fora/human-rights-actors/the-role-of-states>> accessed 20th July 2023.

Available: <<https://www.themorning.lk/articles/212770>> accessed 20 July 2023.

Buddhika Samaraweera, ‘School Dropouts Rise amidst Crisis’ (The Morning, 2023).

Ermiza Tegal & Niyanthini Kadirgamar, ‘The Crisis in Sri Lanka: Human Rights in Peril’ (HRP, 16 November 2022).

Martin Raaiser, ‘Sri Lanka’s Crisis Offers an Opportunity to Reset Its Development Model’ (World Bank Blogs, 27 February 2023).

The Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy).

FOREIGN DEBT AND HUMAN RIGHTS: A CASE STUDY OF SRI LANKA

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ABSTRACT

States such as Sri Lanka are indebted to State and non-state actors since independence. Sri Lanka witnessed worse forms of financial crisis in the year 2022. The crisis led to serious human rights violations. The crisis directly violated the economic, social, and cultural rights enshrined in the International Covenant on Social and Cultural Rights (ICESCR). One of the reasons towards Sri Lanka's inability to gain economic sustainability since independence is the financial mismanagement in the State and the conditionalities imposed by the external money lenders. Conditionality's such as increased privatization, reduction of subsidies and public welfare, free-floating exchange rates, increased taxes, and reduction of restrictions on imports and other conditionalities imposed by the IMF and external lenders resulted in increased vulnerability of the economy. The increased financial mismanagement by the leaders of the country has increased the debt and resulted in a deeper economic crisis violating the rights and freedoms. Although Sri Lanka ratified ICESCR, less importance has been given to the adoption of the enabling domestic legislation of ICESCR. It has not ratified the Optional Protocol on ICESCR which enables Sri Lankans to access the individual complaint mechanism. Although, the United Nations has recognized

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that there are direct linkages between foreign debt and human rights, the Guiding Principle on Foreign Debt and Human Rights has no legal authority to hold States accountable for human rights violations. United Nations, IMF and other States who are lending money to Sri Lanka require imposing conditionality's such as ratification of the optional protocol to the ICESCR to enable individual complaints mechanism and to conduct Human Rights Impact Assessments in development Projects. UN and external money lenders require ensuring transparency in the utilization of foreign funds. A UN fact finding mission on Human Rights violations due to financial mismanagement is a necessity to prevent such human rights violations in the future.

Keywords: Foreign Debt, Human Rights, Sri Lanka, Financial Crisis, IMF

1. INTRODUCTION

Sri Lanka was declared as an independent State in 1948. Although independence was granted the State was not in a position to bear its expenses and witnessed budget deficits. It borrowed money from both external financial and non-financial institutions and States. The State borrowed money for concessionary and non-concessionary interest rates. The International Monitoring Fund (IMF) was one of the prime money lenders since independence for a concessionary interest rate. Subsequent to the declaration of the State as a middle-income country in 2010 by the International Monitoring Fund¹, the foreign concessionary loans facility declined from 85% -100% to 45%-50% out of total foreign loans during

¹ Central Bank of Sri Lanka (2010) Annual Report. Page 3, chapter 01. Available at <https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/publications/annual_report/2010/en/5_Chapter_01.pdf> accessed on 16.04.2022.

the period of 2010 to 2017 and the non-concessionary loans increased to an average of 50% of the total foreign debt. Most of the borrowings were invested in infrastructure development Projects.

The economic crisis has led to violation of people's right to a standard life, right to health, education, and right to life and other social and economic rights. The crisis led to public protests and subsequently protestors were disbursed using force violating the freedom of assembly and declaring emergency. The crisis resulted in serious violations of both civil and economic rights of the people.

The research was carried out with the central research question 'What can the international human rights law do about foreign debt leading to human rights violation in Sri Lanka?' The methodology consisted with an analysis of the nature of the foreign debt and its conditionality's and how it contributed towards the recent financial crisis and the contribution towards human rights violations. Finally, the provisions of the international human rights instruments and mechanisms are analyzed to identify the feasibility of international intervention towards upholding the rights of the people who are affected by the crisis in Sri Lanka.

2. FOREIGN DEBT AND DEVELOPMENT

2.1. SRI LANKA AND FOREIGN DEBT

This section analyses the historical patterns of borrowing on funds since independence. It is important to understand the pattern of the borrowings at various historical junctures by the successive Governments to understand the nature of commitments made by the Governments to ensure financial stability.

An analysis of the history of public debt indicates that Sri Lanka has been borrowing money from various international money lending financial institutions and from States. The financial policies of Sri Lanka have changed based on the Governments in power. Each Government has their own policies and practices. An analysis of Sri Lanka's revenue since independence indicates that it has been heavily depending on both domestic and foreign loans and financial facilities.

The financial lenders imposed certain conditionality's when lending money to Sri Lanka. This conditionality's varied from State to non-State actors. The lenders provided funds with certain interests of profit or some other means. Results of certain conditionality's were witnessed after many years of lending and borrowing. The International Monitoring Fund (IMF) has been a key player in providing financial support to Sri Lanka under concessionary interest rates. However, there were certain conditionality's imposed by IMF during each term of lending. With the liberalization of the economy in 1977, the imports increased and exports declined. According to the Authors of Financial Programming and Policy, the case of Sri Lanka² tea, rubber and coconut exports declined from 88% in 1970 to 31% in 1990 and an increase of direct foreign investments and exports from the garment and textile industry was witnessed. The study states that the Government invested heavily in infrastructure development Projects causing high loss in revenues, and public sector was carrying out most of the affairs in the country. The IMF supported the reforms proposed by the Government in 1977, which focused on increasing domestic savings,

² Karlik.J.R, Bell.M.W, Martin.M, Rajcoomar.S, and Sisson.C.A (1996): Financial Programming and Policy, the case of Sri Lanka. IMF Institute. Washington. D. C. International Monitoring Fund. DOI: <<https://doi.org/10.5089/9781557755797.071>> accessed: 18th April 2022.

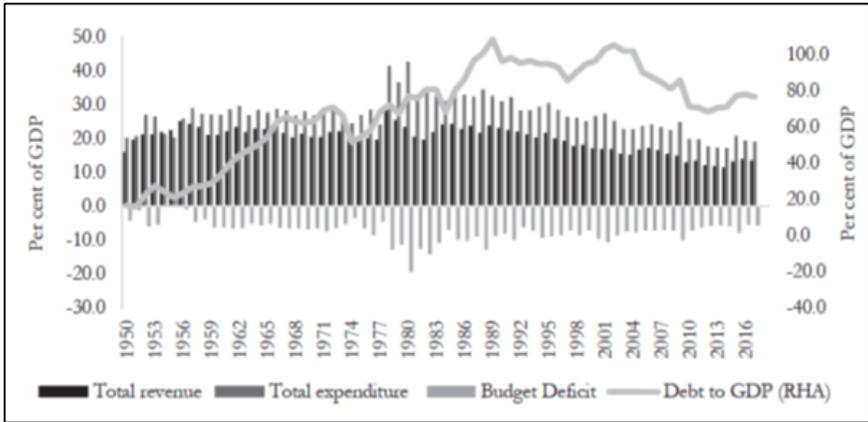
renovating the agricultural sector, expanding employment opportunities and industrial manufacture, and increasing balance payments. In subsequent facilities, IMF requested the Sri Lankan Government to introduce new reforms such as the removal of all restrictions related to trade and payments and import licensing requirements. Among other conditionalities, floating exchange rate, reforms to agricultural prices and export taxes, liberalization by making changes to prices of consumer goods, and public services, reducing subsidies for food and fertilizer, and liberalization of interest rates. This resulted in increased inflation from 1977 onwards and increased the budget deficit from 1% to 9% of GDP during 1978-1980. The influence of the IMF in economic policy in Sri Lanka has led the country to opt for imports without any restrictions and it resulted in the decline of the export income obtained from the three crops before 1977. Through the liberalization of the economy, Sri Lanka became a severely indebted country.

(Priyadarshana.T.R.2019)³ analyses the public debt patterns of Sri Lanka after independence and the budget deficit. The study illustrates the patterns of foreign debt since independence. The following figure I⁴ illustrates the nature of the budget deficit since independence.

³ Priyadarshana.T.R (2019) Is Public Debt Harmful Towards Economic Growth? New Evidence from Sri Lanka. Staff studies, Central Bank of Sri Lanka, Available at <https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/statistics/otherpub/staff_studies_Vol_49_2019_No_1.pdf> accessed 16.04.2022.

⁴ Priyadarshana.T.R (2019) Is Public Debt Harmful Towards Economic Growth? New Evidence from Sri Lanka. Staff studies, Central Bank of Sri Lanka, Available at <https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/statistics/otherpub/staff_studies_Vol_49_2019_No_1.pdf> accessed on 16.04.2022].

Figure I – Government Revenue, Expenditure, budget deficit & debt to GDP

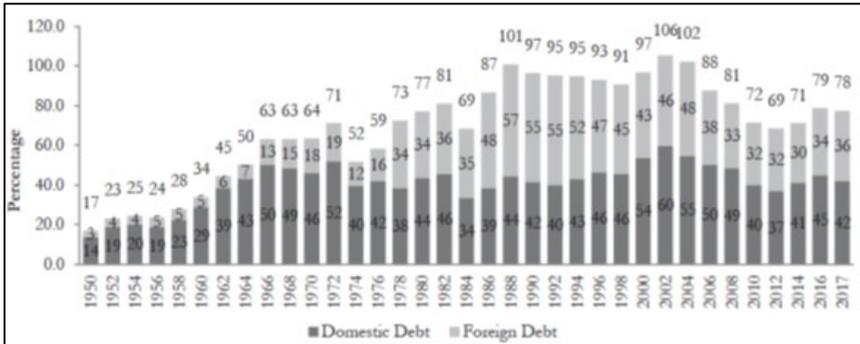


Source: Data from ‘Is Public Debt Harmful Towards Economic Growth? New Evidence from Sri Lanka’. Staff studies, Central Bank of Sri Lanka (2019)

Although the foreign debt was less than 20% of the GDP before the liberalization of the economy in 1977, it increased to 30%-60% after 1977. After 1977, the total public debt increased to 70% to 110% of the GDP. The following figure depicts the outstanding Government debt as a percentage of GDP (figure II⁵).

⁵ Priyadarshana.T.R (2019) Is Public Debt Harmful Towards Economic Growth? New Evidence from Sri Lanka. Staff studies, Central Bank of Sri Lanka, Available at <https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/statistics/otherpub/staff_studies_Vol_49_2019_No_1.pdf> accessed 16.04.2022.

Figure II – Outstanding Government debt as a percentage of GDP



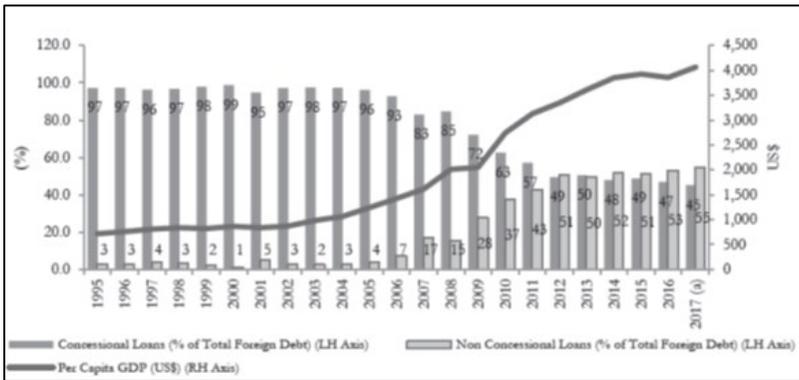
Source: Data from ‘Is Public Debt Harmful Towards Economic Growth? New Evidence from Sri Lanka’. Staff studies, Central Bank of Sri Lanka (2019)

Sri Lanka managed to obtain many foreign loans on concessionary terms. However, after Sri Lanka was determined as a middle-income country in 2010 by the International Monitoring Fund⁶, the foreign concessionary loans facility declined from 85% -100% to 45%-50% out of total foreign loans during the period of 2010 to 2017, and the non-concessionary loans increased to an average of 50% of the total foreign debt as illustrated in the figure III⁷. Opting for non-concessionary loans means that the State has to pay more interest rates and it leads to an increase of debt and more revenue is channeled towards payment of debt.

⁶ Central Bank of Sri Lanka (2010) Annual Report. Page 3, chapter 01. Available at <https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/publications/annual_report/2010/en/5_Chapter_01.pdf> accessed 16.04.2022].

⁷ Priyadarshana.T.R (2019) Is Public Debt Harmful Towards Economic Growth? New Evidence from Sri Lanka. Staff studies, Central Bank of Sri Lanka, Available at <https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/statistics/otherpub/staff_studies_Vol_49_2019_No_1.pdf> accessed on 16.04.2022.

Figure III- Per capita GDP Vs Foreign debt concessional



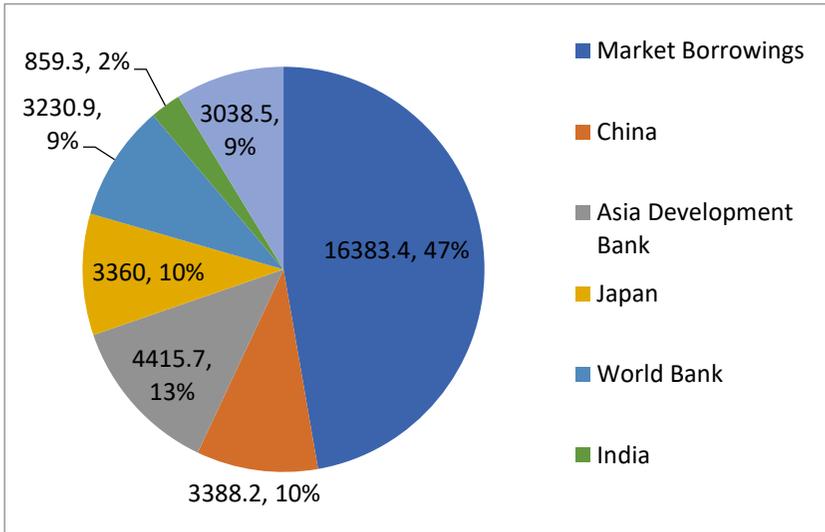
Source: Data from ‘Is Public Debt Harmful Towards Economic Growth? New Evidence from Sri Lanka’. Staff studies, Central bank of Sri Lanka (2019)

By the end of April 2021, Sri Lanka’s foreign debt was 35.1 billion USD. The analysis of the statistics of Department of External Resources⁸ indicates that during the first four months of 2021, a sum of 460.4 million USD was paid as interest and USD 520.6 million was paid as part of the principal payments. An analysis of the State and non-State actors who provided financial support indicates that as of end of April 2021, 47% of the debt stock were market borrowings, 13% from Asian Development bank, 10% from China, 10% from Japan, 9% from World bank, 2% from India and 9% from other sources as illustrated in the following figure IV⁹. A significant amount of the borrowings is for infrastructure development projects. An analysis of the effectiveness of these projects and its revenue generation provides the impact of these borrowings in the economy.

⁸ Department of External Resources, ‘Foreign Debt Summary (as of end April 2021)’ <http://www.erd.gov.lk/index.php?option=com_content&view=article&id=102&Itemid=308&lang=en> accessed 15 April 2022.

⁹ Department of External Resources, ‘Foreign Debt Summary (as of end April 2021)’ <http://www.erd.gov.lk/index.php?option=com_content&view=article&id=102&Itemid=308&lang=en> accessed 15 April 2022.

Figure IV – Debt stock by major lenders and currencies (US\$ million)



Source: Department of External Resources, Sri Lanka, ‘Foreign Debt Summary (as of end April 2021)’

2.2. FOREIGN DEBT AND DEVELOPMENT PROJECTS

Most of the major borrowings were targeted towards infrastructure projects. The money that was borrowed was not utilized for the benefit of the people’s welfare. The financial support provided by China for certain infrastructure projects failed to generate profits and it contributed to the increase in foreign debt¹⁰. Sri Lanka embarked on many infrastructure development projects during the post-war period. The Chinese Exim Bank that supported¹¹ the Mattala Airport Development Project was one such Project which generated less revenue and it is one of the least used airports

¹⁰ Gupta.S, ‘Chinese loans for white elephant projects pushed SL and PAK into present crisis’ <<https://www.hindustantimes.com/world-news/chinese-loans-for-white-elephant-projects-pushed-sl-and-pak-into-present-crisis-101649128210464.html>> accessed 17 April 2022.

¹¹ Aiddata, ‘China Eximbank provides RMB 1.3 billion government concessional loan for the Mattala Rajapaksa international airport project’ <<https://china.aiddata.org/projects/33369/>> accessed 14 April 2022.

in the world¹². Similarly, the Hambantota Port Project was carried out with a non-concessionary loan from the Chinese Exim Bank with an interest rate of 6.3%¹³. However, due to the difficulty of repayment of the loan and considering the loss the Government leased the port to China, Sri Lanka is paying the loan with interest to China for the Hambantota Port¹⁴. The Lotus Tower is another such Chinese funded project which was supposed to open in 2012 and was delayed and was opened in 2019. The project started with around 80% its funding from Chinese Exim Bank on an interest rate of 4.1%¹⁵. Although the Lotus Tower was opened in 2022 the necessity for such a tower is being questioned. It is also alleged that the Government obtained loans to increase the foreign currency inflow and to robust its foreign currency reserves and settle short term borrowings¹⁶. The infrastructure projects caused massive displacement of people in the Hambantota Port Project, and it affected the people's lives and livelihood immensely. Encroachment of forest reserves for relocation of the people

¹² Shephard.W, 'The Story Behind the World's Emptiest International Airport' <<https://www.forbes.com/sites/wadeshepard/2016/05/28/the-story-behind-the-worlds-emptiest-international-airport-sri-lankas-mattala-rajapaksa/?sh=2530ba977cea>> accessed 13 September 2022.

¹³ Aiddata, 'China Eximbank reschedules \$306,726,736 buyer's credit loan to Sri Lanka Ports Authority (SLPA) for Hambantota Port Development Project (Linked to Project ID#33256' < <https://china.aiddata.org/projects/85184/>> accessed 14 April 2022.

¹⁴ Moramudali.U, 'The Hambantota port deal: myths and realities' <<https://thediplomat.com/2020/01/the-hambantota-port-deal-myths-and-realities/>> accessed 15 April 2022.

¹⁵ Aiddata, 'China Exim Bank Provides \$88.6 Million Buyer's Credit Loan For Colombo Lotus Tower Project' <<https://China.Aiddata.Org/Projects/33380/>> accessed 14.04.2022.

¹⁶ Moramudali.U, 'The Hambantota port deal: myths and realities' <<https://thediplomat.com/2020/01/the-hambantota-port-deal-myths-and-realities/>> accessed 15 April 2022.

and obstruction of elephant corridors through development projects has resulted in a human-elephant conflict¹⁷.

The major financial borrowings are invested in projects that are not directly benefited to the citizens, and the lending institutions provide money towards such development projects and the ability to use or invest such borrowings for other means is not feasible due to the conditionalities imposed by the lending institutions. These borrowings increase the debt of the country.

3. FOREIGN DEBT LEADING TO HUMAN RIGHTS VIOLATIONS

The UN and international Human Rights bodies have identified that foreign debt and its conditionalities are a tool for human rights violations. In the year 1998, the United Nations appointed an independent expert on foreign debt to address the effects of foreign debt on human rights and matters related thereto. The initiative was taken to negate the inability of UN treaties to minimize the impact of foreign debt on human rights and the continuous failure of the money lending institutions to end debt in receiving countries. The Guiding Principles on Foreign Debt and Human Rights¹⁸ and Guiding Principles for assessing the Human Rights Impact of Economic Reform Policies were adopted to minimize and prevent the implications caused by external debt and violation of human rights. The

¹⁷ Themirror.Lk, 'Human-Elephant conflict: Empty promises and white Elephants?' <<https://www.themorning.lk/human-elephant-conflict-empty-promises-and-white-elephants/>> accessed 18 April 2022.

¹⁸ UN. Human Rights Council. Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, particularly Economic, Social, and Cultural Rights. Guiding Principles on Foreign Debt and Human Rights. A/HRC/20/23 <<https://digitallibrary.un.org/record/725337?ln=en>> accessed 28th November 2023.

Guiding Principles on Foreign Debt and Human Rights (GPDFHR) stresses the obligations of the UN. According to Articles 1(3) and 56 of the United Nations Charter (UNC), one of the purposes of the United Nations is to achieve international cooperation in addressing economic, social, cultural, or humanitarian issues and promoting human rights. It stresses the right of everyone to a social and international order in which rights and freedoms under the Declaration are recognized. It also emphasizes the obligation and commitment of the international community under various binding and non-binding instruments. Although many non-binding¹⁹ and binding international instruments stress the need of international cooperation in promoting human rights, the State and non-State actors have given less priority towards a human rights-based approach. The GPDFHR lays out a detailed guideline outlining the responsibilities of borrowing States and lending institutions and the obligations of protecting and promoting Human Rights. The core objective of the GPDFHR is to minimize and prevent human rights violations in the borrowing States and to ensure debt sustainability in the borrowing States through international cooperation and to realize Human Rights, particularly economic, social and cultural rights.

Further, to ensure that the borrowing States are deploying the funds in meaningful development projects and lending States and institutions are deploying the money in meaningful development, the Guiding Principles for assessing the Human Rights Impact of Economic Reform Policies were adopted. It emphasizes the importance of Human Rights Impact

¹⁹ Article 28 of the Universal Declaration of Human Rights promotes social and international order to realize the rights in the Declaration. Article 3(3) of the Declaration on the Right to Development emphasizes the State's responsibility to eradicate barriers to development and enhance international cooperation to achieve development while respecting the equality of States and observance of human rights.

Assessments (HRIAs) by States during an economic crisis and normal times²⁰ and it requests the non-State actors to refrain from imposing unfavorable conditionalities on receiving States²¹. Articles 2, 22 and 23 of the International Covenant on Economic, Social and Cultural rights further stresses the responsibility of the international community, States, the United Nations, its subsidiary organs and specialized agencies to provide technical and economic support for Governments to attain the objectives of the Covenant. There are many other treaty provisions²² which emphasize on the need of international cooperation towards the achievement of human rights.

An analysis of the provisions and violations caused to the people in Sri Lanka under the ICESCR provides a clear glimpse of the violations of ESC rights by the foreign debt and its conditionalities. Sri Lanka ratified the ICESCR in 1980. However, as it has not adopted the enabling legislation to the Covenant. Not adopting an enabling legislation shall not mitigate the responsibilities under the Covenant as the State has signed and ratified the Covenant.

The conditionalities imposed by IMF has impacted people's lives in different ways. The pressure to reduce government subsidies and increase privatization has resulted in shrinking the budget allocations for social welfare, health, free education and other welfare facilities. The non-availability of medicines in public hospitals, a decreased quality of free

²⁰ UN Guiding principle on foreign debt and human rights (Adopted 10 April 2011) UN Doc (A/HRC/20/23) Principle 17.

²¹ UN Guiding principle on foreign debt and human rights (Adopted 10 April 2011) UN Doc (A/HRC/20/23) Principle 14.

²² Article 4 of the Convention on the Rights of the Child, Article 4(2), and Article 32 of the Convention on the Rights of Persons with Disabilities also stress that the State's responsibility of ensuring the rights in the Conventions and for international cooperation for the realization of the rights.

education and non-availability of teachers and facilities has paved the way to involuntarily opt for private health care and education. Although many impacts of the conditionalities were witnessed by the people of Sri Lanka, the major implications were witnessed after the financial crisis in 2021-2022.

Articles 13 and 14 of the ICESCR stresses the need of providing free primary education; and the General Comments to the Article 13 of ICESCR states that the State should provide quality education. According to Article 12 of the ICESCR, States must provide the highest attainable standard of physical and mental health. The General Comments to Article 12 of ICESCR²³ states that in ensuring the right to health, the availability, accessibility, acceptability and quality must be ensured. Making available a mere health system is not adequate to fulfill State responsibility. Article 11 of the Covenant emphasizes the State parties to “recognize the right of everyone to an adequate standard of living for himself and family, including adequate food, clothing and housing and to continuous improvement of living conditions”. The General Comments to Article 11²⁴ of ICESCR emphasizes respect, protection and fulfillment as State obligations. The obligation to fulfill indicates the States responsibility to facilitate the process.

²³ UN. Committee on Economic, Social and Cultural Rights (22nd sess. 2000. Geneva). General comment no. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) <<https://digitallibrary.un.org/record/425041?ln=en>> accessed 27th November 2023.

²⁴ Office of the High Commissioner for Human Rights. CESCR General Comment No. 12: The Right to Adequate Food (Art. 11) Adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights, on 12 May 1999 (Contained in Document E/C.12/1999/5) <<https://www.refworld.org/pdfid/4538838c11.pdf>> accessed 27th November 2023.

From the year 2021 to 2022, the people of Sri Lanka were experiencing continuous electricity interruptions, shortages of fuel and increase of fuel prices by more than 100%²⁵, the shortage of domestic gas supplies, the shortage of medicine and other medical equipment's, essential goods, postponement of examinations due to the shortage of paper²⁶, the shortage of fertilizers, the increase of the prices of all essential items, increased foreign debt, continuous budget deficiency and the shortage of foreign currency reserves²⁷.

The high inflation rates increased the prices of essential goods. The annual inflation rate - according to the GDP implicit deflator - has been steady and recorded less than 7% from the year 2013 and increased to an all-time high of 48.8% in the year 2022²⁸. According to the National Consumer Price Index (NCPI) the headline inflation in September 2022, reported as 73.7% and it has been reported to be more than 50% until March 2023²⁹. Meanwhile Sri Lanka's foreign currency reserves have declined to 1.7 billion USD in March 2022 impeding the capability to pay for essential imports³⁰. This resulted in import restrictions of essential items and

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- ²⁵ France24.com, 'Sri Lanka fuel prices up ahead of IMF talks' <<https://www.france24.com/en/live-news/20220418-sri-lanka-fuel-prices-up-ahead-of-imf-talks>> accessed 18 April 2022.
- ²⁶ Presse.A.F, 'Sri Lanka cancels school exams over paper shortage as financial crisis bites'. <<https://www.theguardian.com/world/2022/mar/20/sri-lanka-cancels-school-exams-over-paper-shortage-as-financial-crisis-bites>> accessed 22 March 2022.
- ²⁷ Chughtai.A, Thowfeek. R, Ali.M, 'Infographic: Sri Lanka's economic crisis and political turmoil'. <<https://www.aljazeera.com/news/2022/4/7/infographic-sri-lankas-economic-crisis-and-political-turmoil>> accessed 07 April 2022.
- ²⁸ The World Bank. 2023. <<https://databank.worldbank.org/reports.aspx?source=2&series=NY.GDP.DEFL.KD.ZG&country=LKA>> accessed 03rd November 2023.
- ²⁹ Central Bank of Sri Lanka. 2023. Consumer Price Inflation. <<https://www.cbsl.gov.lk/en/measures-of-consumer-price-inflation>> accessed 27th November 2023.
- ³⁰ CEIC Data, 'Sri Lanka Foreign Exchange Reserves' <<https://www.ceicdata.com/en/indicator/sri-lanka/foreign-exchange-reserves>> accessed 24.04.2022.

medicines. Further, with inflation, people's ability to purchase food and other essential items are limited. Subsequent to the receipt of the IMF support in 2023, essential goods such as eggs, which was not imported before, are being imported to reduce the price of the goods. This has seriously impacted the local egg producers and endangered the entire egg production industry. The import-oriented economy endangered many other local industries too. The liberalized economy and other conditionalities shall further endanger the local products and increase more volatility. The huge queues to obtain fuel, gas and other essential items has brought the State's affairs to a standstill and has witnessed people losing their lives while being in the queues³¹. The financial crisis led to the violation of ESC rights; and by depriving the right to life of the people, it paved the way towards violation of Civil and Political Rights.

However, as discussed above, the money lenders were reluctant to carry out HRIAs for development projects and most of the borrowings were deployed in infrastructure projects and its contribution towards poverty alleviation and upholding ESC rights were seldom.

The conditionalities were very unfavorable for the Government and to gain public popularity. Consecutive Governments negated from abiding by the conditionalities and opted for popular decisions as in the year 2020. In 2019-2020, the Government of Sri Lanka was required to obtain a financial support from the IMF, but they refrained from seeking support. Although the IMF provided low interest rates, certain unpopular conditionalities proposed by the IMF on free floating exchange rates,

³¹ De Silva.D. & Perera.N. 'Fourth fuel-queue death in Sri Lanka in under 48 hours' <<https://economynext.com/fourth-fuel-queue-death-in-sri-lanka-in-under-48-hours-91890/>> accessed 18 April 2022.

reduced public subsidies, an increase of taxes and other reasons prevented the Government from seeking a loan from the IMF³². Finally, the Government reached the IMF after significant damage was done to the economy. The IMF recommended introducing reforms on strengthening VAT and income taxes, reforms to reduce loss-making public enterprises, privatization; and the introduction of a comprehensive strategy to debt sustainability, a flexible exchange rate which is determined by the market and strengthening social safety nets³³. The country witnessed similar conditionalities since the liberation of the economy in 1977. An analysis of the IMF reports since 1977 indicates that it has been continuously requesting privatization, reduction of the public sector, the liberalization of the economy, an increase of tariffs, reduction of taxes on exports and other means³⁴. These recommendations by the IMF have less or no impact on sustaining the economy by domestic production. The import-oriented economy has minimized gross domestic production since it cannot compete with the market price of the imported goods. The IMF has delayed its support during the crisis to the State, sighting assurance of debt sustainability³⁵. This paved the way for more human rights violations. Sri

³² Wignaraja, G. (2022). China's Dilemmas in Bailing Out Debt-Ridden Sri Lanka. East-West Center. <http://www.jstor.org/stable/resrep39675>.

³³ International Monitoring Fund. 'Sri Lanka, 2021 Article IV consultation – press release staff report and statement by the Executive Director for Sri Lanka' <<https://www.imf.org/en/Publications/CR/Issues/2022/03/25/Sri-Lanka-2021-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-515737>> Accessed 18 April 2022.

³⁴ Karlik.J.R, Bell.M.W, Martin.M, Rajcoomar.S, and Sisson.C.A (1996): Financial Programming and Policy, the case of Sri Lanka. IMF Institute. Washington. D. C. International Monitoring Fund. DOI: <<https://doi.org/10.5089/9781557755797.071>> accessed 18th April 2022.

³⁵ Reuters, 'IMF says any loan to Sri Lanka requires debt sustainability' <<https://www.cnbc.com/2022/04/20/imf-says-any-loan-to-sri-lanka-requires-debt-sustainability.html>> accessed 20 April 2022.

Lanka was downgraded by the international credit agencies³⁶ and it influenced the lending institutions to avoid providing loans. Sri Lanka defaulted the payment of loans³⁷ and it has increased the financial fragility of the State and increased the reluctance of the lending institutions to provide financial facilities. As evident from the analysis of the history of the financial pattern of the country, it requires financial support from foreign sources to manage the day-to-day affairs of the State. In addition to the conditionalities imposed by the money lenders, refusal of money lenders to support the State also has implications in managing the States affairs. Sri Lanka's successive Governments have borrowed money since independence and it has not been able to attain debt sustainability or to ensure financial independence. As correctly identified by the UN in its GPFDR, the conditionalities imposed by the money lenders and the mismanagement of funds by the receiving States are significant reasons for the crisis in Sri Lanka. The Supreme Court of Sri Lanka recently determined that the former President, Prime Minister and Finance Minister are responsible for the financial crisis³⁸. Although no compensation was ordered in the decision, it indicates that the rulers of the State have the discretionary power to decide on the States affairs. Although the Constitution of Sri Lanka states that the Judiciary, the Executive and the Legislature need to have checks and balances in Sri Lanka, there is a high

³⁶ Fitch Ratings, 'Fitch Downgrades Sri Lanka To 'C'
<<https://www.fitchratings.com/research/sovereigns/fitch-downgrades-sri-lanka-to-c-13-04-2022>> accessed 13 April 2022.

³⁷ Al Jazeera, 'Sri Lanka to suspend foreign debt payment'
<<https://www.aljazeera.com/economy/2022/4/12/sri-lanka-to-suspend-foreign-debt-payments>> accessed 12 April 2022.

³⁸ *Transparency International Sri Lanka and others v Attorney General and Others*.
SC/FRA/212/2022
https://www.supremecourt.lk/images/documents/sc_fr_195_and_212_2022.pdf,
accessed 27th November 2023.

level of controlling by the head of the State with the power vested under the Constitution.

In addition to the internal mismanagement of funds by the State, international money lending institutions such as the IMF have not prioritized conditionalities on increased human rights standards in the receiving State³⁹ when it provides financial support. The Special Rapporteur on foreign debt indicated that in her visit to Sri Lanka in 2018, neither the Government of Sri Lanka nor the IMF carried out a human rights impact assessment⁴⁰. The Rapporteur has emphasized that social welfare schemes must not be reduced to repay the debts. Additionally, the Rapporteur states that the World Bank and the Asian Development Bank can expand on the existing policies related social and environmental safeguards into more comprehensive human rights policies.

The Special Rapporteur concluded the visit with many recommendations. Few of the recommendations made to the Government includes, conducting a human rights impact assessment (HRIA) before, during and after introducing economic reforms, carrying out debt sustainability with a human rights perspective, introduce progressive tax policies which enhances, among other things, human rights and ratification of the ICESCR and its 1st Protocol. Conducting a debt sustainability analysis, including human rights aspects, increase lending to realization of SDGs

³⁹ International Monitoring Fund. (2020) 'Articles of Agreement'. <<https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf>> Accessed on 15.09.2023. The purpose of Article 1 of the Article of Agreement if the International Monitoring Fund is silent on the human rights standards.

⁴⁰ United Nations Human Rights Council, 'Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, on his visit to Sri Lanka' (September 2018) UN Doc A/HRC/40/57/Add.2.

and economic, social and cultural rights, conduct human rights impact assessments and make them publicly available and accessible were among the key recommendations made to the international financial institutions, international development assistance actors and foreign lenders.

In response to the Rapporteurs recommendations on HRIAs, the Government of Sri Lanka was silent on its commitments⁴¹. The Government's ignorance of the Special Rapporteurs recommendations has led the State in an economic crisis and it has reached out to more State and non-State actors to borrow money to run the day-to-day affairs of the country.

4. RECOMMENDATION/CONCLUSION

Sri Lanka has relied heavily on external funds in managing the States affairs since independence. It has obtained loans from the IMF and State actors for concessionary interest rates and from financial lenders for non-concessionary rates. The majority of the borrowings have been utilized for infrastructure development projects. The conditionalities imposed by money lenders increased privatization, reduced subsidies and public sector expenses, removed license restrictions on imports, floating exchange rates determined by the market, increased taxes and liberalized economy. The conditionalities reduced the budgetary allocations towards social welfare, education, health and for food and for adequate living standards. The States actions limited the people's right to enjoy ESC rights enshrined in the ICESCR. The non-availability of an enabling legislation to provide the

⁴¹ United Nations Human Rights Council, 'Comments/Observations of the Government of Sri Lanka (GoSL) on the advance unedited Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, on his visit to Sri Lanka' (3-11 September 2018) UN Doc A/HRC/40/57/Add.2.

rights under the ICESCR and non-ratification of the 1st optional protocol has impeded the people's right to enjoy the rights under the Covenant.

Although the provisions of ICESCR, its optional Protocol and GPFDR are available, the States are able to have reservations or negate the obligations under these instruments. The States have an obligation towards its population and it is answerable to the people of the State. The absence of an international binding instrument to regularize the affairs between money lending institutions and States and receiving States has provided an unlimited discretionary power to invest borrowed money in unwanted and unnecessary development projects and endangered people's lives and violated their rights. The actors who are responsible for such financial crisis are not held accountable for the violation of the rights.

United Nations, the IMF, and other States who are lending money to Sri Lanka require imposing conditionalities such as ratification of the optional protocol to the ICESCR to enable individual complaints mechanism and to conduct Human Rights Impact Assessments in development projects. Further, the lending institutions require ascertaining the transparency of the process and adoption of anti-corruption legislations to minimize the misuse of the funds. The UN and the money lenders require ensuring more transparency in decisions taken towards implementation of Projects and government expenditure. Finally, a UN fact finding mission on Human Rights violations due to financial mismanagement is a necessity to prevent such human rights violations in the future.

REFERENCES

Aiddata, 'China Exim bank reschedules \$306,726,736 buyer's credit loan to Sri Lanka Ports Authority (SLPA) for Hambantota Port Development Project' (Linked to Project ID#33256)
<<https://china.aiddata.org/projects/85184/>> accessed 14 April 2022.

Aiddata, 'China Eximbank Provides \$88.6 Million Buyer's Credit Loan for Colombo Lotus Tower Project'
<<https://China.Aiddata.Org/Projects/33380/>> accessed 14.04.2022.

Aiddata, 'China Eximbank provides RMB 1.3 billion government concessional loan for the Mattala Rajapaksa international airport project'
<<https://china.aiddata.org/projects/33369/>> accessed 14 April 2022.

Al Jazeera, 'Sri Lanka declares state of emergency as protests spread'
<<https://www.aljazeera.com/news/2022/4/1/sri-lanka-declares-state-of-emergency-as-protests-spread>> accessed 20 April 2022.

Al Jazeera, 'Sri Lanka to suspend foreign debt payment'
<<https://www.aljazeera.com/economy/2022/4/12/sri-lanka-to-suspend-foreign-debt-payments>> accessed 12 April 2022.

BBC.com, 'Sri Lanka crisis: One killed after police fire live bullets at protester', Retrieved from <https://www.bbc.com/news/world-asia-61151037>, accessed 17 April 2022.

Central Bank of Sri Lanka (2010) Annual Report. Page 3, chapter 01. Available at
<https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/publications/annual_report/2010/en/5_Chapter_01.pdf> accessed 16.04.2022.

Central Bank of Sri Lanka, 'Consumer price inflation'
<https://www.cbsl.gov.lk/en/measures-of-consumer-price-inflation>> accessed 13.04.2022.

CEIC Data, 'Sri Lanka Foreign Exchange Reserves'
<<https://www.ceicdata.com/en/indicator/sri-lanka/foreign-exchange-reserves>> accessed 24.04.2022.

Chughtai.A, Thowfeek. R, Ali.M, 'Infographic: Sri Lanka's economic crisis and political turmoil'.

<<https://www.aljazeera.com/news/2022/4/7/infographic-sri-lankas-economic-crisis-and-political-turmoil>> Accessed on 07 April 2022.

Convention on the Rights of Persons with Disabilities, (adopted 24 January 2007, entered into force 03 May 2008) 44910 UNTS 2515 (CRPD) Art 32.

Declaration on the Right to Development Rights (adopted 04 December 1986) UNGA Res 41128 (DRD) Art 3(3).

Department of External Resources, 'Foreign Debt Summary (as of end April 2021)'

<http://www.erd.gov.lk/index.php?option=com_content&view=article&id=102&Itemid=308&lang=en> accessed 15 April 2022.

De Silva.D. & Perera.N. 'Fourth fuel-queue death in Sri Lanka in under 48 hours' <<https://economynext.com/fourth-fuel-queue-death-in-sri-lanka-in-under-48-hours-91890/>> accessed on 18 April 2022.

France24.com, 'Sri Lanka fuel prices up ahead of IMF talks' <<https://www.france24.com/en/live-news/20220418-sri-lanka-fuel-prices-up-ahead-of-imf-talks>> accessed 18 April 2022.

Fitch Ratings, 'Fitch Downgrades Sri Lanka To 'C'' <<https://www.fitchratings.com/research/sovereigns/fitch-downgrades-sri-lanka-to-c-13-04-2022>> accessed 13 April 2022.

Gupta.S, 'Chinese loans for white elephant projects pushed SL and PAK into present crisis' < <https://www.hindustantimes.com/world-news/chinese-loans-for-white-elephant-projects-pushed-sl-and-pak-into-present-crisis-101649128210464.html>> accessed 17 April 2022.

International Convention on the Rights of the Child (adopted 20 November 1989, entered into force 02 September 1990) 27531 UNTS 1577 (CRC) Art 4.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

International Monitoring Fund. (2020) ‘Articles of Agreement’.
<<https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf>> accessed
15.09.2023.

Karlik.J.R, Bell.M.W, Martin.M, Rajcoomar.S, and Sisson.C.A (1996):
Financial Programming and Policy, the case of Sri Lanka. IMF Institute.
Washington. D. C. International Monitoring Fund. DOI:
<<https://doi.org/10.5089/9781557755797.071>> accessed 18th April 2022.

Moramudali.u, ‘The Hambantota port deal: myths and realities’
<<https://thediplomat.com/2020/01/the-hambantota-port-deal-myths-and-realities/>> accessed 15 April 2022.

News18.com, ‘Sri Lanka Imposes Social Media Blackout; Two Dozen
Apps Including Facebook, Twitter, WhatsApp Affected’
<<https://www.news18.com/news/world/sri-lankas-govt-imposes-nationwide-social-media-blackout-two-dozen-apps-including-facebook-twitter-whatsapp-affected-4937213.html>> accessed 18 April 2022.

Presse.A.F, ‘Sri Lanka Cancels School Exams Over Paper Shortage As
Financial Crisis Bites’.
<<https://www.theguardian.com/world/2022/mar/20/sri-lanka-cancels-school-exams-over-paper-shortage-as-financial-crisis-bites>>
accessed 22 March 2022.

Priyadarshana.T.R (2019) Is Public Debt Harmful Towards Economic
Growth? New Evidence from Sri Lanka. Staff studies, Central bank of
Sri Lanka, Available at
<https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/statistics/otherpub/staff_studies_Vol_49_2019_No_1.pdf> accessed 16.04.2022.

Shephard.W, ‘The Story Behind the World's Emptiest International
Airport’ <<https://www.forbes.com/sites/wadeshepard/2016/05/28/the-story-behind-the-worlds-emptiest-international-airport-sri-lankas-mattala-rajapaksa/?sh=2530ba977cea>> accessed 13 September 2022.

Themirror.Lk, 'Human-Elephant conflict: Empty promises and white Elephants?' <<https://www.themorning.lk/human-elephant-conflict-empty-promises-and-white-elephants/>> accessed 18 April 2022.

PublicFinance.lk, 'Why did Sri Lanka's budget deficit increase in 2021? October 2021' <<https://www.themorning.lk/why-did-sri-lankas-budget-deficit-increase-in-2021/>> accessed 20 April 2022.

Reuters, 'IMF says any loan to Sri Lanka requires debt sustainability' <<https://www.cnbc.com/2022/04/20/imf-says-any-loan-to-sri-lanka-requires-debt-sustainability.html>> accessed 20 April 2022.

UN Guiding principle on foreign debt and human rights (Adopted 10 April 2011) UN Doc (A/HRC/20/23).

United Nations Human Rights Council, 'Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, on his visit to Sri Lanka' (September 2018) UN Doc A/HRC/40/57/Add.2.

United Nations Human Rights Council, 'Comments/Observations of the Government of Sri Lanka (GoSL) on the advance unedited Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, on his visit to Sri Lanka' (3-11 September 2018) UN Doc A/HRC/40/57/Add.2.

Wignaraja, G. (2022). China's Dilemmas in Bailing Out Debt-Ridden Sri Lanka. East-West Center. <http://www.jstor.org/stable/resrep396>.

**Sub-Theme (b):
Sexual and
Gender-Based Violence
in a Crisis**

THE SOCIAL MEDIA PLATFORM'S VIOLENCE AGAINST YOUNG GIRLS: A CASE STUDY IN KURUNEGALA DISTRICT

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ABSTRACT

This study encompasses the impact of Social Media platforms and violence against young girls. Sexual and gender-based violence (SGBV) is a gross violation of human rights that affects women, men, boys, and girls globally (Butchart and Milton 2014; Dahlberg and Krug 2002). Social media is at the forefront of digital technology. Currently, Violence against Women and Girls (VAWG) has become a common phenomenon on social media. The objectives of this research are to study the way use of social media by young girls, to understand the various forms of social media violence, and to identify youths' perspectives of their role in making online and social media platforms safer. This research studied how social media impacts gender-based violence among girls in Sri Lanka. The sample included two villages in the Kurunegala district: Sadalankawa, and Makandura. Both in-depth interviews and structured interviews were conducted to collect the required data. The survey was conducted from March to April 2023 among a representative sample of 50 youth (40 girls & 10 boys) in the age group of 18–24-year-olds and 24-30 Years old.

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The secondary data was collected from academic articles and research papers. Data were analyzed using the Statistical Package for Social Sciences (SPSS). This research revealed that girls between 18-24 years of age are mostly affected by social media; and also, that there is an increase in the use of harmful content meaning, and qualities within social media that abuse and humiliate women by mocking and harassing them. Cyber-bullying is also more common among girls compared to young boys. The conclusion of this research is that currently, violence against girls has increased in social media as a new dimension of violence against women, and it was revealed that a legal framework needs to be developed and should be given awareness about it.

Keywords: Gender-Based Violence, Social Media, Young Girls, Harmful Effects.

1. INTRODUCTION

Notably in this era, social media has played a huge role in our daily lives. Social media violence against girls becomes a new dimension of violence with technology. That has a serious impact on the lives of women and girls. The voluminous details in past years on social media violence in Sri Lanka reveal and it remains an unresolved problem despite prolonged public attempts to eradicate the issue of social media violence. In the book 'The Technology of Nonviolence: Social Media and Violence Prevention', Bock (2012) states that social media could also be utilized to foresee and prevent the onset of violence. Based on this background, this research explored the social media violence against girls. The objectives of this research were to study the way that social media is used by young girls, to understand the various forms of social media violence, and, to identify the

perspectives of the youth of their role in making online and social media platforms safer.

The portrayal of women in mainstream media predominantly represents them within the boundaries of the gendered motif “women-as-nation” (Silva, 2004: p. 97). This is constructed upon a binary stage of viewing the male as “the author and subject of the nation while the female stands for the nation itself, in need of male protection, the reproducer and nurturer of future generations and transmitter of cultural values” (De Mel, 2001: p. 3).

The discourse on violence against women on social media can be divided into two main aspects: firstly, how the media portrays women, and secondly, media violence against women. Here, the researcher focused on 2 parts between those discourses. Part 1 deals with how social media portrays girls, and Part 2 deals with how social media contributes to violence against girls.

First, exploring the discussion of how social media portrays girls reveals i) how stereotypical images of relationships between men and women (media reflect and promote traditional arrangements between the sexes,— Women’s dependence/men’s independence.), ii) Men’s authority/women’s incompetence (media representations of relationships is that men are the competent authorities who save women from their incompetence), iii) Women as primary caregivers and men as breadwinners, iv) Sexuality and body – commodity by marketization (gender concept, Produced and Reproduced, Beauty products).

Secondly, exploring the discussion of how social media violence against girls reveals i) Women as victims and sex objects and men as aggressors. this representation is that the very qualities women are encouraged to develop (beauty, sexiness, passivity, and powerlessness) in order to meet

cultural ideals of femininity contribute to their victimization, Also, the qualities that men are urged to exemplify (aggressiveness, dominance, sexuality, and strength) are identical to those linked to abuse of women. Typically, females are shown dancing provocatively in scant and/or revealing clothing as they try to gain men's attention (Texier, 1990). ii) Gender-based violence is identified such as cyberstalking, threats, videos depicting rape, and the distribution of sexual images without consent.

In this paper, the researcher explored how social media portrays girls and, how young girls are affected by social media, and how Violence against Young Girls has become a common phenomenon on social media. Also what kind of policy change wants to develop this discourse?

2. HOW SOCIAL MEDIA PORTRAYS GIRLS.

This paragraph explored the discourse of how social media portrays girls. Here researcher identified 2 major areas to discuss based on field data findings and literature.

2.1 HOW STEREOTYPICAL IMAGES OF RELATIONSHIPS BETWEEN MEN AND WOMEN

The impact of stereotypical images of relationships between men and women in social media has been a subject of academic research. Kara, A. K. (2019) in "Gender Stereotypes in Social Media Advertisements: A Content Analysis of Facebook, Instagram, and Twitter" analyzed gender stereotypes in social media advertisements and their potential effects on perceptions of relationships. Herring, S. C., Job-Sluder, K., Scheckler, R., & Barab, S. (2002) in "Searching for safety online: Managing "trolling" in a feminist forum", discusses the challenges of managing gender-related issues, including stereotypes and harassment, in online forums. These

references offer insights into the ways stereotypical images of relationships between men and women manifest on social media and their potential effects on individuals' perceptions, behaviors, and experiences.

Media reflect and promote traditional arrangements between the sexes. Eg: Women's dependence/men's independence. Baudrillard (as cited in Baban, 2012) takes it as an object and indicates that the media has no usage value (Baban, 2012: p. 72). Bem identified that gender stereotypes are not only used to characterize others but also to characterize oneself (Bem, 1974). Wood notes, "What gender means depends heavily on cultural values and practices; a culture's definitions of masculinity and femininity shape expectations about how individual men and women should communicate; and how individuals communicate establishes gender that, in turn, influences cultural views" (Wood, 2009: p. 20). Social media has improved this gender influence. Media representations of relationships are that men are the competent authorities who save women from their incompetence.

Research data revealed social media users perpetuate traditional gender stereotypes by sharing images that depict men and women in roles or situations associated with these kinds of stereotypes. Such as images of women as caregivers or men as the primary breadwinners. Young girls between 18 to 25 years old are influenced by gender stereotypes by these sharing images. Also, research data revealed that social media special Facebook reinforced unrealistic beauty standards by showcasing individuals with idealized body types, often through edited or filtered photos. This contributes to body image issues and low self-esteem among users. Some Facebook users can be seen sharing content that reinforces racial and ethnic stereotypes. This included caricatures, offensive memes,

or images that portray certain racial or ethnic groups in a negative or exaggerated manner. Some images reinforce stereotypes about certain professions or careers.

Research data explained that social media users can perpetuate traditional gender roles and reinforce harmful stereotypes through social media. Facebook posts depict men and women conforming to traditional gender roles, with men as strong and stoic providers and women as nurturing caregivers. These stereotypes can limit individuals' freedom to express themselves authentically within relationships. Also, images that depict women as dependent on men for financial or emotional support reinforce outdated stereotypes and fail to acknowledge the independence and agency of women in modern relationships. These social media-influenced stereotypes depict men as uncommunicative and women as overly emotional, reinforcing the idea that men should not express their feelings and women are "nagging" or "hysterical." Social media images portray women as solely responsible for childcare and domestic duties, neglecting the evolving roles of fathers in modern families.

The turning point in this sub-topic is how stereotypical images of relationships between men and women influenced violence in social media, stereotypical portrayals of men as dominant and aggressive and women as submissive can normalize violence in relationships. When people see these stereotypes on social media, it may reinforce the idea that aggression is acceptable or even expected. Stereotypical images in social media can reinforce harmful beliefs about relationships, such as the idea that women should tolerate abusive behavior to keep a relationship intact. This can deter individuals from seeking help and support. Stereotypical images on Facebook can perpetuate harmful gender-based violence by

reinforcing traditional power dynamics. This contributes to a culture where violence against women is tolerated or excused. Stereotypes about gender roles can spill over into online interactions, leading to harassment and cyberbullying. Special individuals who challenge traditional gender norms become targets for online abuse. Stereotypical images lead to victim-blaming, where victims of violence are blamed for their own abuse based on their failure to conform to traditional gender roles. Victims of violence are hesitant to share their experiences on social media due to the fear of backlash or not being believed, especially if their experiences do not align with stereotypical narratives.

2.2 SEXUALITY AND BODY – COMMODITY BY MARKETIZATION

Kee (2005) explains that it is important to define sexual violence as broadly as possible to accommodate types of sexual violence that are identified over time. Sexuality and the human body have been commodified and marketed on social media such as Facebook in various ways. This phenomenon is driven by several factors, including the profit motive of social media platforms and the desire for attention and validation among users. Some influencers on social media platforms such as Facebook monetize their sexuality and appearance by partnering with brands to promote products related to beauty, fashion, fitness, and wellness. These influencers often rely on their physical appearance and sensuality to attract followers and secure sponsorship deals.

Some of the scholars revealed this situation through their studies. Tiggemann, M., & Slater, A. (2014) in "NetGirls: The Internet, Facebook, and Body Image Concern in adolescent girls", examine the impact of Facebook and social media on body image concerns among adolescent girls. López-González, L., & Leyva-Moral, J. M. (2021) in her "Sexting

and its impact on the psychological well-being of adolescents: A systematic review", examine the relationship between sexting behaviors and the psychological well-being of adolescents. These references provide insights into the complex interplay between sexuality, body image, and violence in the context of social media.

Some individuals and platforms use social media to promote adult content or subscription-based services, selling explicit images and videos. This leads to the commodification of sexual content, which raises ethical and legal concerns. The commodification of bodies and sexuality on social media also leads to cyberbullying, harassment, and the non-consensual sharing of intimate content, causing harm to individuals. Sexting, which involves sending or receiving sexually explicit messages, photos, or videos via technology, has been a subject of research in various fields, including psychology, and sociology, studies. Sexting refers to the use of technology to send or receive sexually explicit messages and photos, or 'sexts' (Comartin, Kernsmith, & Kernsmith, 2013). Virtual rape and the threat of rape occur when a targeted person (frequently a woman) is the victim of constant messaging containing threats of sexual assault, either from a single harasser or from a more mob-style attack (Halder & Jaishankar, 2011). Virtual harassment, which can include threats of sexual violence, is a serious problem that can have significant emotional and psychological consequences for the victims. Studies often highlight the gendered nature of online harassment, with women, transgender individuals, and gender non-conforming people being disproportionately targeted. Research has shown that threats of sexual violence are more likely to be directed at women. In this research, the researcher identified that sexual violence through social media is more likely to be directed at young girls between 18-25 ages.

Furthermore, research data revealed the online harassment and cyberbullying of individuals based on their sexual orientation, gender identity, or body image lead to psychological distress and, in some cases, can escalate to real-world violence or self-harm. Social media objectifies individuals based on their bodies or sexual appeal, it can reduce them to mere objects of desire. This objectification can contribute to a culture where people are seen as commodities rather than as individuals with their own thoughts, feelings, and agency. In extreme cases, this dehumanization can contribute to violence or harm against others. Content that reinforces traditional gender roles and stereotypes in relationships can contribute to unequal power dynamics, which may lead to violence or control in relationships.

3. HOW YOUNG GIRLS ARE AFFECTED BY SOCIAL MEDIA

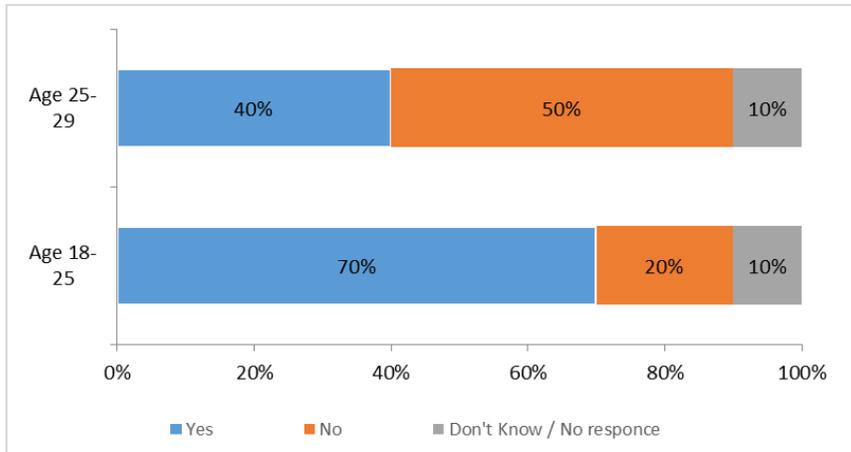
This chapter is mainly based on the findings of the research. Here researcher discussed the data under 3 main categories. I) Girls between 18 to 25 years of age are more affected than those between 25 to 30 years of age by social media. II) There is an increase in the use of harmful content meanings, and qualities within social media that abuse and humiliate women by mocking and harassing them. III) Cyberbullying is more common among girls compared to young boys.

3.1 GIRLS BETWEEN 18-25 YEARS OF AGE ARE MOSTLY AFFECTED BY SOCIAL MEDIA

The way of using social media and the behavior on social media platforms differ according to the socio-cultural, psychological aspects, and demographics of individuals. This research especially considers how young girls are affected by social media. Therefore, two categories of girls

were selected as the sample for this study. The first category is from age 18 to 25 and the second category is from age 25 to 30. Research revealed girls between 18-25 years of age mostly affected by social media.

Graph 01 - Girls between 18-25 years of age are mostly affected by social media



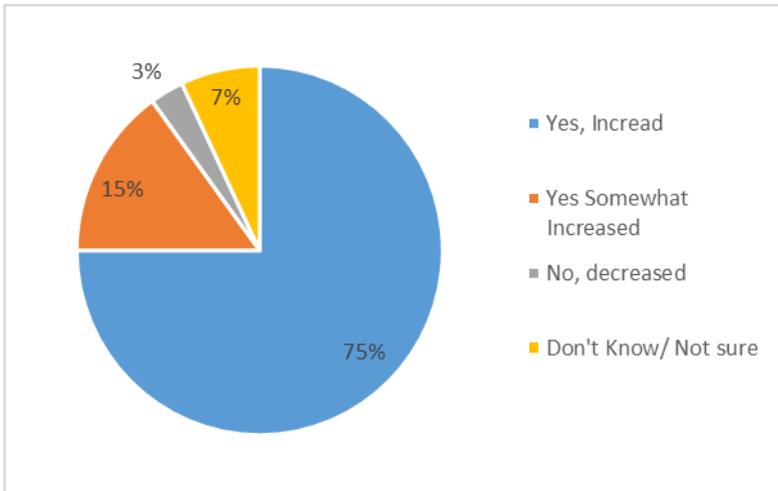
Source: Field Data 2023

Research data revealed young girls between the ages of 18 and 25 are often particularly impacted by social media due to various factors. It’s essential to recognize that the effects of social media can vary greatly from person to person. In this research, the researcher identified some ways in which young girls are influenced by social media. Social media platforms showcase idealized body images and beauty standards, which lead to body image concerns and lower self-esteem among young girls. They compared themselves to influencers and celebrities, feeling pressure to meet unrealistic beauty ideals. The impact of social media on violence against young girls between the ages of 18-25 is a significant concern, as these platforms can both be a source of empowerment and a space where various forms of violence and harm can occur.

Research data identified that: i) young girls in this age group are targeted by cyberbullying, which includes hurtful messages, threats, harassment, or the spreading of false information online, ii) social media platforms expose young girls to various forms of online harassment, including misogynistic or sexist comments, threats of physical or sexual violence, and stalking, and, iii) young girls are victims of non-consensual sharing of intimate images or videos on social media. This form of digital abuse, often called "revenge porn," can be traumatizing and have lasting consequences.

3.2 THERE IS AN INCREASE IN THE USE OF HARMFUL CONTENT MEANINGS, AND QUALITIES WITHIN SOCIAL MEDIA THAT ABUSE AND HUMILIATE WOMEN BY MOCKING AND HARASSING THEM

Graph 2 - The use of harmful content meanings, and qualities within social media that abuse and humiliate women by mocking and harassing them.



Source – Field data 2023

Research data revealed that the increase in the use of harmful and abusive content targeting young girls on social media is a serious and concerning issue. Harmful content targeting women often takes the form of

cyberbullying, including derogatory comments, insults, threats, and personal attacks. Cyberbullying can lead to emotional distress, anxiety, and depression. Many instances of harmful content directed at young girls are rooted in misogyny and sexism. This type of content perpetuates harmful gender stereotypes and can contribute to a culture of discrimination and inequality. Wewagedara (2015) says that, the term “*badu*” when used for women is used in an objectified manner to describe her beauty and the amusement she can provide for the man. Such terms include “*niyama baduwak* (good piece), *mara baduwak* (awesome piece), *patta baduwak* (super/huge piece), *athal baduwak* (a piece that can give a good time), *sira baduwak* (a seriously good piece)” (p.25). Research data explained some individuals share explicit images or videos of girls without their consent, a practice known as revenge porn in social media. Also, some online communities and echo chambers normalized and even encouraged harmful content targeting young girls, perpetuating a cycle of abuse.

The use of harmful content on social media platforms that targets young girls through mocking, harassment, and humiliation is a serious issue that perpetuates gender-based violence and discrimination. Such content contributes to a hostile online environment and can have severe emotional, psychological, and social consequences for the individuals affected.

Rosalind Gill (2003) is from sexual objectification to sexual *subjectification*. New modes of youthful femininity have been identified in media representations of women, and media and culture aimed at girls and young women. (Dobson, 2015:23).

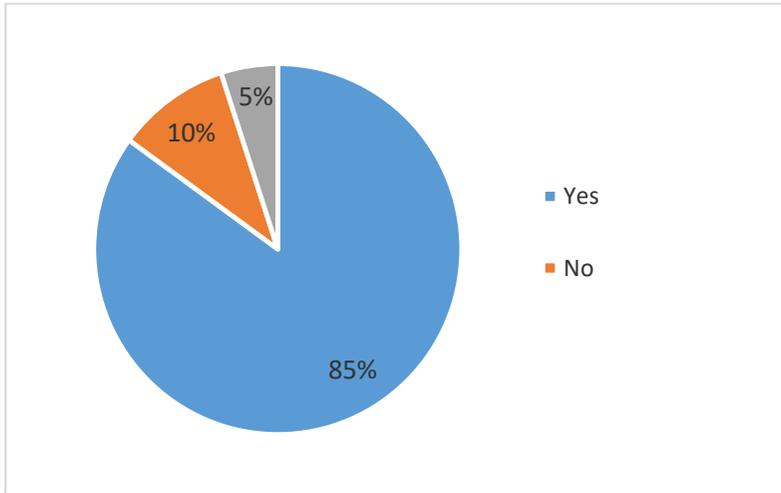
The conclusion of this sub-topic with research data is that feminist perspectives on social media violence are rooted in the examination of how

digital spaces, including social media platforms, can perpetuate and exacerbate violence against women and marginalized communities. Feminist scholars and activists have explored various aspects of this issue, highlighting the need for intersectional analyses and responses. Feminist analyses of social media violence emphasize intersectionality, recognizing that women from marginalized communities face multiple forms of discrimination and violence online. Feminist scholars have extensively examined the prevalence of online misogyny, which includes sexist comments, harassment, threats, and the objectification of women. Social media violence recognizes the interconnectedness of online and offline forms of violence against women. Harmful content often reinforces traditional gender stereotypes, which limit girls' and women's roles and opportunities. Feminists argue that such content can perpetuate harmful expectations and norms about femininity, beauty, and behavior. Many harmful messages and images on social media contribute to the sexualization and objectification of girls. Content that promotes body shaming or mocks girls based on their appearance should be critiqued. Girls are targeted with gender-based insults, threats, or sexually explicit messages. Furthermore, research data revealed how harmful content can silence and marginalize girls, discouraging them from speaking out or participating in online discussions. This silencing effect can hinder girls' freedom of expression.

3.3 CYBERBULLYING IS MORE COMMON AMONG GIRLS COMPARED TO YOUNG BOYS.

Cyberbullying is a complex issue, and its prevalence can vary depending on various factors, including age, gender, and cultural context.

Graph 3 - Cyberbullying is more common among girls compared to young boys.



Source – Field data 2023

Research on cyberbullying has shown that both young girls and young boys can be both perpetrators and victims of cyberbullying, and the patterns can vary. but this research identified, that has suggested that young girls between 18-30 ages young girls may be more likely to experience certain forms of cyberbullying, such as: i) online harassment related to appearance or relationships, and, ii) boys may be more prone to engage in other forms of cyberbullying, such as online trolling or cyber-aggression related to competition or dominance. Van Laer (2013) defines the potentially harmful effects of cyber harassment as "emotional distress ... withdrawal from social network sites or even life itself". In the same way, referring to the study conducted by Ybarra and Mitchell (2004) indicate that cyberbullying may appear in different forms as seen in sending unwanted, derogatory, or threatening comments, spreading rumours, sending pictures or videos that are offensive or embarrassing by text, email, chat, or posting on websites including social networking sites

(Görzig & Frumkin, 2013). Very little is known about the actual percentage of victims and the prevalence of the damage it causes (EIGE, 2017). The prevalence of cyberbullying among young girls on social media platforms like Facebook can vary based on multiple factors, including the region, age group, and the specific dynamics of the social network in question.

4. HOW VIOLENCE AGAINST YOUNG GIRLS HAS BECOME A COMMON PHENOMENON ON SOCIAL MEDIA

4.1 IN SOCIAL MEDIA CONTENT GIRLS AS VICTIMS AND SEX OBJECTS

Violence against young girls on social media has become a common phenomenon due to various factors. Nowadays, online violence against young girls has become normalized in some online communities. This normalization created an environment where such behavior is seen as acceptable or even encouraged.

"McLuhan's utopia has been replaced by Orwell's black utopia. Computer technologies have increased the surveillance and control of individuals almost everywhere to such an extent that they feel as if they are watched even in their private spheres by an electronic eye," (Lyon as cited in Güngör, 2011: p. 177). The portrayal of young girls as victims and sex objects in social media content is a complex and serious issue. It reflects broader societal problems related to gender stereotypes, objectification, and sexualization. Butler (1997) elaborates on the harmful effects of hate speech by saying that, one is not only "derogated and demeaned" by being called "an injurious name" but is also "given a certain possibility for social existence, initiated into a temporal life of language that exceeds the prior

purposes that animate that call” (P.2). Social media perpetuate harmful gender stereotypes by portraying young girls as vulnerable victims or objects of desire. This reinforces traditional gender roles and expectations, limiting the potential and agency of girls and women. Objectifying images and content reduce individuals, in this case, young girls, to mere objects of sexual desire. Objectification leads to self-esteem issues, and body image concerns, and contributes to a culture of harassment and abuse.

Research data revealed that harmful gender stereotypes and attitudes prevalent in society are manifested on social media platforms. Young girls are targeted based on their gender, perpetuating harmful beliefs about their vulnerability or inferiority. Respondents explained that some social media users already hold preconceived notions or biases about gender roles, and that they are more likely to share or engage with content that confirms these biases. Using social media content to objectify young girls or anyone as sex objects is harmful. Objectification reduces individuals to their physical appearance and can perpetuate harmful stereotypes and attitudes. It contributes to a culture of harassment, discrimination, and violence against women and girls.

In conclusion, addressing the portrayal of young girls between 18-30 ages as victims and sex objects in social media content requires a multi-faceted approach involving individuals, social media platforms, educators, and policymakers. Furthermore, it's essential to promote a culture of respect, equality, and empowerment for all individuals, regardless of their gender.

4.2 SOCIAL MECHANISM THAT SEEKS TO KEEP WOMEN IN A TRADITIONAL ROLE

The social mechanism that seeks to keep women in traditional roles is often referred to as "gender role socialization" or "gender role

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reinforcement”. Traditional gender roles are often reinforced through stereotypes. Such as portraying women as nurturing, emotional, and focused on family, while men are depicted as assertive, rational, and breadwinners. Attributes traditionally seen as feminine, such as weakness, cooperation and kindness, had virtually no place in the political arena (Gidengil and Everitt, 2003). Social media plays a significant role in perpetuating these stereotypes. Social media perpetuates traditional gender roles through the sharing of content and discussions that reinforce stereotypes. This includes sharing and endorsing traditional gendered activities, appearance standards, and behaviors. Such as promoting content that idealizes women as homemakers, and caregivers, or primarily focuses on their appearance to reinforce traditional roles. As a social mechanism that seeks to keep women in a situation of disadvantage. This means that violence is often used to “punish” or “correct” women whose attitudes or activities supposedly go against what society expects of them (MESECVI, 2017: P. 36).

When discussing about Social mechanism that seeks to keep women in a traditional role, this research findings revealed, that, i) Women on social media often face harassment and bullying when they deviate from traditional roles or express strong opinions; ii) social media exert immense pressure on women to conform to traditional beauty standards (e.g.: The portrayal of unrealistic body images, and body-shaming comments); and, iii) In the context of social media, several mechanisms and factors can reinforce traditional gender roles and expectations for young girls more than boys. These mechanisms may not be deliberately seeking to enforce traditional roles, but they can have that effect due to existing societal biases. Young girls between 18-25 ages on social media often face higher rates of cyberbullying and online harassment. This discouraged them from

expressing themselves freely and participating in activities that challenged traditional roles. Boys may not face the same level of online harassment for deviating from traditional roles. Social media perpetuates traditional gender stereotypes. For example, certain platforms may showcase images and content that reinforce traditional expectations for girls to be nurturing, submissive, or focused on appearance. This leads to the internalization of these stereotypes by young girls. Research data revealed that social media encourages comparison and competition between young girls especially those aged 18-25 ages young girls than 25 to 30 ages young girls, which can negatively impact the self-esteem of young girls. The pressure to conform to certain beauty standards or lifestyles depicted on social media can make it difficult for them to express themselves authentically.

5. RECOMMENDATION/ CONCLUSION

In the conclusion of this research, the study encompasses the impact of social media platforms on violence against young girls. The objectives were to examine the use of social media by young girls, understand the various forms of social media violence, and identify youths' perspectives on their role in making online and social media platforms safer. The discourse on social media violence against women can be divided into two parts. Firstly, how the media portrays women, and secondly, how media contributes to violence against women. Exploring the discussion of how social media portrays girls reveals: i) Stereotypical images of relationships between men and women, ii) Men's authority/women's incompetence, iii) Women as primary caregivers and men as breadwinners, iv) Sexuality and the body commodified by marketization. The research findings can be discussed within the framework of the aforementioned four main points.

Secondly, delving into the discussion of how social media portrays violence against girls reveals: i) Women are depicted as victims and sex objects, with men portrayed as aggressors. This representation highlights that the very qualities women are encouraged to develop to meet cultural ideals of femininity contribute to their victimization. Additionally, the qualities that men are urged to exemplify are identical to those linked to the abuse of women. ii) Identification of gender-based violence, such as cyberstalking, threats, videos depicting rape, and the distribution of sexual images without consent.

The main suggestion after this research findings are, i) that young girls between 18-30 ages should be educated about the critical analysis of media content and online behaviors as a means of resistance and self-protection, ii) the importance of creating a platform for discussions about the need for legal and policy reforms to address harmful online content targeting young girls (this can include reforms related to cyberbullying, harassment, and online safety), and, iii) improving the provision of support and resources for victims of online violence, including mental health services and counseling.

REFERENCES

- Brown, M. E. (1994). *Soap Opera and Women's Talk: The Pleasure of Resistance*. London: Sage.
- Cuklanz, L., 'Mass Media Representation of Gendered Violence' in L. Steiner, L. McLaughlin, & C. Carter (eds), *The Routledge Companion to Media and Gender* (Routledge 2013) 32-41.
- Cuklanz, L., 'Feminist Theory in Communication' in R. T. Craig (ed), *International Encyclopedia of Communication Theory and Philosophy* (Wiley/Blackwell 2016) 1-11.

- Cuklanz, L., & McIntosh, H. (eds), *Documenting Gendered Violence: Representations, Collaborations, and Movements* (Bloomsbury 2015).
- Cuklanz, L., & Moorti, S., 'Television's 'New' Feminism: Prime-Time Representations of Women and Victimization' (2006) 23(4) *Critical Studies in Media Communication* 302-321.
- Dines, G., & Humez, J., *Gender, Race and Class in Media* (Sage 1995).
- Gunter, B., *Television and Sex Role Stereotyping* (John Libbey 1986).
- Goffman, E., *Gender Advertisements* (Harvard University Press 1978).
- Gallagher, M., 'The Portrayal and Participation of Women in the Media' (1979).
- Kuhn, A., *The Power of the Image: Essays on Representation and Sexuality* (Routledge & Kegan Paul 1985).
- Gidengil, E., & Everitt, J., 'Metaphors and Misrepresentation: Gendered Mediation in News Coverage of the 1993 Canadian Leaders' Debates' (1999) 4(1) *The Harvard International Journal of Press/Politics* 48-65.
- Joshi, U., 'Images of Women in Print Media—A Research Inquiry' (2006) 1(1) *Indian Media Studies Journal* July-Dec.
- Majmudar, S., & Garcia-Rojas, C., 'Reporting on Rape & Sexual Violence: A Media Toolkit to Better Media Coverage' (2012).
- Malamuth, N. M., & Briere, J., 'Sexual Violence in the Media: Indirect Effects on Aggression against Women' (1986) *Journal of Social Issues* 75–92.
- Marshall University, 'Rape Culture – Women's Center' (2020).
- Prasad, K., 'Women, Media and Society: Recasting Communication Policy' in K. Prasad (ed), *Women and Media-Challenging Feminist Discourse* (The Women's Press 2005).
- Ross, K., 'A Hard Ladder to Climb: Women and Power in Media Industries' (2018) *Media Development*.

Rudman, L. A., & Phelan, J. E., 'Backlash Effects for Disconfirming Gender Stereotypes in Organizations' (2008) 28 *Research in Organizational Behavior* 61–79.

Rodriguez, M. P., & Cuklanz, L., 'Gender Dimensions in Media and Communication Studies: Main Concepts and Illustrations in Mass-Mediated Texts' (2014) 50 *Anàlisi: Quaderns de Comunicació i Cultura* 27-38.

Shor, E., van de Rijt, A., & Fotouhic, B., 'A Large-Scale Test of Gender Bias in the Media' (2019) 6 *Sociological Science* 526-550.

Talbot, M., *Language and Gender* (Polity Press 2010).

UN Women, 'Facts and Figures: Ending Violence against Women' (UN Women – Headquarters 2019).

UNICEF, 'Gender-Based Violence, Media and Communications' (July 2018) 1–7.

Tomar, R., 'Gender and Media: Status of Women Journalist in Hindi Print Media in India' (2011) Seminar paper presented at the University of Work, 19-22.

**Sub-Theme (c):
Public Security and
Human Rights
in a Crisis**

THE COMPLEX NEXUS: ANALYTICAL CASE STUDY ON FREEDOM OF EXPRESSION, PUBLIC SECURITY, AND SOCIAL MEDIA DYNAMICS IN SRI LANKA'S PEOPLE'S STRUGGLE

Ranuli Senaratne*

ABSTRACT

Freedom of expression is considered the cornerstone of democracy, as dissent and plurality are integral in hosting government accountability and achieving transparency. Technological advancements have revolutionised the methods of expression, and social media platforms have become a new avenue through which the masses could utilise this right in a globalised manner. However, this right entails certain restrictions, especially in the face of public security concerns. Controversy emanates from such restrictions under the argument that States use it as a pretext to quash its opposition, and this transpired during the 'People's Struggle' of Sri Lanka where multiple states of emergency and emergency regulations were imposed by the State, specifically targeting its people's freedom of expression through digital means. The said struggle was a series of massive-scale peaceful protests against the government and its corruption and mismanagement which led to a severe economic crisis, which incepted and was largely organised through the '*GoHomeGota*' social media

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campaign. This research examines that advocating for the greater existence of freedom of expression over public security and vice-versa is illogical and impractical. It questions that what should instead be strived for is an optimum balance between the two where rights are not restricted for political agendas under the guise of public security. The main research problem is how to maintain the delicate balance between right and restriction without reversing the norm and exception between digitalised freedom of expression and public security. This qualitative research is an analytical case study of the 'People's Struggle' which analyses scholarly work, case law jurisprudence and international and domestic legal instruments. Preliminary findings reveal that despite Sri Lanka's guarantee of freedom of expression as a fundamental right and its international obligations, restrictions on this right exist for public security reasons. However, it is noted that such restrictions must be necessary and proportionate, and their determination is not in the exclusive purview of the State. This research criticises State imposed social media bans, and examines Human Rights Council Resolution 2020 which specifically condemns the use of internet shutdowns to intentionally and arbitrarily prevent access to or dissemination of information online, and calls on governments to refrain from such acts, and concludes with recommendations as to how governmental regulation could be relevant and proportionate, and how to achieve a reasonable equilibrium between freedom of digital expression and public security.

Keywords: freedom of expression, public security, social media, restrictions, People's Struggle

1. INTRODUCTION

In today's digital age, the dynamics surrounding freedom of expression, public security, and the influence of social media have become increasingly intricate and consequential. Nowhere is this complex interplay more evident than in the context of Sri Lanka's 'People's Struggle', a pivotal moment in the nation's history marked by widespread peaceful protests and the utilization of social media as a powerful tool for dissent and mobilization. Freedom of expression, a foundational pillar of democracy, faces new challenges and opportunities in the era of digital communication. This paper strives to analytically dissect the multifaceted relationship between these elements, shedding light on the delicate equilibrium required to safeguard democratic values while addressing legitimate security concerns, that is finding the balance between right and restriction and between norm and exception. Through an examination of legal frameworks, international obligations, and case studies, a nuanced landscape is explored where fundamental rights intersect with the imperatives of public order and national security. Whilst delving into the 'People's Struggle' and its impact, recommendations for governments and societies grappling with the complexities of the digital age will be analysed.

2. FREEDOM OF EXPRESSION IN THE DIGITAL AGE

Freedom of expression is considered the cornerstone of democracy, as dissent and plurality are integral in progressing towards the ideal of equality.¹ It is a fundamental pillar of any democratic system as it fosters the exchange of information and ideas, which are essential for citizens to

¹ Julio Cammarota, 'The value of a multicultural and critical pedagogy: Learning democracy through diversity and dissent' [2011] *Multicultural Perspectives* 62, 63.

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make informed decisions.² Brettschneider agrees and elaborates that freedom of expression encompasses two senses: it protects the right of people to express their political viewpoints without fear of censorship or penalisation from the State; and it embodies the role of the State in clarifying the legal protections afforded to its people to exercise free speech, and encouraging them to utilise it.³

With the advancements of technology, means of communication have been revolutionised, and by extension, the meaning of freedom of expression.⁴ This evolution largely facilitated social media platforms to propel to new heights, which thereby reshaped the landscape of freedom of expression. Such digitalised forms of media and expression is widely considered to be the bedrock of democratic societies due to the vital role it plays in accommodating divergent ideas for people's consumption, and forming global connections intrinsically, thus reshaping the arena of freedom of expression.⁵ The United Nations Human Rights Council adopted a resolution in 2012 on the promotion, protection and enjoyment of human rights on the internet, which affirmed that the same rights that people have offline must also be protected online, in particular freedom of expression.⁶

² Martin H. Redish, 'Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker' [1981] U. Pa. L. Rev. 678, 683.

³ Corey Brettschneider, 'When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion' [2010] Cambridge University Press 1005, 1006.

⁴ Ammar Oozeer, 'Internet and social networks: freedom of expression in the digital age' [2014] Commonwealth Law Bulletin 341, 341.

⁵ Amali EJ, Umar MM, Saawuan A, Madaki AA, 'National Security: Social Media and the Freedom of Expression' [2022] NTAtvc Journal of Communication 75, 75.

⁶ Promotion, Protection and Enjoyment of Human Rights on the Internet, HRC Res 22/5, UN Doc A/HRC/RES/22/5 (5 July 2012).

In the present digital age, a strong dedication to recognise the vital role of freedom of expression in both the information society and the online world exists, and this commitment is crucial as it acknowledges the two-sided nature of the digital era: it offers greater opportunities for the exercise of freedom of expression, but it also brings an increased risk of its limitations.⁷

3. PUBLIC SECURITY AND ITS CHALLENGES IN THE DIGITAL AGE

Both domestic and international law allow States to restrict certain rights under particular circumstances, whilst limitation clauses and derogation systems entrenched in legislations, treaties and norms of customary international law provide legal recourse for this purpose. Alston observes that these exceptions do not grant the State complete exemption from its human rights obligations.⁸ This concept is referred to as ‘margin of appreciation’, where States have a certain leeway in balancing individual rights and national interests, by assessing the factual circumstances and applying the standards envisaged in human rights instruments.⁹

States at times declare ‘states of emergency’ to implement a temporary suspension or enhancement of regular legal procedures or rights. States of emergency are rooted in the concept of distinguishing between the norm and exceptional circumstances, leading to a two-fold approach in balancing societal goals and individual rights. Sheeran opines that

⁷ Wolfgang Benedek and Matthias C. Kettemann, *Freedom of Expression and the Internet* (2nd edn, Council of Europe 2020).

⁸ Philip Alston and Ryan Goodman, *International Human Rights. The Successor to International Human Rights in Context: Law, Politics, and Morals* (1st edn, University of Colombo 2013) 394.

⁹ Onder Bakircioglu, ‘The application of the margin of appreciation doctrine in freedom of expression and public morality cases’ [2007] *German Law Journal* 711, 711.

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consequently, the term 'state of emergency' serves as a descriptor that can swiftly legitimize heightened government restrictions on human rights, and that serious violations of human rights often follow such emergency situations.¹⁰ The International Covenant of Civil and Political Rights¹¹ has therefore precisely delineated that a very high threshold ought to be met prior to declaring a state of emergency: the situation must amount to a public emergency that threatens the life of the nation, and any measures derogating from the Covenant should be limited to the extent strictly required by the exigencies of the situation.¹²

In such a backdrop, the internet has ushered in significant opportunities for the exercise and preservation of human rights in innovative methods, but contrastingly has also increased the potential for human rights infringements. Benedek and Kettermann state that internet related advancements have also led to increased governmental control, specifically to minimise social and political activism, and to criminalise certain forms of expression.¹³

4. THE 'PEOPLE'S STRUGGLE' IN SRI LANKA

The 'People's Struggle' in Sri Lanka was a series of massive-scale peaceful protests throughout the country, where the entire nation came together as one, pivoting from the partisan politics it was previously engaging in, as retaliation against the severe economic crisis created by

¹⁰ Scott P Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics'[2013] Michigan Journal of International Law 491, 492.

¹¹ Hereinafter referred to as ICCPR.

¹² Human Rights Committee, General Comment 29 (on Article 4). See also International Covenant on Civil and Political Rights Article 4.

¹³ Wolfgang Benedek and Matthias C. Kettermann, *Freedom of Expression and the Internet* (2nd edn, Council of Europe 2020).

inter alia corrupt and incompetent governments, economic mismanagement, incorrect policy decisions,¹⁴ lack of respect for rule of law, decrease in foreign remittances and tourism,¹⁵ agricultural crisis,¹⁶ currency devaluation and the COVID-19 pandemic.¹⁷ Sri Lanka experienced extreme inflation, shortages of essential medical supplies, fuel and food items, power outages, and near-depletion of foreign exchange reserves, during the said crisis.¹⁸

In this backdrop, a social media campaign dubbed ‘#GoHomeGota’ materialised, expressing dissent against the then President, Gotabaya Rajapaksha, and the government, and their failure to prevent such a catastrophe. It was predominantly active in social media sites such Facebook and Twitter, amassing millions of posts expressing dissent and disdain towards the government and demanding the President to step down. Largely through social media, peaceful protests were organised throughout the country, and ‘Gota Go Gama’¹⁹ was founded in Galle Face,

¹⁴ Bellwether, ‘How to fix Sri Lanka’s debt crisis, unstable peg, avoid sudden stop event: Bellwether’ (economynext,

¹⁴ February 2021) <<https://economynext.com/how-to-fix-sri-lankas-debt-crisis-unstable-peg-avoid-sudden-stop-event-bellwether-79098/>> accessed 20 August 2023.

¹⁵ ‘Sri Lanka remittances down 61-pct in January 2022 amid parallel exchange rates’ (economynext, 26 February 2022) < <https://economynext.com/sri-lanka-remittances-down-61-pct-in-january-2022-amid-parallel-exchange-rates-90915/> > accessed 20 August 2023.

¹⁶ Samyak Pandey, ‘How Sri Lanka’s overnight flip to total organic farming has led to an economic disaster’ (The Print, 5 September 2021) <<https://theprint.in/world/how-sri-lankas-overnight-flip-to-total-organic-farming-has-ledto-an-economic-disaster/728414/> > accessed August 2023.

¹⁷ ‘As Sri Lankan Economy Recovers, Focus on Competitiveness and Debt Sustainability Will Ensure a Resilient Rebound’ (The World Bank, 9 April 2021) <<https://www.worldbank.org/en/news/press-release/2021/04/09/sri-lankan-economy-recovers>> accessed 20 August 2023.

¹⁸ Wailin Wong and Adrian Ma, ‘Sri Lanka is facing economic crisis — and the U.S. dollar is partly to blame’ (NPR, 29 April 2022) <<https://www.npr.org/2022/04/29/1095642332/sri-lanka-is-facing-economic-crisis-and-the-u-dollar-is-partly-to-blame> > accessed 29 August 2023.

¹⁹ ‘Gama’ is a Sinhala word for village.

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with people erecting tents and camping as a form of expression of their dissent, with their most predominant demand being the resignation of the President. This campaign gradually escalated into a nationwide protest campaign.²⁰ The culmination of this protest campaign could be said to be thousands of protesters storming and occupying the Presidential office and official residences of both the President and Prime Minister, and the eventual resignation of the President.²¹ However, undue suppression of the freedom of expression of the people of Sri Lanka by way of tear gas and water cannon attacks against protesters and social media bans to prevent people's digital freedom of expression was frequent during these times, causing international backlash including from the United Nations Human Rights Council.²²

Social media platforms were used in a myriad of ways in furtherance of the People's Struggle. Using the live video feature of Facebook, thousands of people documented the peaceful protests in real time, whilst capturing instances in which arrests were conducted without following the required procedure, such as arresting without giving reasons,²³ and thus violating

²⁰ Thanabalasingam Krishnamohan, Halideen Fathima Rifasha, 'The Indications of Politics, Economics, and Fundamental Rights. Instabilities in Sri Lanka: A Critical View-Based on The Galle Face People's Struggle of Sri Lanka in 2022' [2023] International Journal of Research and Innovation in Social Science 1160, 1161.

²¹ Imtiyaz Razak, 'Janatha Aragalaya: The People's Struggle In Sri Lanka' (2023) Colombo Telegraph < <https://www.colombotelegraph.com/index.php/janatha-aragalaya-the-peoples-struggle-in-sri-lanka/>> accessed 25 August 2023.

²² 'UN HRC54: Core Group concerned of intimidation & harassment of civil society and journalists, arbitrary use of laws to suppress dissent. in Sri Lanka' (2023) Sri Lanka Brief < <https://srilankabrief.org/un-hrc54-core-group-concerned-of-intimidation-harassment-of-civil-society-and-journalists-arbitrary-use-of-laws-to-suppress-dissent-in-sri-lanka/>> accessed 15 September 2023.

²³ 'Sri Lanka: End Government Crackdown on Peaceful Protesters' (2022) Human Rights Watch <<https://www.hrw.org/news/2022/08/05/sri-lanka-end-government-crackdown-peaceful-protesters>> accessed 15 August 2023.

Article 13(1) of the Constitution of Sri Lanka. Sharing posts online in order to organise protests nationwide, and urging and educating people of their right to engage in peaceful protests, was another method of harnessing social media to exercise digital freedom of expression.

Despite the fact that the ‘#GoHomeGota’ social media campaign and other forms of social media activism were utilised by the people of Sri Lanka as a method of exercising their freedom of expression, which is constitutionally guaranteed,²⁴ the State implemented numerous restrictive measures on this right. Notably, the State restricted access to social media platforms such as Facebook, Twitter, WhatsApp, and Instagram through the Telecommunications Regulatory Commission.²⁵ Criticism arose against this decision specifically due to the fact that the restriction was imposed, along with the declaration of a state of emergency, a day prior to a massive protest scheduled and organised through social media demanding government accountability.²⁶

A youth activist who acted as a page administrator of a Facebook group named ‘GoHomeGota2022’ was arrested and charged under Section 120

²⁴ Article 14 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

²⁵ ‘Social media platforms blocked in Sri Lanka’ (2022) The Indian Express <<https://indianexpress.com/article/world/social-media-platforms-blocked-sri-lanka-7850282/>> accessed 27 August 2023.

²⁶ ‘Sri Lanka protesters defy curfew after social media ban: State of emergency imposed on Friday as country faces severe shortages of food, fuel and other essentials’ (2022) The Guardian <<https://www.theguardian.com/world/2022/apr/03/sri-lanka-protesters-defy-curfew-after-social-media-ban>> accessed 27 August 2023.

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of the Penal Code²⁷, and was later released from the case due to insufficient evidence to pursue a case.²⁸

A Scottish woman's passport was confiscated by the Department of Immigration and Emigration, due to allegedly sharing "negative content" on her Instagram account. The woman states that she was merely documenting the peaceful protests against the government and sharing legal resources on the right of free expression.²⁹ The State authorities' actions concerning the foreign national's social media activity raise concerns about potential violations of her freedom of expression, and it is essential to ensure that any restrictions on freedom of expression are based on clear legal criteria and proportionate to actual security threats, while also allowing for due process and transparency in the investigation.

5. BALANCING ACTS: LEGAL FRAMEWORK AND INTERNATIONAL OBLIGATIONS

The legal framework of Sri Lanka, including its legislations and international obligations, envisage numerous provisions regarding the freedom of expression and its restriction. The Constitution of Sri Lanka

²⁷ Section 120 reads: "Whoever by words, either spoken or intended to be read, or by signs; or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the President or to the Government of the Republic, or excites or attempts to excite hatred to or contempt of the administration of justice, or excites or attempts to excite the People of Sri Lanka to procure, otherwise than by lawful means, the alteration of any matter by law established, or attempts to raise discontent or disaffection amongst the People of Sri Lanka, or to promote feelings of ill-will and hostility between different classes of such People, shall be punished with simple imprisonment for a term which may extend to two years".

²⁸ 'Youth activist behind #GoHomeGota Facebook campaign arrested and produced in Court' (2022) The Sunday Times < <https://www.sundaytimes.lk/220403/news/youth-activist-behind-gohomegota-facebook-campaign-arrested-and-produced-in-court-479036.html> > accessed 25 August 2023.

²⁹ 'Pro-'Aragalaya' Scottish woman being probed, passport confiscated' (2022) The Morning < <https://www.themorning.lk/articles/213005> > accessed 25 August 2023.

bestows on its people both the freedom of expression and its limitations. Article 14(1)(a) of the Constitution explicitly states that every citizen is granted the freedom of speech and expression, as part of the fundamental rights its people are entitled to. However, simultaneously a restriction is also conferred on the same right, per Article 15(2) of the Constitution, which would come into effect in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.

The Judiciary of Sri Lanka has emphatically held that criticism of the government is a permissible exercise of the freedom of expression guaranteed under the Constitution, in the case *Amaratunga v Sirimal and others*.³⁰ In this case, a protest was conducted by means of noise, by ringing bells, tooting vehicle horns, beating of drums, shouting anti-government slogans, and banging of saucepans, to show dissent against the government. It was held that the right to criticise the government is “fundamental to the democratic way of life, and the freedom of speech and expression is one which cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.”³¹

This case and its judgement are of particular importance to the People’s Struggle, as expressing dissent against the government by way of initiating noise was a frequent occurrence during it. Vehicles either passing a protest site, or those which formed part of the protest, would honk their horns imitating the sound that is made when saying ‘go home Gota’ and ‘kaputu

³⁰ S.C. Application No. 468/92 (1993).

³¹ S.C. Application No. 468/92 (1993).

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kaak kaak'.³² However, a person was arrested whilst honking so, and the Magistrate strictly warned the Police to understand the law before filing a case against anyone, and that Constitution of Sri Lanka has given the right to the citizens to express their dissent towards the government, and that the Jana Ghosha case has succinctly highlighted it.³³

Regardless of the fact that such rights are constitutionally guaranteed and underscored by the Judiciary, certain Emergency Regulations were enacted during the People's Struggle which restricted them. Regulation 15 of Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2022 states that any false statement, information, image or message which is likely to cause public alarm or disorder spread digitally, including on social media, is a violation. Due to the fact that the Regulation not only prohibits the dissemination of false information, but also true information that is "likely to cause public alarm or disorder", it would amount to a violation of the freedom of expression and the right to information. It should be noted that whilst the Emergency Regulations in effect since 2005 aimed to curtail rumours and false statements, they did not encompass factual information, which distinguishes them from the 2022 regulations that exhibit a more rigorous application.³⁴

³² This phrase was coined to express dissent against the Government during the People's Struggle, specifically against Parliament Minister Basil Rajapaksha.

³³ Zulfick Farzan, 'Kaputu Kaak Kaak Kaak': Lawyer released from charge of the tooting horn to famous tune' (2022) News First <<https://www.newsfirst.lk/2022/09/14/kaputu-kaak-kaak-kaak-lawyer-released-from-charge-of-tooting-horn-to-famous-tune/>> accessed 25 August 2023.

³⁴ 'Emergency Regulations promulgated in May and July 2022' (2022) Centre for Policy Alternatives <<https://www.cpalanka.org/wp-content/uploads/2022/07/Emergency-Regulations-promulgated-in-May-and-July-2022-Edited.pdf>> accessed 20 August 2023.

A myriad of international conventions addresses the conflict between right and restriction. Sri Lanka ratified the ICCPR and has thus taken on the obligation to protect and promote the rights it contains.³⁵ Article 19 of ICCPR confers on everyone the right to freedom of expression, which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

However, Article 19(3) of ICCPR details that this right could be restricted as provided by law, and as necessary for the protection of national security or public order. It must be noted that this provision was clarified by the ICCPR General Comment No. 34, stating that when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself, and that the Committee recalls that the relation between right and restriction and between norm and exception must not be reversed.

While the principle outlined in ICCPR General Comment 34 emphasizing that restrictions on freedom of expression should not jeopardize the right itself is commendable, there are concerns about the practical implementation and enforcement of this principle. Without clear guidelines on what constitutes 'jeopardizing the right itself,' there is room for interpretation and abuse by governments, and therefore it is essential to strike a delicate balance between protecting legitimate interests, such as national security, and safeguarding the right to freedom of expression. Without a more concrete framework for assessing whether a restriction

³⁵ 'Ratification Status for CCPR - International Covenant on Civil and Political Rights' United Nations Treaty Database
<https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CPR&Lang=en> accessed 25 August 2023.

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crosses the line into jeopardizing the right, there is a risk that governments could justify overly broad and restrictive measures under the pretext of protecting public order or other interests. Furthermore, the statement does not address the potential chilling effect that vague or ambiguous restrictions may have on individuals who fear legal repercussions for expressing their opinions, ultimately hindering the free exchange of ideas and information.

Most treaty bodies such as the United Nations Human Rights Committee, and jurisdictions apply the ‘proportionality test’ when evaluating restrictions on rights. This test comprises of four limbs³⁶: the State must have a legitimate purpose that serves a compelling interest when restricting the right;³⁷ there must be a rational connection between the specific measure used to limit the right and the legitimate interest;³⁸ the measure must be necessary to advance or prevent setbacks to the legitimate interest; and the measure must be ‘strictly proportionate’, this involves a balancing of the benefits gained by the public and the harm caused to the right due to the means selected by law to achieve the proper purpose.³⁹

This concept of proportionality was illuminated by the UN Human Rights Committee in *Robert W. Gauthier v Canada*,⁴⁰ where it was held that

³⁶ Gehan Gunatilleke, ‘Justifying limitations on the freedom of expression’ [2021] Human Rights Review 91.

³⁷ M Kumm, ‘Constitutional rights as principles: On the structure and domain of constitutional justice’ [2004] International Journal of Constitutional Law 574.

³⁸ Y Arai-Takahashi, ‘Scrupulous but Dynamic—the Freedom of Expression and the Principle of Proportionality under European Community Law’ [2005] Yearbook of European Law 247.

³⁹ J Rivers, ‘Proportionality and Variable Intensity of Review’ [2006] Cambridge Law Journal 174.

⁴⁰ Communication No. 633/1995, UN Human Rights Committee, CCPR/C/60/D/633/1995.

restriction must be necessary and proportionate to the goal sought to be achieved, and that it is a determination that is not in the exclusive prerogative of the State. It was further clarified that the State must specify and justify the precise nature of the threat posed by the exercise of freedom of expression by an individual.⁴¹

The utmost importance of maintaining the delicate balance between right and restriction without reversing the norm and exception could be said to be apparent in the foregoing analysis. The significance attached to maintaining such equilibrium could also be seen in the Constitution of Sri Lanka. The Constitution enumerates fundamental rights from Article 10 to 14, and Article 15 details the restrictions attached to them. However, the fact that such restrictions should be necessary and proportionate to the goal sought to be achieved is established by now. Additionally, the Constitution patently states that sovereignty is in the People and is inalienable, and such sovereignty includes the powers of government, fundamental rights and the franchise.

In this context, maintaining a careful balance between these rights and their restrictions is not only a legal imperative but also a matter of upholding the fundamental democratic principle that sovereignty lies with the people. Therefore, the restrictions outlined in Article 15 should not be invoked to undermine this sovereignty, especially under the pretext of public security to stifle political dissent. Article 15 merely holds the exception to the rule that is freedom of expression, and the latter could be restricted only for legitimate purposes proportionately.

⁴¹ Michael O'Flaherty, 'Freedom of expression: article 19 of the International Covenant on civil and political rights and the Human Rights Committee's general comment no 34' [2012] Human Rights Law Review 627.

6. RECOMMENDATIONS FOR A BALANCED APPROACH

The most important initiative to ensure that the equilibrium between right and restriction is maintained, and the relation between norm and exception is not reversed, is to properly apply the ‘proportionality test’ as analysed above. The groundbreaking Human Rights Council resolution firmly maintained that the same international standards and protections afforded offline applies online. Therefore, it must be ascertained that when a right is to be restricted, whether it is done for a legitimate purpose proportionately as per the four limbs of the test.⁴²

The legitimate aim must also be precisely defined and articulated to avoid misuse. Additionally, this aim should be substantiated with compelling evidence that demonstrates the existence of a genuine and significant harm that necessitates the restriction. Evidence-based justifications ensure that limitations on freedom of expression are not arbitrary and are genuinely serving the intended purpose, whether it is safeguarding national security or preventing public unrest.

The UN Human Rights Council report on internet shutdowns specifically focuses on social media bans implemented by governments in the face of political dissent, and categorically criticises them. It states that States should take all steps necessary to ensure that all individuals have meaningful access to the internet, and should refrain from interfering with access to it unless such interference is in full compliance with the requirements of the applicable human rights instruments. It emphatically states that vague provisions such as a “law referring to public order or

⁴² Evelyn Mary Aswad, ‘The Future of Freedom of Expression Online’ [2018-2019] *Duke Law & Technology Review* 26, 36.

national security that does not more specifically address the surrounding circumstances and conditions for Internet shutdowns is likely not sufficiently precise.”⁴³

The report recommends States to refrain from internet bans, and instructs in situations where bans are implemented to make the shutdown: clearly grounded in unambiguous, publicly available law; necessary to achieve a legitimate aim; proportional to the legitimate aim and as narrow as possible, in terms of duration, geographical scope and the networks and services affected; and communicated in advance to the public and telecommunications or Internet service providers, with a clear explanation of the legal basis for the shutdown and details regarding its scope and duration.⁴⁴

7. CONCLUSION

The foregoing analysis strived to showcase that the intricate interplay between freedom of expression, public security, and social media dynamics in the context of Sri Lanka's ‘People's Struggle’ underscores the pressing need for a balanced approach to safeguarding democratic values while addressing legitimate security concerns. In an era marked by digital challenges regarding the freedom of expression, where various methods of restriction have emerged, it is imperative to adopt a balanced approach. By adhering to the proportionality test and upholding international human rights standards, governments can navigate these complexities while safeguarding democratic values and individual rights. Specifically, it is recommended that restrictions are clearly defined and substantiated by compelling evidence to prevent misuse. Moreover, governments should

⁴³ United Nations, Internet Shutdowns: Trends, Causes, Legal Implications and Impacts on a Range of Human Rights, A/HRC/50/55 (13 May 2022).

⁴⁴ *ibid.*

refrain from implementing social media bans and, when necessary, ensure that any shutdowns are transparent, narrowly defined, and grounded in law. Upholding this balance is not just a legal obligation; it is a fundamental democratic principle that recognizes the sovereignty of the people. Such an approach ensures that restrictions are not misused under the pretext of public security to stifle political dissent. By following these recommendations, governments can effectively address the challenges of the digital age, promoting both security and democratic values.

REFERENCES

Amali EJ, Umar MM, Saawuan A, Madaki AA, 'National Security: Social Media and the Freedom of Expression' [2022] *NTAtvc Journal of Communication* 75.

Ammar Oozeer, 'Internet and social networks: freedom of expression in the digital age' [2014] *Commonwealth Law Bulletin* 341.

Cammarota J, 'The value of a multicultural and critical pedagogy: Learning democracy through diversity and dissent' [2011] *Multicultural Perspectives* 62.

Communication No. 633/1995, UN Human Rights Committee, *CCPR/C/60/D/633/1995*.

Corey Brettschneider, 'When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion' [2010] Cambridge University Press 1005.

Evelyn Mary Aswad, 'The Future of Freedom of Expression Online' [2018-2019] *Duke Law & Technology Review* 26.

Gehan Gunatilleke, 'Justifying limitations on the freedom of expression' [2021] *Human Rights Review* 91.

J Rivers, 'Proportionality and Variable Intensity of Review' [2006] *Cambridge Law Journal* 174.

M Kumm, 'Constitutional rights as principles: On the structure and domain of constitutional justice' [2004] *International Journal of Constitutional Law* 574.

Martin H. Redish, 'Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker' [1981] *U. Pa. L. Rev.* 678.

Michael O'Flaherty, 'Freedom of expression: article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment no 34' [2012] *Human Rights Law Review* 627.

Onder Bakircioglu, 'The application of the margin of appreciation doctrine in freedom of expression and public morality cases' [2007] *German Law Journal* 711.

Philip Alston and Ryan Goodman, *International Human Rights. The Successor to International Human Rights in Context: Law, Politics, and Morals* (1st edn, University of Colombo 2013).

Scott P Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics' [2013] *Michigan Journal of International Law* 491.

Thanabalasingam Krishnamohan, Halideen Fathima Rifasha, 'The Indications of Politics, Economics, and Fundamental Rights. Instabilities in Sri Lanka: A Critical View-Based on The GalleFace People's Struggle of Sri Lanka in 2022' [2023] *International Journal of Research and Innovation in Social Science* 1160.

United Nations, *Internet Shutdowns: Trends, Causes, Legal Implications and Impacts on a Range of Human Rights*, A/HRC/50/55 (13 May 2022).

Wolfgang Benedek and Matthias C. Kettemann, *Freedom of Expression and the Internet* (2nd edn, Council of Europe 2020).

Y Arai-Takahashi, 'Scrupulous but Dynamic—the Freedom of Expression and the Principle of Proportionality under European Community Law' [2005] *Yearbook of European Law* 247.

AN ANALYSIS OF THE RIGHTS OF THE SUSPECTS UNDER INTERNATIONAL HUMAN RIGHTS LAW: LESSONS FOR SRI LANKA

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ABSTRACT

The fair treatment of all those involved with the criminal justice system is vital to its effectiveness. During a criminal investigation and a custodial arrest, a suspect is typically viewed as a vulnerable individual. As a result, the rights of the suspects may be violated by different individuals during the criminal investigation process. Although the suspected person is vulnerable in the crime investigation process in any country, he has certain rights as a human being. Besides, under international human rights laws, there are a number of organizations and instruments devoted to the protection of human rights. Against this backdrop, finding a key international instrument designed solely to address the rights of suspects within state parties is challenging, nevertheless. Therefore, the main objective of this paper is to explore and analyse the rights of suspected persons under the existing international human rights regime. This literature review will be based on international human rights instruments, including soft and hard laws and jurisprudence developed by international committees and individual communications. In this analysis, the main focus has been given to the international instruments in which Sri Lanka

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has been a state party. Finally, it is reasonable to argue that even though there isn't a specific international human rights instrument to international issues pertaining to suspects' rights, the current human rights structure is satisfactorily addressing many of the problems they run into while in the context of criminal investigations and detention.

Key Words: International Conventions, Human Rights, Suspects

1. INTRODUCTION

“There is no peace without development, no development without peace, and there is no lasting peace or sustainable development without respect for human rights and the rule of law.”¹

***United Nations Secretary-
General Ban Ki-moon***

The United Nations Organization (hereinafter UN) has initiated many international human rights instruments that stipulate numerous provisions outlining the rights of suspects. One of the main objectives of the UN is “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion²”. This objective showcases that the UN works towards the protection of the rights of the people without any distinction. The prime essence of the criminal justice system should be a balance between the rights of all the personnel involved with the criminal justice administration. Since this objective of

¹ United Nations Secretary-General Ban Ki-moon, Preventing Crimes to Build Sustainable Development, 13th United Nations Congress on Crime Prevention and Criminal Justice, <http://www.un.org/en/events/crimecongress2015/>, accessed on 5th August 2022.

² Article 1 of the United Nations Charter, 1945.

the UN covers all humans, it can include the criminal suspected persons also. Being a suspect does not remove the 'human' status of any person. Although suspect is another human in this world, due to their status of 'suspect', these humans are being ignored or marginalized not only by state officials but also by society. This could lead to the violation of many human rights of suspected persons. Under the guidance of the UN, there are a number of international instruments which work towards the protection of the rights of humans. Within those, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights etc. play a major role. Yet, it is difficult to find a specific international convention that aims at the protection of the rights of the suspects. But there are some guiding principles which are codified by several UN agencies towards the protection of suspected persons' rights. Although a main international convention to recognize the rights of suspected persons cannot be found, provisions of the main international conventions can be used to meet this objective. Therefore, the main objective of this chapter is to identify the rights of suspected persons available under international human rights law. This literature review will be based on international human rights instruments including soft and hard laws and jurisprudence developed by the international committees and individual communications.

2. SELECTED PROVISIONS FROM RELEVANT INTERNATIONAL INSTRUMENTS

Being a suspect of a crime does not mean that the suspected individual is not entitled to any human right. Although he has committed a crime, it is essential to protect his rights to a certain level. Although these rights can

be restricted under certain circumstances, it does not imply the complete removal of all the rights of the suspected persons. The very basic reason for this is the principle of presumption of innocence. Presumption of innocence means ‘everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence’³. This is accepted under Article 14(2) of the International Covenant on Civil and Political Rights also. The General Comment to Article 14 states that the ‘presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt, ensures that the accused has the benefit of the doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle’⁴. This explanation gives priority to the accused person, and it recognizes the importance of treating the criminal suspect in accordance with the rights of the suspected person. If this right is protected, then a series of rights to which suspects are entitled can be observed. Also, this explanation recognizes the importance of giving due dignity to the criminal suspected person as well⁵. With the recognition of this right, it is arguable that suspected persons are entitled to many human rights standards. Some of these human rights standards are specifically aimed at suspected persons, and some are in general. When examining these rights, they can be found in different international instruments, starting from the UDHR. A significant characteristic of these instruments is that most countries are already state parties to those

³ Article 11 (2) of the Universal Declaration of Human Rights, 1948.

⁴ Paragraph 30 of the General Comment 32 (2002) of the Human Rights Committee.

⁵ Communication No. 1056/2002, *Khachatrian v. Armenia*.

international instruments respectively. These human rights instruments are mainly a creation of the UN. Therefore, in the following, I would like to analyse the rights of suspects, under different international human rights instruments.

2.1 RIGHTS OF THE SUSPECTS UNDER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Although there are many criticisms for the UDHR, it is considered as the first document which was drafted with the assistance of many groups of the world by aiming at protecting the rights of the humans in the world. However, the UDHR has attained its recognition, mainly because successive generations of human beings, from distinct cultures and all over the world, recognized in it a “common standard of achievement” (as originally proclaimed), which corresponded to their deepest and most legitimate aspirations⁶. Further, under the Teheran Proclamation⁷ it was noted that the UDHR could be treated as the authentic interpretation of different human rights provisions of the Charter of the United Nations⁸.

Under the UDHR, there are several rights, including civil and political rights, as well as economic, social and cultural rights. Within these two areas, I would like to focus on the civil and political rights which are applicable to the suspected persons.

In general terms, the most significant requirement of the UDHR is the equality in dignity and rights. Accordingly, it states that ‘all human

⁶ Trindade. A.A.C, (2008), Universal Declaration of Human Rights, United Nations Audiovisual Library of International Law, http://legal.un.org/avl/pdf/ha/udhr/udhr_e.pdf, Accessed on 5th August 2022.

⁷ Proclamation of Teheran was drafted subsequent to the First the first International Conference on Human Rights (Teheran, April to May 1968).

⁸ Momtaz. D, (2009), Proclamation of Teheran, United Nations Audiovisual Library of International Law, www.un.org/law/avl, Accessed on 5th August 2022.

beings are born free and equal in dignity and rights⁹. The question comes whether the suspects could include the term ‘all human beings’ under the Declaration. When analysing the other rights of the Declaration, it is notable that the applicability of the Declaration comes very broadly, and it covers almost all the categories of the human world. Therefore, we can argue that the term ‘all human beings’ includes suspects as well¹⁰. The right to recognition everywhere as a person before the law¹¹ is a significant human right recognized under the UDHR. That is because if the person has been recognized as a person before the law, then it would be an avenue to grant other human rights to a person.

Therefore, if the suspected person can get recognition everywhere as a person before the law, then it implies an opportunity for the suspected person to be entitled to other rights.

The most important right of any human being is the right to life¹². Generally, protecting the life of the human is essential because it is the foundation for the other rights of humans. In this context as a human, a suspected person is also entitled to this right, but this right can be restricted if the suspected person is convicted of a murder or related crime. The right to be free from torture or cruel, inhumane treatments or be free from degrading treatments or punishments is another right coming under the Declaration.¹³ This is a highly important right for a suspected person because when the suspect is under the investigating

⁹ Article 1 of the UDHR, 1945.

¹⁰ Further, this is justified by the Article 2 of the Declaration. Accordingly, ‘everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinions, national or social origin, property, birth, or other statuses.

¹¹ Article 6 of the UDHR, 1945.

¹² Article 3 of the UDHR, 1945.

¹³ Article 5 of the UDHR, 1945.

atmosphere, there is a high tendency to face torture or cruel, inhumane treatment.

Equal protection before the law is also another important right to which a suspected person is entitled¹⁴. If the suspect is not protected equally before the law, then all his other rights can be violated. According to the principle of presumption of innocence, till a suspect is proven guilty by a proper court, he should be considered innocent. Until he is proven guilty, the suspected person is entitled to equal treatment before the law. When suspects are subjected to ill treatments during the investigation process, then their equal protection before the law can be violated.

Although all these rights are in general, Article 9 of the Declaration specifically focuses on the suspected persons, since it talks about the right to be free from arbitrary arrest and detention. Further, the right to a fair trial¹⁵, the presumption of innocence¹⁶ and the right to an effective remedy by a competent court are some rights which could be used as basic rights of the suspected persons under this Declaration. However, these rights are not interpreted by any agency under the UN. These provisions were then later gathered under many international instruments among those, the International Covenant on Civil and Political Rights plays a fundamental role.

¹⁴ According to Article 7 of the Declaration, 'all are equal before the law and are entitled without any discrimination to equal protection of the law'.

¹⁵ Article 10 of the UDHR, 1945.

¹⁶ Article 11 of the UDHR, 1945.

2.2 RIGHTS OF THE SUSPECTS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (hereinafter ICCPR) was adopted on 1966 December 16 by the General Assembly¹⁷ resolution. When analysing the rights stipulated under the ICCPR, we can see they have been reflected by the 1945 Universal Declaration on Human Rights. The General Assembly Resolution 543 (VI) of 4 February 1952 can be considered as the inception of the creation of the ICCPR because this resolution guides the Human Rights Commission to draft this document¹⁸. Also, the ICCPR is considered as a collection of many traditional human rights and values¹⁹ which covers all civil and political rights of all humans. Under the preamble of the ICCPR, it has stated that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Therefore, it clearly recognizes the inherent dignity and equal and inalienable rights of all members as the foundation to many things, including that of justice. The term human family includes male, female, children, elderly, disabled, victims, witnesses and suspects of crime as well. Accordingly, there are many rights under the ICCPR which applies to the suspects of a crime as well.

Part II of the ICCPR discusses the state party obligation under the covenant. Consequently, ICCPR urges state parties to respect and ensure the rights of the covenant towards all citizens without any discrimination²⁰.

¹⁷ United Nations General Assembly Resolution 2200 (XXI).

¹⁸ ICCPR was adopted by the General Assembly Resolution 2200 (XXI) on 16th of December 1966.

¹⁹ Tomuschat. C., Introductory Note on International Covenant on Civil and Political Rights, <http://legal.un.org/avl/ha/iccpr/iccpr.html>, Accessed on 05th August 2022.

²⁰ Article 2(1) of the ICCPR 1966.

Therefore, state parties need to take appropriate steps to ensure that these rights are given to all citizens of the country. Under the appropriate steps, state parties are required to enact suitable legislations, regulations, and policy decisions to reach their obligation under the covenant. If any individual rights are violated or restricted, then also state parties have a duty to diagnose suitable measures to effective remedy, although the violation has been committed by persons acting in an official capacity²¹. The most important values and rights come under part III of the covenant, spanning from Article 6 to Article 27. Some rights are, in general terms, applicable to all humans without any distinction; at the same time, there are certain rights discussed under part III of the covenant that directly deal with the suspect of a crime or any individual who is faced with criminal investigations.

Equality before the law without any discrimination is an extremely important right under the ICCPR. This right is defined under Article 26 of the ICCPR, and accordingly, it states that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Here, this includes all humans without any discrimination²². Therefore, we can argue that the protection and the coverage of this provision could cover the suspected persons as well. Since this protection goes towards the suspected persons, such persons are entitled to some key basic human rights under the Covenant. Accordingly,

²¹ Article 2 (3) (a) of the ICCPR 1966.

²² Article 3 of the ICCPR is also relevant in this context accordingly, ‘the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant’.

the right to life²³ is a main right that even suspects should have. Then, the right to be free from torture²⁴, right to liberty and security of persons²⁵, all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person²⁶, right to a fair trial, right to recognition everywhere as a person before the law²⁷, and the right to privacy²⁸ are cardinal rights that can be argued in favour of the suspected person under the Covenant.

Another significant characteristic of this Covenant is its individual communication mechanism. When victims of any human rights violations are not protected by national-level mechanisms, then such victims can directly communicate with the Human Rights Committee²⁹. Therefore, the Human Rights Committee plays a role in accepting individual communications and producing general comments to the rights of the Covenant. The jurisprudence developed by the Human Rights Committee is considered as the landmark interpretation for such rights.

2.2.1 JURISPRUDENCE OF THE GENERAL

RECOMMENDATIONS OF THE HUMAN RIGHTS COMMITTEE

This part specifically analyses the interpretations of the Human Rights Committee (Hereinafter Committee). Part IV of the covenant provides the legal platform for establishing the Committee. Compared to the UDHR, ICCPR rights have been comprehended by the Human Rights Committee of the UN. Therefore, here the author wishes to examine certain rights which

²³ Article 6 of the ICCPR 1966.

²⁴ Article 7 of the ICCPR 1966.

²⁵ Article 9 of the ICCPR 1966.

²⁶ Article 10 of the ICCPR 1966.

²⁷ Article 16 of the ICCPR 1966.

²⁸ Article 17 of the ICCPR 1966.

²⁹ See Article 1 and Article 2 of the Optional Protocol to the ICCPR.

will affect the suspected persons particularly.

Right to life³⁰

The right to life is considered as an absolute right under the Covenant and under the General Comment it is mentioned as the supreme right from which no derogation is permitted even in time of public emergency³¹. Therefore, even under a critical condition, suspects are entitled for a right to life.³² This includes a positive as well as a negative duty towards the state parties.³³ During the investigation process, there are many instances in many countries, where suspects are killed because of the worstform of questioning.

Freedom from Torture³⁴

This right is as important as the right to life. Because cruel and inhumane treatments will lead to violation of the right to life. This right has been discussed under the General Comment number 20 of the Human Rights Committee³⁵. Accordingly, this right covers not only the physical torture, but also the mental torture as well³⁶. Furthermore, it gives the responsibility and the duty for the state parties to take necessary measures to avoid such incidents³⁷. These measures include legislative,

³⁰ Article 6 of the ICCPR.

³¹ General Comment Number 14 (1984), General Comment Number 14 was introduced subsequent to General Comment Number 06 (1982).

³² Under the *Umatellie v. Kyrgyzstan* (HRC 1275/04), HRC concludes that the state failed in its negative duty not to kill arbitrarily and failed in its positive duty to protect Burrell's life whilst he was in State custody. Similarly, in *Dermitt v. Uruguay* (HRC 84/81), HRC followed with the same interpretation of this right.

³³ In *Bueeell v. Jamaica* (HRC 546/93).

³⁴ Article 7 of the ICCPR.

³⁵ This General Comment replaces the General Comment number 7 (1982).

³⁶ General Comment number 20 Paragraph 2.

³⁷ In *Alzery v. Sweden* (HRC 1416/05), the suspected person was subjected to inhumane treatment such as being sent to a small locker room, slitting the clothes with scissors,

administrative, or judicial measures³⁸. When it comes to the suspects, they are mostly subjected to cruel treatment during the criminal investigation process. Another significance of this right lies in the fact that it is also considered as a non-derogable right, in other words, this is an absolute right. Under this perception, this right cannot be restricted under any situation in a country³⁹. Starting from the police investigation to judicial decisions. It is a well-known fact that most suspects are subject to torture or cruel or inhumane treatment while they are in police custody. Under this article it obviously prohibits these activities during the police custody. In this regard, all personnel who are involve with the criminal investigation, are required to undergo through a suitable training⁴⁰. This is a state party obligation and the intended outcome of this is to function the criminal administration in a smooth manner by following the due standards. The General Comment further pins the need of ‘keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment as an effective means of preventing cases of torture and ill-treatment’⁴¹. This is extremely important since investigating officers could use force and imprisonment for interrogation purposes. However, the Human Rights Committee urges that this could lead to the violation of this right. Further, this is most common in many countries and police stations since the police cells are converted into torture chambers. Another

and the suspect was handcuffed and chained to his feet. HRC ultimately found that Sweden was complicit in that treatment, in breach of Article 7 of the ICCPR,

³⁸ General Comment number 20 Paragraph 8.

³⁹ *Giri v. Nepal* (HRC 1761/08) and *Vuolanne v. Finland* (HRC 265/87) are some individual communications concluded by the Human Rights Committee in this regard.

⁴⁰ General Comment number 20 Paragraph 10.

⁴¹ General Comment number 20 Paragraph 11.

requirement mentioned in this General Comment is that the detainee is entitled to prompt and regular access to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members⁴². This provision is meant to eliminate such violations, and it is important to always protect the rights of the detained suspects. If suspects have no access to any of these people, then the custodial atmosphere could easily be used for the violations of the detained suspects. Further, when suspects are in such a vulnerable situation, police officers will use coercion, force, and assault suspects to obtain confessions. The general rule relating to the police confession is that it may be obtained from the suspect or accused of his own will. But if it is obtained by the police officers under torture conditions, then it is not admissible as a piece of evidence against the suspect. Therefore, 'it is important for the discouragement of violations under article 7 and the domestic laws of a state must discourage the use of confessions which obtained by use of force or torture⁴³'. This is a clear safeguard for the suspect. Because confessions are usually taken by the suspects while they are in police custody. Paragraph 12 of the General Comment 20 aims to protect the basic rights of the suspect. This is the broader interpretation of the right to be free from torture. Similarly, this paragraph identifies the confession period as a time where this right can be violated.

⁴² General Comment number 20 Paragraph 11.

⁴³ General Comment number 20 Paragraph 12.

Right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention⁴⁴.

This is a substantive right recognized under the ICCPR, and according to General Comment number 35, liberty⁴⁵ and security of a person⁴⁶ are precious for their own sake, and also because the deprivation of liberty and security of a person has historically been the principal means for impairing the enjoyment of other rights⁴⁷. Article 9 clearly states that ‘everyone’, includes a person convicted of a crime, but it also does not speak about the criminal suspected person. There could be an argument that if it is granted to convicted persons, then impliedly, this covers the criminal suspects as well. If the individual’s liberty or security is restricted, then from that point onwards, his or her other rights will be restricted. The liberty of a person includes physical⁴⁸ as well as mental liberty. This is essential for any human being. But when it comes to the suspects, this right can be restricted. Due to the criminal investigation requirement’s suspects need to undergo some procedures, and this will sometimes automatically limit this right.⁴⁹ However, deprivation of liberty includes police custody, *arraigo*, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and

⁴⁴ Article 9 of the ICCPR, 1966.

⁴⁵ In *Celepli v. Sweden* (HRC 456/91), HRC states that Article 9 applies only to severe deprivations of liberty, such as incarceration within a certain building (e.g. one’s home, prison, psychiatric institution, immigration detention center) rather than restrictions on one’s ability to move freely around a state or an even smaller locality.

⁴⁶ In *Delgado Páez v. Colombia* (HRC 195/85), HRC illustrates that the right to personal security is independent of the guarantee of liberty, and the committee concluded that state parties have to take appropriate measures to protect such right.

⁴⁷ General Comment number 20 Paragraph 2.

⁴⁸ In *Jayawardena v. Sri Lanka* (HRC 916/00), HRC concludes that the failure of the State party to investigate the threats to the life of the author violated his right to security of the person under Article 9, paragraph 1 of the Covenant.

⁴⁹ In *Van Alphen v. The Netherlands* (HRC 305/88), HRC states that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all circumstances.

confinement to a restricted area of an airport, as well as being involuntarily transported⁵⁰. It shows that it includes large area and include many places which restrict the rights of the suspected persons. If a suspect is taken to any places without voluntary consent, then it could lead to a violation of this right, which is discussed elaborately under paragraph 6 of General Comment 35.

Arbitrary⁵¹ arrest and detention is another restriction made under this this Article. In *Van Alphen v The Netherlands*, the author was a Dutch solicitor who was arrested on suspicion of having been an accessory or accomplice to forgery and of filing false income tax returns. The author was detained for over nine weeks in an attempt to force him to provide information to the authorities in relation to certain clients. HRC concludes this as a violation of Article 9, paragraph 1. The General Comment recognizes the need of informing the reason for the arrest of the suspected persons⁵². Sometimes, suspects will be arrested without informing the reason,⁵³ and this could eliminate the defence opportunities. However, sometimes, due to the seriousness of the offence, some suspects need to be arrested immediately, and such instances might be excluded from this right. In *Ismailov v. Uzbekistan* a violation was found in Article 9, paragraph 2 when a person was arrested but was not informed of the charges against him for two days.

⁵⁰ General Comment number 35 Paragraph 5.

⁵¹ In *Van Alphen v. The Netherlands* (HRC 305/88), HRC states that the drafting history of Article 9 paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice, and lack of predictability.

⁵² *Kelly v. Jamaica* (HRC 253/87), *Grant v. Jamaica* (HRC 597/94), and *Griffin v. Spain* (HRC 493/92) are some individual communications concluded under this issue by the HRC.

⁵³ Article 9, paragraph 2 of the ICCPR, 1966.

Humane treatment of persons deprived of their liberty⁵⁴

This is a significant protection for a suspected person, especially when a suspected person is subject to criminal interrogation. As per this discussion, it is clear that a custodial atmosphere will restrict the rights of the suspected person to liberty. Accordingly, this applies to ‘anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals - particularly psychiatric hospitals - detention camps or correctional institutions or elsewhere. States parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held⁵⁵. Therefore, when a suspected person is kept under police custody for more than the stipulated time duration, then this right can be violated. However, keeping the suspected person in custody for an accepted time duration will not affect this right in first instance. In Sri Lanka, for several reasons, there is a tendency for suspected persons to be kept in custody for many days without being produced to the Magistrates.

Further, this General Comment imposes a positive obligation towards the state parties to protect the suspected person when they are in a vulnerable situation. Specially suspected persons should not be subject to torture and inhumane treatment during the custodial period. Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule⁵⁶. This principle specifically makes safeguard on the suspected persons while they are in custody.

⁵⁴ Article 10 of the ICCPR and General Comment 21 applies to this Article, and General Comment number 21(1992) replaces General Comment number 9(1982).

⁵⁵ General Comment number 21(1992) Paragraph 2.

⁵⁶ General Comment number 21(1992) Paragraph 4.

Furthermore, this General Comment significantly identifies certain internationally agreed principles that need to be followed⁵⁷ and state parties are bound to follow the procedures introduced by these internationally agreed principles. The main aim of these principles is to protect the rights of the suspected persons when they are in custody, prison, etc.

Article 10(2) of the ICCPR makes a distinction between the convicted and unconvicted. A suspected person belongs to the category of unconvicted, but mostly, when they are in custody, they are being treated as convicted accused by the inquiring officials. The applicability of the presumption of innocence will justify this distinction as discussed above. Accordingly, the reports of States parties should indicate how the separation of accused persons from convicted persons is affected and need to explain how the treatment of accused persons differs from that of convicted persons⁵⁸. Therefore, state parties need to identify this separation, and the treatment of each group should be based on the segregation.

Right to Fair Trial

Article 14 of the ICCPR recognises the elements of the right to a fair trial⁵⁹. The significance of this right under the ICCPR is that it mainly looked from the perspective of the criminal suspected persons. According to this Article, the ‘right to fair’ includes different subsequent rights, such as right

⁵⁷ United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).

⁵⁸ General Comment 21 (1992) Paragraph 9.

⁵⁹ General Comment 32 Paragraph 6 states that the right to a fair trial is not a *non-derogable* right.

to equality before courts and tribunals, presumption of innocence, right to know the charge against suspect, adequate time to prepare for the defence, consulting opportunities with a Lawyer selected by the suspect, trial without undue delay, knowledge about the witness statements, request for a assistance of interpreter when required, not to be compelled to testify against himself or to confess guilt and right to appeal⁶⁰. The Initial General Comment number 13 for the Article 14 was later replaced by the General Comment 32⁶¹. General Comment number 13⁶² states that these provisions are aimed at ensuring the proper administration of justice and, to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law⁶³. Therefore, it is clear that, this Article mainly focuses on many rights of the suspected person. In other words, this Article recognizes the need to fulfil the right to a fair trial. The analysis of Article 14 shows that paragraph 1 of this Article deals with the general guarantees, and the other hand, paragraphs 2 to 5 deal with the procedural guarantees available to persons charged with a criminal offence.⁶⁴ Further, under General Comment 32, has noted that, the right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.⁶⁵ The terms ‘all persons shall be equal before the courts and tribunals’ and ‘everyone is entitled to fair and public hearing’ give equal positions to all parties involved with the judicial process. In this

⁶⁰ Article 14 (1) to Article 14 (5) of the ICCPR.

⁶¹ Published in 2007.

⁶² General Comment 13 (1984).

⁶³ General Comment 13 (1984) Paragraph 1.

⁶⁴ General Comment 32 (2007) Paragraph 3.

⁶⁵ General Comment 32 (2007) Paragraph 2.

context, we can argue that it intends to include victims as well as the suspected persons in these terms. This is also the main essence of criminal justice principles.

The right to be informed of the charges promptly is another element of this right. This is important to the suspects, because then they can work on their defence. Otherwise, the suspected person will not have any idea about at least what charge is against him. This can be considered a basic need of the criminal investigation process. However, due to the seriousness of the offence, sometimes inquiring officers will not inform the charge promptly. The Committee notes further that the right to be informed of the charge “promptly” requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law.⁶⁶

Adequate time for preparation of the defence and choosing a counsel is another important need to establish the right to a fair trial. Accordingly, what “adequate time” is depends on the circumstances of each case, but it is important to seek whether sufficient time has been given to the defence lawyer in preparing the case. This will enable the suspects to seek the grounds which he or she can bring the defence. Without knowing or without having access to the required documents such as a copy of the charge sheet, suspects would not present the case. Therefore, it is extremely important to have a successful presentation of the suspect's case. When preparing the case, time as well as adequate facilities is also important. “Adequate facilities” must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are

⁶⁶ *Márques de Morais v. Angola*. (HRC 1128/2002 para 5.4).

exculpatory⁶⁷.

Undue delay will negatively affect the suspected person because when there is a delay in the trial process, the suspected person's custodial period might extend. This extension could allow the inquiring offices to violate many other rights of the suspected persons. However, there will be confusion about when this timing starts or when the undue delay starts. According to General Comment 32, paragraph 35, the right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice⁶⁸. So, in all stages, there should not be an undue delay. This time calculation needs to start from the arrest and detention period as well.

Another significant feature of Article 14 is that it recognizes the language rights of the suspected persons⁶⁹. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding, may constitute a major obstacle to the right of defence. Therefore, if the suspected persons are unable to understand the language in this process, then defence will not become a reality. Furthermore, the Article recognizes that the accused may not be compelled to testify against himself or to confess guilt⁷⁰. The suspected persons should have the freedom in the trial process.

⁶⁷ General Comment number 32 paragraph 33.

⁶⁸ In *Sextus v Trinidad and Tobago* (HRC 818/1998) ; a delay of 22 months between the charging of the accused with a crime carrying the death penalty and the beginning of the trial without specific circumstances justifying the delay.

⁶⁹ Article 14 Paragraph 3 (f).

⁷⁰ Article 14 3 (g) of the ICCPR.

The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable⁷¹. If this is not given to the suspected person, his equal protection before the law is also restricted.

General Comment number 32 discusses the protection of the rights of the suspected persons in different stages in the criminal investigation process. This provision can be classified as the cardinal or the fundamental protection for the suspected persons under the ICCPR since its main objective is to have a balance in the administration of justice. When constructing this balance, suspects need to give a considerable position under Article 14 of the ICCPR.

Recognition as a person before the law

This right will give effect to other rights also. If a suspected person is also considered as a ‘person before the law’ automatically, it opens an avenue to grant many rights to all persons. Non-recognition will lead to restriction of the rights of suspected persons. Article 16 of the ICCPR does not distinct any type of person in the Article, therefore, it is arguable that it includes suspects also.

Right to privacy

While the suspect is subject to the criminal investigation process, his or her right to privacy can also be violated.⁷² Consequently, unlawful interference with his or her personal life is restricted, and it restricts the unlawful attacks on his honour and reputation⁷³. The term “unlawful” means that no interference can take place except in cases envisaged by the

⁷¹ General Comment 13 (1983) Paragraph 14.

⁷² Article 17 of the ICCPR recognize this right.

⁷³ Article 17 (1) of the ICCPR, 1966.

law⁷⁴. When suspects are taken into custody or for criminal investigations, their personal lives can be restricted, and their reputations will be attacked. Social reactions towards such an incident will attack the honour and reputation of the suspected person. Therefore, when taking suspects for criminal investigations, it is important to take suitable measures to protect the privacy of the suspected persons. Giving publicity to some crime incidents and taking suspects openly to the police stations or courts will attack the right to privacy of the suspected persons.

2.3 RIGHTS OF THE SUSPECTS UNDER THE CONVENTION AGAINST TORTURE

The Convention Against Torture⁷⁵ (Hereinafter CAT) is a convention which is created on a specific thematic area or can be called as a tailor-made instrument. When suspected persons are in police custody or when they are in criminal interrogation, in most occasions, suspects are being tortured or subjected to different cruel, inhumane treatments. However, inquiring officers attempt to justify it as an effective method of interrogation. Therefore, this is the major difficulty suspects are facing. Under UDHR and ICCPR, this has been restricted. Prior to this hard law document under the international regime Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁷⁶ was drafted by the international community. However, for several reasons, it could not gain appropriate acceptance. Subsequently, the CAT took its place with much recognition from many state parties.

⁷⁴ General Comment 16 (1988) Paragraph 3, *Pinkney v. Canada* (HRC 27/78).

⁷⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984.

⁷⁶ Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975.

The CAT defines the term ‘torture’⁷⁷ under Article 1 of the Convention. This Article identifies that torture could occur as a form of mental harm or physical harm. It includes any activities of obtaining confession by a suspected person by using unacceptable force by a public official. Therefore, this Article recognizes that, this violation can happen from a public officer; it includes inquiring or police officers. Mostly, when inquiring officers want to obtain a confession from the suspected person, officers are using unacceptable force on the suspect. Subsequently, this convention imposes a state party obligation to take suitable measures⁷⁸ to eliminate such practices within the country⁷⁹.

The convention required state parties to identify torture activities as criminal offences⁸⁰. This shows the gravity that has been given to these activities by the Convention. Since this violation happens during the interrogation period, this Convention invites each State Party to keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture⁸¹. Another significant requirement of the CAT is that, it imposes an obligation on the state parties to ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible and in the event of the death of the victim as a result of an act of

⁷⁷ Under the General Comment No. 2 (2007) of the Committee against Torture, torture is considered an absolute and a non-*derogable* right.

⁷⁸ Suitable measures include effective legislative, administrative, judicial or other measures.

⁷⁹ Article 2 of the CAT, 1984, this was further elaborated under the General Comment no. 2 of the Committee against Torture.

⁸⁰ Article 4 of the CAT, 1984.

⁸¹ Article 11 of the CAT 1984.

torture, his dependents shall be entitled to compensation⁸². Therefore, it creates a right to the suspected person to gain compensation if he or she faces such incident, and this is also another protection for the suspected person when such a person is in police custody. The right to prompt, fair and adequate compensation for torture or ill-treatment under Article 14 is multi-layered and compensation awarded to a victim should be sufficient to compensate for any economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary⁸³. In this context, first, there should be an effective mechanism to calculate the damage to the victim of the torture, and then its effective implementation is required to reach the objective of Article 14 of the CAT.

Further, the Convention makes the Committee against Torture as a competent entity to accept individual communications from victims from different states. The state needs to declare⁸⁴ under this Article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention⁸⁵. However, in Article 22 of the CAT there is a restriction on receiving individual communications to the Committee against torture. That is, if a state party is not making a declaration to recognize the competence of the Committee against Torture, then no individual communications can be received from such a state party. Therefore, when state parties are not making the required declaration, there is no possibility

⁸² Article 14 (1) of the CAT 1984.

⁸³ General Comment no. 3 (2012) of the Committee against Torture.

⁸⁴ Sri Lanka has not made such a declaration to recognize the competence of the Committee against Torture, United Nations, (1998) Report of the Committee against Torture, General Assembly records A/ 53/44, p. 26.

⁸⁵ Article 22 (1) of the CAT 1984.

of making any individual communication to this Committee by victims of torture in state parties.

2.4 RIGHTS OF THE SUSPECTS UNDER THE STATUTE OF INTERNATIONAL CRIMINAL COURT

The statute of the International Criminal Court⁸⁶ (Hereinafter called ICC) is the key document that establishes a permanent court to prosecute international crimes.⁸⁷, such as genocide⁸⁸, crimes against humanity⁸⁹ and war crimes⁹⁰. This prosecution process is followed by the stages of preliminary examination, investigations, pre-trial stage, trial stage, appeal stage and enforcement of the sentence⁹¹. It is important to examine the crime investigation stage of the ICC. Part V of the ICC statute deals with the investigation process. In the investigation process, the ICC Statute gives prominence to the rights of the persons during the investigation⁹². Accordingly, it states that, a person shall not be compelled to incriminate himself or herself or to confess guilt, shall not be subjected to any form of coercion, duress or threat, to torture or any other form of cruel, inhuman or degrading treatment or punishment. These are two important needs to protect the suspected persons rights during the investigation process. This can be considered a milestone in the rights of the suspects under international-level crimes⁹³. Further, this Article recognizes language

⁸⁶ was adopted on 17 July 1998 and entered into force on 1 July 2002.

⁸⁷ Preamble of the ICC Statute states that “State party to the Statute Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”.

⁸⁸ Article 6 of the ICC Statute, 1998.

⁸⁹ Article 7 of the ICC Statute, 1998.

⁹⁰ Article 8 of the ICC Statute, 1998.

⁹¹ ICC, Legal Process, <https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess>, Accessed on 5th August 2022.

⁹² Article 55 of the ICC Statute, 1998.

⁹³ Article 55 1 (a) & (b) of the ICC Statute, 1998.

rights, and it recognizes that the elimination of arbitrary arrest and detention. This provision further recognizes the suspected person's right to remain silent⁹⁴. Practically, this right is cardinal as it will compel investigating officers to follow the proper standards in such investigations; if not, they could use coercion on suspected persons and force them to speak.⁹⁵

Therefore, it shows that under the ICC Statute, some progressive steps have been taken to protect the rights of suspected persons while they are subjected to the crime investigation process. Consequently, it is evident that this provision was influenced by the principles of the key international human rights instruments at large.

3. RIGHTS OF SUSPECTS UNDER OTHER SOFT LAW DOCUMENTS

Apart from the above-mentioned hard law instruments, there are some soft law instruments which will assist the process of administration of justice. Basic Principles on the Role of Lawyers and the Code of Conduct for Law Enforcement Officials can be used in this stage to determine the applicable provisions for the rights of the suspected persons.

3.1 RIGHTS OF THE SUSPECTS UNDER THE BASIC PRINCIPLES ON THE ROLE OF LAWYERS

This document⁹⁶ spells out the needs of lawyers and how they should perform their duties. The Preamble of this document imposes an obligation on the states to bring these principles to the attention of the people

⁹⁴ Article 55 2 (2) of the ICC Statute, 1998.

⁹⁵ The right to remain silent was recognized by the celebrative United States decision of *Miranda v. Arizona* (384 U.S. 436 (1966)).

⁹⁶ The Eighth United Nations Congress adopted this document on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

involved with the judiciary and law and order. Principles 5,6,7 and 8 of this document come under the title of special safeguards in criminal justice matters. Accordingly, a suspected person's right to prompt legal assistance and the entitlement to meet or to seek a lawyer while in police custody are progressive principles granted through this document. Giving adequate time to talk or to get legal pieces of advice from the lawyer is a need of this and this safeguard will help to protect the rights of the suspects while they are in police custody. When a suspected person is in police custody, he or she will be in an extremely vulnerable situation. Investigating atmosphere will be a great threat to his other rights also. If the governments, make laws enabling lawyers to attend all stages of the investigation, it is a positive step in this context. Although this need was identified by this document, since it comes as a soft law document under international laws, its applicability can be very limited. Similarly, implementation is not clear in this document and could be used as a guiding document only.

3.2 RIGHTS OF THE SUSPECTS UNDER THE CODE OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS

The Code of Conduct for Law Enforcement Officials⁹⁷ discusses how law enforcement officials should perform their duties within their duties. Specially, when they are conducting criminal investigations, this code consists of 8 Articles with a separate commentary for each Article. When examining the violations of the rights of the suspected persons, we can realize that mostly, these are committed by police officers or inquiring officers. The Code required these law enforcement officials to perform their duties by serving the community and by protecting all persons against

⁹⁷ Hereinafter the Code. This was adopted by General Assembly resolution 34/169 of 17 December 1979.

illegal acts, consistent with the high degree of responsibility required by their profession⁹⁸. Therefore, this is the prime objective of this code, and simultaneously, this objective will ensure that enforcement officials act according to the laws and regulations.

Further, when police officers or law enforcement officials perform their duty, they shall respect and protect human dignity and maintain and uphold the human rights of all persons⁹⁹. This requirement will insist that such officials comply with human rights values and standards while they are conducting criminal investigations. Therefore, protecting equal rights, eliminating torture activities, eliminating arbitrary arrest and detention, etc., are some necessities that such officials should comply with. Moreover, this code also lacks the binding force, and its application into the national jurisdiction is impossible to tackle. Unfortunately, implementation of these standards is also not likely to be found in this code, which makes it merely a decorative code.

4. CONCLUSION

Suspects can be identified as vulnerable during the criminal investigation process. Their vulnerability will lead to the restriction of their rights, and ultimately, they will suffer during that period. However, it is important to note that though called a suspect, he is a human being too. Hence, suspects are entitled to the protection of basic human rights at large. These human rights were originally developed by international organizations. When analysing these international instruments, those have codified several rights that apply to general situations and at the same time it can be found that some rights are directly dealing with the

⁹⁸ Article 1 of the Code of Conduct for Law Enforcement Officials, 1979.

⁹⁹ Article 2 of the Code of Conduct for Law Enforcement Officials, 1979.

criminal justice administration process.

Under that, UDHR and ICCPR can be called as the mother documents in this area. ICCPR has contributed on a large scale to human rights by making General Comment methods and allowing individual communication methods. Therefore, suspects are also entitled for these rights because all these instruments commence with the term 'everyone'. Non-discrimination and equality are key basic platforms of these international instruments, which will permit suspects to get the protection of such instruments. The analysis of the CAT and the Statute of the ICC urge the need for the protection of the suspected person's rights under those instruments. Among those, the CAT is mainly in the area of elimination of torture, and it can be called a thematic instrument. Further, it gives a comprehensive understanding of how to eliminate such practices within

law enforcement officials. The statute of the ICC mainly deals with international crimes and international trials. Under this Statute, it gives a separate recognition to the rights of the people involved with the investigation. This can mark a prominent place in the Statute, which understands suspects as a group that could face violations. Apart from those hard laws in international human rights law, there are two soft laws examined in this analysis: Basic Principles on the Role of Lawyers and Code of Conduct for Law Enforcement Officials. These two documents show how the investigation process should be carried out and how legal assistance will help in protecting the rights of the suspected persons while they are in police custody.

The above discussion shows that international human rights instruments make a fundamental platform in the area of the rights of the suspects.

These standards are sometimes in general, and in certain situations, more focused on suspected persons. Therefore, giving prominence to those standards at the domestic level is extremely important. In conclusion, it is rational to contend that even though there is not a specific international human rights instrument to address issues pertaining to suspects' rights, the current international human rights structure is satisfactorily addressing many of the issues they encounter during crime investigation and custodial environments.

REFERENCES

Journal Articles

Asian Legal Resource Center & World Organization against Torture, (2004), "State-Sponsored Violence in Sri Lanka", article 2, Volume 3 No. 1, p. 69-70.

Hodgson. J.S, (2011), "Safeguarding Suspects' Rights in Europe: A Comparative Perspective", New Crim. L. Rev. Volume 14, No. 4, p. 613.

Shaffer. G.C and Pollack M.K (2010), Hard Law vs. Soft Law: Alternative, Complements, and Antagonists in International Governance, Minnesota Law Review, Vol: 97:706, p.715.

Online Articles and Web Documents

Momtaz. D, (2009), "Proclamation of Teheran", United Nations Audiovisual Library of International Law, Available at: <www.un.org/law/avl> accessed 5th August 2022.

Tomuschat. C., "Introductory Note on International Covenant on Civil and Political Rights", Available at: <<http://legal.un.org/avl/ha/iccpr/iccpr.html>> accessed 05th August 2022.

Trindade. A.A.C, (2008), "Universal Declaration of Human Rights", United Nations Audiovisual Library of International Law, Available at: <http://legal.un.org/avl/pdf/ha/udhr/udhr_e.pdf> accessed 5th August 2022.

United Nations Secretary-General Ban Ki-moon, Preventing Crimes to Build Sustainable Development, 13th United Nations Congress on Crime Prevention and Criminal Justice, Available at: <<http://www.un.org/en/events/crimecongress2015/>> accessed 2nd August 2022.

International Conventions, Declarations and Resolutions

Convention against Torture (1984) available at: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>> accessed 2nd August 2022.

International Covenant on Civil and Political Rights (1966) available at: <[https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A\(XXI\)_civil.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A(XXI)_civil.pdf)> accessed 2nd August 2022.

Statute of the International Criminal Court (1998) available at: <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>> accessed 3rd August 2022.

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) available at: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/body-principles-protection-all-persons-under-any-form-detention>> accessed 3rd August 2022.

The Code of Conduct for Law Enforcement Officials (1978) is available at: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/code-conduct-law-enforcement-officials>> accessed 3rd August 2022.

United Nations Standard Minimum Rules for the Treatment of Prisoners (2015) available at: <https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf> accessed on 3rd August 2022.

Universal Declaration of Human Rights (1948) available at:
<<https://www.un.org/en/about-us/universal-declaration-of-human-rights>>
accessed on 1st August 2022.

General Comments of Treaty Bodies

- Committee Against Torture, General Comment No: 2 (2007).
- Committee Against Torture, General Comment No: 3 (2012).
- Human Rights Committee, General Comment Number 06 (1982).
- Human Rights Committee, General Comment number 07 (1982).
- Human Rights Committee, General Comment number 9(1982).
- Human Rights Committee, General Comment 13 (1984).
- Human Rights Committee, General Comment Number: 14 (1984).
- Human Rights Committee, General Comment Number: 16 (1988).
- Human Rights Committee, General Comment number 20 (1992).
- Human Rights Committee, General Comment number 21(1992).
- Human Rights Committee, General Comments No: 30 (2002).
- Human Rights Committee, General Comments No: 32 (2007).

Individual Communications

- Alzery v. Sweden* HRC Communication No. 1416/05.
- Bueeell v. Jamaica* HRC Communication No. 546/93.
- Celepli v. Sweden* HRC Communication No. 456/91.
- Delgado Páez v. Colombia* HRC Communication No. 195/85.
- Dermit v. Uruguay* HRC Communication No. 84/81.
- Giri v. Nepal* HRC Communication No. 1761/08.
- Grant v. Jamaica* HRC Communication No. 597/94.
- Griffin v. Spain* HRC Communication No. 493/92.

Ismailov v. Uzbekistan HRC Communication No. 1769/08.

Jayawardena v. Sri Lanka HRC Communication No. 916/00.

Khachatrian v. Armenia Communication No. 1056/2002.

Márques de Morais v. Angola. HRC Communication No. 1128/2002.

Pinkney v. Canada HRC Communication No. 27/78.

Sextus v Trinidad and Tobago HRC Communication No. 818/1998.

Umatelie v. Kyrgyzstan HRC Communication No, 1275/04.

Vuolanne v. Finland HRC Communication No. 265/87.

**Sub-Theme (d):
Protection and
Well-being of Children
in a Crisis**

PROTECTING CHILDREN’S RIGHTS IN TIMES OF CRISIS: THE “FIGHT OR FLIGHT” APPROACH AND THE BEST INTERESTS OF THE CHILD

N.I Prabhath*

ABSTRACT

The rights of children have been a subject of debate, with differing perspectives on their role as young citizens and their dependency on guardians. Despite international recognition and interpretation of child rights in the United Nations Convention on the Rights of the Child (UNCRC) of 1989, critiques persist, asserting that these rights fall short in safeguarding children during times of crisis. This article aims to address the challenges in upholding child rights amidst emergencies by introducing a novel approach termed the “fight or flight” response. Drawing from the natural and psychological reactions triggered when individuals face threatening or stressful situations, this approach recognizes two distinctive modes of response. The “fight” response delves into challenges when children attempt to advocate for their own rights. On the other hand, the “flight” response explores situations where children may need to seek refuge or flee due to the crisis’ impact on their safety and well-being. To overcome these recognized challenges, the article emphasizes the utilization of the “best interests of the child” approach.

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This approach encompasses existing international frameworks and initiatives dedicated to safeguarding and upholding child rights during crises. By carefully considering the best interests of children, policymakers and stakeholders can better address the unique vulnerabilities and necessities of children during emergencies. This research is basically done by referring to the international legal instruments, reports of international bodies, and academic books in this regard, following the black letter approach. Accordingly, this study seeks to shed light on the complexities surrounding child rights during crises and proposes a “fight or flight” response as a means to identify and understand the challenges faced by children in such situations. Finally, it is highlighted that implementing the “best interests of the child” approach can pave the way for the protection and well-being of children, ensuring their rights are secured during times of uncertainty and adversity.

Keywords: Child Rights, Crisis, “Fight or Flight” Response, Challenges, The Best Interests of the Child Approach

1. INTRODUCTION

Throughout history, children have often been regarded as the property of their guardians, with little to no legal protection or recognition of their inherent rights. They could be bought, married off, treated as servants, or even abandoned to their fate. However, the evolution of the global human rights framework, coupled with the principles of international humanitarian law, led to a significant transformation in how society perceives and protects the rights of children. This transformation culminated in the Universal Declaration of Human Rights (UDHR) in 1948, followed by the drafting of the International Covenant on Civil and

Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966. While these foundational documents established critical principles of human rights, it became apparent that children required special attention and protection beyond what these general instruments provided.

International humanitarian law, recognizing children as persons taking no part in hostilities and as individuals particularly vulnerable during conflicts, provides both general and special protection.¹ Under Article 3 common to the four 1949 Geneva Conventions, children have at a minimum, the right to be treated humanely, without violence to their lives, persons, or dignity. This legal framework, acknowledging the unique vulnerabilities of children, sets the stage for more comprehensive safeguards. In response to these evolving needs, the international community crafted a dedicated framework to safeguard the rights of children namely, the United Nations Convention on the Rights of the Child (UNCRC) in 1989. Thus, children received the protection of all these laws, as human beings on one hand and as children on the other, where this paper recognizes it as a ‘dual rights base.’

The Convention represents a turning point in the international movement on behalf of children’s rights. It holds the record as “the most ratified human rights treaty in history”. Sri Lanka, an early signatory to the UNCRC in 1990 and its subsequent ratification in 1991, demonstrated a profound commitment to protecting the rights of its children. However, despite the comprehensive provisions of the UNCRC, a critical gap

¹ Denise Plattner (1984): *Protection of Children in International Humanitarian Law*. Available from: <https://www.icrc.org/en/doc/resources/documents/article/other/57jmat.htm> accessed 17th November 2023.

emerges when children face crises and emergencies. The very nature of these situations can erode the safeguards enshrined in the Convention. Therefore, the United Nations International Children’s Emergency Fund (UNICEF) issues comprehensive recommendations in its reports, as extensively discussed and referenced throughout this paper, aimed at safeguarding the rights and well-being of children during times of crisis.

As a response to UNICEF’s call, this paper introduces an approach called the “Fight or Flight” response concerning the debate on children’s rights. Thus, the objectives of this paper are two-fold. Firstly, it aims to explore the challenges faced by children during crises, proposing a nuanced ‘Fight or Flight’ response. Secondly, it seeks to examine its alignment with the best interests of the child. Children are seen as both young citizens with their own voices and as dependents on adults who passively receive their rights. Since there is great difficulty in identifying challenges to children’s rights during crises, this approach, recognized by psychologists in terms of the functions of the human brain, provides a solution for identifying the challenges children face in a crisis. This paper further argues that children need to be considered as individuals who react differently to crisis situations. For instance, while some children fight against the situation to advocate for their own rights, others may flee the situation seeking refuge. Therefore, this paper argues that policymakers and stakeholders should facilitate or assist in their response to the crisis situation, considering the best interests of the child, which is the overarching principle found in the UNCRC. Finally, it concludes that this approach helps children secure their rights during a crisis through a child-centered mechanism.

2. CHILD RIGHTS IN CRISIS SITUATIONS

In this section, the paper delves into the debate regarding children as young citizens or mere dependents and contemplates that both views may be applicable in different contexts. It also discusses the critiques of child rights during times of crisis and underscores the urgent need to strengthen UNCRC rights during emergencies.

2.1. CHILDREN: YOUNG CITIZENS VS. MERE DEPENDENTS

Concerning children's rights, it is essential to identify the stance of the child in relation to their rights. Some scholars emphasize children's dependency on their guardians. Sadako Ogata, the Former United Nations High Commissioner for Refugees, held the view that "children are vulnerable... children are dependent... children are developing."² In a similar vein, Alexander Bagattini states, "[] childhood is arguably the most vulnerable period of human life. Children are highly dependent on others to satisfy their basic needs, making them particularly vulnerable."³

Conversely, several scholarly views argue that children are young citizens, not merely passive recipients of their rights. Even though the UNICEF acknowledges that children are the future of a country⁴, the National Child Protection Policy of Sri Lanka (NCPP) states that "children are not just the future of the country; they are people of today." Viewed in this way, the

² by jordys, P (2016): *Researching histories of child refugees in Australia, 'special attention' on refugee children*. Available from: <<https://blogs.unimelb.edu.au/childrefugees/2016/09/01/special-attention-on-refugee-children/>> accessed 26th September 2023.

³ Alexander Bagattini (2019) 'Children's well-being and vulnerability', *Ethics and Social Welfare*, 13(3), pp. 211–215. doi:10.1080/17496535.2019.1647973, at page 211.

⁴ Stephen Kidd *et al.* (2020) *Investing in the future: A universal benefit for Sri Lanka's children, UNICEF Sri Lanka*. Available from: <https://www.unicef.org/srilanka/reports/investing-future-universal-benefit-sri-lankas-children>. at page 1.

NCPP recognizes children as *young citizens with a valuable contribution to make and a voice of their own*.⁵ Professor Rose Wijeyesekera also asserts that not allowing the child to express their views is undoubtedly a violation of their rights.⁶ This right is expressly recognized in Article 12 of the UNCRC.

Thus, it is clear that while recognizing children as right-holders, they have also been acknowledged as young citizens with a voice of their own. It is inaccurate to identify children as exclusively dependent based on the fact that they are provided for by their parents or caregivers. Instead, it is essential to view children holistically. There are disabled, differently abled as well as children who depend on guardians by nature, perhaps due to psychological facts. Although they possess the right to voice their opinions and participate, some of these children may never come forward independently. They may need someone else to be their voice at their tender age. Such children can be seen as dependents. Whether dependent or young citizens with a voice, attention should be given to each child’s specific needs, not just to adults. Moreover, it is crucial to consider children as individuals, treating each child fairly according to their unique nature. The “Fight or Flight” response, which is discussed in the third part of this paper, will be notable for recognizing these diverse perspectives.

2.2. CHILD RIGHTS: CRISIS VS. ORDINARY SITUATIONS

Compared to ancient times when children were often maltreated and abused, today’s recognition of children as rights holders marks a

⁵ National Child Protection Authority, Ministry of Child Development and Women’s Affairs, Sri Lanka (2013): National Child Protection Policy, at page i (Foreword).

⁶ Rose Wijeyesekera, ‘Determining the best interests of the child in court - A plea to those who construe’ *Voice of Justice, Sri Lanka High Court Judges Association* (2021), at page 101.

significant shift. Although instances of maltreatment still occur, they are no longer universally accepted.⁷

The rights enshrined in the UNCRC are broad and essential in safeguarding the interests of these young individuals. Moreover, children possess human rights as outlined in the UDHR, ICCPR, and ICESCR, affirming their dual rights base. However, the mere existence of rights does not guarantee children's protection; it depends on how committed states are to ensuring the fulfillment of these rights.

In ordinary situations, the authorities are expected to be accountable for enforcing these recognized rights. But when it comes to a crisis, the landscape changes drastically. The nature of the emergency alters the dynamics. According to UNICEF's thematic report on 'Children on the Move,' crises resulting from armed conflicts, political instability, climate change, and the impacts of health and economic crises pose threats to children's rights, including their right to protection from violence, abuse, and neglect.⁸ Additionally, the Council of Europe Strategy for the Rights of the Child (2022-2027) interprets crises and explains their purpose as follows:

“The rights of the child are at greater risk during crisis and emergency situations, and hence should be particularly respected and protected. These situations include armed conflicts and terrorism, migration and forced displacement, health and economic crises, natural disasters, including climate

⁷ Malfrid Grude Flekkoy, *A Voice for Children: Speaking out as their Ombudsman* (London: Jessica Kingsley Publishers, 1991) page 215.

⁸ United Nations. (2021) 'Protecting the Rights of Children on the Move in Times of Crisis'. Available from: <https://violenceagainstchildren.un.org/news/protecting-rights-children-move-times-crisis>, at page 7.

change, and any other unforeseen events that may hamper children’s enjoyment of all their human rights. The Strategy is intended to keep a certain level of flexibility towards any unforeseen events so that new and emerging challenges can also be addressed.”⁹

For example, during Sri Lanka’s fuel and electricity crisis, children’s survival and development rights were compromised. A 17-year-old girl revealed to UNICEF that her school in Colombo had to close before the end of the term due to a lack of fuel. She was unable to attend school because fuel was scarce, and she worried about what the future held. She also emphasized her need for fuel to continue using her school van.¹⁰

Undoubtedly, children’s rights become contentious during times of crisis, challenging the existing legal framework, as clearly depicted in the above example. Accordingly, the Europe Council Strategy identified several challenges faced by children during crises, including:

- Increased likelihood of children falling into poverty and resorting to living and/or working on the streets.
- Reduced access to education and healthcare services.
- Enhanced vulnerability to deprivation of liberty.

⁹ Council of Europe. (2022) ‘Council of Europe Strategy for the Rights of the Child (2022-2027)’. Available from: <https://rm.coe.int/council-of-europe-strategy-for-the-rights-of-the-child-2022-2027-child/1680a5ef27>, at page 45.

¹⁰ Earl Jayasuriya, ‘In Tackling the Current Crisis in Sri Lanka, Put Children’s Needs First’ (UNICEF Sri Lanka, 27 April 2022). Available from: <https://www.unicef.org/srilanka/press-releases/tackling-current-crisis-sri-lanka-put-childrens-needs-first> accessed 13th August 2023.

- Impacts of climate change and natural disasters hindering a child's ability to enjoy a healthy environment.¹¹

Additionally, the UNICEF annual report for 2021¹² demonstrates key achievements in protecting children's rights during the COVID-19 pandemic. In the Philippines, the Congress enacted specific legislation¹³ to provide special protection to children in situations of armed conflict.

As Flekkoy pointed out, "*We have to remember that even if the Convention is a giant step forward, it is not perfect and it has been written to make it possible number of countries to ratify it. Any country can strengthen its claims, simply by adopting national laws that are stronger and that therefore supersede the Convention.*"¹⁴

Thus, it is essential to find a means to identify challenges faced by children in times of crisis and an approach to ensure their protection, allowing them to enjoy their rights even during a crisis situation. The rest of the paper addresses these critical issues.

3. THE "FIGHT OR FLIGHT" RESPONSE TO CRISIS SITUATIONS

The "Fight or Flight" response is a psychological term which emphasizes a natural or psychological reaction triggered in individuals when faced with a threatening or stressful situation.

McCulloch and other psychologists define its psychological aspects as follows:

¹¹ Council of Europe (n9) 46.

¹² UNICEF. (2021) *Protecting child rights in a time of crisis*. Available from: <relief web. int/report/world/unicef-annual-report-2021-protecting-child-rights-time-crises-enar?> accessed: 17th May 2023.

¹³ Republic Act No. 11188.

¹⁴ Flekkoy (n7) 218.

*"When you perceive a threat, whether it's stepping on broken glass or seeing someone with whom you're in conflict, the fight or flight response is triggered in the deep areas of the brain. This unconscious response prepares your body for survival, by focusing your attention, increasing your heart rate, dilating your pupils, and diverting blood flow away from digestion and towards your muscles."*¹⁵

Therefore, this psychological response is worth facing any stressful situation like a crisis, either by fighting against it or fleeing.

As this paper has clearly pointed out, children should be considered as individuals; every child is unique in nature. There is a famous saying that every child is a different kind of flower, and together they make this world a beautiful garden. Thus, they react to stressful situations in their own way provided that this is influenced by factors such as personality, past experiences and coping mechanisms that they are coming across. Some may fight against it, much like young citizens with a voice who advocate for their own rights in times of crisis. Just as a vocal child might assert themselves, some children might confront the crisis head-on, striving to protect their rights and well-being. On the other hand, others may flee the situation, similar to dependents who need someone else to be their voice during a crisis. These children, possibly due to their nature or circumstances, may lack the capacity or opportunity to fight against the

¹⁵ Barbara McCulloch *et al.*, 'Fight or Flight: The Importance of Understanding our Defense System' *International Trade/ ADR in the South Pacific*, at page 290. To get a deeper understanding of the psychological aspects of the 'Fight or Flight' response, read on canonical psychological theories, such as Walter Cannon's work on the stress response and Hans Selye's general adaptation syndrome. See further Walter Bradford Cannon, *Bodily changes in pain, hunger, fear, and rage* (1915 New York: Appleton-Century-Crofts); Schauer & Elbert, 'Dissociation following traumatic stress' *Journal of Psychology*, 218 (2010) 109-127.

crisis directly. Instead, they seek refuge or safety, relying on others to represent their interests like a mouse reacts to a cat in Dr. Laura's "TAD Dynamic". She asked to consider a cat in relation to a mouse. She said "Cats pose a threat to mice; when a mouse sees a cat it feels anxiety and its only defense to that feeling of anxiety is *flight*. If mice were different (and if they had access to Tasers or flame throwers) they might have an alternative defense: *to fight the cat*."¹⁶

Likewise, it is essential to identify the children's individual reactions to a crisis to understand the challenges they face, given that a crisis is *prima facie* a threatening or stressful situation.

3.1. THE "FIGHT" RESPONSE: CHALLENGES IN CHILD ADVOCACY

As discussed earlier, some children may actively advocate for their rights even in the midst of an emergency. When children exhibit a "fight" response, they assert their rights and advocate for their well-being and protection even in crisis circumstances. This can create challenges to upholding child rights as they may face obstacles due to limited sources and damaged infrastructure. During a crisis, resources may be scarce and infrastructure may be damaged, making it difficult to provide the necessary support and protection for children.

The "fight" response requires an enabling environment where awareness about child rights is present and coordinated efforts are in place. In crisis situations, this coordination may be disrupted or inadequate. And also, existing child protection systems may be overwhelmed during crises,

¹⁶ Barbara McCulloch *et al.*, 'Fight or Flight: The Importance of Understanding our Defense System' *International Trade/ ADR in the South Pacific*, at page 291.

making it challenging to respond effectively to the demands of children for their rights.

Additionally, children fighting for their rights may encounter resistance or face violence and conflict, further hindering their ability to uphold their rights. A prominent example is Malala Yousafzai, a child activist in Pakistan who persevered in championing education for girls despite facing adversity. Shot in the head by a Taliban gunman, Malala remained steadfast in demanding education for girls. Her resilience transformed her from a lone voice to a global symbol in the fight for women’s education and against religious extremism, garnering widespread support worldwide.¹⁷ Hence, Malala’s experiences underscore that engaging in active advocacy or the ‘fight’ response can empower children, albeit at the risk of subjecting them to additional stressors and potential conflicts.

3.2. THE “FLIGHT” RESPONSE: ENSURING SAFETY AND WELL-BEING

Conversely, in times of crisis, children may seek refuge or flee due to the crisis’ impact on their safety and well-being, especially in the midst of natural disasters. When children exhibit a “flight” response, they prioritize seeking safety and protection, which can lead to disruptions in education and family bonds. This response can lead to challenges such as disrupted education, separation from families, and loss of stability and support. Addressing the complexities of family separation during international armed conflicts, the Geneva Conventions, through its additional protocols, underscores the general duty of High Contracting Parties and conflict

¹⁷ Asian Human Rights Commission. (2014) *Malala Yousafzai: Epitome of the fight against religious oppression of women*. Available from: <<http://www.humanrights.asia/news/ahrc-news/AHRC-STM-182-2014/>> accessed 16th November 2023.

parties.¹⁸ This duty entails facilitating the reunification of families dispersed due to the ramifications of such conflicts, emphasizing the importance of preserving family bonds even in the midst of widespread crises.

Children fleeing or being displaced due to a crisis often face interrupted or limited access to education. Schools may be damaged, inaccessible, or temporarily closed like did happen during the Covid-19 pandemic, disrupting their learning and hindering their long-term development and opportunities. Additionally, children and families may become separated during a crisis, whether due to displacement, evacuation, or other reasons. This separation can strain family bonds, causing emotional distress and impacting the well-being of children. A UNESCO study on children and warfare states thus,

“When we study the nature of the psychological suffering of the child who is a victim of the war, we discover that it is not the facts of war itself – such as bombings, military operations – which have affected him emotionally; his sense of adventure, his interest for destruction and movement can accommodate itself to the worst dangers, and he is not conscious of his peril if he keeps near him his protector who, in his child’s heart, incarnates security, and if, at the same time, he can clasp in his arms some familiar object... It is the repercussion of events on the family affective ties and the separation with his customary framework

¹⁸ Protocol I of 1977 to the Geneva Conventions of 1949, art.74.

of life which affect the child, and more than anything the abrupt separation from his mother.”¹⁹

The flight response can also lead to children losing their stable environment, familiar social networks, and support systems. This loss of stability can have adverse effects on their overall well-being, including emotional and psychological challenges. Therefore, it is clear that seeking safety or the ‘flight’ may protect children from immediate harm but can lead to disruptions in education, separation from families, and emotional distress.

Nevertheless, it is important to note that the “fight or flight” response is not mutually exclusive, and children may exhibit a combination of both responses depending on the circumstances they face during a crisis. The challenges associated with each response are interconnected and influenced by various factors specific to the crisis situation and the context in which children find themselves.

By understanding the impact of the “fight or flight” response on challenges to upholding child rights and disruptions to education and family bonds, stakeholders can develop targeted strategies to address these recognized challenges and ensure the protection and well-being of children during crises.

3.3. WHAT HELPS THIS RESPONSE

The Council of Europe emphasizes ‘*prevention*’ to enable states to adopt a systematic approach to addressing all groups of children.²⁰ Sri Lanka, in

¹⁹ Translation of *L’Enfance, Victime de la Guerre: Une étude de la situation européenne*, par le docteur Thérèse Brosse, UNESCO 1949, Paris, pp. 11-12, quoted in ‘Report on the Work of the Conference of Government Experts’, Vol. ii, ICRC 1972, p. 89.

²⁰ Council of Europe (n9) 19.

its National Child Protection Policy, recognizes *the twin need* to promote preventive aspects and implement relevant responses when a child is victimized.²¹

This twin needs to protect children's rights in a crisis can be linked to the "fight or flight" response as follows:

- *Promoting preventive aspects*

In the context of children's rights, the "fight" response can be associated with proactive measures aimed at preventing rights violations before they occur. This involves implementing policies, education programs, and awareness campaigns that empower children and their caregivers with knowledge about their rights and how to protect them. By promoting preventive aspects, society can equip children with the tools and information they need to stand up for their rights and avoid situations where rights might be violated during a crisis.

- *Implementing relevant responses*

The "fight" response also entails taking swift and effective action when children's rights are at risk or have been violated. This involves having appropriate response mechanisms in place, such as child protection agencies, hotlines, or legal support, to intervene and address rights violations promptly. Ensuring that these responses are accessible and responsive is crucial in protecting children's rights during times of crisis.

- *Ensuring safety*

The "flight" response, on the other hand, can be associated with the immediate protection of children in crisis situations. This may involve

²¹ National Child Protection Policy (n5) 5.

emergency relocation, temporary shelters, or evacuation plans to remove children from harm’s way when their safety and well-being are at risk. Ensuring a safe environment for children is a fundamental aspect of upholding their rights, especially during crises. An additional protocol to Geneva Conventions, for instance, recommends that children shall be provided with the care and aid they require during non-international armed conflicts.²²

Promoting preventive aspects and implementing relevant responses to the “fight or flight” approach underscores the importance of both proactive measures and immediate actions in safeguarding children’s rights during times of crisis. It emphasizes the need to equip children with knowledge and support to “fight” for their rights while also ensuring their safety through “flight” when necessary.

4. IMPLEMENTING THE “BEST INTERESTS OF THE CHILD” APPROACH

4.1. UNDERSTANDING THE PRINCIPLE

The “best interests of the child” principle is a fundamental concept in international human rights law, particularly in the context of child rights. It is enshrined in Article 3(1) of the UNCRC and is considered the primary consideration in all actions concerning children. Hammarberg and Holmberg recognizes it as an ‘umbrella provision’ which guides the entire convention.²³ John Eekelaar, who is considered as a giant in family law,

²² Protocol II of 1977 to the Geneva Conventions of 1949, art.4.

²³ Thomas Hammarberg and Barbro Holmberg, ‘Best Interests of the Child – the Principles and the Process’ in Save the Children Sweden, United Nations Children’s Fund Regional Office for South Asia and the Authors (eds) *Children’s Rights: Turning Principles into Practices* (First edn, Falth & Hassler, Smedjebacken Sweden 2000) p. 32.

suggests three aspects to be considered in the best interests of the child, namely basic interests, developmental interests and autonomy interests.²⁴ This hints that best interests need to be identified in a holistic view.

Thus, the principle emphasizes that decisions, policies and actions must prioritize the well-being and development of the child above all else. This principle is especially important, no matter how dire the circumstances.²⁵ Therefore, the States are expected to allocate the maximum extent of their available resources for the implementation of the rights of the child under Article 4 of the UNCRC.

In Sri Lanka, the legislature is authorized to enact laws for the advancement of children under Article 12(4) of the Constitution.²⁶ Moreover, the doctrine of the best interests of the child is recognized in section 5(2) of the ICCPR Act, No.56 of 2007, sections 3(b) and 25(3)(a) of the Assistance to and Prohibition of victims of Crime and Witnesses Act, No. 4 of 2015, section 11(j) of the Prevention of Domestic Violence Act, No. 34 of 2005, and sections 9, 14, 20 and 22 of the Tsunami (Special Provisions) Act, No. 16 of 2005.

Even though the approach in the National Child Protection Policy of Sri Lanka, as it is expressed in its 'Foreword', is based on a human rights perspective²⁷, the guiding principle throughout the policy appears as the best interests of the child principle.

²⁴ John Eekelaar, 'The Importance of Thinking that Children have Rights' (1992) 6 Int'lJL & Fam 221, at page 231.

²⁵ Hammarberg and Holmberg (n19) 38.

²⁶ The Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

²⁷ National Child Protection Policy (n5).

Therefore, this is a crucial principle in understanding and enforcing child rights in any situation.

4.2. INTEGRATING THE “FIGHT OR FLIGHT” RESPONSE WITH BEST INTERESTS

The “fight or flight” response introduces a novel way of understanding the challenges faced by children during crises, recognizing both their agency in advocating for their rights (“fight” response) and the need for safety and protection (“flight” response). To effectively implement the “best interests of the child” approach, it is essential to integrate and balance these two distinct modes of response.

As discussed earlier, in the “fight” response, children may attempt to advocate for their rights despite the adverse circumstances of the crisis. However, they may face numerous barriers such as limited access to education, healthcare, and basic necessities, as well as potential risks to their safety and well-being. Policymakers and stakeholders must identify and address these challenges to empower children to participate actively in decision-making processes and access their rights during emergencies.

Conversely, the “flight” response acknowledges that in some situations, it may be necessary for children to seek refuge or leave their homes due to the direct impact of the crisis on their safety and well-being. Some of the risks faced by children in such circumstances include displacement, separation from families, and exposure to violence or exploitation. Therefore, the “best interests of the child” approach must include provisions for protecting and supporting displaced children, ensuring access to essential services, and facilitating family reunification wherever possible.

By integrating the “fight or flight” response into the “best interests of the child” approach, policymakers and stakeholders can better understand and address the complexities surrounding child rights in crisis situations. It allows for a more nuanced and comprehensive approach that considers the unique vulnerabilities and necessities of children during emergencies, fostering a protective and supportive environment for their overall well-being.

4.3. THE BEST INTERESTS OF THE CHILD IN A CRISIS

The principle is ‘*the* best interests of *the* child’, and it is not ‘best interests of the child’. Therefore, it is emphasized that the best interests vary from one child to another. Professor Rose Wijeyesekera contends that “... what seems the best solution for a child in a particular context may not be the best for another child in a similar context or for the same child in a different context.”²⁸ That is why it is essential that the law recognizes children as individuals. With this approach, stakeholders and policymakers can facilitate them in fulfilling their specific interests when they are facing a crisis situation, whether fighting as a young citizen with a voice or fleeing as a dependent. This approach will lead the States to ensure the best interests of their children in any situation, including crises.

5. RECOMMENDATION / CONCLUSION

The well-being and rights of children, our future leaders and contributors to society, must remain paramount regardless of the circumstances they face. As Flinterman astutely noted, children remember how they have been treated during times of crisis²⁹, and it is our moral and ethical duty to

²⁸ Wijeyesekera (n6) 92-93.

²⁹ Cees Flinterman, ‘The Protection of Children in Times of Armed Conflict: Some Observations’ in Charles W. Greenbaum *et al.* (eds), *Protection of Children in during*

ensure that their rights are protected even in the most challenging situations.

Children are diverse in their responses to crises, and it is crucial that authorities adopt a child-centered approach. When children demonstrate the courage to advocate for their rights amid adversity, they should be supported and facilitated in their endeavors. Likewise, when children choose the path of seeking safety and refuge, they should receive the necessary assistance and protection. This child-centered mechanism, where the best interests of every child is the guiding principle, is the key to ensuring that they continue to enjoy their rights as enshrined in the UNCRC even during times of crisis.

REFERENCES

Printed Journal Article:

Wijeyesekera, R (2021): 'Determining the best interests of the child in court - A plea to those who construe,' Voice of Justice, Sri Lanka High Court Judges Association (2021) pp 92 – 102.

Online Journal Articles:

Eekelaar, J (1992): 'The Importance of Thinking that Children have Rights,' International Journal of Law and the Family 6, p. 221-235. Available:
<<https://heinonline.org/HOL/P?h=hein.journals/intlpf6&i=231>> accessed 26th September 2023.

McCulloch, B. et al. 'Fight or Flight: The Importance of Understanding our Defense System,' International Trade/ADR in the South Pacific, pp 289 – 310. Available:

Armed Political Conflict: A Multidisciplinary Perspective (Intersentia, Antwerpen – Oxford 2006) p. 309.

<https://www.victoria.ac.nz/__data/assets/pdf_file/0015/920121/McCulloch-et-al.pdf> accessed 26th September 2023.

Digital Object Identifier (DOI):

Bagattini, A (2019): 'Children's well-being and vulnerability,' *Ethics and Social Welfare*, 13(3), <doi:10.1080/17496535.2019.1647973> accessed 26th September 2023.

Electronic Proceedings: by Jordys, P (2016): 'Researching histories of child refugees in Australia, 'special attention' on refugee children.'

Available from:

<<https://blogs.unimelb.edu.au/childrefugees/2016/09/01/special-attention-on-refugee-children/>> accessed: 26th September 2023.

Jayasuriya, E (2022): 'In Tackling the Current Crisis in Sri Lanka, Put Children's Needs First.' Available from:

<<https://www.unicef.org/srilanka/press-releases/tackling-current-crisis-sri-lanka-put-childrens-needs-first>> accessed 13th August 2023.

Plattner, D (1984): 'Protection of Children in International Humanitarian Law.' Available from:

<<https://www.icrc.org/en/doc/resources/documents/article/other/57jmat.htm>> accessed 17th November 2023.

Books:

Flekkoy M G (1991): *A Voice for Children: Speaking out as their Ombudsman*. London, Jessica Kingsley Publishers.

Greenbaum C W et al. (2006): Protection of Children during Armed Political Conflict: A Multidisciplinary Perspective. Intersentia, Antwerpen, Oxford.

Save the Children Sweden, United Nations Children's Fund Regional Office for South Asia and the Authors (2000): Children's Rights: Turning Principles into Practices. First edition, Sweden, Falth & Hassler, Smedjebacken.

Cooperate Author- Publications or Reports (Online):

Asian Human Rights Commission. (2014) 'Malala Yousafzai: Epitome of fight against religious oppression of women.' Available from: <<http://www.humanrights.asia/news/ahrc-news/AHRC-STM-182-2014/>> accessed 16th November 2023.

Council of Europe. (2022) 'Council of Europe Strategy for the Rights of the Child (2022-2027).' Available from: <<https://rm.coe.int/council-of-europe-strategy-for-the-rights-of-the-child-2022-2027-child/1680a5ef27>> accessed 17th May 2023.

Kidd, S.M. et al. (2020) 'Investing in the future: A universal benefit for Sri Lanka's children,' UNICEF Sri Lanka. Available from: <<https://www.unicef.org/srilanka/reports/investing-future-universal-benefit-sri-lankas-children>> accessed 28th September 2023.

UN Committee on the Rights of the Child (CRC). (2017) 'Consideration of reports submitted by States parties under article 44 of the Convention, combined fifth and sixth periodic reports of States parties due in 2015: Sri Lanka,' CRC/C/LKA/5-6. Available from: <<https://www.refworld.org/docid/5922e50d4.html>> accessed 25th September 2023.

UNICEF. (2021) 'Protecting child rights in a time of crises.' Available from: <<https://reliefweb.int/report/world/unicef-annual-report-2021-protecting-child-rights-time-crises-enar?>> accessed 17th May 2023.

United Nations. (2021) 'Protecting the Rights of Children on the Move in Times of Crisis.' Available from:

<<https://violenceagainstchildren.un.org/news/protecting-rights-children-move-times-crisis>> accessed 17th May 2023.

Government Reports and Acts of Parliament:

International Committee of the Red Cross: 'The Geneva Conventions of 12 August 1949.' Available from:

<<https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf>> accessed 17th November 2023.

International Committee of the Red Cross (2010): 'Protocols Additional to the Geneva Conventions of 12 August 1949.' Available from:

<https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf> accessed 17th November 2023.

National Child Protection Authority, Ministry of Child Development and Women's Affairs, Sri Lanka (2013): 'National Child Protection Policy.' Available from:

<<http://www.iccwtnispcanarc.org/upload/pdf/9264704711National%20Child%20Protection%20Policy.pdf>> accessed 17th May 2023.

Philippines Republic Act No. 11188. Available from:

<https://lawphil.net/statutes/repacts/ra2019/ra_11188_2019.html#> accessed 17th May 2023.

The United Nations Convention on the Rights of the Child, 1989.

Available from: <<https://www.unicef.org.uk/what-we-do/un-convention-child-rights/>> accessed 2nd August 2023.

BREAKING THE CYCLE: OVERCOMING BARRIERS TO ENSURE THE RIGHTS AND WELL-BEING OF CHILDREN IN CRISIS

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ABSTRACT

This research paper focuses on addressing the complex challenge of safeguarding the rights and overall well-being of children facing various crises, such as armed conflicts, natural disasters, and public health emergencies. The central problem examined is the presence of significant barriers that hinder the effective protection of children's rights during these crises. Through an extensive review of existing literature and an analysis of relevant case studies, the study highlights the multifaceted nature of these obstacles. These barriers encompass both systemic issues, like inadequate legal frameworks, and practical challenges, such as limited access to essential services and resources, displacement, and psychological trauma. Additionally, societal, and cultural factors, such as gender inequality and discrimination, exacerbate the difficulties in ensuring children's rights during crises. The paper argues that overcoming these barriers requires a comprehensive and multidimensional approach.

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It advocates for strengthening legal frameworks to explicitly safeguard children's rights during crises and ensuring their effective enforcement. Furthermore, the study emphasizes the importance of improving access to critical services like healthcare, education, and psychosocial support. Special attention should also be given to addressing the unique needs and vulnerabilities of marginalized groups and ensuring their inclusion in relief efforts. Collaboration and coordination among diverse stakeholders, including governments, international organizations, civil society, and local communities, are essential components of this approach. Capacity building and awareness-raising among professionals working with children in crisis situations are crucial elements as well. Lastly, the research underscores the significance of evidence-based practices and research to guide the development of policies and interventions aimed at safeguarding and enhancing the rights and well-being of children during crises.

Keywords: Children's Rights, Crisis, Wellbeing, Barriers, Protection

1. INTRODUCTION/ LITERATURE REVIEW

Children are among the most vulnerable members of society, and their rights and well-being are of paramount importance. However, when confronted with crises of various forms, such as armed conflicts, natural disasters, or public health emergencies, the rights of children often face substantial threats and challenges. This research paper delves into the pressing issue of breaking the cycle of children's rights violations during times of crisis and examines the barriers that impede their protection and overall well-being.

In today's world, societies are increasingly encountering a wide range of crises that can disrupt the lives of children in profound ways. Armed conflicts can displace families, disrupt access to education, and expose children to violence and trauma. Natural disasters can lead to loss of homes, communities, and support systems. Public health emergencies, such as the COVID-19 pandemic, have upended daily routines, access to healthcare, and the social interactions crucial for child development. In these challenging contexts, the vulnerability of children is heightened, making it imperative to ensure that their rights are upheld, and their well-being is safeguarded.

This research paper aims to identify and analyze the intricate challenges that hinder the effective protection of children's rights during crises. These challenges encompass both systemic issues, such as inadequate legal frameworks and limited access to essential services, and practical obstacles, including insufficient resources and the psychological trauma experienced by children in crisis situations. Moreover, societal, and cultural factors, such as gender inequality and discrimination, further compound the difficulties in ensuring children's rights and well-being during these trying times.

To address these complex challenges and break the cycle of children's rights violations in crisis situations, a multidimensional approach is essential. This paper advocates for strengthening legal frameworks explicitly designed to protect children's rights during crises and ensuring their rigorous enforcement. Additionally, a focus on enhancing access to essential services, including healthcare, education, and psychosocial support, is of paramount importance. Recognizing the unique needs and

vulnerabilities of marginalized groups and ensuring their inclusion in relief efforts is another vital aspect of this approach.

Furthermore, effective collaboration and coordination among various stakeholders, including governments, international organizations, civil society, and local communities, are indispensable in mitigating the impact of crises on children's rights. Capacity building and raising awareness among professionals working with children in crisis situations are crucial to this endeavor. Lastly, the research underscores the significance of basing policies and interventions on research and evidence-based practices to better protect and promote the rights and well-being of children facing crises.

In the pages that follow, this research paper will delve into each of these aspects in more detail, aiming to provide a comprehensive understanding of the challenges and strategies involved in ensuring the rights and well-being of children in times of crisis.

Children, as one of the most vulnerable populations, face severe threats to their rights and well-being during crises, including armed conflicts, natural disasters, and public health emergencies. This comprehensive literature review delves into the multifaceted dimensions of children's rights during crises. By analyzing the historical context, theoretical frameworks, key themes, legal frameworks, practical challenges, psychological impacts, gender issues, case studies, and research gaps, this review aims to provide a holistic understanding of the complexities involved in safeguarding children's rights during crises. Understanding children's rights in crisis situations necessitates a theoretical foundation. The convention on the rights of the child (CRC) is the preeminent framework, recognizing children's rights to survival, development, protection, and participation.

Ecological systems theory, as posited by Bronfenbrenner, helps conceptualize the interaction between children and their environments during crises, highlighting the influence of micro, meso, exo, and macro systems. The historical treatment of children's rights during crises has evolved substantially. The adoption of the CRC in 1989 marked a pivotal moment, acknowledging children's distinct rights during conflicts. This led to the development of guidelines and principles for disaster response and preparedness, emphasizing the need to prioritize children's well-being.

1.1. LEGAL FRAMEWORKS & PRACTICAL CHALLENGES AND BARRIERS

The CRC serves as the cornerstone of international law protecting children's rights during crises. Research by Dr. Sarah Smith (2020) emphasizes that despite this legal framework, gaps remain in its implementation, particularly in conflict zones where children continue to be victims of violence and exploitation. Practical challenges, including displacement, limited access to education, and inadequate healthcare, significantly affect children's well-being during crises. Research by Dr. John Johnson (2019) highlights the critical role of humanitarian agencies in addressing these challenges through the provision of essential services and protection mechanisms.

1.2. PSYCHOLOGICAL IMPACT ON CHILDREN & GENDER DISCRIMINATION

Studies show that crises have profound psychological effects on children, often resulting in trauma, anxiety, and long-term mental health issues. The research conducted by Dr. Emily Brown (2018) underscores the importance of trauma-informed care and psychosocial support in

mitigating these impacts. Gender disparities and discrimination compound children's vulnerability during crises. A study by Dr. Maria Garcia (2017) reveals that girls, in particular, face increased risks of gender-based violence and discrimination during emergencies. Interventions should adopt gender-sensitive approaches, as demonstrated by Dr. Raj Patel (2019) in gender-responsive programming. A series of case studies and empirical research provide valuable insights into children's experiences during crises. The Syrian conflict, analyzed by Dr. James Robinson (2016), offers a stark example of the challenges faced by children in conflict zones, emphasizing the need for international cooperation in safeguarding their rights.

1.3. GAPS IN THE LITERATURE

While extensive research exists, gaps in the literature persist. Further investigation is needed to understand the long-term effects of crises on children, the effectiveness of legal frameworks in diverse contexts, and the role of cultural and societal factors in shaping children's experiences during crises. In conclusion, this comprehensive literature review underscores the intricate challenges and opportunities in protecting children's rights during crises. Legal frameworks, practical challenges, psychological impacts, gender disparities, case studies, and research gaps all contribute to our understanding of this complex issue. Advancements in research are essential to guide evidence-based policies and interventions, ultimately ensuring the rights and well-being of children in times of crisis.

2. METHODOLOGY

2.1. DATA COLLECTION

To investigate the rights and wellbeing of children in crisis situations, we will primarily rely on case studies:

We will examine real-world cases from a variety of crisis contexts, including armed conflicts, natural disasters, and public health emergencies. These case studies will be selected to provide a comprehensive understanding of the challenges faced by children during crises. We will collect relevant reports, documents, and academic studies to extract data that elucidates the experiences of children in these circumstances.

2.2. DATA ANALYSIS

Our analysis will be centered on the data collected from the case studies. Qualitative content analysis will be employed to systematically review and extract pertinent information from the selected cases. This analysis will help identify recurring themes, challenges, and patterns related to the rights and wellbeing of children during crises. Cross-case comparisons will be conducted to draw overarching insights and lessons learned.

2.3. ETHICAL CONSIDERATIONS

Throughout the research, we will uphold ethical principles, ensuring the responsible and respectful use of case study data. We will attribute proper credit to the sources, maintaining transparency and integrity in the process. By focusing exclusively on case studies, this research aims to offer a practical and in-depth understanding of the challenges faced by children during crises. The methodology chosen allows for a hands-on examination

of real-world situations, providing valuable insights into the protection of children's rights and wellbeing in times of crisis.

3. BARRIERS TO CHILDREN'S RIGHTS DURING CRISES/ STRATEGIES TO OVERCOME BARRIERS/ MULTIDIMENSIONAL APPROACH

Safeguarding children's rights during crises is a critical concern, as children are among the most vulnerable populations when disasters, conflicts, or emergencies occur. To analyze the barriers to safeguarding children's rights during crises, we will examine two subtopics: (1) Barriers related to access to basic needs and protection, and (2) Barriers related to child participation and agency.

3.1. BARRIERS RELATED TO ACCESS TO BASIC NEEDS AND PROTECTION

- a. **Resource Constraints:** One significant barrier during crises is the scarcity of resources, which can hinder the provision of essential services such as food, clean water, healthcare, and education. Limited resources can lead to competition among different groups for assistance, potentially leaving children without adequate access to these basic needs. In the Syrian refugee crisis, resource constraints led to overcrowded refugee camps with insufficient access to clean water and sanitation facilities. Children in these conditions were vulnerable to diseases and malnutrition.
- b. **Inadequate Infrastructure:** Crises often disrupt existing infrastructure, including healthcare systems and schools. This lack of infrastructure can hinder the delivery of necessary services and protection mechanisms for children. The 2010 earthquake in Haiti destroyed

many schools, making it challenging for children to continue their education and exposing them to exploitation and abuse.

- c. **Security Concerns:** In conflict situations, the safety of humanitarian workers and the children they aim to assist can be compromised. This can limit the delivery of aid and protection services to children. In regions affected by armed conflict, such as parts of Afghanistan, humanitarian organizations have faced significant security challenges in accessing and assisting vulnerable children.

3.2. BARRIERS RELATED TO CHILD PARTICIPATION AND AGENCY

- a. **Limited Voice and Participation:** Children's rights include the right to express their views and have those views taken into account in matters affecting them. During crises, children often have limited opportunities to participate in decision-making processes that affect their lives. In refugee camps, children may not be adequately consulted on matters like the distribution of relief aid or the design of education programs, limiting their agency in shaping their own futures.
- b. **Cultural and Societal Norms:** Cultural and societal norms may restrict the participation of children, especially girls, in decision-making processes and accessing services. These norms can be exacerbated during crises. In some conservative communities, girls' education may be deprioritized during crises, as families may prioritize the safety and well-being of boys over girls.
- c. **Lack of Child-Friendly Mechanisms:** In many emergency response systems, there is a lack of child-friendly mechanisms for reporting abuse, exploitation, and protection concerns. This can deter children

from seeking help or speaking out. In the aftermath of natural disasters, some children may not know where to turn if they experience abuse or exploitation, as there may be limited awareness of child protection services.

In conclusion, safeguarding children's rights during crises is fraught with various barriers related to resource constraints, infrastructure issues, security concerns, limited child participation, and cultural norms. Case studies from different crises illustrate how these barriers can manifest in real-world situations, underscoring the importance of addressing these challenges to ensure the protection and well-being of children in times of crisis. To overcome these barriers, a comprehensive approach involving governments, humanitarian organizations, and local communities is essential, focusing on resource allocation, infrastructure rebuilding, child participation, and changing cultural norms to prioritize children's rights.

Breaking the cycle of crisis and ensuring the rights and well-being of children in such situations requires a comprehensive approach that encompasses legal, policy, and practical measures. One of the foremost legal strategies is the adherence to international agreements and conventions such as the United Nations Convention on the Rights of the Child (CRC). Ratifying and implementing these agreements at the national level obliges governments to prioritize children's rights and protection during crises. This includes provisions for access to education, healthcare, and protection from violence. Legal mechanisms can also enable child protection agencies to intervene swiftly in cases of abuse or neglect.

Policy measures play a pivotal role in addressing barriers. Crisis-responsive policies should be developed, allocating resources for child protection, psychosocial support, and education continuity in crisis

settings. An example of a successful policy intervention is the "No Lost Generation" initiative, established in response to the Syrian refugee crisis. This initiative focuses on providing education, child protection, and youth empowerment to Syrian children affected by the conflict. The policy has helped thousands of children access education and psychosocial support, breaking the cycle of despair.

Practical measures are equally vital. Establishing safe spaces for children in crisis zones, providing access to quality healthcare and nutrition, and supporting families through cash transfer programs are practical strategies. For instance, UNICEF's Child-Friendly Spaces initiative has been deployed in numerous humanitarian emergencies worldwide. These spaces provide children with a safe environment to learn, play, and heal, helping them regain a sense of normalcy and security in crisis situations. By combining legal, policy, and practical measures, societies can effectively break the cycle of crisis and ensure the rights and well-being of children in these challenging circumstances.

A multidimensional approach is essential for effectively tackling the complex issue of children in crisis situations. Such an approach recognizes that these children face a range of interconnected challenges, including physical and mental health needs, educational disruptions, trauma, and protection issues. By addressing these challenges from multiple angles, we can provide comprehensive support and improve their overall well-being.

Collaboration among various stakeholders is crucial because children in crisis situations often require assistance from multiple sectors, including healthcare, education, social services, and child protection. Collaboration ensures that resources are coordinated and that children receive holistic care. This can involve cooperation between government agencies, non-

governmental organizations, community groups, and international bodies. These stakeholders bring different expertise and resources to the table, making it possible to provide a more comprehensive response.

Capacity building and awareness-raising among professionals working with children in crisis situations are vital for several reasons. Firstly, these professionals need specialized skills and knowledge to address the unique needs of these children, such as trauma-informed care or culturally sensitive approaches. Secondly, they need to be aware of the available resources and best practices to deliver effective services. Training and awareness-raising initiatives can help professionals provide higher quality care to children in crisis situations.

Evidence-based practices play a central role in informing policies and interventions for children in crisis. Robust research and data collection help identify what works and what doesn't. Evidence-based practices ensure that limited resources are allocated to interventions with a proven track record of success. This approach also promotes accountability and transparency in the provision of services to children in crisis situations. By relying on evidence, policymakers can make informed decisions, and interventions can be tailored to the specific needs of the affected children, increasing the likelihood of positive outcomes.

In conclusion, a multidimensional approach that emphasizes collaboration, capacity building, awareness-raising, and evidence-based practices is critical for addressing the complex issue of children in crisis situations. It recognizes the interconnected challenges these children face and aims to provide them with comprehensive support and opportunities for a brighter future.

4. SRI LANKAN CONTEXT

Breaking the cycle and ensuring the rights and well-being of children in crisis is a critical issue globally, and the Sri Lankan context presents its own set of challenges and opportunities. Sri Lanka has faced various crises, including armed conflict, natural disasters, and socio-economic challenges. Addressing the barriers to children's well-being in such contexts requires a comprehensive and multidimensional approach. Sri Lanka experienced a prolonged civil conflict that ended in 2009. The aftermath of conflict poses challenges in terms of psychological trauma, displacement, and the need for reconciliation. Efforts to rebuild communities must prioritize children's psychosocial well-being, ensuring access to education, mental health services, and programs that promote social cohesion.

Access to quality education is crucial for children affected by crises. In Sri Lanka, disparities in education persist, with challenges including infrastructure gaps, teacher shortages, and unequal distribution of resources. Initiatives should focus on rebuilding and improving the education system, ensuring that it is inclusive and reaches children in conflict-affected areas. Children in crisis situations often face health challenges, including malnutrition, lack of access to healthcare facilities, and exposure to diseases. Strengthening healthcare infrastructure, particularly in conflict-affected regions, and implementing outreach programs are essential to ensure children receive the necessary medical attention.

Children in crisis situations are vulnerable to various forms of exploitation, including child labor, trafficking, and recruitment into armed groups. Strengthening child protection mechanisms, including legal frameworks,

law enforcement, and community-based initiatives, is crucial to safeguarding children's rights. Socio-economic disparities can exacerbate the impact of crises on children. Vulnerable populations may face increased challenges in accessing resources and opportunities. Addressing economic inequalities through targeted social programs and policies can contribute to breaking the cycle of crisis and poverty.

Involving local communities in the planning and implementation of interventions is vital. This ensures that initiatives are culturally sensitive, sustainable, and meet the specific needs of the affected population. Empowering communities to take an active role in the well-being of their children fosters resilience and contributes to breaking the cycle of crisis. Collaboration with international organizations, NGOs, and the global community is essential. Sharing best practices, resources, and expertise can enhance the effectiveness of interventions in addressing the specific challenges faced by children in crisis in Sri Lanka.

Ensuring the rights and well-being of children in crisis in the Sri Lankan context requires a holistic approach that addresses the unique challenges posed by the country's history and current socio-economic conditions. Collaborative efforts involving government, civil society, and the international community are crucial for sustainable and positive outcomes for the children affected by crises in Sri Lanka.

5. DISCUSSION/ CONCLUSION

5.1. MAIN FINDINGS AND INSIGHTS FROM RESEARCH

Children in crisis situations, such as armed conflict, natural disasters, or displacement, face a complex web of challenges, including physical and psychological trauma, lack of access to education, healthcare, and adequate nutrition, as well as the risk of exploitation and violence. Despite

international conventions and agreements aimed at safeguarding their rights, many children in crisis continue to experience violations, including child labor, child marriage, and recruitment into armed groups.

Remarkably, children in crisis are often resilient, developing coping mechanisms and support networks within their communities, which can be vital in designing effective interventions. Comprehensive programs that combine education, psychosocial support, healthcare, and protection are more likely to succeed in ensuring the wellbeing of children in crisis.

5.2. IMPLICATIONS FOR POLICY, PRACTICE, AND FUTURE RESEARCH

Governments and international organizations must prioritize the ratification and implementation of international agreements protecting children in crisis, such as the Convention on the Rights of the Child.

Resource allocation should focus on creating and strengthening child protection systems in crisis-affected areas, integrating a rights-based approach into policies. Humanitarian organizations and NGOs should collaborate to provide holistic support to children in crisis, including education, psychosocial support, healthcare, and safe spaces. Local communities should be actively involved in the design and implementation of child-focused programs to ensure cultural sensitivity and community ownership.

Frontline workers should receive training emphasizing trauma-informed care and child protection. Longitudinal studies tracking the long-term outcomes of children who have experienced crisis situations are needed to understand the lasting impact on their lives.

Research into the effectiveness of different intervention strategies, including community-based programs and mental health support, should be conducted to inform best practices. Cross-cultural studies can help identify variations in the experiences of children in crisis and inform context-specific interventions.

5.3. GAPS IN THE EXISTING LITERATURE

Limited research exists on the unique challenges faced by girls and boys in crisis situations, necessitating exploration of how gender influences experiences and access to services. Comprehensive research on the mental health of children in crisis, including the prevalence of trauma-related disorders and effective interventions, is lacking.

There is a dearth of studies examining the long-term consequences of crisis experiences on children transitioning into adulthood, an area needing more attention to inform policies and programs promoting resilience and recovery. Research on the root causes of crises and strategies for conflict prevention is essential to reduce the number of children affected by crises, but this area remains underexplored.

In conclusion, our research has highlighted the significant challenges that children face in crisis situations, encompassing physical and psychological trauma, inadequate access to essential services, and violations of their rights. Despite these challenges, children often demonstrate remarkable resilience and coping mechanisms. The central argument of our research underscores the necessity of holistic, rights-based approaches to provide comprehensive support to these vulnerable populations.

Our research findings emphasize several critical points:

- Children in crisis confront multifaceted challenges that necessitate nuanced responses.
- Protection gaps persist despite international agreements, leading to issues like child labor, child marriage, and recruitment into armed groups.
- The resilience and coping mechanisms of children in crisis offer valuable insights for effective interventions.
- Holistic programs encompassing education, psychosocial support, healthcare, and protection are essential for the wellbeing of children in crisis.

It is of utmost importance to address barriers in protecting children's rights during crises. Children's protection is not only a moral duty but a fundamental human rights obligation. Failing to provide adequate support perpetuates suffering and hampers the potential for recovery and development in affected regions.

In closing, we emphasize the urgency of collective efforts in policy, practice, and research to break the cycle of suffering for children in crisis. Governments and international organizations must ratify and implement international agreements protecting children's rights. Resources should be allocated to establish and strengthen child protection systems in crisis-affected areas, with a focus on a rights-based approach. Humanitarian organizations and NGOs should collaborate to provide comprehensive support, engaging local communities in program design and implementation. Frontline workers should receive training in trauma-informed care and child protection.

REFERENCES

Alliance for Child Protection in Humanitarian Action, "Psychosocial Support for Children in Humanitarian Settings: A Review of the Evidence." Available at: <<http://alliancecpa.org/en>> accessed 9th September 2023.

Children in Crisis: Seeking Safety and Well-being. Available at: <<https://www.rescue.org/search/site/Children%20in%20Crisis%3A%20Seeking%20Safety%20and%20Well-being>> accessed 9th September 2023.

UNAIDS, UNICEF, and USAID (2004), "Children on the Brink 2004: A Joint Report of New Orphan Estimates and a Framework for Action." Available at: <https://www.unaids.org/en/resources/documents/2004/20040928_chldn-on-brink> accessed 9th September 2023.

Harvard University Center on the Developing Child, "Children's Resilience in the Face of Adversity." Available at: <<https://academic.oup.com/book/36915/chapter-abstract/322183409?redirectedFrom=fulltext>> accessed: 9th September 2023.

Child Protection Working Group, "Child Protection Minimum Standards in Humanitarian Action." Available at: <<https://resourcecentre.savethechildren.net/document/minimum-standards-child-protection-humanitarian-action-2012/>> accessed 10th September 2023.

UNICEF, "Child Rights in Humanitarian Action: 3 Steps for Response and Recovery." Available at: <<https://www.unicef.org/pacificislands/media/961/file/Child-protection-toolkit.pdf>> accessed: 10th September 2023.

Elaine E., Lori P., "Children and Disasters: Understanding Impact and Enabling Agency." Available at: <https://www.academia.edu/95629675/As_the_climate_changes_Intergenerational_action_based_learning_in_relation_to_flood_education?f_rid=673768> accessed 10th September 2023].

**Sub-Theme (e):
Facilitating
Access to Justice**

ADAPTING TO CHALLENGES POSED BY A CRISIS TO ACCESS COURTS – LEGAL EVOLUTION

Linuri Munasinghe*

ABSTRACT

Throughout the ages, humans have been compelled to deal with crises of varying forms. In recent times, Sri Lanka was devastated by the effects of the COVID-19 pandemic, and the political and economic crisis of Two Thousand and Twenty-Two. In addition to the economic, political, and social impact of these crises, a detrimental impact on the fundamental rights guaranteed under Chapter III of the Constitution of Sri Lanka was observed,¹ in the form of restrictions and derogations. Further, practical challenges to accessing courts were encountered, hindering access to justice, and thereby compromising the constitutional values of equality and justice guaranteed by the Preamble to the Constitution of Sri Lanka.² Upon scrutiny of the court system of Sri Lanka, the article argues that the

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¹ The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31st August 1978, Chapter III.

² The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31st August 1978, Preamble.

obstacles to accessing the court system in Sri Lanka are centuries-old issues that are widely acknowledged, albeit insufficiently addressed. The recent crises merely served to exacerbate these issues. As a result, the legal community was forced to confront this stagnancy and adopt non-traditional measures to ensure the continued functioning of courts, the most notable of which was virtual hearings. The article employs comparative legal research methodology, by analysing the implementation of these measures within court systems in a number of jurisdictions, inclusive of Sri Lanka, in the context of human rights and access to justice, in order to determine their effectiveness. The article asserts that the legal innovations engineered during the crisis serve as potential solutions to the issues plaguing the court system. To that end, the article proposes measures that may be adopted as standard practice, so as to achieve the ultimate ideal of equal justice for all.

Keywords: Crisis, Court System, Access to Justice, Human Rights, Sri Lanka

1. INTRODUCTION

It is imperative to frame a crisis in order to analyse its impact and overcome the obstacles it poses. However, this presents challenges in and of itself given that the concept is hardly unequivocal and straightforward. The Greeks first found distinct definitions for the word in terms of law, medicine, and theology.³ However, these distinctions do not hold weight in the face of the realities of the 21st century – in Sri Lanka, the medical and health crisis caused by the COVID-19 pandemic in early 2020, created the backdrop for the political and economic crisis in 2022, with echoes of the same occurring globally. This lends credence to the hypothesis that

³ Reinhart Koselleck, 'crisis' (2006) 67(2) *Journal of the History of Ideas* 357.

while a crisis imposes ‘choices between stark alternative—right or wrong, salvation or damnation, life or death,’⁴ it cannot be distinctly defined, as its impact may be felt on multiple fronts – politics, economy, finance, society, health, and human rights.

While acknowledging the complex implications of a crisis, the article explores the detrimental impact of a crisis on human rights and the access to justice, with a special focus on the access to courts. This approach is embarked upon, because although numerous countries no longer consider courts to be central to the justice system, the traditional notion of a courts-centric system is very much prevalent in Sri Lanka to this day.⁵ Through this approach, the article raises the argument that the challenges posed by crises only exacerbated pre-existing flaws within the Sri Lankan court system, and thereby ‘forced rapid change with a clear goal, operational continuity.’⁶ The article contends that the momentum of this change must be maintained, leaving no room for regression, in order to wholly reform the Sri Lankan Court System.

2. ACCESSING JUSTICE AMIDST A CRISIS

2.1. THE RIGHT TO ACCESS JUSTICE

Guaranteeing access to justice is of paramount importance, and is reflected in the Preamble of the Constitution that ‘assures to all peoples, freedom, equality, justice, fundamental human rights and the independence of the

⁴ Reinhart Koselleck, 'crisis' (2006) 67(2) *Journal of the History of Ideas* 357.

⁵ Tania Sourdin, Bin Li, Donna Marie McNamara, 'Court Innovations and Access to Justice in Times of Crisis', (2020) 9(4) *Health Policy and Technology* 447 <<https://pubmed.ncbi.nlm.nih.gov/32895624/>> accessed 30 May 2023.

⁶ J.M. Baldwin, J.M. Eassey, E.J. Brooke, 'Court Operations during the COVID-19 Pandemic' (2020) 45 *Am J Crim Just* 743 <<https://doi.org/10.1007/s12103-020-09553-1>> accessed 1 June 2023.

judiciary.⁷ The right to access justice is also one of the fundamental principles enshrined in international human rights law, and is integral to the rule of law, and the principle of equality before the law.^{8,9,10} Further, the United Nations has featured access to justice prominently as a goal in the 2030 Agenda for Sustainable Development.¹¹

Justice is engineered in large part by lawyers and judges, who are duty bound to carry out the functions of their office to guarantee access to justice. The UN Human Rights Office of the High Commissioner espouses such duties in the ‘Basic Principles on the Role of Lawyers,’ emphasizing the right to access legal services, and the role of the government in facilitating this, especially in relation to disadvantaged persons. The instrument also stipulates that lawyers shall function to maintain the honour and dignity of their profession. Further, the importance of professional associations is highlighted, as such associations have a crucial role to play in coordinating with the government to ensure equal access to justice.¹²

⁷ The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31st August 1978, Preamble.

⁸ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, Art 7.

⁹ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Art 14.

¹⁰ UN General Assembly, Convention on the Rights of Persons with Disabilities, resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, Art 13.

¹¹ UN General Assembly, Transforming our world : the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, Goal 16
<<https://www.refworld.org/docid/57b6e3e44.html>> accessed 1 June 2023.

¹² United Nations Basic Principles on the Role of Lawyers, 7 September 1990
<<https://www.refworld.org/docid/3ddb9f034.html>> accessed 25 July 2023.

2.2. THE HARSH REALITIES OF A CRISIS

The need to fulfil the aforementioned duties is made all the more dire during a period of crisis. ‘The ICJ Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis’ accentuates the crucial role of the judiciary and legal community in safeguarding the rule of law, and human rights in a time of crisis, despite these parties being subject to immense pressure during such a time. ‘Lawyers should assume enhanced responsibilities both in protecting the rights of their clients and in promoting the cause of justice and the defence of human rights.’¹³

These responsibilities of the legal community are critical, because when access to justice is hindered people are unable to exercise their fundamental rights and freedoms, or hold the State and its extensions accountable. This is especially concerning because in times of crisis, States have been known to impose limitations or outright derogations of rights in an effort to curb the impact of a crisis.¹⁴

2.3. THE IMPACT OF A CRISIS ON THE COURTS SYSTEM

Having touched upon the generalities of accessing justice amidst a crisis, the article will now home in on the specifics of accessing courts during such a time, which is apposite as the fundamental rights enshrined in the Constitution must be respected, secured, and advanced by all organs of

¹³ ICJ Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis < <https://www.icj.org/wp-content/uploads/2012/04/ICJ-Declaration-and-Plan-of-Action-Position-papers-2008.pdf>> accessed 25 July 2023.

¹⁴ ‘Sri Lanka: Economic Crisis Puts Rights in Peril’ (*Human Rights Watch*, 16 August 2022) <<https://www.hrw.org/news/2022/08/16/sri-lanka-economic-crisis-puts-rights-peril>> accessed 15 June 2023.

government, inclusive of the courts, as per Article 4(d) of the Constitution.¹⁵

As discussed previously, each ‘crisis’ faced by humanity will be possessed of a variety of attributes peculiar to it. However, what follows will discuss the challenges faced by the people in accessing justice via courts, in the context of the crises in recent times. With the COVID-19 crisis came the need to balance the interests of public health and safety, with the interests of justice, and as a result the courts were faced with a number of obstacles in providing unimpeded service.¹⁶ The imposition of lockdown and other emergency regulations necessitated the closure of courts.¹⁷ Even when courts were reopened, health regulations imposing social distancing prevented the functioning of courts at full capacity.¹⁸ On the other hand, Sri Lanka in 2022 experienced the manner in which a political and economic crisis can bring a country to a standstill, and the courts were not exempt from the difficulties of the situation.¹⁹ Further, social justice was compromised as vulnerable groups in terms of social class, gender,

¹⁵ The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31st August 1978, Art 4(d).

¹⁶ J.M. Baldwin, J.M. Eassey, E.J. Brooke (n 6).

¹⁷ Presidential Secretariat, ‘Special circular on court proceedings’ (*Presidential Secretariat Press Releases*, 19 March 2020) <<https://www.presidentsoffice.gov.lk/index.php/2020/03/19/special-circular-on-court-proceedings/>> accessed 19 June 2023.

¹⁸ World Health Organization, ‘COVID-19: physical distancing’ (*World Health Organization Western Pacific*) <<https://www.who.int/westernpacific/emergencies/covid-19/information/physical-distancing/>> accessed 23 June 2023.

¹⁹ Dushni Weerakoon, ‘Sri Lanka’s hard road to recovery from economic and political crisis’ (*East Asia Forum*, 8 January 2023) <<https://www.eastasiaforum.org/2023/01/08/sri-lankas-hard-road-to-recovery-from-economic-and-political-crisis/#:~:text=In%202022%20Sri%20Lanka%20faced,heart%20of%20the%20country's%20problems>> accessed 15 July 2023.

sexuality and race were disproportionately adversely affected.²⁰ Obstacles to accessing courts mounted exponentially, however, the article stands firm in its assertion that the effects of the crises merely exacerbated pre-existing flaws in the Sri Lankan court system.

3. THE INTRICACIES OF THE SRI LANKAN COURT SYSTEM

3.1. INHERENT FLAWS IN THE SRI LANKAN COURT SYSTEM

The article will now seek to prove this assertion through an analysis of the inherent flaws in the Sri Lankan court system. The root cause of many ills is that the courts remain at the epicentre of the justice system in Sri Lanka, with the prevalence of alternative dispute resolution in its infancy in terms of mediation, and inefficient in terms of arbitration.²¹ Further, this focus places an unduly heavy burden on ensuring justice upon lawyers, wherein the difficulties in accessing legal representation creates a crisis in and of itself. However, ‘This diagnosis of the problem proceeds from a preference for a single specific solution: more legal services.’²² This contributes to the age-old issues of high expenses and delays in the court system, stemming from a culmination of legal fees and complex court procedure.

²⁰ Marjorie Mayo, Gerald Koessler, Matthew Scott, Imogen Slater, *Access to Justice for Disadvantaged Communities* (Bristol University Press 2015).

²¹ I. M. C. S. Illankoon, Vivian W. Y. Tam, Khoa N. Le, K. A. T. O. Ranadewa, ‘Causes of disputes, factors affecting dispute resolution and effective alternative dispute resolution for Sri Lankan construction industry’ (2019) 22(2) *International Journal of Construction Management* <<https://www.tandfonline.com/doi/abs/10.1080/15623599.2019.1616415>> accessed 26 July 2023.

²² Rebecca L. Sandefur, ‘Access to what?’ (2019) 148(1) *Daedalus* (Cambridge, Mass.) 49<https://www.amacad.org/sites/default/files/publication/downloads/19_Winter_Daedalus_Sandefur.pdf> accessed 25 June 2023.

The Sri Lankan court system is also ill equipped to deal with the variety of cases that come before it effectively and efficiently. For instance, the criminal justice system is weakened as a result of inadequate powers of investigation, which is especially perturbing as it hinders the ability to hold state institutions accountable. Further, there is a failure to hold those guilty of acts and omissions relating to financial crimes accountable.²³ Accusations of politicization can also be levelled at the judiciary, and legislation such as the Public Security Ordinance, No. 25 of 1947,²⁴ and the Prevention of Terrorism Act No.48 of 1979,²⁵ have been known to limit the ability of the judiciary to mete justice.²⁶

Thereby it can be concluded that crises to a large extent merely brings age old flaws in a system to sharp relief, wherein they can no longer be wilfully overlooked. The article will analyse this phenomenon through the examination of methods by which court systems in the world surmounted the challenges posed by crises, placing special focus on Sri Lanka.

3.2. ADAPTING TO A CRISIS: JUSTICE FORGING FORWARD

‘Ordinarily, organizational inertia is such that change is often incremental...By contrast, the current pandemic has forced rapid change with a clear goal, operational continuity.’²⁷ While this statement directly

²³ Basil Fernando, ‘SRI LANKA: Delays in Justice as A Major Cause Of Economic & Political Catastrophe’ (Asian Human Rights Commission, 27 June 2022) <<http://www.humanrights.asia/news/ahrc-news/AHRC-ART-018-2022/#:~:text=Sri%20Lanka's%20criminal%20justice%20system,related%20crime%20is%20rather%20poor>> accessed 26 July 2023.

²⁴ Public Security Ordinance, No. 25 of 1947.

²⁵ Prevention of Terrorism (Temporary Provisions) Act, No.48 of 1979.

²⁶ ‘Sri Lanka’s Judiciary: Politicized Courts, Compromised Rights’ (*International Crisis Group*, 30 June 2009) <<https://www.crisisgroup.org/asia/south-asia/sri-lanka/sri-lanka-s-judiciary-politicised-courts-compromised-rights>> accessed 20 May 2023.

²⁷ J.M. Baldwin, J.M. Eassey, E.J. Brooke (n 6).

references the COVID-19 pandemic, it is directly applicable to a variety of crises, and reflects the hypothesis of the article - it is through the legal innovation engineered during a crisis that the pre-existing flaws in the court system can be remedied.

Courts worldwide in the face of a crisis adopted novel and innovative measures to ensure their continued operation. During a pandemic, the goal was to eliminate in-person appearances, or conduct entirely virtual, or hybrid proceedings, in the interests of public health and safety. To that end, social distancing was practiced, along with the use of advanced sanitation procedures, technology, and electronic communications and documentation.²⁸

Sri Lanka followed suit, and held staggered sessions wherein courts were filled to one-third their total capacity, an X was marked on every other chair to facilitate physical distancing, and lawyers were only permitted to remain in the courtroom for the period needed to make submissions.²⁹ A particularly commendable innovation in light of these constraints related to court ordered maintenance. The Legal Aid Commission, with the assistance of the United Nations Development Programme (UNDP) granted women who had been deprived of court-ordered maintenance for a period of several months the funds they so desperately needed, through the 'Government's COVID-19 cash transfer programme'.³⁰

²⁸ J.M. Baldwin, J.M. Eassey, E.J. Brooke (n 6).

²⁹ 'A taste of court's hearing in the High Court of Kuala Lumpur during the Conditional Movement Control Order (CMCO)' (*Alex Chang & Co*, 29 May 2020) <<https://alexchanglaw.com/index.php/courts-open-cmco-staggered-jaryne-lam-hui-jun/>> accessed 20 May 2023.

³⁰ UNDP, 'Upholding the Rule of Law in Sri Lanka during the lockdown and beyond' (*UNDP*, 15 July 2020) <<https://www.undp.org/srilanka/news/upholding-rule-law-sri-lanka-during-lockdown-and-beyond>> accessed 11 November 2023.

A significant number of measures adopted during the pandemic were enacted through the Coronavirus Disease 2019 (COVID - 19) (Temporary Provisions) Act, No. 17 of 2021.³¹ Perhaps the most novel and appropriate measure adopted by the courts is virtual hearings, carried out via a live link generated through remote communication, as provided under section 4 of the aforementioned Act.³² The process was further refined and given legal support under the Supreme Court (Electronic Filing and Urgent Digital Virtual Hearings) (Special Provisions) Rules, 2021,³³ and the Court of Appeal (Electronic Filing and Urgent Digital Virtual Hearings) (Special Provisions) Rules, 2021,³⁴ wherein applications and submissions were permitted to be made electronically.

During the pandemic, with the financial support of UNDP, the Legal Aid Commission, the Judicial Service Commission and the Ministry of Justice spearheaded the initiative of electronic filing of bail applications followed by virtual hearings, with the first case in question concerning drug possession.³⁵ Similarly with the support of UNDP, the Legal Aid Commission and the Prison Department provided ‘virtual legal assistance’ to inmates.³⁶ Further, the pandemic impacted avenues of alternative dispute resolution, with arbitration being conducted virtually, notably with

³¹ Coronavirus Disease 2019 (COVID - 19) (Temporary Provisions) Act, No. 17 of 2021.

³² *ibid.*

³³ Supreme Court (Electronic Filing and Urgent Digital Virtual Hearings) (Special Provisions) Rules, 2021.

³⁴ Court of Appeal (Electronic Filing and Urgent Digital Virtual Hearings) (Special Provisions) Rules, 2021.

³⁵ ‘e-filing of bail applications now a reality; virtual hearings expected to pick up’ *The Sunday Times* (Colombo, Sri Lanka, 27 December 2020) <<https://www.sundaytimes.lk/201227/news/e-filing-of-bail-applications-now-a-reality-virtual-hearings-expected-to-pick-up-426632.html>> accessed 11 November 2023.

³⁶ UNDP (n 30).

respect of construction matters.³⁷ Thereby, Sri Lanka established a basis for holding virtual hearings which this article heralds as the future of the court system, and in support of this assertion, an analysis of the concept of virtual hearings will be carried out.

4. THE SAVING GRACE OF THE COURT SYSTEM

4.1. VIRTUAL HEARINGS WORLDWIDE

In order to determine the effectiveness of virtual hearings as a legal innovation to reform the court system, it is prudent to consider its implementation in other jurisdictions of the world. This approach is the essence of comparative law, which is not limited to analysis of the laws of different jurisdictions alone, but extends to legal reform and policy recommendations.³⁸ In so doing, the article will consider the virtual courts of the United Kingdom of England and Wales, the United States of America, and India.

Virtual hearings have been carried out via a live video link in the UK, since 2009 in the Magistrates Court, wherein criminal proceedings could be conducted without the need for the Defendant to be physically present.³⁹ Further, the English civil courts were empowered to hold hearings and receive evidence via telephone, and to receive evidence via a video link, particularly in the case of witnesses living abroad, in order to expedite the

³⁷ Vithusha Lingasabesan and Mahesh Abenayake, 'Opportunities and challenges in conducting virtual alternative dispute resolution (ADR) methods in the Sri Lankan construction industry' (10th World Construction Symposium 2022, Sri Lanka, 24-26 June 2022) <<http://dl.lib.uom.lk/handle/123/19959>> accessed 11 November 2023.

³⁸ Antonina Bakardjieva Engelbrekt, 'Comparative Law and European Law: The End of an Era, a New Beginning or Time to Face the Methodological Challenges?' (2015) 61. *Scandinavian Studies in Law* 88 <<https://www.diva-portal.org/smash/get/diva2:905008/FULLTEXT01.pdf>> accessed 30 June 2023.

³⁹ 'Virtual court first hearings' (*The Law Society*, 7 July 2021) <<https://www.lawsociety.org.uk/topics/criminal-justice/virtual-court-first-hearings>> accessed 30 June 2023.

case.⁴⁰ Following COVID-19, virtual hearings became even more widespread, and in keeping with this momentum, HM Courts and Tribunals Service (HMCTS) envisions the transition to a new video hearing service to occur as early as March 2024. The new service will introduce virtual consultation rooms, and built-in guidance for court users. This lends credence to the argument of the article that legal innovation during a period of crisis can transition to a time of peace, in order to remedy shortcomings of a court system.

In the United States of America, virtual hearings were employed to a great extent, through the utilization of audio and video conferencing technology following the COVID-19 pandemic, in order to ensure operational continuity of the courts. Certain proceedings such as first appearance hearings transitioned easily to a virtual environment, with many lower federal courts and the state supreme courts taking smoothly to the new regime. Further, the digitalization of procedure made access to documentation and court processes available electronically, twenty-four hours a day, seven days a week.⁴¹

India ventured into the realm of virtual hearings following the COVID-19 pandemic, and as supported by the article, is currently making efforts to make the prevalence of virtual courts more widespread. The first virtual court in India was set in motion in Faridabad in 2019.⁴² At present, cases relating to offences under the Motor Vehicle Act (Traffic Challan Cases), and petty offences where summons can be issued under Section 206 are

⁴⁰ Fiona Gillett, Kieran Mercer, 'Remote hearings in England and Wales' (*International Bar Association*) <<https://www.ibanet.org/article/2E1CF14C-095F-448A-8B19-11BE3287337D>> accessed 30 June 2023.

⁴¹ J.M. Baldwin, J.M. Eassey, E.J. Brooke (n 6).

⁴² Anku Anand, 'Virtual Courts: The Changing Face of Indian Judicial System' (2021) <<http://dx.doi.org/10.2139/ssrn.3865629>> accessed 15 July 2023.

heard,⁴³ in twenty-one virtual courts, in seventeen states and Union territories. Building upon the success of this endeavour, the Law Ministry of India has invited proposals from numerous experts with a view to launching '24x7 virtual courts', dealing in a wider variety of matters.⁴⁴

4.2. ADAPTING TO VIRTUAL COURTS WITH DUE DILIGENCE

It is apparent that the courts of the aforementioned jurisdictions fully intend to continue to adopt and develop measures devised during the crisis. During this process, the pros and cons of virtual courts have been considered at length, which the article deems prudent to examine at this stage.

One of the most glaring flaws of traditional courts systems are the delays in hearing cases, and while traditional courts and tribunals do not function on weekends and public holidays, there is no such limitation applicable to virtual courts. Virtual hearings can be held twenty-four hours a day, seven days a week, with documentation and court processing available in that time frame as well. The latter would also increase the transparency of the court process, facilitating better accountability.⁴⁵ Further, parties would not need to be in court in person, minimizing potential delays, and eliminating the inconveniences of travel on business days. Thereby, the added advantage of reducing the body of people present in courts at a time

⁴³ 'Virtual Courts' (*e-Committee, Supreme Court of India, Information and Communication Technology in Indian Judiciary*)

<<https://ecommitteesci.gov.in/service/virtual-courts/>> accessed 15 July 2023.

⁴⁴ 'Soon, India may have 24x7 virtual courts deciding cases' Times of India (New Delhi, 8 July 2023)

<http://timesofindia.indiatimes.com/articleshow/101582055.cms?utm_source=content_ofinterest&utm_medium=text&utm_campaign=cppst> accessed 9 July 2023.

⁴⁵ Anku Anand (n 42).

would accrue as well, allowing cost cutting.⁴⁶ The article opines that virtual hearings would reduce the delays and inflated expenses inherent in the court process to a marked extent.

However, it would be remiss to launch virtual courts without acknowledging and addressing the issues appurtenant to doing so. It almost seems too obvious to state, but virtual hearings are carried out without the presence of the parties, witnesses and their legal representation in the courtroom, and that in itself carries challenges to accessing justice. It creates obstacles to real time interactions in the courtroom, with less supervision of the parties and witnesses, and less judicial interaction. Further, security and logistical issues arise, in the form of issues in obtaining signatures, confirming identities, preventing intimidation, and deficiencies in knowledge of technology of the persons involved which hinders their ability to participate effectively. The shift to the use of modern technology may cause further barriers to social justice, as vulnerable groups and rural communities are unlikely to be equipped with the proper resources to benefit from this legal evolution.⁴⁷ However, the pros outweigh the cons in the case of virtual hearings, and the article asserts that this concept should be implemented, with the incorporation of measures to overcome incidental issues.

Fortunately, Sri Lanka has already acknowledged that virtual hearings are the panacea to what ails the justice system. In 2022, Hon. Ali Sabry disclosed that digitalization had been planned for the last eight years. The final conceptualization of the digitalization project which envisioned an overhaul of the prevailing system, was a product of the input of experts,

⁴⁶ ‘Soon, India may have 24x7 virtual courts deciding cases’ (n 44).

⁴⁷ J.M. Baldwin, J.M. Eassey, E.J. Brooke (n 6).

the Judicial Service Commission, and the Technology Committee of the Ministry of Justice. Several models worldwide were evaluated, with the bidding coming down to vendors from Malaysia and Singapore. The former was selected as it was more cost effective. However, Hon. Ali Sabry admitted that the five hundred million rupees allocated for the project in the last five years was returned in the absence of positive action, and that at present the twenty million required to finance a pilot project involving hundred courthouses is beyond the financial capacity of the treasury. Therefore, the project remains stagnant.⁴⁸

However, the court system in Sri Lanka is slowly but surely reverting to the traditional model with its innumerable flaws. The article by no means condones this regression and asserts that further cost-effective measures could be adopted until such time as the digitalization project can be brought to completion.

4.3. PROPOSALS FOR THE REFORMATION AND MODERNIZATION OF THE SRI LANKAN COURT SYSTEM

Reform must be proposed with the central viewpoint that the imperative principles of justice are not compromised in the name of legal innovation, and the article shall take pains to do so forthwith.

Virtual hearings are conducted up to the present day in respect of calling matters in the Supreme Court,⁴⁹ and the Commercial High Court,⁵⁰ while

⁴⁸ 'Future-proofing Sri Lanka's Legal System' *Echelon* (Colombo, 28 September 2022) <<https://www.echelon.lk/future-proofing-sri-lankas-legal-system/>> accessed 25 July 2023.

⁴⁹ Supreme Court of Sri Lanka, 'Daily Court List' (*Supreme Court of Sri Lanka*) <https://www.supremecourt.lk/index.php?option=com_content&view=article&id=63&Itemid=56> accessed 11 November 2023.

⁵⁰ SLT Mobitel, 'Sri Lanka Telecom introduces Virtual Hearing Solution for Commercial High Courts' (*SLT Mobitel*) <<https://www.slt.lk/en/content/sri-lanka->

the Court of Appeal yet allows witnesses such as prisoners to give evidence virtually via a live video link. Further, the Bar Association of Sri Lanka has a ‘Support Centre for Virtual Court Hearings’ in order to aid members with accessibility in this regard.⁵¹ In courtrooms already possessed of the resources and technology to do so, the practice of conducting hearings virtually must become more widespread.

However, it must be acknowledged that in certain situations in person trials remain prudent – jury trials in criminal cases, cases involving fraud, misrepresentation, dishonesty, and professional negligence where witness testimony is heavily contested, and cases involving parties or witnesses who are children.⁵²

While technology such as Zoom, Microsoft Teams, Starleaf, Skype for Business, and Webex were of little use to the legal community prior to the COVID-19 pandemic, they are now incorporated into legal practice even outside the courtroom.⁵³ When the funding for comprehensive reform becomes available, the utilization of Artificial Intelligence (AI) in courtrooms must be reviewed as well. AI is already utilized in numerous judicial systems in the field of criminal justice, for the purposes of investigative assistance and automatic decision-making.⁵⁴ It would also be prudent to develop an app to monitor case lists and court announcements

[telecom-introduces-virtual-hearing-solution-commercial-high-courts](#)> accessed 11 November 2023.

⁵¹ Bar Association of Sri Lanka, ‘BASL Support Centre for Virtual Court Hearings’ (BASL) <<https://basl.lk/basl-support-centre-for-virtual-court-hearings/>> accessed 11 November 2023.

⁵² Fiona Gillett, Kieran Mercer (n 40).

⁵³ *ibid.*

⁵⁴ ‘AI and the Rule of Law: Capacity Building for Judicial Systems’ (UNESCO) <<https://www.unesco.org/en/artificial-intelligence/rule-law/mooc-judges>> accessed 30 June 2023.

island-wide, in lieu of disseminating the information through multiple sources.

However, digitalization of any degree carries with it a host of risks that need to be addressed. Ideally, when funding becomes available, internal software should be developed for the court system, as opposed to utilizing third-party software. At present, this option is being explored by the Ministry of Law in India, to strengthen cyber-security.⁵⁵ Further, steps must be taken to ensure the integrity of witness testimony. To that end, it is imperative that witnesses are supplied with all the relevant documentation physically or electronically, that cameras are positioned in such a way as to ensure that witnesses are not intimidated or unduly influenced, and that the witness is not in a jurisdiction that does not permit evidence to be given remotely.⁵⁶ In order to better overcome the challenges associated with asynchronous trials, judges and lawyers would each require two monitors, one from which to view the participants, and another from which to view documentation.⁵⁷ Further, clients and lawyers may communicate with one another in real time in virtual hearing through WhatsApp groups, as in the case of *National Bank of Kazakhstan*.⁵⁸ It is also prudent to develop formal guidelines to manage and review electronic bundles of data, and develop software to translate English court documents into Sinhala and Tamil, and vice versa, by drawing inspiration from the system developed in India.⁵⁹

⁵⁵ Anku Anand (n 42).

⁵⁶ Fiona Gillett, Kieran Mercer (n 40).

⁵⁷ *ibid.*

⁵⁸ *National Bank of Kazakhstan v The Bank of New York Mellon and others* [2020] EWHC 916 (Comm)

⁵⁹ Anku Anand (n 42).

Digitalization as aforementioned does not guarantee that vulnerable groups and rural communities will have equal access to justice. However, this state of affairs can be remedied by empowering, and providing adequate funding to the Legal Aid Commission. After all, it is critical that the reform to be implemented on the heels of a crisis, takes a ‘people-centred approach to justice,’⁶⁰ and safeguards the imperative principles of natural justice.

5. CONCLUSION

John F. Kennedy once remarked, ‘When written in Chinese, the word “crisis” is composed of two characters. One represents danger and the other represents opportunity.’⁶¹ In that vein, the article is staunch in its assertion that despite the challenges to human rights and the access to justice presented by a crisis, the state of affairs is also rife in opportunity, as the urgency it presents compels innovation that can be transformed into true, long-lasting change. The article concludes that the crises merely exacerbated pre-existing flaws in Sri Lanka’s court system, and that the measures adopted during that time represented the makings of the panacea to what has ailed the court system for centuries. In light of this revelation, the article delved into the pros and cons of measures adopted during the crises in Sri Lanka, and comparatively those in other jurisdictions as well,

⁶⁰ Vladyslav Teremetskyi, Yevheniia Duliba, Olena Drozdova, Liudmyla Zhukovska, Olena Sivash, Iurii Dziuba, 'Access to Justice and Legal Aid for Vulnerable Groups: New Challenges Caused by the Covid-19 Pandemic' (2021) 24 *Journal of Legal, Ethical and Regulatory Issues* 1 <<https://www.abacademies.org/abstract/access-to-justice-and-legal-aid-for-vulnerable-groups-new-challenges-caused-by-the-covid19-pandemic-11384.html>> accessed 25 July 2023.

⁶¹ Papers of John F. Kennedy ‘Pre-Presidential Papers Senate Files, Box 902 United Negro College Fund, Indianapolis, Indiana’ (John F. Kennedy Presidential Library, 12 April 1959) <<https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/indianapolis-in-19590412>> accessed 25 July 2023.

in order to propose measures of reform, with a particular emphasis on virtual hearings.

The article acknowledges that growing pains will be associated with such an expansive overhaul of the court system, which is so integral to the justice system of Sri Lanka. In order to address this reality, reform should be engineered through the coordination of key institutions such as the Ministry of Justice, Judicial Service Commission, Law Reform Commission, Legal Aid Commission, and the Bar Association of Sri Lanka. Further, the article contends that reform must be implemented incrementally through pilot projects, in order to address any issues that may arise in implementing reform, and to overcome the innate reticence of the legal community to change. However, change is imminent and unavoidable if the court system of Sri Lanka is to guarantee access to justice for all citizens, and the only way forward is by embracing reform - legal evolution.

REFERENCES

Cases:

National Bank of Kazakhstan v The Bank of New York Mellon and others [2020] EWHC 916 (Comm).

Legislation:

Coronavirus Disease 2019 (COVID - 19) (Temporary Provisions) Act, No. 17 of 2021.

Court of Appeal (Electronic Filing and Urgent Digital Virtual Hearings) (Special Provisions) Rules, 2021.

Prevention of Terrorism (Temporary Provisions) Act, No.48 of 1979.

Public Security Ordinance, No. 25 of 1947.

Supreme Court (Electronic Filing and Urgent Digital Virtual Hearings) (Special Provisions) Rules, 2021.

The Constitution of the Democratic Socialist Republic of Sri Lanka, certified on 31st August 1978.

UN General Assembly, Convention on the Rights of Persons with Disabilities, resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106.

UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966.

UN General Assembly, Universal Declaration of Human Rights, 10 December 1948.

Books:

Mayo M, Koessl G, Scott M, Slater I, Access to Justice for Disadvantaged Communities (Bristol University Press 2015).

Journal Articles:

Anand, A (2021): Virtual Courts: The Changing Face of Indian Judicial System. on-line doi: <<http://dx.doi.org/10.2139/ssrn.3865629>> accessed: 15 July 2023.

Baldwin, J M; Eassey, J M; Brooke, E J (2020): Court Operations during the COVID-19 Pandemic. Am J Crim Just, 45. doi: <<https://doi.org/10.1007/s12103-020-09553-1>> accessed: 1 June 2023.

Engelbrekt, A B (2015): Comparative Law and European Law: The End of an Era, a New Beginning or Time to Face the Methodological Challenges, Scandinavian Studies in Law, 61. p88. <<https://www.diva-portal.org/smash/get/diva2:905008/FULLTEXT01.pdf>> accessed 30 June 2023.

Illankoon, I M C S; Tam, V W Y; Le K N; Ranadewa, K A T O (2019): Causes of disputes, factors affecting dispute resolution and effective alternative dispute resolution for Sri Lankan construction industry, International Journal of Construction Management, 22(2)

<<https://www.tandfonline.com/doi/abs/10.1080/15623599.2019.161641>> accessed 26 July 2023.

Koselleck, R (2006): crisis, *Journal of the History of Ideas*, 67(2), p357
<<https://www.jstor.org/stable/30141882>> accessed 30 May 2023.

Lingasabesan V and Abenayake M, 'Opportunities and challenges in conducting virtual alternative dispute resolution (ADR) methods in the Sri Lankan construction industry' (10th World Construction Symposium 2022, Sri Lanka, 24-26 June 2022)
<<http://dl.lib.uom.lk/handle/123/19959>> accessed 11 November 2023.

Sandefur, R L (2019): Access to what?, *Daedalus* (Cambridge, Mass.). 148(1). p 49.

<https://www.amacad.org/sites/default/files/publication/downloads/19_Winter_Daedalus_Sandefur.pdf> accessed 25 June 2023.

Sourdin, T; Li B; McNamara, D M (2020): 'Court Innovations and Access to Justice in Times of Crisis', *Health Policy and Technology*. 9(4). p 447.
< <https://pubmed.ncbi.nlm.nih.gov/32895624/>> accessed 30 May 2023.

Teremetskyi, V; Duliba, Y; Drozdova, O; Zhukovska, L; Sivash, O; Dziuba, I (2021): Access to Justice and Legal Aid for Vulnerable Groups: New Challenges Caused by the Covid-19 Pandemic, *Journal of Legal, Ethical and Regulatory Issues*. 24 1.
<<https://www.abacademies.org/abstract/access-to-justice-and-legal-aid-for-vulnerable-groups-new-challenges-caused-by-the-covid19-pandemic-11384.html>> accessed 25 July 2023.

Websites:

'AI and the Rule of Law: Capacity Building for Judicial Systems' (UNESCO) <<https://www.unesco.org/en/artificial-intelligence/rule-law/mooc-judges>> accessed 30 June 2023.

'A taste of court's hearing in the High Court of Kuala Lumpur during the Conditional Movement Control Order (CMCO)' (Alex Chang & Co, 29 May 2020) <<https://alexchangelaw.com/index.php/courts-open-cmco-staggered-jaryne-lam-hui-jun/>> accessed 20 May 2023.

Bar Association of Sri Lanka, ‘BASL Support Centre for Virtual Court Hearings’ (BASL) <<https://basl.lk/basl-support-centre-for-virtual-court-hearings/>> accessed 11 November 2023.

‘e-filing of bail applications now a reality; virtual hearings expected to pick up’ The Sunday Times (Colombo, Sri Lanka, 27 December 2020) <<https://www.sundaytimes.lk/201227/news/e-filing-of-bail-applications-now-a-reality-virtual-hearings-expected-to-pick-up-426632.html>> accessed 11 November 2023.

Fernando B, ‘SRI LANKA: Delays In Justice As A Major Cause Of Economic & Political Catastrophe’ (Asian Human Rights Commission, 27 June 2022) <<http://www.humanrights.asia/news/ahrc-news/AHRC-ART-018-2022/#:~:text=Sri%20Lanka's%20criminal%20justice%20system,related%20crime%20is%20rather%20poor>> accessed 26 July 2023.

‘Future-proofing Sri Lanka’s Legal System’ Echelon (Colombo, 28 September 2022) <<https://www.echelon.lk/future-proofing-sri-lankas-legal-system/>> accessed 25 July 2023.

Gillett F, Mercer K, ‘Remote hearings in England and Wales’ (International Bar Association) <<https://www.ibanet.org/article/2E1CF14C-095F-448A-8B19-11BE3287337D>> accessed 30 June 2023.

ICJ Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis <<https://www.icj.org/wp-content/uploads/2012/04/ICJ-Declaration-and-Plan-of-Action-Position-papers-2008.pdf>> accessed 25 July 2023.

Papers of John F. Kennedy ‘Pre-Presidential Papers Senate Files, Box 902 United Negro College Fund, Indianapolis, Indiana’ (John F. Kennedy Presidential Library, 12 April 1959) <<https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/indianapolis-in-19590412>> accessed 25 July 2023.

Presidential Secretariat, ‘Special circular on court proceedings’ (Presidential Secretariat Press Releases, 19 March 2020)

<<https://www.presidentsoffice.gov.lk/index.php/2020/03/19/special-circular-on-court-proceedings/>> accessed 19 June 2023.

‘Soon, India may have 24x7 virtual courts deciding cases’ Times of India (New Delhi, 8 July 2023)

<http://timesofindia.indiatimes.com/articleshow/101582055.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 9 July 2023.

‘Sri Lanka: Economic Crisis Puts Rights in Peril’ (Human Rights Watch, 16 August 2022) <<https://www.hrw.org/news/2022/08/16/sri-lanka-economic-crisis-puts-rights-peril>> accessed 15 June 2023.

SLT Mobitel, ‘Sri Lanka Telecom introduces Virtual Hearing Solution for Commercial High Courts’ (SLT Mobitel)

<<https://www.slt.lk/en/content/sri-lanka-telecom-introduces-virtual-hearing-solution-commercial-high-courts>> accessed 11 November 2023.

‘Sri Lanka’s Judiciary: Politicized Courts, Compromised Rights’ (International Crisis Group, 30 June 2009)

<<https://www.crisisgroup.org/asia/south-asia/sri-lanka/sri-lanka-s-judiciary-politicised-courts-compromised-rights>> accessed 20 May 2023.

Supreme Court of Sri Lanka, ‘Daily Court List’ (Supreme Court of Sri Lanka)

<https://www.supremecourt.lk/index.php?option=com_content&view=article&id=63&Itemid=56> accessed 11 November 2023.

United Nations Basic Principles on the Role of Lawyers, 7 September 1990 <<https://www.refworld.org/docid/3ddb9f034.html>> accessed 25 July 2023.

UNDP, ‘Upholding the Rule of Law in Sri Lanka during lockdown and beyond’ (UNDP, 15 July 2020)

<<https://www.undp.org/srilanka/news/upholding-rule-law-sri-lanka-during-lockdown-and-beyond>> accessed 11 November 2023.

UN General Assembly, transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, Goal 16

<<https://www.refworld.org/docid/57b6e3e44.html>> accessed 1 June 2023.

‘Virtual Courts’ (e-Committee, Supreme Court of India, Information and Communication Technology in Indian Judiciary)
<<https://ecommitteesci.gov.in/service/virtual-courts/>> accessed 15 July 2023.

'Virtual court first hearings' (The Law Society, 7 July 2021)
<<https://www.lawsociety.org.uk/topics/criminal-justice/virtual-court-first-hearings>> accessed 30 June 2023.

Weerakoon D, ‘Sri Lanka’s hard road to recovery from economic and political crisis’ (East Asia Forum, 8 January 2023)
<<https://www.eastasiaforum.org/2023/01/08/sri-lankas-hard-road-to-recovery-from-economic-and-political-crisis/#:~:text=In%202022%20Sri%20Lanka%20faced,heart%20of%20the%20country's%20problems>> accessed 15 July 2023.

World Health Organization physical distancing¹⁹: physical distancing’ (World Health Organization Western Pacific)
<<https://www.who.int/westernpacific/emergencies/covid-19/information/physical-distancing>> accessed 23 June 2023.

STRENGTHENING FUNDAMENTAL HUMAN RIGHTS BY SUPPORTING ACCESS TO JUSTICE FOR CHILDREN IN SRI LANKA; A COMPARATIVE ANALYSIS WITH INDIA

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ABSTRACT

The purpose of this paper is to examine and strengthen the existing Sri Lankan justice system upon human rights covered under the fundamental rights of the Constitution of Sri Lanka 1978 and towards assessing the currently prevailing justice system with Indian justice system towards the legal factor of access to justice for children in Sri Lanka. The researcher highlights the Sri Lankan National Child Protection Authority Act being a pioneer in the justice system towards governing and formulating policies towards the prevention of child abuse and the protection and treatment of such affected children by coordinating, monitoring and governing such matters incidental towards such abuses by highlighting and discussing the provisions of the aforesaid Act in depth from a judicial perspective. Though Sri Lanka ratified Convention on the Rights of the Child (CRC), being a country practicing dualism, it does not take precedence over Sri Lankan national law since ratified international instruments do not automatically have the force of law through legislation. However, CRC

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has been referred to when passing Sri Lankan domestic legislation in the situations where Minister of Justice introduce Maintenance Bill in the parliament made in reference to CRC as being a guiding force behind the law-making process. The researcher has acknowledged the fact that to the present date, CRC has not been directly incorporated into the Sri Lankan law, however Sri Lanka has expressed its view upon many of the provisions of the CRC being in line with the Sri Lankan Constitution of 1978. Sri Lanka has adopted the Children Charter in 1992 by following the ratification of CRC. However, this Charter has no binding force, instead working as a policy document towards guiding Sri Lanka towards its policy making and legal reforming procedures. The researcher has further encountered that, Sri Lanka has initiated reviews upon the present laws towards determining which are consistent and which are inconsistent in nature with the CRC and has acted regarding strengthening the legislation towards passing new areas towards enhancing protection of children and access to justice concerning children.

Furthermore, the researcher would compare the Indian legislative structure and its implementation procedure towards access to justice for children and propose recommendations towards improving the Sri Lankan justice system along with its legislations towards improving, strengthening, and supporting fundamental human rights by supporting access for justice towards children in Sri Lanka by taking the essence from the Indian legislature.

Finally, this research offers a source of legal information to the future legal scholars, legal academics and legal researchers towards addressing the present Sri Lankan legislation and the current situation towards access to justice for children, available loopholes and ways to improve the national justice system with the essence of Indian Legislature towards strengthening the access to justice for children in mitigating the risks of children being preyed to majorly towards criminal offences due to not having a proper legal protection standard within Sri Lankan legal system.

Keywords: Fundamental Human Rights, Access to Justice, Children, Sri Lanka, India, Comparative Analysis

1. INTRODUCTION

“Access to justice traditionally interpreted as the right to seek a remedy before a court of law or a tribunal which is constituted by law, and which can guarantee independence and impartiality in the application of the law”.

(Francioni, 2007)¹

As per the declaration of Garth and Cappelletti in 1978, access justice has been defined as an effective formal right which is an individual’s most essential human right. This declaration was given during the era of post second world war years when Welfare State Reforms were underway in many of the Global North countries². Additionally, as the possession of rights are meaningless without mechanisms for their effective exoneration,

¹ F Francioni, ‘Access to Justice as a Human Right’ in F Francioni (ed), *The Rights of Access to Justice under Customary International Law* (Oxford University Press, Oxford, 2007).

² BG Garth and M Cappelletti ‘Access to Justice: The newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) *Buffalo Law Review* Available at- <<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2140&context=facpub>> accessed 19/04/2023.

access to justice thus came to be approached as citizens' actual ability to seek remedy before a court of law when their rights are unfulfilled or violated³. During this era, for access to justice to be considered as an effective right, governments of Global North countries were required to structure the policies by guaranteeing that even the most disenfranchised members of the society have the access to the respective legal systems⁴. Furthermore, it is important to perceive that access to justice is positioned through State Courts as the only way which the people can access justice⁵. The aforesaid argument could be further supported and established on the concept of the Rule of Law on the existence of impartial legal procedures and on separation of powers of the executive, legislature, and judiciary, where the judiciary would be independent from the executive.

Justice for children encompasses legislation, policies, procedures, and mechanisms specifically applicable to children who are victims and witnesses of crimes and children in conflict with the law. In the context of children in conflict with the law, specialised justice systems for children have a further obligation to ensure that they are positioned to address the root causes of offending behaviour and to facilitate the reintegration of children into society⁶. As per right of justice for children in maintaining a child friendly justice system, it is vital to understand that a child generally

³ B Hastie 'The Inaccessibility of Justice for Migrant Workers: A Capabilities-Based Perspective' (2017) Windsor Yearbook of Access to Justice Available at- https://commons.allard.ubc.ca/fac_pubs/447/ accessed 19/04/2023.

⁴ *ibid.*

⁵ *ibid.*

⁶ T Liefwaard, 'Access to Justice for Children: Towards a Specific Research and Implementation Agenda' (2019) 27 International Journal of Children's Rights Available at- https://www.researchgate.net/publication/333113855_Access_to_Justice_for_Children_Towards_a_Specific_Research_and_Implementation_Agenda accessed on- 20/04/2023.

regarded as an individual who is below the age of eighteen years subjecting to diversities under special instances as per different legal systems, it is undoubtedly accepted principle that under any situation, best interest of the child must be accepted and considered paramount⁷. This system intends on maintaining a child friendly justice system ensuring a child to be given special treatment in a manner which shall be consistent with dignity of the child and reinforces the effective implementation of children's rights by maintaining child's respect and fundamental freedom from others⁸. Thus, child-friendly justice embraces the objective of the judicial system of a country that that could be credible, authoritative and an enthralling tool towards positively shape the life of the child who encounters the court of law a victim.

The researcher has identified that every child whose life has associated with the law requires a special and unique attention where it is needed to maintain a Child-Friendly Justice. Additionally, it is a visible fact that, children who come to Court of Law get victimized socially and psychologically resulting in experiencing traumatic conditions⁹. Moreover, the researcher has established the fact that, infrastructural inequalities towards access to information with regards to the availability and existence of legal remedies to certain groups of the community with

⁷ T Liefwaard, 'Access to Justice for Children: Towards a Specific Research and Implementation Agenda' (2019) 27 International Journal of Children's Rights Available at- https://www.researchgate.net/publication/333113855_Access_to_Justice_for_Children_Towards_a_Specific_Research_and_Implementation_Agenda accessed on- 20/04/2023.

⁸ UNICEF, 'A Legal and Institutional assessment of Sri Lanka's Justice System for Children' (2017) Verite Research Available at- <https://www.unicef.org/srilanka/media/376/file/A%20Legal%20And%20Institutional%20Assessment%20Of%20Sri%20Lanka%E2%80%99s%20Justice%20System%20For%20Children.pdf> accessed 21/04/2023.

⁹ *ibid.*

underprivileged conditions of lack of economic, linguistic, and social resources need to access to judicial protection as same as the privileged set of community¹⁰. However, the researcher acknowledges the fact that, in most countries of the world, peoples undergo judicial systems that are prohibitively onerous, labyrinthine, lengthy, and biased against the least powerful. Furthermore, international child-friendly justice jurisprudence unveils substantial principles allowing children towards enforcing their rights and procure States to institute and to encourage child-friendly court procedure policies.

As per access to justice for children in Sri Lanka, it is important to acknowledge the fact that maintaining a child-friendly justice system is an important aspect of the administration. Sri Lanka having an adversarial justice system, the judge plays a crucial role towards discovering the truth from the accused, witnesses, and the victims. Moreover, if the accused or the victim is a child, the courts generally cohere to the best interest of the child principle. However, the practical position of Sri Lankan law with regards to the maintenance of the best interest of the child principle is disputed even though the best interest of the child is theoretically present in the Sri Lankan justice system, the researcher reasonably argues that compared to other jurisdictions and international standards with regards to the aforesaid concept, the adequacy of the practicability of the concept of the best interest of the child is not up to the level of expectation. Furthermore, in Sri Lanka, weak legislative frameworks, and institutional

¹⁰ UNICEF, 'A Legal and Institutional assessment of Sri Lanka's Justice System for Children' (2017) Verite Research Available at- <https://www.unicef.org/srilanka/media/376/file/A%20Legal%20And%20Institutional%20Assessment%20Of%20Sri%20Lanka%E2%80%99s%20Justice%20System%20For%20Children.pdf> > accessed 21/04/2023.

practices, as well as inefficient enforcement, have widened the gap between domestic standards and international best practices pertaining to justice for children. Such weaknesses result in an increased risk of children being re-victimised and exploited by the justice system. Additionally, the increasing backlog in courtrooms has further impeded the effectiveness of Sri Lanka's children's justice system. Supporting the aforesaid factors, the researcher found out that, as per the data gathered in 2012, it takes average six years to undertake the investigation of a child's case to its commencement of the trial¹¹. Since Sri Lanka is having only two specialised Juvenile Courts caught a scarcity of such specialised juvenile courts resulting majority of the child related cases to be heard in general courts alongside the adults related cases which would embark insensitive performances of judicial services with regards to specific special needs to be paved to minors.

When considering the international standards being incorporated in Sri Lankan legal context, the United Nations Convention in the Rights of the Child (CRC) is the primary international instrument that establish civil, political, economic, cultural, and social rights of the children. Article 1 of CRC defines a child as an individual who is below the age of eighteen¹². Article 37,39 and 40 specifically undertakes on administration of justice for children in conflict with law and child victims of crimes¹³. Sri Lanka

¹¹ Centre for Policy Alternatives (CPA), 'The Need for Accountability in Sri Lanka's Criminal Justice System: A Glance at Seven Emblematic Cases' (2019) CPA Available at: < <https://reliefweb.int/report/sri-lanka/need-accountability-sri-lanka-s-criminal-justice-system-glance-seven-emblematic>> accessed 22/04/2023.

¹² BMP Bandaranayake, 'Child-friendly justice and the best interest of the child: A comparative Analysis of Sri Lanka, India, and International Standards' (2021) KDU IRC Available at: < <http://ir.kdu.ac.lk/bitstream/handle/345/5083/FOL-191-198.pdf?sequence=1&isAllowed=y>> accessed 23/04/2023.

¹³ United Nations Human Rights, 'Convention on the Rights of the Child' (1989) Available at: < <https://www.ohchr.org/sites/default/files/crc.pdf>> accessed 24/04/2023.

ratified the CRC in the year 1990 and the primary legal instruments governing children's justice are The Children and Young Persons Ordinance No.48 of 1939 (CYPO), The Probation of Offenders Act No.10 of 1948 (POA), The Youthful Offenders (Training School) Act No. 42 of 1944 (YOTSA) respectively.

However, it is noticeable that domestic framework on justice for children in Sri Lanka becomes insufficient with regards to certain areas concerning international best practises. Such inadequacies are the stipulation of a uniform definition of a child, and an internationally acceptable age of minimum criminal responsibility, consider the deprivation of a child's liberty being a matter of last resort, prioritise the diversion of children away from the formal justice system, and distinguish the responses applicable to children in conflict with the law and children in need of care and protection¹⁴.

Towards addressing the prevailing inefficiencies of the CYPO, Ministry of Justice had drafted the Children (Judicial protection) Bill (CJPB) which contains number of notable improvements to the framework governing justice administration for children. Some of such improvement requisites are to maintain and give predominance towards the best interests with regards to all matters concerning children, to appoint judicial guardian towards assisting children during legal proceedings, and to prioritise the foster care system in the judicial administration of children¹⁵. However,

¹⁴ Centre for Policy Alternatives (CPA), 'The Need for Accountability in Sri Lanka's Criminal Justice System: A Glance at Seven Emblematic Cases' (2019) CPA Available at: <<https://reliefweb.int/report/sri-lanka/need-accountability-sri-lanka-s-criminal-justice-system-glance-seven-emblematic>> accessed 22/04/2023.

¹⁵ *ibid.*

despite the improvements above, the Bill fails to prioritise the diversion of children away from the formal justice system as a matter of first resort.

As the researcher undertakes a comparative legal analysis among Sri Lanka and India, India has ratified CRC in 1992 and has also ratified optional protocols on children in armed conflict and on the sale of children. Since ratified international instruments do not automatically have legal enforcement in India, it must be given effect through national legislation. However, as per the declaration of the Indian Supreme Court, international conventions ratified by India can be relied upon in the presence of a vacuum in Indian Law in the absence of any conflicts with the Indian Constitution or other laws¹⁶. Thereby, CRC does not take precedence over national law, however, national law is interpreted wherever possible in a consistent way with international law. The CRC has yet to be directly incorporated into national law. A piecemeal approach has been adopted to incorporate provisions of the CRC where the standards of the CRC are also reflected in delegated legislation under the Juvenile Justice Act and other laws¹⁷. The Constitution does, however, specifically require that the Government take international law and treaty obligations into consideration in conducting its affairs. The CRC has been cited extensively in Indian case law. Among other decisions, the Supreme Court has discussed the CRC in judgments related to child labour, sexual abuse, and juvenile justice¹⁸.

¹⁶ BMP Bandaranayake, 'Child-friendly justice and the best interest of the child: A comparative Analysis of Sri Lanka, India, and International Standards' (2021) KDU IRC Available at- <http://ir.kdu.ac.lk/bitstream/handle/345/5083/FOL-191-198.pdf?sequence=1&isAllowed=y> Accessed on-23/04/2023.

¹⁷ G Chopra, *Child Rights in India* (e-book, Springer India, 2015).

¹⁸ *ibid.*

Thereby, this research attempts to find the ways of which Sri Lankan justice system could strengthen the fundamental human rights by supporting access to justice for children in Sri Lanka in comparison to that of the Indian justice System. In doing so, the researcher has organised the research paper as follows, Introduction, Research Problem, Research Questions and methodological approaches of the research, literature review, methodology adopted by the researcher in terms of methods, methodology and epistemology, an in-depth legal discussion on the legal psychology of the concept of *Mens Rea* in Sri Lanka, an in-depth legal discussion in the legal psychology of UK, conscience of profound case studies of both local and foreign jurisdictions in view of the concept of *Mens Rea*, Recommendations towards improving both UK and Sri Lankan laws with regards to the concept of *Mens Rea*, Avenues for future research and finally an illustration of the utilized sources of study through a comprehensive Bibliography respectively.

1.1 MAIN RESEARCH PROBLEM

Sri Lankan Law has not directly incorporated CRC, however, has expressed its view upon many of the provisions of the CRC being in line with the Sri Lankan Constitution of 1978. Sri Lanka has adopted the Children Charter in 1992 by following the ratification of CRC. Thereby, this Charter has no binding force, instead working as a policy document towards guiding Sri Lanka towards its policy making and legal reforming procedures. Thereby, the research problem addressed by the researcher is whether Sri Lanka has adequate measures and legislature towards strengthening fundamental human rights by supporting access to justice for children in Sri Lanka?

1.2 RESEARCH QUESTIONS

- (a) What is the definition of access to justice for children?
- (b) What is the legislative framework towards supporting access to justice for children in Sri Lanka in comparison to India?
- (c) What are the lessons appraised by Indian justice system towards strengthening the justice system for the support of access to justice in Sri Lankan Justice System?
- (d) What are the recommendations towards improving current Sri Lankan justice system and associated legislature towards improving the access for justice for children in Sri Lanka with the essence of Indian justice system.

1.3 RESEARCH OBJECTIVES

This research article pursues towards accomplishing the following objectives:

- a) To analyse the definition of access to justice for children with the essence Sri Lankan and Indian Justice systems and respective legislative instruments.
- b) To evaluate the legislative framework towards supporting access to justice for children in Sri Lanka in comparison to India.
- c) To appraise lessons from Indian Justice system towards strengthening the Sri Lankan justice system towards supporting access to justice for children.
- d) To provide recommendations towards improving the current Sri Lankan justice system and associated legislature towards improving the access to justice for children in Sri Lanka with the essence of Indian justice system.

2. LITERATURE REVIEW

The researcher has attempted in finding literary work conducted by both national and international researchers towards finding information towards the access to justice for children with regards to both Sri Lankan and Indian legal systems. However, it was identified by the researcher that there is a visible gap of clear inadequacy of Sri Lankan Research work on the area of the access to justice for children in Sri Lanka from a fundamental human rights perspective. Most of the authors have determined regarding best interests of the children in the legal procedures with regards to juvenile delinquency but very few of the authors have mentioned regarding the access to justice for children in highlighting the present Sri Lankan justice system considering the general ability of the children towards obtaining remedies when their rights are being violated, not respected, or rather denied. The local authors have failed in determining the extent to which such fundamental human rights of kids are being violated in diverse legal areas.

The researcher has accompanied the research with the General Assembly Resolutions of the UN where it defines access to justice is a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights. Furthermore, Meeting of General Assembly with regards to Rule of Law at the national and International Levels in 2012, UN along with the Member States reaffirmed the right of equal access to justice for all, including members of vulnerable groups and further acknowledged and recognized the importance of the rule of law for the protection of the children's rights including protection from discrimination, violence, abuse, and exportation and ensuring the best

interests of the children in all actions, and recommit towards full implementation of the children's rights¹⁹.

For the purpose of this research article, the access to justice is defined as the ability towards obtaining a just and timely remedy towards violations of rights that are determined in national and international norms and standards concerning the Convention on the Rights of the Child (CRC). CRC applies to civil, administrative and criminal spheres of national jurisdictions, including customary and religious justice mechanisms, international jurisdictions, as well as alternative and restorative dispute resolution mechanisms, and enfolds all relevant judicial proceedings, affecting children without any limitations, including children alleged as, accused of, or recognized as having infringed the penal law, victims and witnesses or children coming into contact with the justice system for other reasons, such as regarding their care, custody or protection²⁰. As per UN Common Approach to Justice for Children, the concept of access to justice for children requires the legal empowerment of all the children where they should be provided with access to relevant information and to obtain effective remedies towards claiming their rights through legal and other services such as child education, counselling, aids from knowledgeable adults. Furthermore, the researcher encountered that, access to justice for children is proportionate toward the evolvement of maturity of children and their understanding regarding the rights they are entitled in exercising such rights.

Towards assessing the access to justice in Sri Lanka, the book written by Sharya Scharenguivel titled, "Parental and State Responsibility for

¹⁹ United Nations; General Assembly of the Nations, Sixth Committee (Legal)-77th Session.

²⁰ Convention on the Rights of the Child 1989.

Children: The Development of South African and Sri Lankan Law”, published in the year 2014, has become a driving force towards determining administering of children, supporting children, juvenile delinquency related laws and children in civil law situations. However, the research gap determined by the researcher would be that this book compares Sri Lankan access to justice standards with South Africa and not India and the year of publication being 2014 where there is a knowledge gap of nine years²¹.

The research article written by BMP Bandaranayake, titled “Child-Friendly Justice and the Best Interest of the Child: A comparative Analysis of Sri Lanka, India and International Standards” was referred by the researcher where this particular research articulated in discussing the presently available juvenile justice systems in Sri Lanka requires more measures to eliminate the practical difficulties a child faces during a court proceeding and to ensure the best interest of the child in a child-friendly juvenile justice system in comparison to Indian Justice System and International Standards with regards to access for justice²².

As per analysing the Indian Justice system with regards to the access for justice for children, the researcher has referred to the article composed by AAK Sharma and Prof. M Gupta titled, “The Path of Juvenile Justice System Development in India: A Hypercritical Study of the legislations”. This article envisages the issues that the Juvenile Justice System is facing

²¹ S Scharenguivel, *Parental and State Responsibility for children; The Development of South African and Sri Lankan Law* (1st edn, Stamford Lake Publication, 2015)

²² BMP Bandaranayake, ‘Child-friendly justice and the best interest of the child: A comparative Analysis of Sri Lanka, India, and International Standards’ (2021) KDU IRC Available: <<http://ir.kdu.ac.lk/bitstream/handle/345/5083/FOL-191-198.pdf?sequence=1&isAllowed=y>> accessed 23/04/2023.

in India, which are eroding its legitimacy, and proposes plausible alternatives. Furthermore, the writer has elaborated that, while India's current Juvenile Justice System can be traced back to colonial rule with many improvisations, it lacks vitality and does not address the reality of exacerbated criminal tendencies among the young. However, this research mainly focuses on Juvenile Justice System with regards to the persisting issues where it does not highlight the access to justice as a major area of concern with regards to fundamental human rights perspective but a part of the Juvenile Justice System. Furthermore, while providing major recommendations for improvement, the writer has recognized that majority of the cases fail in the implementation phase²³.

The research article written by B Yadav on Juvenile Justice System, titled “The Society and Much Needed Improvisation of Rehabilitation Homes in India”, focuses upon the concept of Juvenile Justice System in India giving focus to the Criminal Justice System relying upon the current legislation and relevant Articles of the Constitution towards enlightening the Juvenile Justice in India. The writer however limits the research towards the concept of house arrest and its implementation procedure in India being not legalized in circumstances where a child offender could be treated as an adult. The research gap encountered by the researcher would be that, this research has given its major focus on juvenile justice system with regards to house arrest and its implementation where the writer has not mentioned regarding access for justice towards other factors such as a child being a witness instead of an offender and the ways in which Indian Justice System could aid children in access to justice in protecting

²³ AAK Sharma and M Gupta, ‘The path of Juvenile Justice System Development in India: A Hypercritical Study of the Legislations’ (2022) 10(6) IJCRT Available: <<https://ijcrt.org/papers/IJCRT22A6628.pdf>> Accessed on- 24/04/2023.

themselves from all kinds of risks from criminal, civil and administrative perspectives²⁴.

The legal assessment conducted by UNICEF in 2017 titled “A Legal and Institutional Assessment of Sri Lanka’s Justice System for Children” encompassing the justice for children underlying the legislation, policies, procedures, and mechanisms specifically applicable for children who claim to be victims and witnesses of crime and children in conflict of law. thereby, the UNISEF has commissioned a comprehensive study of how Sri Lankan justice system functions towards access to justice for children and analyzed the challenges to obtain effective administration standards of justice towards such children²⁵.

Furthermore, a previous research work conducted by the researcher with regards to “A critical view on the Sri Lankan Juvenile Legislation and rehabilitation procedures available towards Juvenile Delinquents” and the literature utilized for that research has been also utilized in this research;The journal article produced by the Sri Lanka Journal of Child Health regarding juvenile delinquency and child health in 2018 is referred by the researcher in order to determine the factors affecting the occurrence of juvenile delinquencies from the perspective of children’s health²⁶.

²⁴ B Yadav, ‘Juvenile Justice System, The Society and Much Needed Improvisation of Rehabilitation Homes in India (1932) 4(1) International Journal of Law Management and Humanities Available: <<http://doi.org/10.1732/IJLMH.25954>> accessed on- 25/04/2023.

²⁵ E Attygalle, ‘Bill to set up children-only judicial system ready’ (2018) Sunday Times Available: <<http://www.sundaytimes.lk/180121/news/bill-to-set-up-children-only-judicial-system-ready-277949.html>> accessed 25/04/2023.

²⁶ JMSP Jayathilake, ‘A critical view on the Sri Lankan Juvenile Legislation and rehabilitation procedures available towards Juvenile Delinquents’ (2023) – Unpublished Work.

The research article exhibited by Save the Nation (1994) titling “A Study into the Reasons for Admission to Residential Care in Sri Lanka” was reviewed by the researcher where the researcher was able to find the contributing factors for aggravating juvenile delinquency, such as illiteracy, child labor, squalor, and disobedience²⁷.

The article written by T Moffitt titled Life-course-persistent versus adolescent-limited antisocial behavior in the year 2006 in the edited book of Developmental psychopathology: Risk, disorder, and adaptation by the two editors D Cicchetti and DJ Cohen was analyzed by the researcher to examine the antisocial behavior proposing two primary hypothetical prototypes of life-course-persistent versus adolescence-limited offenders²⁸. As per the taxonomic theory, life-course-persistent offender’s antisocial behavior originated from neurodevelopmental processes beginning from childhood and continues persistently thereafter. Alternatively, adolescence-limited offender’s antisocial behavior originates from social processes, beginning from adolescence²⁹.

The book written by L Steinberg titling “Adolescence” in the year 2020 is cited by the researcher in appraising the parent-child relations and psychological development during the adolescence concerning the growth

²⁷ Save the Nation, ‘A Study into the Reasons for Admission to Residential Care in Sri Lanka’ [1994].

²⁸ TE Moffitt, ‘*Life-course-persistent versus adolescent-limited antisocial behaviour*’ in D Cicchetti and DJ Cohen (Eds), *Developmental psychopathology: Risk, disorder, and adaptation* (2nd edn, John Wiley and Sons Inc, New York, 2006).

²⁹ UNICEF, ‘A Legal and Institutional assessment of Sri Lanka’s Justice System for Children’ (2017) Verite Research Available at- <https://www.unicef.org/srilanka/media/376/file/A%20Legal%20And%20Institutional%20Assessment%20Of%20Sri%20Lanka%E2%80%99s%20Justice%20System%20For%20Children.pdf> > accessed 21/04/2023.

and development of adolescents across diverse social, economic, and cultural backgrounds³⁰.

Handbook of Juvenile Forensic Psychology and Psychiatry, written by EL Grigorenko, published in the year 2012 is explored by the researcher in taking an overview on the most critical issues in the field of forensic work with juveniles focusing on the juvenile justice system in proposing recommendations towards improving the current juvenile justice system in Sri Lanka³¹.

The foreign research article of the two authors Mark W. Lipsey and David B. Wilson community-based “Effective Intervention for Serious Juvenile Offenders” discussing Serious and Violent Juvenile Offenders, Risk Factors and Successful Interventions, in the year 2000 suggested that rather than depending on institutional based corrections towards meeting best interests of juveniles and towards reducing the reconvicted rates of juvenile delinquency, it is more effective to practice community-based correction mechanisms by treating them specially and differently from adult offenders³².

Thereby, based on the above literary work, it is comprehensible that there is a dearth of relevant and helpful scholarly articles on the topic of access to justice for children in both Sri Lanka and India. However, there seems to be gaps where the researcher encountered that other scholars have mainly focused their research work upon the juvenile delinquency issues

³⁰ L Steinberg, *Adolescence* (11th edn, McGraw-Hill Education, 2016).

³¹ EL Grigorenko, *Handbook of Juvenile Forensic Psychology and Psychiatry* (Springer Science & Business Media, New York, 2012).

³² MW Lipsey, DB Wilson and L Cothorn, ‘Effective Intervention for Serious Juvenile Offenders’ [2020] <<https://www.ojp.gov/pdffiles1/ojdp/181201.pdf>> accessed 29/02/2023.

more than discussing the fundamental human right perspective of access to justice for children in Sri Lanka and India. Thus, this paper attempts in filling the research information gaps by contributing and exploring as to how the present Sri Lankan legal background upon access to justice for children works and how it could be improved by introducing newer aspects to the legalities and benefit the future of Sri Lanka with the essence of Indian Justice System which has comparatively higher standards of access to justice for children compared to Sri Lankan Justice System.

3. METHOD, METHODOLOGY AND EPISTEMOLOGY

The researcher followed a qualitative research approach where methods of data collection utilized are as per the primary sources, the researcher has utilized, national and foreign statutes and case laws. As per secondary sources, the researcher has utilized, books. Finally, as tertiary legal sources, the researcher utilized online law journals, online legal conference papers, and quotations through surfing credible e-journals and websites such as LexisNexis, Emerald, Westlaw, Google Scholars and JSTOR etc and other frequently utilized databases by legal researchers across various legal disciplines to find literature of both local and foreign researchers.

However, the researcher was only found few articles based on the aforementioned search criteria. The clear lack of helpful research studies and inadequacy of research articles on the area of research motivated this study to be taken forward.

The researcher has utilized the traditional Black Letter methodology towards conducting study torch and used utilized by the researcher when stigmatizing the research methodology to contain a legal approach to its

methodology aiming to reduce the content of the research study to an essentially descriptive analysis towards collating, describing and organizing legal rules and procedures towards offering comments upon the significance and the emergence of the related and authoritative legal sources which could be primary and secondary sources of law utilized by the researcher towards conducting the respective research study.

Finally, the researcher follows ‘revelational epistemology’ as the philosophical foundation of gathering new knowledge throughout the research by justifying the aforesaid primary, secondary, and tertiary sources of data collection methods.

Limitations

Although this research is focused upon minor victims, offenders, and witnesses with regards to access to justice, it was not conducted any in person interviews with such children or those who conflict with law

towards maintaining and protecting the research ethics and privacy of them and due to practical difficulties upon collecting and analysing such data through field visits due to time limitations.

4. FINDINGS AND DISCUSSIONS

Right to justice under Sri Lankan Justice System

- **The legal status of child and status of the child in presenting a case before the Court of Law as per the present Sri Lankan Justice System**

Sri Lanka ratified the CRC on 12 July 1991. However, ratified international instruments do not automatically have the force of law in Sri

Lanka. To have domestic effect, they must be incorporated into domestic law through legislation. The CRC does not take precedence over national law. It has however been referred to when passing domestic legislation, such as when the Minister of Justice, in introducing the Maintenance Bill in Parliament made reference to the CRC as being a guiding force behind the law.³³ In Sri Lanka, children and their representatives are entitled to bring cases in the Sri Lankan Supreme Court to challenge violations of their “fundamental rights,” where the term used by the Constitution to refer to an individual’s rights. Additionally, claims concerning violations of an individual’s fundamental rights can only be brought before the Sri Lankan Supreme Court³⁴. Initiation of civil actions on damages for torts or pecuniary and nonpecuniary losses incurred because of such violations, shall be undertaken by the children through their respective representatives. Similarly, a child through their representative may initiate a criminal action against the defendant by making a complaint themselves to the court that an offence has been committed, provided the Police have not filed an action³⁵. To date, the CRC has not been directly incorporated into national law. Sri Lanka has, however, expressed its view that many of the provisions of the CRC are in line with many of the current rights espoused by the 1978 Sri Lankan Constitution.³⁶ Following the ratification of the CRC, in 1992 Sri Lanka adopted the Children Charter of Sri Lanka. The Charter has no legal or binding force but it is instead intended as a policy document to guide Sri Lanka in its policy making and legal reforms.

³³ BMP Bandaranayake, ‘Child-friendly justice and the best interest of the child: A comparative Analysis of Sri Lanka, India, and International Standards’ (2021) KDU IRC Available: <<http://ir.kdu.ac.lk/bitstream/handle/345/5083/FOL-191-198.pdf?sequence=1&isAllowed=y>> accessed 23/04/2023.

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

Sri Lanka has additionally initiated reviews of its current laws to determine which are consistent and which are inconsistent with the CRC. Furthermore, Sri Lanka has pointed towards legislation that was passed in a number of areas which strengthen the rights of children and enhance their protection. The CRC cannot be directly enforced in Sri Lankan courts, although it can be used to interpret legislation and legal principles concerning the rights of the child.³⁷

The Sri Lankan National Child Protection Authority Act No.50 of 1998³⁸ provides for the establishment of child protection authority for the purpose of formulating national policy in the prevention of child abuse, protection and treatment of children who are being victimized by such abuses, coordination, and monitoring of actions against all forms of child abuse and matters connected to such abuses. Under Section 2(1)³⁹ of the Act, it declares that there shall be an established authority called the National Child Protection Authority towards governing the victims of child abuse. The members of the aforesaid authority consist of senior psychiatrists, senior paediatricians, forensic medical practitioners, and senior psychologists. Concerning the aforesaid Act under access to justice perspective, it could be stated that Child Protection Authority acts as a local authority towards protection of children from abuse and exploitation by providing children access to justice under Section 34(1)⁴⁰ by extending

³⁷ Centre for Policy Alternatives (CPA), 'The Need for Accountability in Sri Lanka's Criminal Justice System: A Glance at Seven Emblematic Cases' (2019) CPA Available: <<https://reliefweb.int/report/sri-lanka/need-accountability-sri-lanka-s-criminal-justice-system-glance-seven-emblematic>> accessed 22/04/2023.

³⁸ National Child Protection Authority Act No.50 of 1998.

³⁹ Section 2(1), National Child Protection Authority Act No.50 of 1998.

⁴⁰ Section 34(1), National Child Protection Authority Act No.50 of 1998.

powers of inspection for such child abuse scenarios, Section 35(1)⁴¹ by extending powers to seize articles and Section 37(1)⁴² elaborates the offenses of which if individuals fails to furnish any information compliance with the requisites of this Act, knowingly make a false statement and being an officer who disclose information in relation to such abuse and exploitation other than for the purpose of protecting the children's right, shall be guilty of an offence under this Act. Furthermore, under Section 14(f)⁴³ , Child protection authority functions towards recommending the legal, administrative or other reforms required for effective implementation of the national policy for prevention of child abuse and moreover, Section 14(g)⁴⁴ declares that the aforesaid authority shall monitor the implementation of laws relating to all forms of child abuse and Section 14(h)⁴⁵ states that it monitors the progress of all investigations and criminal proceedings relating to child abuse. These provisions acknowledged the researcher that the Sections mentioned under the aforesaid Act enables children towards access to justice through the establishment of the Child Protection Authority.

The Civil Procedure Code of Sri Lanka declare the rules governing the participation of minors in civil court proceedings where every action by a child is required to be made in the child's name by an adult who designated as the representative of the child⁴⁶. Furthermore, the aforesaid representative of the child is liable to pay any costs in action on behalf of the child where such a representative could be any individual with a sound

⁴¹ *ibid* Section 35(1).

⁴² Section 37(1), National Child Protection Authority Act No.50 of 1998.

⁴³ *ibid* Section 14(f).

⁴⁴ *ibid* Section 14(g).

⁴⁵ *ibid* Section 14(h).

⁴⁶ S Scharenguivel, *Parental and State Responsibility for Children; The Development of South African and Sri Lankan Law* (1st edn, Stamford Lake Publication, 2015).

mind, not a minor, not a defendant of any other case in action, and their interests shall not be adverse to the best interests of the child respectively⁴⁷. An application by way of summary procedure supported by an affidavit is needed for an individual to be fit for a child's representative in the Sri Lankan Court of Law. The Court has the legal authority to eliminate the respective child's representative on an application made by summary procedure by either the child or a defendant. Such reasons for elimination could be ceases to reside within Sri Lanka or a cause suffice the elimination procedure⁴⁸. If such a child's representative is removed, the court proceedings shall be on hold until another representative is being appointed. Furthermore, in case if the child is an infant, under Sri Lankan law there appears to be no difference in the initiation of a case between infants and young children, and "minors" as defined under the Civil Procedure Code where such a case would be brought in line with the Civil Procedure Rules outlined respectively⁴⁹.

➤ **The Sri Lankan legal perspective on eligibility of children or their representatives towards receiving free or subsidised legal assistance in brining cases in front of the Court of Law**

The Sri Lankan Constitution pave the Government towards establishing legal aid schemes towards ensuring and securing the access to justice for all Sri Lankan citizens. Towards fulfilling this obligatory requirement, Sri Lankan Legal Service Authorities have been established across the country

⁴⁷ S Scharenguivel, *Parental and State Responsibility for Children; The Development of South African and Sri Lankan Law* (1st edn, Stamford Lake Publication, 2015).

⁴⁸ Centre for Policy Alternatives (CPA), 'The Need for Accountability in Sri Lanka's Criminal Justice System: A Glance at Seven Emblematic Cases' (2019) CPA Available at: <<https://reliefweb.int/report/sri-lanka/need-accountability-sri-lanka-s-criminal-justice-system-glance-seven-emblematic>> accessed 22/04/2023.

⁴⁹ *ibid.*

to provide free legal assistance to vulnerable and financially underprivileged population⁵⁰. With the objective of governing the availability of legal aids, to establish separate Legal Service Committees in administering legal aid schemes in each State, National Legal Services Authority (NSLSA) have established policies and procedures where such applications for legal assistance are to be filled with any of these Committees appropriate⁵¹.

Children are automatically eligible for legal aid facilities. Additionally, children who are involved in juvenile justice or child welfare proceedings have the right of being represented at the expense of the Government where in certain occasions Government funded legal aids too shall be available to some child criminal defendants⁵². Nevertheless, if there is no suitable person to act as a child's representative to suit in civil proceedings, the Court may appoint one of such officers and later direct the cost of representation to be carried by either the plaintiff's side or by the defendant's side depending on which side the child is a party to⁵³.

➤ **The legal position of challenging child right violations before national courts under Sri Lankan justice system**

When considering the legal position of the child right violations, the Sri Lankan Constitution grant fundamental rights to all its citizens which includes children. As per Article 17, *“every person shall be entitled to*

⁵⁰ S Scharenguivel, *Parental and State Responsibility for children; The Development of South African and Sri Lankan Law* (1st edn, Stamford Lake Publication, 2015)

⁵¹ *ibid.*

⁵² JMSP Jayathilake, 'A critical view on the Sri Lankan Juvenile Legislation and rehabilitation procedures available towards Juvenile Delinquents' (2023) – Unpublished Work.

⁵³ Centre for Policy Alternatives (CPA), 'The Need for Accountability in Sri Lanka's Criminal Justice System: A Glance at Seven Emblematic Cases' (2019) CPA Available: <<https://reliefweb.int/report/sri-lanka/need-accountability-sri-lanka-s-criminal-justice-system-glance-seven-emblematic>> accessed 22/04/2023.

apply to the Supreme Court.... in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right... ”⁵⁴. Moreover, Article 126 declare that “the Supreme Court shall have sole and executive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right... ”⁵⁵. Thereby, the researcher acknowledges the fact that both the aforesaid Articles Constitutionally determine that, access to justice shall be taken into eminent consideration by the Sri Lankan Supreme Court in terms of any violation takes place including fundamental rights of children, where such violations shall be brought before the Supreme Court.

Violation of children’s rights can also be filed by children or their representatives under national Human Rights Commission. Under Human Rights Commission Act, the Human Rights Commission has the power to conduct investigations with regards to complaints of violation of fundamental rights⁵⁶. Thereby, the Commission may refer such violation matter for mediation or reconciliation after the disclosure of it being infringement of fundamental right through a thorough investigation procedure⁵⁷. However, if such procedure is not successful, the Commission would recommend the violation of fundamental rights matter to appropriate authorities to take over the case against the offender by referring such matter to the Court or make appropriate recommendation to

⁵⁴ Constitution [1978], Article 17.

⁵⁵ *ibid* Article 126.

⁵⁶ Centre for Policy Alternatives (CPA), ‘The Need for Accountability in Sri Lanka’s Criminal Justice System: A Glance at Seven Emblematic Cases’ (2019) CPA Available at: <<https://reliefweb.int/report/sri-lanka/need-accountability-sri-lanka-s-criminal-justice-system-glance-seven-emblematic>> accessed 22/04/2023.

⁵⁷ *ibid*.

authorities with the aim of remedying or rather preventing the aforesaid violation⁵⁸.

Lack of enhancement of access to justice for children, and the number of complaints received by its offices regarding violations of children's rights is low in proportion to other categories of complaints since there is no bureau for children's rights within the Human Rights Commission of Sri Lanka⁵⁹. Moreover, the Committee on the Rights of the Child has scrutinised on appointment procedure of Commissioners and lack of independence of such appointments due to the availability of the political influence⁶⁰.

Ministry of Child Development and Women's Empowerment assigned both Department of Probation and Child Care Services (DPCCS) and National Child Protection Authority (NCPA) to handle the complaints about child right violations⁶¹. DPCCS assigned towards covering wide range of legal violations of child rights including child abuse, child labour, children in conflict with the law and children's right to education and health⁶². As per NCPA, it has prioritized in investigation, prosecution and prevention of child abuse including trafficking of children, sexual violence against children, use of children in obscene publications, exploitative labour, and cruelty to children⁶³.

⁵⁸ Centre for Policy Alternatives (CPA), 'The Need for Accountability in Sri Lanka's Criminal Justice System: A Glance at Seven Emblematic Cases' (2019) CPA Available at: <<https://reliefweb.int/report/sri-lanka/need-accountability-sri-lanka-s-criminal-justice-system-glance-seven-emblematic>> accessed 22/04/2023.

⁵⁹ S Scharenguivel, *Parental and State Responsibility for children; The Development of South African and Sri Lankan Law* (1st edn, Stamford Lake Publication, 2015)

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ *ibid.*

Conclusively, an application to a court in respect of a victimized child undergone domestic violence could be made on his or her behalf by parent or guardian or an authorized person in writing by NCPA, under the prevention of Domestic Violence Act (PDVA). Aforesaid Act provides granting of Protection Orders against the offenders of domestic violence actions including emotional abuse committed towards children. Thereby, under NCPA children are both protected as direct victims of domestic violence and as children from adult victims who suffers from domestic violence respectively⁶⁴.

Right to justice under Indian Justice System

➤ The legal status of child and status of the child in presenting a case before the Court of Law as per the present Indian Justice System

Children may bring civil cases in national courts to challenge violations of their rights with the assistance of a “next friend” as described in further detail below. If these violations amount to an offence, it is also possible for children and their representatives to initiate criminal proceedings⁶⁵. A writ petition can be filed before the Supreme Court or the High Court regarding violations of fundamental rights. Alternatively, all persons have the right to enforce their fundamental rights under the Constitution by filing what is commonly known as “Public Interest Litigation”.⁶⁶ Public Interest Litigation allows for children, their representatives, and any other person with sufficient interest to challenge laws and Government actions

⁶⁴ Centre for Policy Alternatives (CPA), ‘The Need for Accountability in Sri Lanka’s Criminal Justice System: A Glance at Seven Emblematic Cases’ (2019) CPA Available at: <https://reliefweb.int/report/sri-lanka/need-accountability-sri-lanka-s-criminal-justice-system-glance-seven-emblematic>> accessed 22/04/2023.

⁶⁵ G Chopra, *Child Rights in India* (e-book, Springer India, 2015).

⁶⁶ *ibid.*

that violate children's rights⁶⁷. Public Interest Litigation is of more recent origin and is usually used to bring the attention of the court to mass violations⁶⁸. In addition, children may challenge violations of their rights by lodging complaints with the National Commission for the Protection of Child Rights, the National Human Rights Commission, or to state commissions⁶⁹.

In Indian legal procedure in access to justice for children, a representative for the child must be assigned to bring a case involving a child in suing or taking legal actions for violation of child rights. When a child acts as the defendant to a certain case in a civil suit, a guardian for the suit shall be appointed on behalf of that child. Such a guardian for the lawsuit must act without any conflict of interest to the child without adversely affecting child's welfare interests⁷⁰. Such representatives shall be removed if such personalities are unable to adequately represent the best interests of a child and in such instances a child after reaching the age of majority could continue the suit without the assistance of such guardian. If a child is being arrested, such child's parents or the guardian must be acknowledged and will be expected to appear during Juvenile Board proceedings⁷¹. Moreover, any individual who has been arrested and detained has the right to consult and be defended by a lawyer. Furthermore, considering the legal representation of infants and young children in Indian Justice System,

⁶⁷ G Chopra, *Child Rights in India* (e-book, Springer India, 2015).

⁶⁸ BMP Bandaranayake, 'Child-friendly justice and the best interest of the child: A comparative Analysis of Sri Lanka, India, and International Standards' (2021) KDU IRC Available at: <<http://ir.kdu.ac.lk/bitstream/handle/345/5083/FOL-191-198.pdf?sequence=1&isAllowed=y>> accessed 23/04/2023.

⁶⁹ *ibid.*

⁷⁰ AAK Sharma and M Gupta, 'The path of Juvenile Justice System Development in India: A Hypercritical Study of the Legislations' (2022) 10(6) IJCRT Available at: <<https://ijcrt.org/papers/IJCRT22A6628.pdf>> accessed 24/04/2023.

⁷¹ *ibid.*

parents have the core responsibility to maintain the best interest of their children. If the best interest of children being violated, a legal guardian shall be appointed to care and manage the affairs of the child whose access to justice are being violated⁷².

➤ **Indian legal perspective on eligibility of children or their representatives towards receiving free or subsidised legal assistance in brining cases in front of the Court of Law**

The Indian Constitution directs the Government to establish legal aid schemes ensuring access to justice for all its citizens including children. Towards fulfilling this obligation, the Legal Services Authorities in India have established across the country towards providing free legal assistance to vulnerable and underprivileged communities⁷³. The National Legal Services Authority (NSLSA) has made policies and procedures towards governing such legal aid and has established separate Legal Services Committees towards administering legal aid schemes in each of the States in India. Thereby, applications for legal assistance may be filed with any of these Committees as appropriate. Children and certain other groups are automatically eligible for legal aid, and the and children involved in juvenile justice or child welfare proceedings have the right to be represented at the expense of the Indian Government⁷⁴. Moreover, Indian Government funded legal aid is also available to some criminal defendants. If there is no person fit and willing to act as child's

⁷² B Yadav, 'Juvenile Justice System, The Society and Much Needed Improvisation of Rehabilitation Homes in India (1932) 4(1) International Journal of Law Management and Humanities Available at: <<http://doi.org/10.1732/IJLMH.25954>> accessed 25/04/2023.

⁷³ ibid

⁷⁴ G Chopra, *Child Rights in India* (e-book, Springer India, 2015).

representative for the suit in civil proceedings, the Court may appoint one of its officers later direct that the costs of this representation be borne by either side⁷⁵.

➤ **The legal position of challenging child right violations before national courts under Indian Justice System**

As per the legal position in child rights violations under Indian Justice System, civil proceedings shall be commenced by filing a complaint as mentioned under Code of Civil Procedure. As per violation of fundamental rights, Civil Courts must provide a notice to Attorney general where necessary by adding the Indian Government as a defending party to the suit⁷⁶. Criminal Proceedings with regards to child right violations are filed and prosecuted with the Magistrate's permission or Magistrate's Court by passing its own motion of initiation of proceedings, when necessary, evidence is being provided upon the offence being committed. Under Part III of the Indian Constitution, Public Interest Litigation may be initiated, or writ petitions may be filed before the High Courts of Supreme Court regarding violation of fundamental rights⁷⁷.

For Courts to laugh their proceedings, it is necessary for the complainants to bring their respective cases directly by filing a petition or providing sufficient information about the occurrence of violation. Furthermore, access to justice for child right violations are handled where cases being brought before the Children's Court under Commissions for Protection of

⁷⁵ B Yadav, 'Juvenile Justice System, The Society and Much Needed Improvisation of Rehabilitation Homes in India (1932) 4(1) International Journal of Law Management and Humanities Available at: <<http://doi.org/10.1732/IJLMH.25954>> accessed 25/04/2023.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

Child Rights Act 2005⁷⁸. With regards to sexual offences, the cases shall be handled under Protection of Children from Sexual Offences Act 2012 before a Special Court. Such cases would directly handle before a Special Court where they do not have to be handled by the Magistrate's Court⁷⁹.

Furthermore, National Commission for the protection of Child Rights is established towards launching inquiries towards potential violations of child rights and recommend initiation of legal proceedings⁸⁰. In cases where children being held in custody, the National Commission is authorized towards receiving and investigating complaints or investigate potential rights violations, whereas other Commissions too shall have appropriate mandate towards receiving complaints from children⁸¹.

5. RECOMMENDATIONS

- Creating various standards and guidelines in the field of child-friendly justice considering specific needs of children by aiming at improving the justice system and adapting it to the specific needs of children. This entails creating a justice system which guarantees respect for and the effective implementation of all children's rights where most extensive set of standards on child-friendly justice are ; being accessible, age appropriate, speedy, diligent, adapted to and focused on the needs of the child, respecting the right to due process, respecting the right to participate in and to understand the proceedings,

⁷⁸ AAK Sharma and M Gupta, 'The path of Juvenile Justice System Development in India: A Hypercritical Study of the Legislations' (2022) 10(6) IJCRT Available at: <<https://ijcrt.org/papers/IJCRT22A6628.pdf>> accessed 24/04/2023.

⁷⁹ *ibid.*

⁸⁰ G Chopra, *Child Rights in India* (e-book, Springer India, 2015).

⁸¹ *ibid.*

respecting the right to private and family life, respecting the right to integrity and dignity respectively.

- Provision of guidelines for a better implementation of the existing recommendation concerning mediation in penal matters.
- To set the minimum age of criminal responsibility at least 14 years of age and that states should establish a maximum period of detention to which a child may be sentenced. The resolution also urges states to decriminalise status offences.
- Take steps towards children whose parents are imprisoned concerning their difficulties faced emotionally and materialistically subjecting to psychological trauma and stigmatisation where such children tend to hide their traumas from public attention.
- Bring out a new set of guidelines on child-friendly justice enhancing the children's access to and treatment in justice where such guidelines would apply to under all circumstances in which children under any capacity to be in contact with criminal, civil or administrative justice system.
- Introduce guidelines to reform the access to justice of children by promoting principles of the best interest of the child, care and respect, participation, rule of law and equal treatment and encourage respective trainings to officials who undertake such child right protection initiatives.
- Take steps in implementing the ratified CRC or rather construct a new legislative instrument underpinning the necessary provisions towards improving high standards of access to justice for children by bridging the gap between the national and international standards child right protection and access to justice standards.

- Organises international conferences for countries with similar judicial systems to enable them to share good practices with regards to child-friendly justice.

5.1. AVENUES FOR FUTURE RESEARCH

The aim of this paper is to undertake a comparative analysis with regards to access to justice in Sri Lanka with India with the objective of strengthening fundamental human rights in Sri Lanka for with regards to children. It is hoped that this researcher shall bridge the research gap and provide a source of reference to the future legal academics, researchers and readers who are interested in studying the legalities and to stimulate their knowledge upon the practical aspects of the legal implications with regards to this area of discussion.

6. CONCLUSION

By contributing this research to the legal academia, the researcher has acknowledged the fact that children have a right to access to justice in both Sri Lankan and Indian Justice Systems through respective Constitutional Fundamental Human Rights of each jurisdiction and deriving from corresponding obligations from international human rights law. The researcher has recognized that children in general, experience specific challenges in seeking effective remedies against violations of their human rights and fundamental freedoms and in enjoying their right to access to justice. Such challenges recognized by the researcher would be majorly because of lack of acknowledgement and willingness of the community to accept that children or minors have rights, and such rights must be enforced and make accessible to children to exercise their rights including

right to access to justice and seek effective remedies. This research contribution shall end with the submission that both the aforesaid jurisdictions shall win if the academia steps in towards developing and conceding the access to justice declaring access to justice to be considered as a fundamental human right of every child. Furthermore, by comparing Sri Lankan justice system with Indian justice system, the researcher has come across the below mentioned recommendations towards progressively develop the Sri Lankan law and order, guidelines, and standards towards distinguishing and providing importance to the implementation of access to justice for children.

REFERENCES

Primary Sources

International Conventions

Convention on the Rights of the Child 1989 (CRC).

Indian Statutes

Code of Civil Procedure.

Commissions for Protection of Child Rights Act 2005.

Constitution 1975.

Sexual Offences Act 2012.

Sri Lankan Statutes

Children and Young Persons Ordinance No.48 of 1939 (CYPO).

Constitution 1978.

National Child Protection Authority Act No.50 of 1998.

Probation of Offenders Act No.10 of 1948 (POA).

Youthful Offenders (Training School) Act No. 42 of 1944 (YOTSA).

Secondary Sources

Books

Chopra G, *Child Rights in India* (e-book, Springer India, 2015).

Francioni F, 'Access to Justice as a Human Right' in F Francioni (ed), *The Rights of Access to Justice under Customary International Law* (Oxford University Press, Oxford, 2007).

Grigorenko EL, *Handbook of Juvenile Forensic Psychology and Psychiatry* (Springer Science & Business Media, New York, 2012).

L Steinberg, *Adolescence* (11th edn, McGraw-Hill Education, 2016).

Scharenguivel S, *Parental and State Responsibility for children; The Development of South African and Sri Lankan Law* (1st edn, Stamford Lake Publication, 2015).

Edited Books

TE Moffitt, 'Life-course-persistent versus adolescent-limited antisocial behaviour' in D Cicchetti and DJ Cohen (Eds), *Developmental psychopathology: Risk, disorder, and adaptation* (2nd edn, John Wiley and Sons Inc, New York, 2006).

Tertiary Sources

Online Journals

Attygalle E, 'Bill to set up children-only judicial system ready' (2018) *Sunday Times* Available at:
<<http://www.sundaytimes.lk/180121/news/bill-to-set-up-children-only-judicial-system-ready-277949.html>> accessed 25/04/2023.

Bandaranayake BMP, 'Child-friendly justice and the best interest of the child: A comparative Analysis of Sri Lanka, India, and International Standards' (2021) KDU IRC Available at:
<http://ir.kdu.ac.lk/bitstream/handle/345/5083/FOL-191-198.pdf?sequence=1&isAllowed=y> Accessed 23/04/2023.

Centre for Policy Alternatives (CPA), 'The Need for Accountability in Sri Lanka's Criminal Justice System: A Glance at Seven Emblematic Cases' (2019) CPA Available at: <<https://reliefweb.int/report/sri-lanka/need-accountability-sri-lanka-s-criminal-justice-system-glance-seven-emblematic>> accessed 22/04/2023.

Garth BG and Cappelletti M, 'Access to Justice: The newest Wave in the Worldwide Movement to Make Rights Effective' (1978) Buffalo Law Review Available at: <<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2140&context=facpub>> accessed 19/04/2023.

Hastie B, 'The Inaccessibility of Justice For Migrant Workers: A capabilities-based Perspective' (2017) Windsor Yearbook of Access to Justice Available at: <https://commons.allard.ubc.ca/fac_pubs/447/> accessed 19/04/2023.

Jayathilake JMSP, 'A critical view on the Sri Lankan Juvenile Legislation and rehabilitation procedures available towards Juvenile Delinquents' (2023) – Unpublished Work.

Liefaard T, 'Access to Justice for Children: Towards a Specific Research and Implementation Agenda' (2019) 27 International Journal of Children's Rights Available at: <https://www.researchgate.net/publication/333113855_Access_to_Justice_for_Children_Towards_a_Specific_Research_and_Implementation_Agenda> accessed 20/04/2023.

Lipsey MW, Wilson DB and Cothorn L, 'Effective Intervention for Serious Juvenile Offenders' [2020] <<https://www.ojp.gov/pdffiles1/ojjdp/181201.pdf>> accessed on-29/02/2023.

Save the Nation, 'A Study into the Reasons for Admission to Residential Care in Sri Lanka' [1994].

Sharma AAK and Gupta M, 'The path of Juvenile Justice System Development in India: A Hypercritical Study of the Legislations' (2022) 10(6) IJCRT Available at: <https://ijcrt.org/papers/IJCRT22A6628.pdf> > accessed 24/04/2023.

**Strengthening Fundamental
Human Rights by Supporting Access to Justice
for Children in Sri Lanka; A Comparative Analysis with India**

J.M Sajini Poornima Jayathilake

UNICEF, 'A Legal and Institutional assessment of Sri Lanka's Justice System for Children' (2017) Verite Research Available at:

<https://www.unicef.org/srilanka/media/376/file/A%20Legal%20And%20Institutional%20Assessment%20Of%20Sri%20Lanka%E2%80%99s%20Justice%20System%20For%20Children.pdf> > Accessed on- 21/04/2023.

United Nations Human Rights, 'Convention on the Rights of the Child' (1989) Available at: <<https://www.ohchr.org/sites/default/files/crc.pdf>> accessed 24/04/2023.

United Nations; General Assembly of the Nations, Sixth Committee (Legal)-77th Session.

Yadav B, 'Juvenile Justice System, The Society and Much Needed Improvisation of Rehabilitation Homes in India (1932) 4(1) International Journal of Law Management and Humanities Available at-<http://doi.one/10.1732/IJLMH.25954> Accessed on- 25/04/2023.

A UNION BETWEEN ARTIFICIAL INTELLIGENCE AND ACCESS TO JUSTICE IN SRI LANKA; PLAUSIBILITY AND CHALLENGES

Ama Karunarathne*

ABSTRACT

The paper intends to examine the possibility and challenges in using Artificial intelligence (AI) to promote access to justice in Sri Lanka. The research rested on a qualitative approach by usage of primary and secondary sources, including government legislations, scholarly articles, academic and media data and other materials that were available through the internet. AI takes knowledge as the object, acquires knowledge, analyzes and studies the methods of knowledge, and employs these approaches to achieve the effect of simulating human intellectual activities. Access to justice is another core human right that needs to be protected to ensure social justice and equality in a country. Numerous countries have practically tested the possible union between AI and their legal systems which ultimately has heightened access to justice. Though AI is given comparatively less legal recognition in Sri Lanka, it can be used as a due diligence tool, to locate legal services online, in DNA analysis, for gunshot detection, to form legal retrieval-analysis systems, to prevent favoritism in courts and that can lead to improvement of access to justice regardless of status, and efficiency in the court system.

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Nevertheless, it may face obstacles in its actual implementation on using AI to promote access to justice. The research identified potential issues and challenges to incorporate AI into the legal system, such as lack of efficient regulation, lack of public awareness, lack of ability in creative interpretation and potential risks of overriding humanity by technology. Author suggests adopting a hybrid AI system with the involvement of humans to improve access to justice in Sri Lanka. It will be a stepping-stone in securing Human Rights in Sri Lanka.

Key words- Artificial Intelligence, Access to Justice, Legal Artificial Intelligence

1. INTRODUCTION

One of the most essential human rights that needs to be protected to forward the cause of social justice and equality is the right to access to justice. Access to justice and seeking relief or redress before institutions of law is not a luxury that everyone can enjoy. And consequently, people have lost trust and faith in the legal procedures. Unfortunately, access to justice is restricted in many parts of the world, including Sri Lanka, and this is especially the case for individuals who have a lower socio-economic position.

AI, which hosts a major role in every field of the world, can essentially improve access to justice by enhancing the effectiveness of the judicial system and reducing the lacunas in it. A simple definition of AI is that it is the development of computer-based tools to reach what human minds can perform. Added to that, legal AI focuses on applying the technology of AI for the efficient completion of tasks in the legal domain.

This essay examines not only the practicability of using artificial intelligence to improve access to justice in Sri Lanka but also the obstacles that may stand in the way.

2. LITERATURE REVIEW

AI powered tools can be used in law in legal research, case analysis, and even in decision-making processes. Moreover, AI technologies can expand access to justice by way of chatbots, virtual assistants, and AI-powered online platforms to provide legal information and even basic legal advice. However, the authors urge the essential requirements of developing ethical principles and increasing the transparency of AI algorithms used in the legal field. The authors identify the importance of a comprehensive understanding of international legal frameworks such as the European Union's General Data Protection Regulation (GDPR) and Budapest Convention by countries to incorporate AI in law (Gulyamov Said et al, 2023).

“AI and law” involve the application of computer and mathematical techniques to make law more understandable, manageable, useful, accessible, or predictable. The author suggests to use AI for Judges and Administrators in Decision-Making, in policing, and to promote access to justice for ordinary people. Yet there are risks such as potential for bias in algorithmic decision-making and interpretability of AI systems and transparency around how AI systems are making their decisions. Therefore, it is crucial to understand the strengths and weaknesses of AI within the law before implementing it (Surden, 2019).

Rapid development in technology and AI had various repercussions on legal regimes. However, the impact of AI on law has not been properly

investigated in SL. Authors promotes national regulation of AI as a subject of law, improving infrastructural facilities for AI, preliminary recommendations on legal drafting with regard to AI status as that of autonomous legal personality and making people aware of implications of AI on legal system in SL (Ariyadasa, 2019).

While the benefits of using AI in the legal system can improve efficiency, accuracy, and accessibility there are serious dangers that come with doing so, especially in terms of people's basic liberties. The European Commission proposed regulations standardizing AI in April of that year (2021). The Regulation would regulate the development, distribution, and use of AI systems across the European Union in accordance with a risk-based methodology (Kulesza, & Radeva, 2018).

AI has a deep impact on everyone's life, and it has the potential to be a permanent part of our justice environment. AI can be applied *inter alia* to detect crimes, for DNA analysis and to identify criminals. However, there are risks that come with it such identifying a person as a criminal based on racial prejudice that may be unintentionally built into the AI system. Such risks should be clearly assessed before determining the use of AI in criminal legal system in SL (Wickramarathna, 2021)

3. METHODOLOGY

The research rested on a qualitative approach by usage of primary and secondary sources, including government legislations, scholarly articles, academic and media data and other materials that were available through the internet.

The research methodology was based on comparative legal research, hypothesis formation, interpretation of legal rules, legal reasoning etc.

The criteria that have been used in selecting data are the credentials of the author, credibility of the material, depth of analysis and relevancy to the connection between AI and Law in Sri Lankan context.

4. ANALYSIS AND FINDINGS

AI is a knowledge project that takes knowledge as the object, acquires knowledge, analyzes and studies the methods of knowledge, and employs these approaches to achieve the effect of simulating human intellectual activities¹.

On the other hand, Access to Justice is a “Cross-cutting right that must be understood and interpreted in line with other principles such as equal recognition before the law.”²

Access to justice is more than improving an individual’s access to courts or guaranteeing legal representation³. In order to ensure ‘access to justice’,

¹ Caiming Zhang and Yang Lu ‘Study on artificial intelligence: The state of the art and future prospects’, *Journal of Industrial Information Integration*, Volume 23,2021 doi: <<https://doi.org/10.1016/j.jii.2021.100224>>.

² Alan Gutterman, ‘Older Persons’ Access to Justice’ (February 22, 2022). Oakland CA: Older Persons’ Rights Project, 2022), Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3889752>.

³ UNDP, Practice Note on Access to Justice (9 March 2004) Available at: <https://www.undp.org/sites/g/files/zskgke326/files/publications/Justice_PN_En.pdf>

a country needs to cater to a comprehensive legal framework, legal protection, legal awareness and knowledge, access to justice institutions, fair procedure and adjudication, enforceable solutions and civil society and parliamentary oversight⁴.

To entertain above proposition, AI and its derived technologies can be used to assist Administrators of law, Practitioners, social workers, prison officials, community leaders, paralegals and Litigants who are the main parties involved in a legal system.

China has set an example by stepping a milestone in establishing a “Smart Court” which incorporates AI into every aspect of China's judicial system. The system of AI *inter alia* automatically checks court cases for references, suggests rules, creates legal documents, and, if necessary, changes verdicts that are tainted by human mistake⁵.

Judges must consult the AI on every case, and if they reject the machine's recommendation, they must submit a written explanation. Remarkably, this has reduced the workload of judges, saved US\$45 billion that could cost for legal expenses and promoted access to justice to commoners⁶.

⁴ United States Institute of Peace, ‘Necessary Condition: Access to Justice’ (23 January 2002) <<https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice>>.

⁵ Chris Pleasance, (2022) ‘China uses AI to ‘improve’ courts - with computers ‘correcting perceived human errors in a verdict’ and JUDGES forced to submit a written explanation to the MACHINE if they disagree’, Mail online, (London, 13 July 2022). Available at: Chinese courts allow AI to make rulings, charge people, and carry out punishments | Daily Mail Online.

⁶ Tiffany Winfrey, (2022) ‘China Uses Artificial Intelligence (AI) to Run Courts, Supreme Justices, Cutting Judges' Typical Workload by More Than a Third and Saving Billion Work Hours’, The Science Times, (14th July 2022). Available at: China Uses Artificial Intelligence (AI) to Run Courts, Supreme Justices; Cutting Judges' Typical Workload by More Than a Third and Saving Billion Work Hours | Science Times.

Online Dispute Resolution Methods are introduced in England and Wales to handle low value civil claims. Through an internet-based court service, known as HM Online Court (HMOC), they aim to increase access to justice (a more affordable and user-friendly service). This innovative approach has 3 steps, which are; (i) online evaluation (where an AI based system first evaluates people's grievances, their difficulties are categorized, and available entitlements and options for them are discussed), (ii) online facilitation (well trained and experienced facilitators working online, review papers and statements from parties, and then help them by mediating, advising, or negotiating) and (iii) online judges (finally judges refer into the dispute in an electronic platform and award with remedies)⁷.

4.1. A UNION BETWEEN AI AND ACCESS TO JUSTICE IN SRI LANKA; PLAUSIBILITY AND CHALLENGES

4.1.1. PLAUSIBILITY AND OPPORTUNITIES

AI could **enhance the efficiency** of the legal system in Sri Lanka⁸.

There is a strong argument that there is a lack of legislation to facilitate the use of AI in the legal system in SL to promote Access to Justice. Nevertheless, ETA (The Electronic Transactions Act of No 19 of 2006) shows a promising light. **Section 2** includes *provision* to facilitate electronic filling of documents with Government and to promote efficient delivery of Government services by means of reliable forms of electronic communications. Moreover, it can be interpreted that **Section 3**- 'legal recognition of electronic records and **Section 8**- 'Use of electronic records

⁷ Civil Justice Council (Online Dispute Resolution Advisory Group), 'Report on Online Dispute Resolution for Low-Value Civil Claims' (February 2015).

⁸ A.S Sinder, (2019). 'A.I. in the Law: Legal Education, Practice, and Access to Justice.' J. Tech. L. & Pol'y, 24, 1.

in Government institutions and statutory bodies' lay a groundwork for adaptation of AI to SL legal system.

As Sri Lankan authors have perceived, AI can be used for DNA analysis, gunshot detection, video and image analysis, to predict criminals and crime spots and to decide for the pretrial release to **ensure fair procedure and adjudication** which plays a pivotal part in ensuring access to justice. Further, such measures can **prevent favoritism/ bias in courts**⁹.

In addition, legal **AI is identified as a Due diligence tool** which allows lawyers to focus on relevant sections in a contract when carrying out contract reviews, and for litigation analysis¹⁰. Further, it has been stated that legal analysis systems and legal retrieval systems could provide legal information, summarize results, and translate the formal legal language of the content to a more conversational natural language for the response, reveal strategic insights on opposing parties and counsel, track records and key decisions of presiding judges, and illuminates trends on case resolutions, findings, and damages.

Since AI tools can quickly review vast amount of data such as legal contracts, case law, legal articles and legislation, it enables legal professionals including lawyers to reach better-informed quick conclusions which in ordinary circumstances would be a labor- intensive task and time consuming.

⁹ Nipuni Wickramarathna, and EATA Edirisuriya, (2021) 'Artificial Intelligence in the Criminal Justice System: A Literature Review and a Survey' KDU International Research Conference, Colombo, Sri Lanka. pp 330-340 Available from: <http://ir.kdu.ac.lk/handle/345/5244>.

¹⁰ S, Tilakawardane, (2021) 'AI in the Legal System: Opportunities and Concerns', Journal by the Sri Lanka Judges' Institute, Volume 5.

Using AI, **litigants can locate their legal services online**, obtain information about justice processes, options, and alternatives through web-based information system¹¹. This will provide direct access to justice system for individuals and clear the case backlog in the courts, which would enhance efficiency. Introduction of Online Dispute Resolution methods to Sri Lanka is also encouraged in that aspect.

High cost in litigation has always been a barrier for litigants in seeking relief from law. Fusing AI in the legal field could upsurge access to justice.

For an example, automating time-consuming and repetitive legal tasks, lawyers are able to **save time and reduce costs for clients**¹².

4.1.2. CHALLENGES AND LIMITATIONS

Lack of effective regulatory mechanisms on legal AI could prevent incorporating AI into our legal system. It is recognized that SL is still not prepared for the challenges posed by AI within the legal system of SL¹³. Besides, the European Commission has proposed ‘The Artificial Intelligence Act’ which can be an inspiration for Sri Lanka. Moreover, **Primary Legislation** required to be implemented to introduce new AI infused dispute resolution mechanisms (ODR) in the country.

¹¹ Joel Tito, ‘How AI can improve access to justice’ (Centre for Public Impact, 23 October 2017) <How AI can improve access to justice | Centre For Public Impact (CPI).

¹² Neil Sahota, ‘AI in Law: The Positives and The Negatives’ (07 March 2023) Available at: <<https://www.linkedin.com/pulse/ai-law-positives-negatives-neil-sahota-%E8%90%A8%E5%86%A0%E5%86%9B->>.

¹³ Aparajitha Ariyadasa, (2019) ‘A Challenge from Humanoid Bots: An Analysis of the Legal Regime in Sri Lanka on Artificial Intelligence’ International Conference On Business Innovation (ICOBI), 22 November 2019. Colombo, Sri Lanka pp. 164-169.

AI performs well in occasions which can be judged by definite right or wrong answers¹⁴. However, there are countless **instances in law which require a creative interpretation**. This proposition can be elucidated more by referring into recent case, *Chandani De Soya and another v Akila Kariyawasam and 8 others*¹⁵. There, judges have stepped outside the literal parameters of law and have creatively held that our Constitution enshrines the Right to education of children living with or affected by HIV. Thus, it is questionable whether an AI could provide such a cognitive and creative interpretation and ensure access to justice to the people who are aggrieved. AI systems cannot, nor are they necessarily designed to, match higher-order human abilities, such as 100% efficient abstract reasoning, concept comprehension and flexible understanding¹⁶.

Another challenge that is encountered in incorporating AI into the legal system of a country is **the accuracy of predictions by AI**¹⁷. This is explained via an example where a person is identified as a criminal or suspicious of criminal activities based on racial prejudice that may be unintentionally built into the AI system. Such risks should be assessed before incorporating AI into our legal system. Moreover, in traditional court procedures there could be ‘unique and reflexive situations’ which fall outside the parameters of legal AI algorithms¹⁸. There, predictions of

¹⁴ Ed Oswald, (2019) ‘What is artificial intelligence? Here’s everything you need to know Demystifying artificial intelligence: Everything you need to know about A.I.’ (Digital Trends, 27 February 2019).

¹⁵ SC /FR/ Application No 06/2017 Decided on 30.11.2017.

¹⁶ Michael Chui, James Manyika, Mehdi Miremadi ; (2018) ‘What AI can and can’t do (yet) for your business’, McKinsey Quarterly, January Volume, doi: <[What AI can and can’t do \(yet\) for your business | McKinsey](#)>.

¹⁷ *ibid* 10.

¹⁸ Maxime Cohen, Samuel Dahan, Warut Khern-am-nuai, Jajime Shimao, Jonathan Touboul, ‘The use of AI in legal systems: determining independent contractor vs. employee status’, *Artif Intell Law* (2023). <<https://doi.org/10.1007/s10506-023-09353-y>>.

AI algorithms could be less accurate and defaulted. As opposed to that, judges in traditional court houses can use their legal knowledge to reach judgments which are context dependent, reflecting unique societal and factual circumstances involved with the case in hand.

When AI tools are used in a legal system, it processes a large amount of data including sensitive and confidential information. Coupled with this, issues with regards to **Data privacy and Security** could arise.

A lack of awareness among the public on the implications of AI on legal system of SL is another challenge that should be addressed. People should have a crystalline idea on the right to access to justice and means and methods which ensure the right. Conducting legal awareness campaigns in the grassroots level is a productive to raise awareness.

The introduction of AI into the legal arena costs high and a 3rd world country with a less developed economy like Sri Lanka's **capacity of affordability** to facilitate such a system is another practical question encountered.

Solely relying on AI risks creating a world where man is ruled by machines. And that humans will gradually lose free will with an increasing **dependency on technology**.

5. RECOMMENDATIONS AND CONCLUSION

There is a tremendous promise in the use of AI to improve the judicial system, despite the obstacles that must be overcome. It is possible that the application of AI will boost productivity, decrease expenses, and ultimately make it simpler for all members of society to have access to justice. Yet, there are major practical challenges that need to be addressed when incorporating AI to a legal system.

To address the legal and practical challenges, it is recommended initially to construct a firm basis via establishing primary legislation to facilitate incorporation of AI into the legal system and to adopt a human in the loop system which encourages a hybrid structure where an autonomous system refer into human instructions in instances of difficult judgments. Therefore, it is suggested that we should only be adopting the parts of AI which can make access to justice more proper and available in SL.

REFERENCES

Cases

Chandani De soyza and another v Akila Kariyawasam and 8 others SC /FR/ Application No 06/2017 Decided on 30.11.2017.

Acts

Electronic Transactions Act No.19 of 2006.

Journal Articles Online:

Chui, M., Manyika, J., Miremadi, M. (2018) ‘What AI can and can’t do (yet) for your business’, McKinsey Quarterly, January Volume, doi: What AI can and can’t do (yet) for your business | McKinsey.

Gutterman, A. ‘Older Persons' Access to Justice’ (February 22, 2022). Oakland CA: Older Persons' Rights Project, 2022), Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3889752 accessed on 19th March 2023.

Kulesza, T., & Radeva, A. (2018). ‘Using Artificial Intelligence to Enhance Access to Justice’. *UMKC L. Rev.*, 87, 423.

Maxime Cohen, Samuel Dahan, Warut Khern-am-nuai, Jajime Shimaou, Jonathan Touboul, ‘The use of AI in legal systems: determining independent contractor vs. employee status’. *Artif Intell Law* (2023). <<https://doi.org/10.1007/s10506-023-09353-y>>.

Said, G., Azamat, K., Ravshan, S., Bokhadir, A. (2023) 'Adapting Legal Systems to the Development of Artificial Intelligence: Solving the Global Problem of AI in Judicial Processes', International Journal of Cyber Law, Volume: 1 Issue: 4 2023, doi:

<<https://irshadjournals.com/index.php/ijcl/article/view/49/35>>

Sinder, A. S. (2019). 'A.I. in the Law: Legal Education, Practice, and Access to Justice.' J. Tech. L. & Pol'y, 24, 1.

Sri Lanka Bar Association. (2016). Access to Justice in Sri Lanka.

Surden, H. (2019) 'Artificial Intelligence and Law: An Overview', 35 Ga. St. U. L. Rev. doi:

<<https://readingroom.law.gsu.edu/gsulr/vol35/iss4/8>>

Tilakawardane, S. (2021) 'AI in the Legal System: Opportunities and Concerns', Journal by the Sri Lanka Judges' Institute, Volume 5.

Yang Lu, C.Z. 'Study on artificial intelligence: The state of the art and future prospects', Journal of Industrial Information Integration, Volume 23, 2021 doi: <<https://doi.org/10.1016/j.jii.2021.100224>>

Conference Proceedings:

Ariyadasa, A. (2019) 'A Challenge from Humanoid Bots: An Analysis of the Legal Regime in Sri Lanka on Artificial Intelligence' International Conference on Business Innovation (ICOBI), 22 November 2019. Colombo, Sri Lanka pp. 164-169 Available from: A Challenge from Humanoid Bots: An Analysis of the Legal Regime in Sri Lanka on Artificial Intelligence.

Wickramarathna, N.A and Edirisuriya EATA, (2021) 'Artificial Intelligence in the Criminal Justice System: A Literature Review and a Survey' KDU International Research Conference, Colombo, Sri Lanka. pp 330-340 Available from: <<http://ir.kdu.ac.lk/handle/345/5244>>

Reports

Civil Justice Council (Online Dispute Resolution Advisory Group), 'Report on Online Dispute Resolution for Low-Value Civil Claims' (February 2015).

UNDP, Practice Note on Access to Justice (9 March 2004) Available at <https://www.undp.org/sites/g/files/zskgke326/files/publications/Justice_PN_En.pdf Accessed on 15 September 2023>

Websites:

‘Demystifying artificial intelligence: Everything you need to know about A.I.’ (digital trends, 27 February 2019) Available at: What Is Artificial Intelligence? A.I. and Machine Learning Explained | Digital Trends.

Neil Sahota, ‘AI in Law: The Positives and The Negatives’ (07 March 2023) Available at: <<https://www.linkedin.com/pulse/ai-law-positives-negatives-neil-sahota-%E8%90%A8%E5%86%A0%E5%86%9B->>

Oswald, E. (2019) ‘What is artificial intelligence? Here’s everything you need to know.

Tito, J ‘How AI can improve access to justice’ (Centre for Public Impact, 23 October 2017) How AI can improve access to justice | Centre For Public Impact (CPI) Accessed: 14 March 2023.

United States Institute of Peace, ‘Necessary Condition: Access to Justice’ (23 January 2002) <<https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice>> accessed 15 September 2022.

Online Newspaper Articles:

Pleasance, C. (2022) ‘China uses AI to ‘improve’ courts - with computers ‘correcting perceived human errors in a verdict’ and JUDGES forced to submit a written explanation to the MACHINE if they disagree’, Mail online, (London, 13 July 2022). Available at: Chinese courts allow AI to make rulings, charge people, and carry out punishments | Daily Mail Online (Accessed: 12 March 2023).

Winfrey, T. (2022) 'China Uses Artificial Intelligence (AI) to Run Courts, Supreme Justices, Cutting Judges' Typical Workload by More Than a Third and Saving Billion Work Hours', The Science Times, (14th July 2022). Available at: China Uses Artificial Intelligence (AI) to Run Courts, Supreme Justices; Cutting Judges' Typical Workload by More Than a Third and Saving Billion Work Hours | Science Times (Accessed: 12th March 2023).

LEGAL AWARENESS: A PRECURSOR TO ACCESS TO JUSTICE

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ABSTRACT

Access to justice has been recognised as an essential principle of the rule of law which is necessary for the protection of human rights and vulnerable populations. Accordingly, all persons must be guaranteed fair and equal access to justice. However, deficits in legal capability of the general public together with the absence of effective remedial measures severely impairs access to justice, especially, of vulnerable populations. When people do not have the capacity to demand their rights in the face of violations due to a lack of legal awareness or due to an ineffective and labyrinthine judicial process, fair and equal access to justice is denied. In Sri Lanka this has resulted in vulnerable populations particularly, women and sexual minorities being denied access to justice as well as judicial remedies. This paper argues that, in such a context, legal awareness becomes a precursor for access to justice. Legal awareness assists people to understand the law, identify legal issues, access appropriate services and legal redress. The Sri Lankan legal system, whilst acknowledging the importance of raising public legal awareness, adopts an ad hoc approach to legal awareness primarily, through institutional statutes which mandate key government institutions to undertake legal awareness activities. This

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paper further argues that legal awareness interpreted narrowly as the impartation of education and information cannot improve access to justice. In order to ensure that women and sexual minorities have fair and equal access to justice, legal awareness efforts should capacitate women and sexual minorities to use the law to protect and advance their rights through. This paper concludes that legal awareness is essential to ensure access to justice for the marginalised.

Keywords: Legal Awareness, Access to Justice, Women and Sexual Minorities, Legal Capacity, Marginalised Communities and Vulnerable Populations

1. INTRODUCTION

Access to justice has been recognised as an essential principle of the rule of law which is necessary for the protection of human rights and vulnerable populations. Access to justice came to the forefront of legal discourse with the setting of the Sustainable Development Goals (SDG) which recognised that all persons must be guaranteed fair and equal access to justice in order to achieve sustainable development. However, several barriers exist which deprive vulnerable populations from easily and fairly accessing justice, including barriers such as the lack of education, poverty, socio-economic status etc. Women and sexual minorities in particular face several barriers that hinder their access to justice not least of which is the complexity and insensitivity of the justice system itself to their needs. In such a context this paper argues that legal awareness is a precursor to ensuring access to justice for women and sexual minorities.

Legal awareness, also known as Community Legal Education (CLE)¹, Public Legal Education (PLE)², or legal literacy in different jurisdictions empowers the general public to understand the law in order to use the law. It capacitates the public to recognise the rights, entitlements and remedies they are afforded by the law. However, the simple understanding of legal awareness as education alone, is insufficient to further access to justice. As such, in order to improve access to justice for women and sexual minorities including Sexual and Gender Based Violence (SGBV) victim-survivors legal awareness must be defined and understood more broadly to also include the capacitation of women and sexual minorities to not only *know* their rights but to effectively *enforce* those rights to their advantage. This paper first discusses the concept of access to justice and how it relates to women and sexual minorities whilst briefly touching on the barriers that they face. The paper next defines legal awareness and argues that it is a precursor to ensuring access to justice wherein legal awareness must be used as a tool to capacitate women and sexual minorities to understand and recognise their rights and entitlements, to educate them on the procedural requirements of the legal system and to educate the legal system itself to be responsive to such minorities. Whilst this paper does not argue that legal awareness alone is enough to ensure access to justice for women and sexual minorities, it posits that it is an essential step in the right direction.

¹ In Australia.

² In the United Kingdom.

2. ACCESS TO JUSTICE

2.1. ACCESS TO JUSTICE AS A HUMAN RIGHT

Access to justice is an essential principle of the rule of law, which is situated within the broader human rights framework, recognising that equal access to justice is imperative to protect the rights of individuals.³ A foundational value of democracy, the rule of law presupposes that all individuals must be treated equally before the law and that governments act within the scope of their powers.⁴ This has been given universal recognition in the Universal Declaration of Human Rights Article 1 which recognises the inherent equality of all human beings in dignity and rights.⁵ However, for all human beings to be inherently equal and equal before the law, the law must first and foremost be accessible to all. The Convention on the Elimination of Discrimination Against Women likewise recognises the principle of equality between men and women, including but not limited to, equality in accessing justice.⁶ This is further, confirmed in Article 15 of the Convention which stipulates that women and men must have equality before the law and benefit from equal protection of the law. Development discourse has now recognised that in order to achieve inclusive and sustainable development, poverty-stricken underdeveloped

³ 'Sustainable Development Goals' (United Nations) <<https://www.un.org/sustainabledevelopment/peace-justice/>> accessed 30 August 2023.

⁴ OECD, 'Gender Equality in Colombia: Access to Justice and Politics at the Local Level' (OECD, 11 July 2020).

⁵ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 1.

⁶ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 2(c) and UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 33' UN Doc. CEDAW/C/GC/33; Report of the Secretary-General, 'Legal Empowerment of the poor and eradication of poverty' (2009) UN Doc A/64/133.

communities must be ensured fair and equal access to justice. As such enabling people to satisfy their justice needs is now an essential component of development and poverty alleviation.⁷ In recognition of this shift in the conceptualisation of development, the SDGs Target 16.3 requires states to “promote the rule of law at the national and international levels and ensure equal access to justice for all”. Target 16 similarly stipulates that states must maintain accountable and transparent institutions,⁸ which are inclusive, participatory and presentative at all levels.⁹ Recognising the undisputable nexus between legal education/awareness and access to justice Target 16.10 stipulates that states must “Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements”.¹⁰ As such, it is evident that goal 16 recognises that people are entitled to live lives free from fear of violence and should be granted redress against all forms of violence.¹¹ The achievement of this objective essentially requires that all persons have equal access to justice.

Access to justice, therefore, serves as a safeguard against the marginalisation of vulnerable populations by ensuring their equal treatment before the law. Thus, access to justice envisioned in Goal 16 of the SDGs requires that people gain legal capability whilst the justice system simultaneously guarantees remedial measures.¹² Accordingly, the

⁷ United Nations Development Programme, ‘Access to Justice Assessments in The Asia Pacific: A Review of Experiences and Tools from The Region (UNDP, 2012).

⁸ SDG Target 16.6.

⁹ SDG Target 16.7.

¹⁰ OECD, ‘Session 2. Enabling Access to Justice Through Legal Capability & Empowerment’ (OECD Policy Roundtable on Equal Access to Justice, Latvia, 5-6 July 2018).

¹¹ ‘Sustainable Development Goals’ (United Nations) <<https://www.un.org/sustainabledevelopment/peace-justice/>> accessed 30 August 2023.

¹² OECD (n 11).

United Nations Development Programme (UNDP) has defined access to justice as “*The ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards*”.¹³ In order to seek and obtain a remedy, as a first step people must be aware that they are entitled to a remedy and they must be aware about how to proceed to enforce said remedy. As such, if people are unaware of their rights and entitlements, they may be denied access to justice.¹⁴

2.2. ACCESS TO JUSTICE: WOMEN AND SEXUAL MINORITIES

Access to justice is increasingly recognised as a critical dimension to addressing inequalities and on the other hand, the lack of access to justice has been identified as a contributory factor towards the continued marginalisation of vulnerable populations. In the context of women and sexual minorities, the lack of access to justice often impacts their social, emotional and financial situation.¹⁵ Women and sexual minorities often face compounding barriers to access justice which may include, cost related barriers, structural barriers within the legal system itself, and social barriers arising from judicial stereotypes, social stigmas and discrimination.¹⁶

The response of the legal system to violence against women and sexual minorities is inadequate and often revictimizes the victim-survivor

¹³ United Nations Development Programme, *Programming for Justice: Access for All a Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice* (UNDP, 2005)

¹⁴ United Nations Development Programme (n 8).

¹⁵ OECD (n 5).

¹⁶ *ibid.*: United Nations Development Programme, ‘Strengthening Judicial Integrity through Enhanced Access to Justice’ (Lessons Learned Series: Rule of Law, Justice and Human Rights, UNDP Regional Centre for Europe and the CIS, 2013).

throughout the whole process, as the system remains gender blind.¹⁷ The justice system is also plagued by a complexity that has been described as labyrinthine¹⁸, which undermines the objectives of Goal 16 to maintain transparent and accountable institutions. The complexity of the legal system prevents women and sexual minorities from approaching the legal system wherein many victim-survivors opt out of seeking legal redress due to the many structural and procedural barriers that they must circumvent.

The Sri Lankan justice process has several barriers that women must overcome beginning with an overburdened justice system¹⁹, which results in long court processes and ineffective dispute resolution resulting in a loss of faith in the judicial process.²⁰ This is further exacerbated by the inconsistency in the judicial system's application and implementation of the law.²¹ Furthermore, where access to justice envisages the maintenance of inclusive, participatory and representative institutions, some women and sexual minorities are denied access to justice due to the prevalence of language barriers wherein the legal system lacks adequate Tamil speaking officers in the North and East of the country.²² To name but a few of the

¹⁷ The Asia Foundation, 'Inside Justice: Enabling Justice for Victim Survivors of Sexual and Gender-Based Violence Sharing of The Asia Foundation's Experience (TAF, 2021); U. S. Department of State, 'U.S. State Department Human Rights Reports' (United States, 2022).

¹⁸ Centre for Equality and Justice, 'Labyrinth: Navigating Response Mechanisms for Sexual and Gender Based Violence Project (CEJ, July 2023).

¹⁹ Ministry of Justice, Prison Affairs and Constitutional Reforms, 'Annual Performance Report for the year 2021' (MOJ). According to the Ministry of Justice, 982,793 cases are pending before the courts as of the 30th of June 2021.

²⁰ Centre for Policy Alternatives, 'Legal Reform to Combat Sexual and Gender-Based Violence Part 1' (CPA, 2020); Centre for Women's Research, 'People's Development Justice Report on National Review and Monitoring of Sustainable Development Goals in Sri Lanka' (CENWOR, 2019).

²¹ Asian Development Bank, Legal Empowerment for Women and Disadvantaged Group (ADB, 2009).

²² FOKUS WOMEN, 'Wither Justice the Language Barrier in Accessing the Criminal Justice System in Cases of Violence Against FHH in the North and East of Sri Lanka'

barriers that women and sexual minorities must navigate, they are also revictimized due to the insensitivity of public officials²³, lack adequate laws to protect them from violence²⁴ and in some instances simply do not have the knowledge or capacity to understand that their rights have been violated.

Lack of Legal Awareness Amongst Women and Sexual Minorities

Access to justice may be denied when people who need legal remedies do not have the capacity to demand them which may arise from a lack of legal awareness. One of the key barriers impeding women and sexual minorities access to justice is their lack of knowledge on the available laws, rights, and procedural processes. Women and sexual minorities lack an understanding of discrimination and what it entails, and as such may not even recognise certain behaviours as discriminatory. Therefore, women and sexual minorities are not aware of how to protect themselves from discrimination, of the mechanisms available to them or of public authorities' obligations towards them in this respect.²⁵ Anecdotal evidence suggests that victim-survivors are even unaware of organizations that they can approach for free support and services.²⁶

Arguably this is a consequence of a weak education system which does not focus on public legal education, and thereby deprives marginalized groups of the information they need to protect their legal rights.²⁷ This inherently, results in few women approaching the legal system as many

(FOKUS WOMEN, 2016); Women in Need, 'Why Accessing Justice is Challenging for Victims of Sexual and Gender-Based Violence?' (TAF, 2019).

²³ The Asia Foundation (n 18).; Women in Need (n 23).

²⁴ U. S. Department of State (n 18).

²⁵ United Nations Development Programme (n 17).

²⁶ Women in Need (n 23).; The Asia Foundation (n 18).

²⁷ Asian Development Bank (n 22).

victim-survivors are unaware that they have rights that they can enforce and even if they are aware of their rights, they are unaware of *how* they can enforce those rights. The above reluctance is further exacerbated by a lack of awareness amongst legal professionals about sexual orientation, gender identity, gender expression and how antiquated laws negatively affect equality.²⁸

Therefore, whilst access to justice has been recognized as human right, myriad combined barriers that women and sexual minorities face result in them being denied equal access to justice. This in turn perpetuates their vulnerabilities and the violation of their equal rights.

3. LEGAL AWARENESS

3.1. DEFINING LEGAL AWARENESS

Most people do not know the law until such time as they need the law²⁹, and as such, when they do need the law, members of the public find themselves ill equipped to navigate the legal system. In such a context, it is necessary to improve the public's understanding of the legal system so that they are empowered to use it, when necessary, especially women and sexual minorities. Therefore, the overall objective of legal awareness is to

²⁸ International Commission of Jurists, 'Sri Lanka: Legal Professionals' Awareness Workshop on Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics (SOGIESC) Equality' held (ICJ, 16 September 2022) <<https://www.icj.org/sri-lanka-legal-professionals-awareness-workshop-on-sogiesc-equality/>> accessed 1 September 2023.

²⁹ Sam Bresnick, 'Knowing the law before needing the law' (*Daily News*, 26 April 2017) <<https://www.dailynews.lk/2017/04/26/features/114144/knowning-law-needing-law>> accessed 25 August 2023; Independent Public Legal Education and Support (PLEAS) Task Force, 'Developing Capable Citizens: The Role Of Public Legal Education' (PLEAS Task Force, 2007).

create a knowledgeable general public who have a basic legal understanding and use this understanding to seek legal remedies.

Legal Awareness has been defined in many forms across several jurisdictions. The foundational concept of it being, the process by which people are familiarised with the law, their rights, legal processes and redress mechanisms. The early understanding of legal awareness posited it as a means of communicating information and education about the law to members of the community.³⁰ However, understanding that legal awareness must go beyond the mere dissemination of information to the public, broader definitions of legal awareness have now been adopted wherein, legal awareness is understood as providing people “*with awareness, knowledge and understanding of rights and legal issues, together with the confidence and skills they need to deal with disputes and gain access to justice*”.³¹ Legal awareness is based on the premise that not everyone has an equal understanding of the law, such persons must be capacitated to understand the law and navigate the legal system in order to ensure fair and equal access to justice.³² The overall objective of legal awareness is to help citizens to understand everyday life issues, make better informed decisions and anticipate and avoid legal problems.³³ The overall function of legal awareness therefore is to equip people to understand how the law affects their daily lives and be skilled enough to deal with problems that may arise using the legal system.³⁴ As such, legal awareness can take many forms, and may be included in general education,

³⁰ Australian National Community Legal Education Advisory Group, ‘Guidelines for the Management of Community Legal Education Practice’ (CCLCG, 2004).

³¹ Independent Public Legal Education and Support (PLEAS) Task Force (n 30).

³² Australian National Community Legal Education Advisory Group (n 31).

³³ Independent Public Legal Education and Support (PLEAS) Task Force (n 30).

³⁴ *ibid.*

school programmes, community education programmes and even social media outreach.

Effective legal awareness should also enable people to understand how the justice system works³⁵ and create a conducive climate for vulnerable groups to be an active participant in the decision-making process of institutions.³⁶ Understood as such, legal awareness becomes a precursor to access to justice, as functions not only to assist people to identify the law and legal issues, but rather also to help them to participate in the legal process as well.

3.2. LEGAL AWARENESS FOR WOMEN AND SEXUAL MINORITIES IN SRI LANKA

The Sri Lankan legal system statutorily mandates key government institutions to carry out legal awareness activities. Of these institutions certain government entities are mandated to raise legal awareness for women and sexual minorities. One such is the Human Rights Commission of Sri Lanka which is empowered to promote awareness of and provide education in relation to human rights,³⁷ which includes education on the rights of women and sexual minorities. Over the years, the Ministry of Women's Affairs in all its varying reincarnations, has taken steps to carry out awareness programmes for women. These have included legal awareness programmes on reproductive health and women's rights for women serving in trade zones, the prevention of sexual harassment, and the implementation of media programmes to raise awareness of women on

³⁵ Melina Buckley, 'Evolving Legal Services: Review of Current Literature' (Community Legal Education Ontario Toronto, 2013).

³⁶ Australian National Community Legal Education Advisory Group (n 31).

³⁷ Human Rights Commission of Sri Lanka Act No. 21 of 1996 section 10(f).

their rights and entitlements.³⁸ Likewise, the National Plan of Action to Address Sexual and Gender Based Violence includes awareness rising activities on SGBV encompassing all categories of the population.³⁹ The Legal Aid Commission has also carried out some legal awareness programmes for women over the years, focussing on the conditions of law affecting their day-to-day lives such as maintenance, domestic violence, divorce, fundamental rights and labour laws.⁴⁰

In the civic space several national level civil society organisations (CSOs) and non-governmental organisations (NGOs) have undertaken awareness campaigns, including social media campaigns such as 2six4 the personal safety mobile app by Women in Need⁴¹, ‘Inside Justice’ by The Asia Foundation⁴², ‘Labyrinth’ by Centre for Equality and Justice⁴³ and local campaigns such as ‘Don’t Stay Silent in Sri Lanka’.

Whilst there have been many *ad hoc* legal awareness programmes to raise the legal awareness of women and sexual minorities, there has been no concerted effort to continuously work with such communities to ensure

³⁸ State Minister of Women and Child Development, Pre-school and Primary Education, School Infrastructure and Education Services, ‘Progress and Performance Report - 2021’ (State Minister of Women and Child Development, Pre-school and Primary Education, School Infrastructure and Education Services, 2022).

³⁹ Ministry of Women and Child Affairs, ‘Policy Framework and National Plan of Action to address Sexual and Gender-based Violence (SGBV) in Sri Lanka 2016-2020’ (Ministry of Women and Child Affairs, 2016).

⁴⁰ The Legal Aid Commission of Sri Lanka, ‘Annual Report 2018’ (The Legal Aid Commission of Sri Lanka, 2019).

⁴¹ Women In Need, ‘2SIX4 mobile app: Women in need’ (WIN Against Violence, 9 February 2019) <<https://www.winsl.net/2six4-mobile-app/>> accessed 10 September 2023.

⁴² ‘Inside justice: SGBV in Sri Lanka Archives’ (The Asia Foundation) <<https://asiafoundation.org/tag/sgbv-justice-sector-sri-lanka/>> accessed 10 September 2023.

⁴³ ‘Labyrinth / වංකඹිමය / ලැබිරින්’ (Facebook) <https://web.facebook.com/LabyrinthbyCEJ?_rdc=1&_rdr> accessed 15 August 2023.

that they understand their rights and moreover are confident enough to exercise said rights.

3.1. LEGAL AWARENESS AS A PRECURSOR TO ACCESS TO JUSTICE FOR WOMEN AND SEXUAL MINORITIES

The power imbalance that women and sexual minorities face place women and sexual minorities in a position of vulnerability. This imbalance is further perpetuated by an unequal access to legal information. In fact, withholding legal information may be seen as a tactic for domination.⁴⁴ As such addressing this power imbalance requires external interventions to empower women and sexual minorities.⁴⁵ In this regard, legal awareness becomes imperative to equip women and sexual minorities to correct the power imbalance that prevails. Legal awareness has the power to correct power imbalances as it supports women and sexual minorities to take informed choices to pursue the course of legal action that is best suited to their needs.⁴⁶ In order for women and sexual minorities to take informed choices about the law, they must first be aware of what the law is, how it applies to their everyday life, and what problems they may face in pursuing legal recourse.⁴⁷ Therefore in order for women and sexual minorities to access legal channels, even if they are seldom used, they must first be aware of their legal options. As such, legal awareness is a definite precursor to accessing justice for women and sexual minorities.

⁴⁴ Alana Prochuk and Cecile Afable, 'Re-Envisioning Public Legal Education and Information' (West Coast Legal Education and Action Fund British Columbia, 2021).

⁴⁵ M Gramatikov and R B Porter, 'Yes, I can: Subjective legal empowerment' (2010) XVIII (2) Georgetown Journal on Poverty Law & Policy 169.

⁴⁶ Laboucane Benson, Patti and Alex Choby, 'Indigenous Public Legal Education—PLE from an Interconnected Worldview' (LawNow, 4 July 2018) <lawnow.org/indigenous-publiclegal-education-ple-from-an-interconnectedworldview/> accessed 12 July 2023.

⁴⁷ Alana Prochuk and Cecile Afable (n 45).

Despite the vital importance of improving legal awareness, legal awareness activities have been adopted in an *ad hoc* manner by both government institutions as well as their civil society counterparts, as demonstrated above.⁴⁸ As such legal awareness activities tend to be episodic, lacking continuity and as such do not empower the recipient to exercise and enforce their rights.⁴⁹ The sporadic and episodic nature of legal awareness programmes in effect limits the scope of legal awareness to the mere provision of facts about the law. Legal awareness programmes delivered in this manner, do not serve the overall objective of advancing access to justice of women and sexual minorities. Rather, legal awareness programmes should strive to be continuous in nature and capacitate women and sexual minorities to develop the skills required to track down information about different laws when needed. It should equip them to be able to independently find out the legal options and laws available to them, rather than teaching them about one particular law. Therefore, legal awareness should take the form of skill development combined with knowledge impartation.⁵⁰

Towards improving access to justice for women and sexual minorities, the improved legal knowledge of women and sexual minorities must be supported with improved legal awareness for state side actors as well⁵¹, in order to ensure that they properly carry out their duties in a manner that does not violate the rights of women and sexual minorities. There has been some recognition of this concept in Sri Lanka wherein awareness programmes have been conducted for public officials by the Legal Aid

⁴⁸ See section 3.2.

⁴⁹ Independent Public Legal Education and Support (PLEAS) Task Force (n 30).

⁵⁰ Alana Prochuk and Cecile Afable (n 45).

⁵¹ *ibid.*

Commission⁵² and for Officers on Mediation Boards.⁵³ Understanding legal awareness as a requirement that must be provided for public officials too, may lead to reduced violations of rights.⁵⁴

Making Legal Awareness Practical

Understanding the importance of legal awareness to ensure access to justice, legal awareness programmes must be practical and impactful. As such legal awareness must be provided in a manner that is timely and appropriate to the needs of the community.⁵⁵ Legal awareness activities, must be grounded in the realities of the audiences that they seek to assist. Therefore, if the overall objective of fostering access to justice is to be achieved, legal awareness programmes must include awareness on the substantive matter of the law and the procedural aspects of the law⁵⁶ Similarly, legal information must be made readily accessible, in simple language, and tailor made to the population that it is meant to reach.⁵⁷ Legal awareness programmes must also not presume to know what is best for women and sexual minorities or other target audiences, but simply set out their legal options in clear and concise language, thereby empowering them to choose the legal options best suited to their needs.⁵⁸

⁵² The Legal Aid Commission of Sri Lanka (n 41).

⁵³ State Minister of Women and Child Development, Pre-school and Primary Education, School Infrastructure and Education Services (n 39).

⁵⁴ Alana Prochuk and Cecile Afable (n 45).

⁵⁵ 'Access to Justice Services Agreements (AJA)' (Government of Canada, 20 August 2021) <<https://www.justice.gc.ca/eng/fund-fina/gov-gouv/access.html>> accessed 22 August 2023

⁵⁶ Benjamin van Rooij and Ineke van de Meene, *Access to justice and legal empowerment: Making the Poor Central in Legal Development Co-operation*, (Leiden University Press, 2011)

⁵⁷ Asian Development Bank (n 22).

⁵⁸ Alana Prochuk and Cecile Afable (n 45); Laboucane Benson, Patti and Alex Choby (n 47).

4. CONCLUSION

The rule of law is rendered meaningless if women and sexual minorities are excluded from access to justice. Women and sexual minorities who are unaware of their rights are unable to claim their rights. As such, as a first step, legal awareness must be recognised as a precursor to access to justice and should be freely provided to women and sexual minorities. The ultimate goal of legal awareness should be to produce legally capable women and sexual minorities, and thereby enhance their access to justice. This paper concludes that the provision of continuous, practical legal awareness as defined broadly, will address barriers which prevent access to justice of vulnerable populations. In this context, ensuring women, sexual minorities and vulnerable populations their right to access to justice, must as a first step include capacitating them to recognise their rights and entitlements, educating them on the procedural requirements of the judicial system and educating the judicial system itself to be responsive to such minorities. Empowered and legally capable citizens will not only be better equipped to prevent actions from escalating to the point of needing legal recourse but will also be able when necessary to make informed choices about which legal recourse should be taken, thereby enhancing equal access to justice.

REFERENCES

International Treaties and Documents

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

Report of the Secretary-General, 'Legal Empowerment of the poor and eradication of poverty' (2009) UN Doc A/64/133.

UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 33' UN Doc. CEDAW/C/GC/33.

Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948 UNGA Res 217 A(III)).

National Legislation and Policies

Human Rights Commission of Sri Lanka Act No. 21 of 1996.

Ministry of Women and Child Affairs, 'Policy Framework and National Plan of Action to address Sexual and Gender-based Violence (SGBV) in Sri Lanka 2016- 2020' (Ministry of Women and Child Affairs, 2016).

State Minister of Women and Child Development, Pre-school and Primary Education, School Infrastructure and Education Services, 'Progress and Performance Report -2021' (State Minister of Women and Child Development, Pre-school and Primary Education, School Infrastructure and Education Services, 2022).

The Legal Aid Commission of Sri Lanka, 'Annual Report 2018' (The Legal Aid Commission of Sri Lanka, 2019).

Books

United Nations Development Programme, Programming for Justice: Access for All a Practitioner's Guide to a Human Rights-Based Approach to Access to Justice (UNDP 2005).

Van Rooij, B. and van de Meene, I, Access to justice and legal empowerment: Making the Poor Central in Legal Development Cooperation, (Leiden University Press, 2011).

Reports and Articles

Asian Development Bank, *Legal Empowerment for Women and Disadvantaged Group* (ADB, 2009).

Australian National Community Legal Education Advisory Group, 'Guidelines for the Management of Community Legal Education Practice' (CCLCG, 2004).

Buckley M, 'Evolving Legal Services: Review of Current Literature' (Community Legal Education Ontario Toronto, 2013).

Centre for Equality and Justice, 'Labyrinth: Navigating Response Mechanisms for Sexual and Gender-Based Violence Project (CEJ, July 2023).

Centre for Policy Alternatives, 'Legal Reform to Combat Sexual and Gender-Based Violence Part 1' (CPA, 2020).

Centre for Women's Research, 'People's Development Justice Report on National Review and Monitoring of Sustainable Development Goals in Sri Lanka' (CENWOR Colombo, 2019).

FOKUS WOMEN, 'Wither Justice the Language Barrier in Accessing the Criminal Justice System in Cases of Violence Against FHH in the North and East of Sri Lanka' (FOKUS WOMEN, 2016).

Independent Public Legal Education and Support (PLEAS) Task Force, 'Developing capable citizens: the role of public legal education' (PLEAS Task Force, 2007).

M Gramatikov and R B Porter, 'Yes, I can: Subjective legal empowerment' (2010) XVIII (2) *Georgetown Journal on Poverty Law & Policy* 169.

Ministry of Justice, Prison Affairs and Constitutional Reform, 'Annual Performance Report for the year 2021' (MOJ, 2022).

OECD, 'Gender Equality in Colombia: Access to Justice and Politics at the Local Level' (OECD, 2020).

OECD, 'Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All' (OECD, 2016).

OECD, ‘Session 2. Enabling Access to Justice Through Legal Capability & Empowerment’ (OECD Policy Roundtable on Equal Access to Justice, Latvia, 5-6 July 2018).

Prochuk A and Afable C, ‘Re-Envisioning Public Legal Education and Information’ (West Coast Legal Education and Action Fund British Columbia, 2021).

The Asia Foundation, ‘Inside Justice: Enabling Justice for Victim Survivors of Sexual and Gender-Based Violence Sharing of The Asia Foundation’s Experience (TAF, 2021).

United Nations Development Programme, ‘Access to Justice Assessments in The Asia Pacific: A Review of Experiences and Tools from The Region (UNDP, 2012).

United Nations Development Programme, ‘Strengthening Judicial Integrity through Enhanced Access to Justice’ (Lessons Learned Series: Rule of Law, Justice and Human Rights, UNDP Regional Centre for Europe and the CIS, 2013).

United States, ‘U. S. State Department Sri Lanka 2021 Human Rights Report’ (United States, 2022).

Women in Need, ‘Why Accessing Justice is Challenging for Victims of Sexual and Gender-Based Violence?’ (TAF, 2019).

Website and Online Sources

‘Access to Justice Services Agreements (AJA)’ (Government of Canada, 20 August 2021) <<https://www.justice.gc.ca/eng/fund-fina/gov-gouv/access.html>>

‘Inside justice: SGBV in Sri Lanka Archives’ (The Asia Foundation) <<https://asiafoundation.org/tag/sgbv-justice-sector-sri-lanka/>> accessed 10 September 2023.

‘Labyrinth / වංකඹරිය / பூதிர’ (Facebook) <https://web.facebook.com/LabyrinthbyCEJ?_rdc=1&_rdr> accessed 15 August 2023.

‘Sustainable Development Goals’ (United Nations)
<<https://www.un.org/sustainabledevelopment/peace-justice/>>

Benson L, Choby P and A, ‘Indigenous Public Legal Education—PLE from an Interconnected Worldview’ (LawNow, 4 July 2018)
<lawnow.org/indigenous-publiclegal-education-ple-from-an-interconnectedworldview/>

International Commission of Jurists, ‘Sri Lanka: Legal Professionals’ Awareness Workshop on Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics (SOGIESC) Equality’ held (ICJ, 16 September 2022) <<https://www.icj.org/sri-lanka-legal-professionals-awareness-workshop-on-sogiesc-equality/>>

Sam Bresnick, ‘Knowing the law before needing the law’ (Daily News, 26 April 2017)
<<https://www.dailynews.lk/2017/04/26/features/114144/knowning-law-needing-law>>

Women In Need, ‘2SIX4 mobile app: Women in need’ (WIN Against Violence, 9 February 2019) <https://www.winsl.net/2six4-mobile-app/> accessed 10 September 2023
Women In Need, ‘2SIX4 mobile app: Women in need’ (WIN Against Violence, 9 February 2019) <https://www.winsl.net/2six4-mobile-app/> accessed 10 September 2023.

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