THE LEICESTER STUDENT LAW REVIEW

2023 – 2024

SPECIAL ISSUE

UNIVERSITY OF LEICESTER

NOTE FROM THE EDITOR-IN-CHIEF

The Leicester Student Law Review (LSLR) was established nine years ago to provide a space for the student body to interact with legal writing and academia beyond what is required in their modules. Allowing students to engage and contribute to the discourse on areas of personal interest and highlight their unique student voice is of utmost importance. It is my personal mission to ensure that the curiosities and passions of the student body are both encouraged and celebrated within the Leicester Student Law Review.

This special edition of the journal highlights the fantastic research of the postgraduate law students from various jurisdictions and universities, who presented their papers during the 2023 University of Leicester Law Postgraduate Research Conference. This edition marks a momentous time for the Law Review and for the University of Leicester itself. The collaborative culture nourished by the University has allowed for much innovation within the Law Review for which I am enormously proud of. From the successful launch of the 'Let's Review' podcast in 2022, to the upcoming launch of the Law Gazette, a passion project of the talented Alice Messler, this special edition of the Law Review is another testament to the hard working and dedicated student body of the University of Leicester.

This venture would not have been made possible without the support of our amazing faculty, namely, Dr. Nauman Reayat, Dr. Ewa Zelazna, and Dr. Sarah Fox. I am grateful to Kathryn Sandilands, Cemre Kadioglu Kumtepe and Mandeep Singh for their commitment to this special issue in volunteering their time to editing the submissions on top of their PhD studies.

It is with great pleasure that I present this special edition of the Leicester Student Law Review.

Rebecca Bocchinfuso
Editor-in-Chief, LSLR 2023-2024

For more information – follow us on social media:

Instagram: @uollawreview | Website: www.leicesterstudentlawreview.com | Facebook: Leicester Student Law Review | Or send us an e-mail at leicslawreview@le.ac.uk

This page is intended to be blank

Cemre C Kadioglu Kumtepe
Kathryn Sandilands
Mandeep Singh
(Editors and Members of the Organising Committee)

University of Leicester Law School Postgraduate Research Conference

Law in Motion: Adapting to a Changing World

(23 June 2023)

Organised by
University of Leicester

Published by
Leicester Student Law Review

Abstracts of University of Leicester Law School Postgraduate Research Conference - Law in Motion: Adapting to a Changing World (23 June 2023)

Editors and the Members of the Organising Committee

Cemre C Kadioglu Kumtepe PhD Candidate University of Leicester	Kathryn Sandilands PhD Candidate University of Leicester	Mandeep Singh PhD Candidate University of Leicester

Conference Organizer

University of Leicester

Conference Venue

University of Leicester, Sir Bob Burgess Building, Leicester, UK (in-person and remotely)

Publication Date

Fall 2023

Special Issue, Leicester Student Law Review

Website: https://www.leicesterstudentlawreview.com

Disclaimer

This special issue includes the content provided by the authors who presented at the 2023 Leicester Law School Postgraduate Research Conference. Editing has been limited to formatting and style adjustments. The publisher and conference organiser do not take responsibility for any claims, instructions, methods, or policies mentioned in the abstracts, and they maintain a neutral stance regarding any legal matters discussed. The authors of abstracts hold the right to their work, which can be submitted as a full paper to any subsequent publication.

Table of Contents

About the Conference

In March 2023, the University of Leicester Law School invited submissions for the University of Leicester Law School's Postgraduate Research Conference, which took place in hybrid form at the University of Leicester (in-person) or remotely on Friday 23 June 2023.

The conference aimed to provide an opportunity for postgraduate students to present their ongoing research, engage with new ideas, and connect with fellow researchers. The broad theme of the conference, "Law in Motion: Adapting to a Changing World", is intended to reflect the wide range of research areas and perspectives fostered by Leicester Law School, including doctrinal, socio-legal, interdisciplinary, and theoretical approaches. Many responses were received for the call for abstracts from researchers with international backgrounds.

The conference was held in three parallel sessions and one plenary session which were arranged according to the broad themes of Corporate Governance, Commercial Law, International Trade and EU Law, Intellectual Property and Digital Law, Health Law, Human Rights and International Law, and Gender Studies. This categorisation was implemented mainly for organizational purposes as most abstracts also fell under different themes and areas of research.

The presenters were given the opportunity to present extended abstracts or full papers to be considered for the best paper prize to be published in this Special Issue. We thank all the researchers for becoming part of our community and congratulate them for sharing their research with rigour and passion.

Acknowledgements

The Organising Committee and the Editors of the Special Issue of the 2023 University of Leicester Law School Postgraduate Research Conference would like to extend special thanks to Dr Navajyoti Samanta and Dr Ed Bates for their guidance and support throughout the entire organization; Prof Pablo Cortes, who presented his academic journey and recent working paper which was an inspiration to many researchers; Ms Teresa Rowe and Ms Shameela Mayet for their constant assistance and housekeeping; Mr Anthony Berry for his support in IT and privacy policies; the catering and AV teams of the University of Leicester.

We would like to thank Ms Sinead Moloney from Hart Publishing and Ms Alison Kirk from Informa for their time and for agreeing to present during the conference. We were pleased to hear from the esteemed editors about the steps that the researchers should take if seeking to publish their thesis after they are awarded their degrees.

Fore and foremost we extend our gratitude to the amazing academics, Prof. Peter Jaffey, Dr. Patrick Masiyakurima, Prof. Kimberley Brayson, Dr. Ebenezer Adodo, Dr. Clark Hobson, Dr. Ed Bates, Dr. Troy Lavers, who chaired the sessions, ensured fruitful exchange of ideas, and provided feedback to the researchers.

Finally, we thank the Leicester Student Law Review for sharing their platform and making this publication possible.

The support we received made a successful event and carry the legal research forward that we hope just ignited a spark for the years to come.

Keynote Speaker

Prof Pablo Cortés has kindly accepted our invitation to speak at the conference as the keynote speaker. He talked about his academic journey with crucial takeaway notes which were helpful for PhD candidates and early career researchers. Here are the highlights of Prof Cortés' academic background, absent the compelling insights into the PhD experience which he shared during the conference.

Prof Cortés holds a chair in Civil Justice at Leicester Law School, where he teaches and conducts research in the field of dispute resolution, civil procedure, and consumer law. He has been invited to speak at international conferences and expert meetings in over 20 different countries, including by the UN Commission for International Trade Law, the European Commission, and the European Parliament. He regularly serves as an independent adjudicator or arbitrator for various civil disputes, with a primary focus on aviation, water, and telecommunications cases. Additionally, he has worked as a consultant for numerous private and public organizations in the domains of dispute resolution and consumer law. He is a fellow of the National Centre for Technology and Dispute Resolutions at the University of Massachusetts and a founding member of the International Council for Online Dispute Resolution (ICODR). In 2012, he held the position of Gould Research Fellow at Stanford University. He serves as the co-editor of the journal Mediation - Theory and Practice and acts as the external examiner for the Alternative Dispute Resolution modules at University College London. His research centres around civil dispute resolution methods, with a particular focus on leveraging technology to resolve consumer disputes. He has secured funding from various institutions, including the European Commission, the European Parliament, and the Nuffield Foundation. He teaches Dispute Resolution, Analysing the English Legal System, and Civil Dispute Resolution Methods.

Prof Cortés also generously shared parts of his most recent research on dark web dispute resolution, which attracted a great deal of interest from the audience. He explained what is meant by the dark web and why it has been used, the types of disputes that are generated on these platforms and the extra-judicial method of dispute resolution that takes place between dark web users. We are grateful for an early insight into this thought-provoking research and eagerly await the publication of the full paper. We are pleased to present the working abstract of the paper:

Abstract

This paper seeks to unravel how participants in the marketplaces of the Dark Web have access to dispute avoidance tools and dispute resolution systems designed to minimise and settle disputes arising from illicit transactions. A growing number of individuals go the Dark Web marketplaces to carry out mostly illegal activities, which range from the purchase of illegal drugs and prescription medications to the purchase of ransomware and weapons. Payments typically take place via an escrow system that holds the cryptocurrency paid by anonymous buyers to anonymous sellers until the buyers confirm their satisfaction with the transaction. When buyers are not satisfied and cannot settle their complaint directly with the seller, they can start a dispute whereby typically an independent adjudicator freezes the payment in the escrow and considers the evidence provided by the parties and determines the outcome of the dispute. The paper examines the dispute avoidance and resolution tools that seek to enhance trust in anonymous peer to peer illicit transactions, and it argues that these tools are resulting in the organic growth of a civil justice ecosystem that enables the success of the marketplaces of the Dark Web.

Winner of the Best Paper Prize

A Critique of the Legal Framework Relating to Hate Speech in Sri Lanka in the Digital Era

Chamath Fernando*

Abstract

Websites, blogs, social media platforms, and gossip channels have expanded all the limitations experienced by traditional print and electronic media in the modern world. Despite the fact that presently information communication technology has developed to an unimaginable extent, the basic principles of law relating to hate speech remain the same. Based on the above paradox, this paper analyses whether the present legal system in Sri Lanka concerning hate speech could meet the new challenges in the digital era and explore the need for reforms in the law relating to hate speech in Sri Lanka in order to meet the new challenges in the digital media context. In conclusion, it is observed that there is a need to introduce necessary reforms to safeguard the rights of the public.

I. Introduction

Freedom of speech and expression including publication are fundamental rights enshrined in the Constitution of the Republic of Sri Lanka. However, such fundamental rights are not absolute and are subject to restrictions prescribed by law in the interest of *inter alia* national security, racial and religious harmony, contempt of court, or incitement to an offence. "Sri Lanka is a multi-ethnic and multi religious country where a number of ethnoreligious groups have been co-existing for centuries. But that co-existence has not always been without stress, tension and sometimes violence."[1] Due to the multi-ethnic, multi-racial, and multi-religious social structure of Sri Lankan society, publication of print and audio/visual material to offend other communities is not an uncommon occurrence. Hence, hate speech is a significant limitation to freedom of speech and expression.

The term "hate speech" has been defined as "speech that carries no meaning other than the expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence".[2] In the present-day context content sharing on digital platforms plays a vital role and it is observed that online platforms have defined "hate speech" differently. Well-known audio-visual content sharing online platform Google-YouTube has defined hate speech as "content promoting violence or hatred against individuals or groups based on any of the following attributes: Age, Caste, Disability, Ethnicity, Gender Identity and Expression, Nationality, Race, Immigration Status, Religion, Sex/Gender, Sexual Orientation, Victims of a major violent event and their kin, Veteran Status".[3] The social media platform "Facebook" has defined hate speech as "a direct attack against people – rather than concepts or institutions – on the basis of what we call protected characteristics: race, ethnicity,

* LL.B., LL.M., Attorney-at-Law, kmcfernando@gmail.com, Faculty of Law, University of Colombo, Sri Lanka.

[1] Sasanka Perera, 'The ethnic conflict in Sri Lanka: A Historical and Sociopolitical outline' (*World Bank*, February 2001) <https://documents1.worldbank.org/curated/en/727811468302711738/pdf/677060WP00PUBL0io0political0Outline.pdf> accessed 21 August 2023.

[2] Bryan A Garner, *Black's Law Dictionary* (10th edn, Thomson Reuters 2004) 1618 .

[3] Google, 'Hate Speech Policy' (*YouTube Policies*, 05 June 2019) <https://support.google.com/youtube/answer/2801939?hl=en#> accessed 21 August 2023.

national origin, disability, religious affiliation, caste, sexual orientation, sex, gender identity and serious disease."[4]

Unlike in the past when mass communication was limited to print and electronic media, in the modern digital era websites, blogs, social media platforms, and gossip channels have expanded all the limitations experienced by traditional print and electronic media. Social media has reached a level where it has become a platform to gather people even to overthrow legally appointed governments. Due to the digitalization of media, information communication has accrued new dimensions and by a simple press of a button, a person could distribute hate speech material, whether it is oral or written to the entire world in the blink of an eye. However, the present legal framework in Sri Lanka to combat hate speech has not anticipated the special issues presented by the modern digitalization of mass media.

One of the primary obstacles in addressing the distribution of hate speech material on the Internet is the presence of many technical limitations ranging from factors such as the speed at which content may be disseminated, the variety of online platforms and languages that may be involved in and the complex manner of user interactions within these platforms. Further, the absence of a definite and unambiguous interpretation of the term "hate speech" has also posed a significant challenge in effectively curtailing the publication of such harmful material on the internet and other online social media platforms. Additionally, the lack of a proper definition of the term "hate speech" creates a major threat to the democratic rights of the people as the Sri Lankan Government in power could use wide statutory provisions to limit the freedom of speech and expression facilitated by the modern online media platforms to criticise actions of the Government.

In light of the above paradox, this paper analyses whether the present legal system in Sri Lanka concerning hate speech could meet the new challenges in the digital era and explore the need for reforms in the law in Sri Lanka relating to hate speech in order to meet the new challenges in the digital media context. The methodology followed in this research involves a critical analysis of the information gathered through primary sources and secondary sources to identify the gap between the present legal provisions to fight hate speech in the wake of digital transformation in the field of information communication. In this research paper, an extensive examination of published materials across various digital and other social media platforms has been conducted. To effectively illustrate the collected data, screenshots and images have been incorporated as supporting evidence upon due acknowledgement of the source. The examination of approaches taken by other jurisdictions, especially, South Africa, Australia and the United Kingdom have been used for comparative purposes. In this paper, the analytical lens followed will be confined to a rights-based approach which highlights how right to free speech and expression need to be curtailed to protect the interest of the larger community and in certain aspects equality dimension will also be brought into the analysis of freedom of speech.

The analysis of this paper is distributed among four sections. Section I provides a general introduction to the entire subject matter. Section II discusses the present legal regime concerning freedom of speech and expression and hate speech. In this Section, the importance of freedom

[4] Meta, 'Hate speech' (*Facebook Community Standards*, 22 August 2023) <https://transparency.fb.com/en-gb/policies/community-standards/hate-speech/> accessed 22 August 2023. Facebook is an American online social network service that is part of the company Meta Platforms. Facebook was founded in 2004 by Mark Zuckerberg, Eduardo Saverin, Dustin Moskovitz, and Chris Hughes, all of whom were students at Harvard University. Facebook became the largest social network in the world, with nearly three billion users as of 2021, and about half that number was using Facebook every day. The company's headquarters are in Menlo Park, California. 'Facebook' (*Britannica*) <https://www.britannica.com/topic/Facebook> accessed 22 August 2023.

of Speech and expression in a democratic society has been highlighted to demonstrate the danger of high-level censorship. However, simultaneously it has been argued that freedom of speech and expression is not an absolute right and one of the significant limitations to the said right is hate speech. Section III investigates special challenges presented due to the digitalisation of information communication. The concluding Section VI discusses the way forward and the importance of law reforms to meet the new challenges in the digital era.

In conclusion, it is observed that present legal provisions pertaining to addressing hate speech have inherent limitations in the digital era and there is a need to introduce necessary reforms to the present legal structure concerning hate speech to safeguard the rights of the public at large.

II. A brief overview of the present legal regime in respect of the law relating to freedom of expression and hate speech in Sri Lanka

When addressing the issue of combating hate speech, several challenges emerge. The implementation of measures to restrict hate speech, whether through legal mechanisms or self-regulation, may potentially encroach upon the fundamental right to freedom of speech and expression including publication. Therefore, an assessment of the present legal regime to ensure free speech is essential. Freedom of speech and expression is an internationally recognised human right. Universal Declaration on Human Rights[5] has been ratified by Sri Lanka and Article 19 of the same reads that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[6] Further, the said right is enshrined in the International Covenant on Civil and Political Rights (ICCPR).[7] In addition, freedom of speech and expression has been included in domestic laws of many countries. To mention a few, the First Amendment to the U.S. Constitution prohibits Congress from making any law that abridges the freedom of speech or the press.[8] Article 10 of the European Convention on Human Rights provides that "Everyone has the right to freedom of expression."[9] Article 9 of the African Charter on Human and Peoples' Rights (the "African Charter") contains provisions to protect freedom of expression and freedom of information.[10] Hence, it is very clear that globally freedom of speech and expression is a well-established human right.

The freedom of speech and expression including publication is a fundamental right guaranteed to every citizen under the Constitution of the Democratic Socialist Republic of Sri Lanka (1978) (hereinafter referred to as "the Constitution of Sri Lanka").[11] By the Nineteenth Amendment to the Constitution of Sri Lanka,[12] right of access to any information *inter alia* held by the State, a Ministry or any Government Department or any statutory body established or created under any law has been recognised as a fundamental right in order to further strengthen the freedom of

[5] Universal Declaration on Human Rights (adopted 10 December 1948) 217 A(III) (UDHR), Article 19.
[6] ibid.
[7] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 19.
[8] By the Fourteenth Amendment to the U.S. Constitution the said prohibition was extended to the States. However, the U.S. Supreme Court in *Roth v. United States*, 354 US 476 (1956) has held that freedom of expression is not absolute.
[9] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) (entry into force 3 Seprember 1953) 213 UNTS 211, Article 10.
[10] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), Article 9. This article reads: "1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law."
[11] Constitution of the Democratic Socialist Republic of Sri Lanka (1978), Article 14(1)(a).
[12] ibid, Article 14A introduced by the Nineteenth Amendment.

speech and expression as the said rights are interdependent.[13] It is interesting to note that in foreign jurisdictions the rationale for protecting the freedom of speech and expression has been eloquently explained in many decided cases. Justice Brandies in *Whitney v. California*, *inter alia* observed that "(...)freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile(...)".[14] Similarly, Sri Lankan courts have given a wide interpretation to "speech and expression" and have held that it extends to forms of expression other than oral or verbal such as display of placards, picketing, the wearing of black armbands, display of any flag, drumming, clapping and other sounds, however unmusical or discordant can be regarded as "speech and expression".[15]

Under the Constitution of Sri Lanka, the matters relating to fundamental rights fall under the exclusive jurisdiction of the Supreme Court,[16] the highest and final superior Court of record in the Republic.[17] Hence, a series of judgments delivered by the Supreme Court of the Republic has expanded and demarcated the boundaries of the freedom of speech and expression under the Sri Lankan legal system. The Supreme Court has held that freedom of speech and expression necessarily includes the freedom to impart knowledge, disseminate knowledge and propagate ideas.[18] Whilst observing that adult education which included a discussion of Supreme Court decisions on fundamental rights is a perfectly legitimate topic of discussion, the Supreme Court in the said case held further that "knowledge" is not confined to any particular branch of learning.[19] Hence, it is very clear that in freedom of speech and expression context, knowledge could include variety of subjects *inter alia* including sex education, political views, religious teachings, and history.

In the context of traditional media, the Supreme Court has observed that "suppressing freedom of speech and expression, including publication, whether by preventing a newspaper being published or otherwise, would be graver if motivated either by a desire to benefit a rival or by political antagonism".[20] The importance of freedom of speech and expression in the context of representative democracy has been well recognised by the Supreme Court in many occasions and has observed that freedom of thought and expression is an indispensable condition if Sri Lanka is to be more than a nominally representative democracy.[21] To make an informed and educated decision in choosing his elected representative, in deciding to vote for one group of persons rather than another, a voter must necessarily have the opportunity of being informed and educated about proposed policies.[22]

In the case of *Fernando v. Sri Lanka Broadcasting Corporation,* the Supreme Court has held that the freedom of speech can even include a participatory listener's right.[23] In the said case, the

[13] *Environmental Foundation Limited v. Urban Development Authority of Sri Lanka and others* [2009] 1 Sri L.R. 123, per Sarath N. Silva, C. J. "the freedom of speech and expression including publication guaranteed by Article 14(l)(a), to be meaningful and effective should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain."
[14] 274 U.S. 357 (1927).
[15] *Amaratunga v. Sirimal and others* [1993] 1 Sri L.R. 264 (Jana Ghosa case).
[16] Constitution of Sri Lanka (n 11) Article 17 read together with Article 126.
[17] ibid Article 118.
[18] *Wanigasuriya v. S. I. Peiris* SC(FR) 199/87, decided on 22.08.1988.
[19] ibid.
[20] *Deshapriya v. Municipal Council, Nuwara Eliya* [1995] 1 Sri L. R. 362 at 370.
[21] Jana Ghosha Case (n 15) 271. See also *Karunathilaka and another v. Dayananda Dissanayake, Commissioner of Elections and others* (Case No. 1) [1999] 1 Sri L.R. 157 at 174.
[22] *Channa Peiris v Attorney General* [1994] 1 Sri L.R. 1.
[23] [1996] 1 Sri L.R. 157.

State-owned radio station abruptly stopped the broadcast of a non-formal education programme dealing with a wide range of topics, such as human rights, ethnicity, sociology, politics, current affairs etc. and later discontinued the same on the basis that some of the views expressed during the programme have criticised the Government. The Petitioner, who complained to the Supreme Court, was a regular listener. In the landmark judgement the Supreme Court whilst observing that the broadcasting media by its very nature is different from the press as airwaves are public property held that it is the obligation of the State to ensure that airwaves are used for the public good and freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses but in the liberty of the public to hear and read, what it needs.

The long line of decisions delivered by the Supreme Court has demonstrated that freedom of speech and expression, including publication is not to be interpreted narrowly and it extends to and includes implied guarantees necessary to make the express guarantees fully meaningful and effective. Hence, to enhance the democratic rights of the citizens the Supreme Court has held that criticism of the Government and political parties and policies is *per se* a permissible exercise of the freedom of speech.[24] Further, it has been observed that the most effective manner in which a voter may give expression to his views, with minimum risk to himself and his family is by silently marking his ballot paper in the secrecy of the polling booth and therefore, the silent and secret expression of a citizen's preference as between one candidate and another by casting his vote is no less an exercise of the freedom of speech and expression, than the most eloquent speech from a political platform.[25]

However, it has been universally accepted that the said freedom of speech and expression is not an absolute right and may be curtailed under appropriate circumstances.[26] In the context of UDHR it has been observed that "Article 19 includes the right to 'seek, receive, and impart information and ideas through any media and regardless of frontiers.' Although individuals enjoy the same rights online as offline, states are also censoring, and sometimes criminalizing, a wide range of online content via vague or ambiguous laws prohibiting 'extremism', 'blasphemy', 'defamation', 'offensive' language, 'false news' and 'propaganda'."[27] In terms of Article 15(2) of the Constitution of Sri Lanka freedom of speech and expression may be restricted in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence. Further, Article 15(7) of the Constitution of Sri Lanka specifically provides *inter alia* that such freedom may be curtailed in the interest of national security, public order, and the protection of public morality, or for due recognition and respect for the rights and freedoms of others. It has been observed that a significant difference in the restrictive provisions of the Constitution of India[28] and Sri Lankan Constitution is that the Indian Constitution allows the State to impose only "reasonable restriction on the exercise of the right".[29] The corresponding provision in the Constitution of Sri Lanka does not contain this

[24] Jana Ghosha Case (n 15).

[25] *Karunathilake v. Dayananda Dissanayake* (n 21); *Mediwake v. Dayananda Dissanayake, Commissioner of Elections* [2001] 1 Sri L.R. 177.

[26] ICCPR (n 7) Article 19(3).

[27] United Nations Human Rights Office of High Commissioner, 'Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 19' (*United Nations*, 28 November 2018) <https://www.ohchr.org/en/press-releases/2018/11/universal-declaration-human-rights-70-30-articles-30-articles-article-19#:~:text=Article%2019%20includes%20the%20right,vague%20or%20ambiguous%20laws%20prohibiting%20%E2%80%9C> accessed 21 August 2023.

[28] Ministry of Law and Justice, Government of India, 'Constitution of India' (*Legislative Department*, 8 August 2023) <https://cdnbbsr.s3waas.gov.in/s380537a945c7aaa788ccfcdf1b99b5d8f/uploads/2023/05/2023050195.pdf> accessed 21 August 2023.

[29] Constitution of India (n 28) Article 19(4).

qualification.[30] Thus it is seen that one of the significant restrictions on freedom of speech and expression including publication is "hate speech". However, it is salient to note that under the Sri Lankan legal context "hate speech" has not been conclusively interpreted by any Statute. The term "hate speech" has been defined as "speech that carries no meaning other than the expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence".[31]

Sri Lanka being a multi-racial and multi-religious Island Nation situated in the Southeast Asia is still haunted by the bitter memories of the decades-long Civil War, which began in 1983 and ended in May 2009. The conflict was mainly between the State Armed Forces and an insurgent group namely, Liberation Tigers of Tamil Eelam (LTTE) which attempted to establish a separate state for the Tamil minority. Due to the said historical reasons tensions have prevailed between the Tamil minority and Sinhalese majority for a long time. The situation became more complicated and aggravated due to the Easter Sunday Attacks, which took place on 21st April 2019 and involved a series of bomb attacks supposed to have been conducted by a Muslim extremist group against the Catholic community on Easter Sunday. The Supreme Court observed that

> On the ill-fated day of 21st of April 2019, this island home was awoken rudely to witness one of its most tragic events in the annuls of its history and in a series of bomb explosions that sent the nation reeling in shock and disbelief, scores of innocent worshippers at several churches as well as citizens in several locations were plucked away from their loved ones in the most macabre and dastardly acts of terrorism that this country has ever seen. In what has now come to be known as the Easter Sunday Attack or the Easter Sunday Tragedy in its melancholy sense, there was desolation and despair all-round the country and it may not be denied that it took a long while for this country to limp back to normalcy from the ravages of this tragedy.[32]

Hence, hate speech, especially visual or verbal publications against the interest of racial and religious harmony has gained significant attention and prominence in Sri Lanka. At present it is seen that law enforcement authorities in Sri Lanka utilises several isolated statutory provisions to combat hate speech. Article 15(2) of the Sri Lankan Constitution permits the State to curtail freedom of speech and expression in the interest of racial and religious harmony. The said restriction intends to maintain racial and religious harmony within the State. In addition, Penal Code provides for the punishment of any person who destroys, damages, or defiles any place of worship, or any object held sacred by any class of persons, with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage, or defilement as an insult to their religion.[33] Further, whoever does any act, in or upon, or in the vicinity of, any place of worship or any object which is held sacred with intent to or in veneration by any class of persons, with the intention wounding the

[30] *Malalgoda v. Attorney General* [1982] 2 Sri L.R. 777. Per Soza J., "It will be seen that the Indian Constitutional provisions in regard to freedom of speech are subject to such 'reasonable restrictions' as the law may have imposed or may impose under the sub-heads spelt out in Article 19(2) (...) It will be seen that the limitations to the right of freedom of speech are in Sri Lanka prescribed in more absolute terms than in India. In Sri Lank the operation and exercise of the right to freedom of speech are made subject to restrictions of law not qualified by any test of reasonableness. Neither the validity nor the reasonableness of the law imposing restrictions is open to question unlike in America or India."

[31] Bryan A Garner, *Black's Law Dictionary* (10th edn, Thomson Reuters 2004) 1618.

[32] *Janath S. Vidanage v. Pujith Jayasundara*, Inspector General of Police SC (FR) 163/2019 decided on 12.01.2023.

[33] Penal Code, Ordinance No. 2 of 1883, Section 290.

religious feelings of any class of persons or with the knowledge that any class of persons is likely to consider such act as an insult to their religion is a punishable offence.[34] Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremonies[35] is also a punishable offence under the Penal Code. It is salient to note that Section 291A of the Penal Code specifically provides that whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, is an offence within the meaning of the Penal Code. Section 291B of the Penal Code also provides that it is a punishable offence if, any person with the deliberate and malicious intention of outraging the religious feelings of any class of persons, by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class.

The most recent piece of legislation which deals with hate speech is International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007. Section 3(1) of the said ICCPR Act provides for the punishment of any person who shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[36] The High Court of the Western Province had the occasion to refer to s. 3 in an application for bail made on behalf of a suspect arrested and remanded under the ICCPR Act.[37] He had been in remand for more than five months. The Facebook page of the suspect contained a post in which he had stated that it was necessary to dispel the belief in society that COVID-19 virus was spread by Muslims and that Muslims must prepare themselves for an "ideological *jihad"* for that purpose. The High Court Judge in the said case observed that the suspect had not stated anything that would create hostility among racial or religious groups. Saying that an ideological struggle or war must be launched cannot be said to violate s. 3.[38] It is salient to note that Human Rights Commission of Sri Lanka has recommended that Section 3 of the ICCPR Act be interpreted in light of the international jurisprudence on Article 20 of the Covenant.[39]

The preceding discussion outlines the legal framework in Sri Lanka concerning hate speech. It is observed that although Sri Lanka has become a party to many international conventions and treaties to eliminate all forms of racial discrimination,[40] the legislature has so far failed to introduce a specific, comprehensive, and all-inclusive legal framework to fight hate speech in Sri Lanka.

III. Prevention of Hate Speech in the wake of digital transformation of information communication technology - some salient issues

[34] ibid Section 290A.
[35] ibid Section 291.
[36] ICCPR (n 7) Section 3.
[37] Application No. HC/BA 24/2020, 17 September 2020.
[38] See also Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka* (3rd edn, Stamford Lake 2021) 829.
[39] Human Rights Commission of Sri Lanka, 'Legal Analysis of the Scope of Section 3 of the ICCPR Act No. 56 of 2007 and Attendant Recommendations' <https://www.hrcsl.lk/wp-content/uploads/2020/02/LEGAL-ANALYSIS-OF-THE-SCOPE-OF-SECTION-3-OF-THE-ICCPR-ACT-NO.56-OF-2007-_-English.pdf> accessed on 03 June 2023.
[40] ICCPR (n 7) Article 20; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, Article 4(a) requires State parties *inter alia* "to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof".

New media or convergent media tradition emerged due to infusion of information communication with Internet has fundamentally transformed the global landscape.[41] In the present digital world have unimaginable opportunities to freely exchange information at an unprecedented speed due to the advancements in technology.[42] Social media platforms such as Facebook and WhatsApp have made a vital impact on the modern society having the capability of even overthrowing Governments. The tumultuous beginning of the "*Arab Spring*" which ignited in the streets of Tunisia and expanded like wildfire across the Middle East, communicated primarily through the channels of social media is a fitting example to demonstrate the power of new media.[43] Sri Lanka also experienced similar political turmoil due to the uprising of the citizens against the policies and decisions taken by the Government and the Executive President which resulted imposing of temporary suspension of all social media platforms by the Government.[44] Thus, it is seen that digital as well as social media platforms, have the potential to be utilized for the utmost benefit of the public, but also possess the capability to create significant turmoil and disruption in the society.

It is important to consider the actual impact of such new technological advances on the society in order to introduce an updated legal structure to address new issues that can be propagated due to such digital transformations. Research has proven that globally as well as locally the use of social media and other internet-based services have been increased drastically. As it is clearly manifested in Figure 1 it has been observed that there are 5.19 billion internet users in the world today. The total number of internet users around the world grew by 105 million during the past 12 months. Globally, internet user numbers are growing at an annual rate of 2.1 percent, but year-on-year growth is much higher in many developing economies. As depicted in Figure 2 below, it has been observed that "there were 14.58 million internet users in Sri Lanka at the start of 2023, when internet penetration stood at 66.7 percent. Sri Lanka was home to 7.20 million social media users in January 2023, equating to 32.9 percent of the total population. A total of 36.18 million cellular mobile connections were active in Sri Lanka in early 2023, with this figure equivalent to 165.5 percent of the total population".[45]

[41] Henry Jenkins, *Convergent Culture Where Old and New Media Collide* (New York University Press 2006) 5.
[42] Tim Dwyer, *Media Convergence* (Open University Press 2010) 26.
[43] Erin Blakemore, 'What was the Arab Spring and How Did it Spread?' (*National Geographic*, 29 March 2019) <https://www.nationalgeographic.com/culture/article/arab-spring-cause> accessed 21 August 2023.
[44] His Excellency the President of Sri Lanka by Gazette (Extraordinary) No. 2273/86 dated 01.04.2022 declared a state of Public Emergency. Further an Island wide 48 hours curfew was declared commencing from 6.00 p.m. on Friday, 01st April 2022 and imposed a temporary suspension of all social media platforms due to the civil protests and situation prevailed in the country.
[45] 'Digital 2023: Sri Lanka' (*DataReportal*, 26 Jan 2023) <https://datareportal.com/reports/digital-2023-sri-lanka> accessed 21 August 2023.

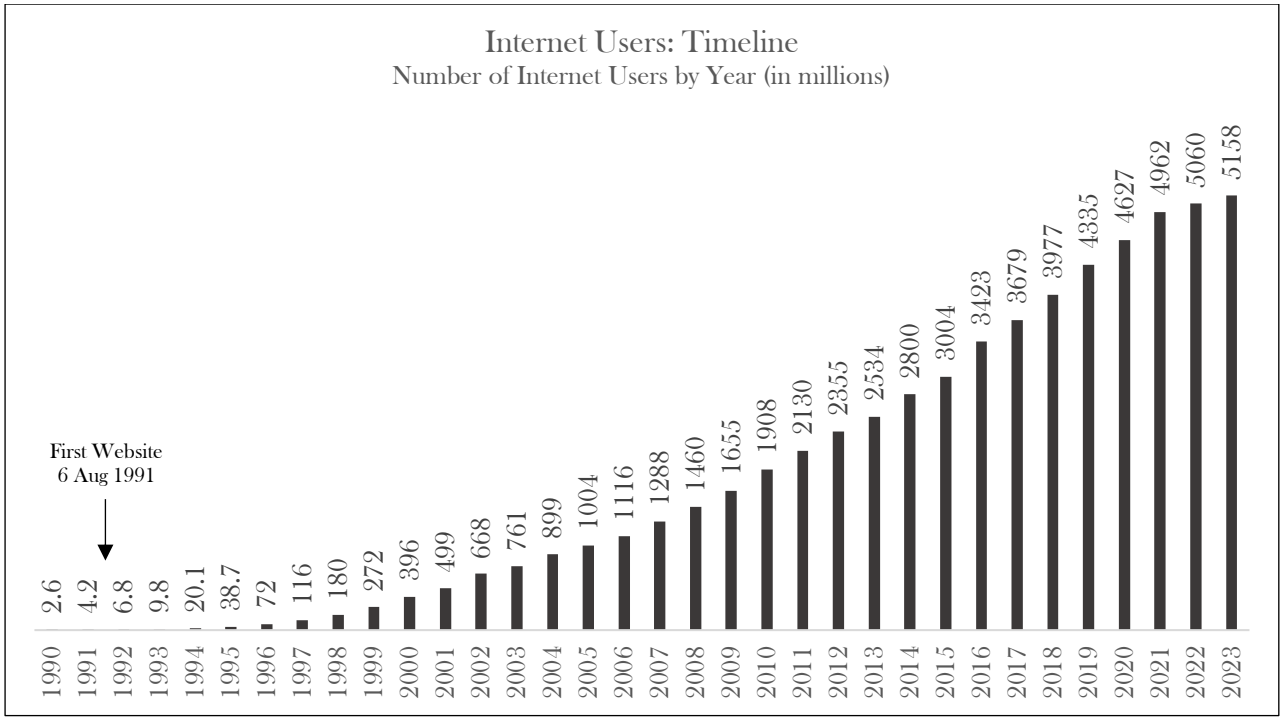

Figure 1- Global Internet users timeline[46]

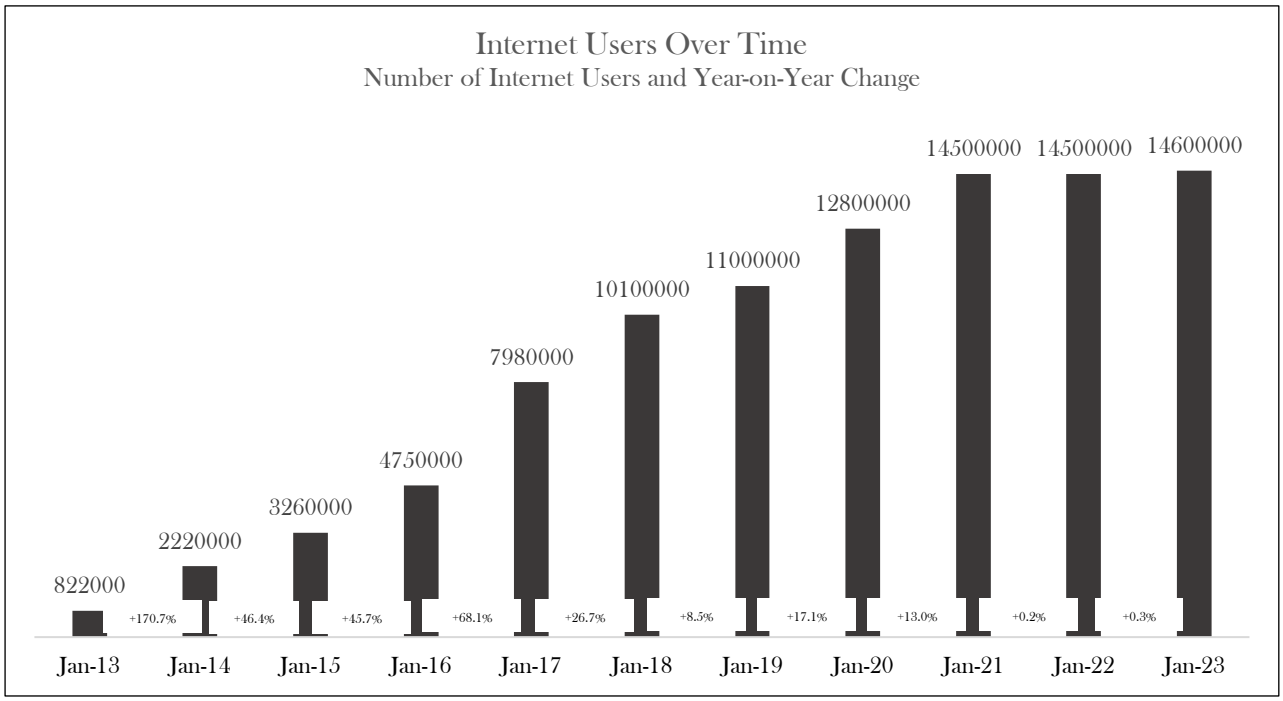

Figure 2- Sri Lanka Internet users over time[47]

[46] 'The Changing World of Digital in 2023' (*DataReportal*, 26 Jan 2023) <https://datareportal.com/global-digital-overview#:~:text=There%20are%205.19%20billion%20internet,higher%20in%20many%20developing%20economies> accessed 21 August 2023.
[47] 'Digital 2023: Sri Lanka' (n 45).

In addressing issues relating to hate speech on internet and social media certain inherent issues may be faced by the law enforcement authorities. In order to impose penal sanctions in terms of the aforementioned states, it is essential to identify the person who published the material which can be identified as hate speech. However, on social media many fake accounts operate and therefore the actual person who is behind the account could not be identified. Further, on the internet, anonymous bloggers maintain blogs without providing any information whatsoever to identify the natural or legal person who oversees such blogs. In the event that such questionable material has been published on social media or internet using a fake account or by an anonymous blogger, the law enforcement authority will not be able to institute an action under the Penal Code or ICCPR Act as the accused could not be identified. Users are permitted to "share", "tag" and "comment" to a post, which make identification of hate speech more complicated. In the light of the identification of the publisher of the hate speech material the question is whether a person who has shared or tagged or commented could be made liable equally as the original publisher. In a situation of this nature courts may consider adopting the 'repetition rule' followed in *The Lord McAlpine of West Green v Sally Bercow*[48] which states that a defendant who repeats a defamatory allegation made by another is treated as if he had made the allegation himself, even if he attempts to distance himself from the allegation.[49]

If a third party has been tagged by the wrongdoer in a hate speech post on social media without the knowledge or permission of the said third party, the question is whether such third party had *mens rea*, which is an essential element under the general criminal law to impose criminal liability[50] on an offender as such publication may result in punishment under the criminal law. It is submitted that the same issue may arise with regard to a person who has been 'tagged' or 'mentioned' on social media in respect of a hate speech statement published by the original wrongdoer. However, even if the accused is identified in a case where the hate speech statement has been published on a 'gossip website' or 'blog', it will be extremely difficult to pursue criminal action if the accuse operates from a foreign country or the gossip website is registered in a domain outside Sri Lanka.

Due to the absence of a definite and explicit definition of the term "hate speech" under the Sri Lankan legal system difficulties may arise to identify unlawful speech which falls into the category of hate speech and permissible speech such as political speech, which constitutes a lawful exercise of freedom of expression, an essential element for a democratic society. Needless to state, loosely defined laws allow perpetrators of hate speech to get away by sheltering behind the defence of freedom of expression.

It is seen that legal as well as self-regulatory framework may not effectively curtail the spread of hate speech on social media platforms due to language competencies of monitoring mechanisms. A statement in the native language (Sinhala) which will directly and clearly intrude on the religious or racial harmony in Sri Lanka may not be detected by a particular social media platform as it is not in a position to read and comprehend the context in which it is published and the language used.[51] All most all the social media websites allow users to express their emotions by using 'emojis' - A small digital image or icon used to express an idea or emotion.

[48] [2013] EWHC 1342 (QB).
[49] See also *Flood v. Times Newspapers Limited* [2012] UKSC 11.
[50] *Perera v. Munaweera* (Food and Price Control Inspector) 56 NLR 433 at 437.
[51] Facebook defines Hate Speech as "Content that attacks people based on their actual or perceived race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or disease is not allowed. We do, however, allow clear attempts at humour or satire that might otherwise be considered a possible threat or attack. This includes content that many people may find to be in bad taste (ex: jokes, stand-up comedy, popular song lyrics, etc)." Facebook, 'Help Centre' <https://www.facebook.com/help/135402139904490/> accessed 23 August 2023.

Figure 3- Well known emojis commonly used on social media[52]

Such icons or images represent a state of mind or feelings of the user and communicate a message to the public.[53] If a person reacts with the "Angry face" or "Haha face" to a religious post published on social media, issues can arise as to whether such reaction could be considered as a statement amounting to advocate religious hatred that constitutes hostility in terms of Section 3(1) of the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007. This situation has become more complicated in the context of recent judgement in *South West Terminal Ltd v. Achter Land & Cattle Ltd*[54]. In the said case the question was whether the defendant's "thumbs up" emoji constituted a valid signature vis-à-vis a legal contract is concerned. The King's Bench for Saskatchewan, Canada considering the circumstances of the case decided that a the "thumbs up" emoji is a non-traditional means to "sign" a document but nevertheless was a valid way to convey the two purposes of a "signature". Hence, it is very clear that in the said case, the court has accepted that emojis could have legal consequences. Therefore, if a person communicates with an emoji, that person may be subjected to legal consequences if such communication could be considered as hate speech due to the surrounding circumstances.

Unlike traditional communication methods such as letters, placards, posters and banners internet and social media-based platforms allow the users to leave their comments or views on a post or a publication. Hence, an innocent post could receive absolute hate speech comments and until the original publisher takes remedial steps such content will be visible to the public. If such a hate speech comment 'go viral' within a short period, serious repercussions may be resulted.[55]

If the injurious comment has been made by a fake account user or an anonymous user on social media, the issue is whether the original publisher of the innocent post could be held liable for all the results of such hate speech comment. If the original publisher has assisted or allowed the hate speech statement to be repeated under the English law, it can be argued that the original publisher of the post will be held liable in terms of 'repetition rule'[56] which is recognised under the law of defamation. Hence, Sri Lankan courts could deal with a similar situation by relying on

[52] See also Facebook, 'emojipedia' <https://emojipedia.org/facebook/> accessed 23 August 2023 for the colored emojis used on social media, specifically on Facebook.

[53] In the *Lord McAlpine v Sally Bercow* (n 49). Justice Tugendhat discussing the effect of emoji *Innocent face* in a tweet which read "Why is Lord McAlpine trending? *Innocent face*" observed thus, "It is common ground between the parties that the words "innocent face" are to be read like a stage direction, or an emoticon (a type of symbol commonly used in a text message or e-mail). Readers are to imagine that they can see the Defendant's face as she asks the question in the Tweet. The words direct the reader to imagine that the expression on her face is one of innocence, that is an expression which purports to indicate (sincerely, on the Defendant's case, but insincerely or ironically on the Claimant's case) that she does not know the answer to her question. Twitter permits users to express themselves in tweets of no more than 140 characters. Tweets are used in a similar way to ordinary conversation. People tweet descriptions of what they are doing or would like to do, jokes and gossip, and comments on people or topics at large, and anything else they want to say. They tweet using conversational words and expressions."

[54] *South West Terminal (SWT) v Achter Land & Cattle Ltd.*, 2023 SKKB 116, decided on 08.06.2023 para 62.

[55] Going viral is "spreading or becoming popular very quickly through communication from one person to another, especially on the internet." Cambridge Dictionary, 'Viral' <https://dictionary.cambridge.org/dictionary/english/viral> accessed 23 August 2023.

[56] As observed in *Lord McAlpine v Sally Bercow* (n 49). "Under that rule [repetition rule] a defendant who repeats a defamatory allegation made by another is treated as if he had made the allegation himself, even if he attempts to distance himself from the allegation."

the said repetition rule. Further, in situations where it is not possible to identify or trace the actual wrongdoer, law enforcement authorities have focus on search engines, such as Google, Microsoft Bing and Yahoo.[57] Therefore, it is observed that under certain tense situations the Government of Sri Lanka has taken steps to block access to certain websites. Typically, such web censoring is done by the local telecom regulator ordering the internet service providers to block specific URLs.[58] Due to the lack of proper legal framework pertaining to such web censorship Government could misuse the said option to curtail freedom of expression and free speech in the guise of suppressing hate speech.[59]

Above discussion signifies that digital transformation in the field of information communication has propagated certain unique issues concerning law of hate speech and certain issues goes to the root of inflicting liability upon a wrongdoer. Therefore, it is important to assess the present legal structure in the light of the latest technological developments in order to provide effective measures to combat hate speech.

IV. Conclusion

In summary, the above discussion has identified a real problem that will only continue to grow. The question is whether the law should change simply because there is a new communication technique used. The answer simply lies in the well-established legal principle enunciated in the maxim "*salus populi est suprema lex*- regard for the public welfare is the highest law."[60] In order words, the law needs to modernize according to the needs of the society in order to safeguard the welfare and rights of the public. Considering the special issues propagated by the digital transformation of the information communication field, the present legal system in Sri Lanka concerning hate speech needs further developments and reforms to meet the new challenges in the digital era. Such challenges may get aggravated due to the adoption of convergent media culture without giving much consideration to the issues that may follow. Traditionally a hate speech article contained in a newspaper or placard will only be read by the people residing in a town or village or Sri Lanka. However, under the present convergent media structure the newspaper is being read on television and the television content will be communicated to the whole world through a live stream on social media. In order to address certain ambiguities and challenges it is proposed to introduce an all-inclusive legislation with clear definitions. Internet and social media will provide immense benefits to the public and in order to maximise such benefits it is necessary to curtail the actions of cyber-bullies, gossip mongers and peeping toms and those who interfere with the interest of others without lawful justification. Hence, the law relating to hate speech needs to safeguard the peaceful existence of a multi-religious and multi-racial society like Sri Lanka.

Bibliography

Table of Cases

Amaratunga v. Sirimal and others [1993] 1 Sri L.R. 264 (Jana Ghosa case).

[57] Dave Davies, 'Meet the 7 Most Popular Search Engines in the World' (*Search Engine Journal*, 3 March 2021) <https://www.searchenginejournal.com/seo/meet-search-engines/#close> accessed 21 August 2023.

[58] Due to the mass public protests against the Government policies and economic crisis His Excellency the President of Sri Lanka by Gazette (Extraordinary) No. 2273/86 dated 01.04.2022 declared a state of Public Emergency. Further an Island wide 48 hours curfew was declared commencing from 6.00 p.m. on Friday, 01st April 2022 and imposed a temporary suspension of all social media platforms through internet service providers.

[59] Nalaka Gunawardene, *Digital Transformation in Sri Lanka: Opportunities and Challenges in Pursuit of Liberal Policies* (Friedric Naumann Foundation Sri Lanka 2017) 79.

[60] *Broom's Legal Maxims* (11th edn, Universal Law Publishing 2011) 1.

Channa Peiris v Attorney General [1994] 1 Sri L.R. 1.

Dayasena Amaratunga v. Sirimal [1993] 1 Sri L.R. 264.

Deshapriya v. Municipal Council, Nuwara Eliya [1995] 1 Sri L. R. 362.

Environmental Foundation Limited v. Urban Development Authority of Sri Lanka and others [2009] 1 Sri L.R. 123.

Fernando v. Sri Lanka Broadcasting Corporation [1996] 1 Sri L.R. 157.

Flood v. Times Newspapers Limited [2012] UKSC 11.

High Court of the Western Province, Application No. HC/BA 24/2020, 17 September 2020.

Janath S. Vidanage v. Pujith Jayasundara, Inspector General of Police SC (FR) 163/2019 decided on 12.01.2023.

Karunathilake and another v. Dayananda Dissanayake, Commissioner of Elections (Case No. 1) [1999] 1 Sri L.R. 157.

Malalgoda v. Attorney General [1982] 2 Sri L.R. 777.

Mediwake v. Dayananda Dissanayake, Commissioner of Elections [2001] 1 Sri L.R. 177.

Perera v. Munaweera, (Food and Price Control Inspector) 56 NLR 433.

Roth v. United States, 354 US 476 (1956).

South West Terminal Ltd v. Achter Land & Cattle Ltd 2023 SKKB 116, decided on 08-06-2023.

The Lord McAlpine of West Green v. Sally Bercow [2013] EWHC 1342 (QB).

Wanigasuriya v. S. I. Peiris SC(FR) 199/87, decided on 22.08.1988.

Whitney v. California 274 U.S. 357 (1927).

Primary Sources

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

Constitution of the Democratic Socialist Republic of Sri Lanka (1978).

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) (entry into force 3 Seprember 1953) 213 UNTS 211.

His Excellency the President of Sri Lanka, Public Emergency Declaration, Gazette (Extraordinary) No. 2273/86 dated 01.04.2022.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195.

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

International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007.

Ministry of Law and Justice, Government of India, 'Constitution of India' (*Legislative Department*, 8 August 2023) <https://cdnbbsr.s3waas.gov.in/s380537a945c7aaa788ccfcdf1b99b5d8f/uploads/2023/05/2023050195.pdf> accessed 21 August 2023.

Penal Code Ordinance No. 2 of 1883.

Universal Declaration on Human Rights (adopted 10 December 1948) 217 A(III) (UDHR).

Secondary Sources

— — 'Digital 2023: Sri Lanka' (*DataReportal*, 26 Jan 2023) <https://datareportal.com/reports/digital-2023-sri-lanka> accessed 21 August 2023.

——'Facebook' (*Britannica*) <https://www.britannica.com/topic/Facebook> accessed 22 August 2023.

— — The Changing World of Digital in 2023' (*DataReportal*, 26 Jan 2023) <https://datareportal.com/global-digital-overview#:~:text=There%20are%205.19%20billion%20internet,higher%20in%20many%20developing%20economies> accessed 21 August 2023.

Blakemore E, What Was the Arab Spring and How Did It Spread?' (*National Geographic*, 29 March 2019) <https://www.nationalgeographic.com/culture/article/arab-spring-cause> accessed 21 August 2023.

Broom's Legal Maxims (11th edn, Universal Law Publishing Co Pvt Ltd 2011).

Cambridge Dictionary, 'Viral' <https://dictionary.cambridge.org/dictionary/english/viral> accessed 23 August 2023.

Davies D, 'Meet the 7 Most Popular Search Engines in the World' (*Search Engine Journal*, 3 March 2021) <https://www.searchenginejournal.com/seo/meet-search-engines/#close> accessed 21 August 2023

Dwyer T, *Media Convergence* (Open University Press 2010).

Facebook, 'emojipedia' <https://emojipedia.org/facebook/> accessed 23 August 2023.

——'Help Centre' <https://www.facebook.com/help/135402139904490/> accessed 23 August 2023.

Garner BA, *Black's Law Dictionary* (10th edn, Thomson Reuters 2004).

Google, 'Hate Speech Policy' (*YouTube Policies*, 05 June 2019) <https://support.google.com/youtube/answer/2801939?hl=en#> accessed 21 August 2023.

Gunawardene N, *Digital Transformation in Sri Lanka: Opportunities and Challenges in Pursuit of Liberal Policies* (Friedric Naumann Foundation Sri Lanka 2017).

Human Rights Commission of Sri Lanka, 'Legal Analysis of the Scope of Section 3 of the ICCPR Act No. 56 of 2007 and Attendant Recommendations' <https://www.hrcsl.lk/wp-content/uploads/2020/02/LEGAL-ANALYSIS-OF-THE-SCOPE-OF-SECTION-3-OF-THE-ICCPR-ACT-NO.56-OF-2007-_-English.pdf> accessed on 03 June 2023.

Jayampathy Wickramaratne, Fundamental Rights in Sri Lanka (3rd edn, Stamford Lake 2021).

Jenkins H, *Convergent Culture Where Old and New Media Collide* (New York University Press 2006).

Meta, 'Hate speech' (*Facebook Community Standards*, 22 August 2023) <https://transparency.fb.com/en-gb/policies/community-standards/hate-speech/> accessed 22 August 2023.

Perera S, 'The Ethnic Conflict in Sri Lanka: A Historical and Sociopolitical Outline' (*World Bank*, February 2021) <https://documents1.worldbank.org/curated/en/727811468302711738/pdf/677060WP00PUBL0io0political0Outline.pdf> accessed 21 August 2023.

United Nations Human Rights Office of High Commissioner, 'Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 19' (*United Nations*, 28 November 2018) <https://www.ohchr.org/en/press-releases/2018/11/universal-declaration-human-rights-70-30-articles-30-articles-article-19#:~:text=Article%2019%20includes%20the%20right,vague%20or%20ambiguous%20laws%20prohibiting%20%E2%80%9C> accessed 21 August 2023.

We are social inc, 'Digital 2023: Sri Lanka' (DataReportal, 26 Jan 2023) <https://datareportal.com/reports/digital-2023-sri-lanka> accessed 21 August 2023

Wickramaratne J, *Fundamental Rights in Sri Lanka* (3rd edn, Stamford Lake 2021).

Extended Abstracts

The Realistic Prospects of Contractual Relations for Emerging Technologies: Metaverse and AI: Evaluation of Possible Pathways for Legal Acting

Vazgen Zakharyan*

Introduction

The innovative technologies introduced changing trends in our daily praxis. The modern development and intensive integration of novelties established new possibilities for society. Indeed, the legal scope and especially the doctrinal prism of research on matters of modern technological developments need to have solutions that plays an important role since it can be considered as a launching point for new regulative measures. Also, it can be remarked that "it is not a new thing that technological innovation in the law has attracted a lot of attention".[1] The decadence of Artificial Intelligence and Metaverse impresses and shows unprecedent ways for users and creators. The legal scope of modern creativity openings reflects the need for sustainable and resistant legal support for the effective development of economies.

Prism of Research: vision, observance, and assumptions

Indeed, AI has already developed on a certain level to be well integrated into life and this enables to have easy-accessible machinery support on various issues. The role of AI is especially highlighted not only for individual demands but includes corporative approach to new possibilities that might play impacting role in the managerial part of economic productivity. Indeed, "it is not surprising that AI is so difficult to define clearly".[2]

Indeed, the meaning of AI have multifunctional implications by providing effectiveness for different segments where data and immense information are accumulated for analysis. By this way might be important to include that "this sceptical recital is commonplace in discussions of the social impacts of AI today".[3]

Certain attention can be dedicated to the modification of the law-making initiatives, policy regulations, and especially on practice-oriented issues. In fact, can be mentioned that "Artificial intelligence (AI) refers to the effect generated by the realisation of human minds through computers".[4]

In the following prism of AI developments, as an institution can be in a stimulative rather than restrictive approach since it is necessary for smooth and productive development with a prerogative of user-oriented priority. However, need to point that "On the other hand, low-risk

* PhD Student, University of Leicester, ORCID ID: 0009-0002-6764-3089.

[1] Bart Verheij, 'Artificial Intelligence as Law' (2020) 28 Artificial Intelligence and Law 181 <https://doi.org/10.1007/s10506-020-09266-0> accessed 30 May 2023.

[2] Haroon Sheikh, Corien Prins and Erik Schrijvers, 'Artificial Intelligence: Definition and Background' in Haroon Sheikh, Corien Prins and Erik Schrijvers (eds) *Mission AI: The New System Technology* (Springer International Publishing 2023) <https://doi.org/10.1007/978-3-031-21448-6_2> accessed 30 May 2023.

[3] Ryan Calo, 'Artificial Intelligence and the Carousel of Soft Law' (2021) 2 IEEE Transactions on Technology and Society 171 <doi: 10.1109/TTS.2021.3113288> accessed 01 June 2023.

[4] Jingchen Zhao and Beatriz Gómez Fariñas, 'Artificial Intelligence and Sustainable Decisions' (2023) 24 European Business Organization Law Review 1 <https://doi.org/10.1007/s40804-022-00262-2> accessed 30 May 2023.

AI systems are subject to various transparency obligations, and the adoption of codes of conduct is encouraged."[5]

The general regulative norms in the scope of AI contractual relations are present on the following objects. In the current scope can be important to mention importance of a) AI evaluation in the regular contractual relation; b) individual based critical observation of AI in correlation with current law; c) AI relation in the focus of corporate policy and its regulative needs. In addition to the theoretical component can be important to reflect on the practical side of AI consideration in the prism of IP law and highlight several issues such as a) ethical and entity-related vision; b) the role of AI integration in the creation process; c) the impact and risk related issued for actions that automated and trusted to AI.

At the same time the role of Metaverse not similarly but impressively fast holding trend for dynamic development and representing interest for individuals and business. To observe in detail it necessary to mention that "one way to think of the Metaverse is as an Internet that is entirely immersive".[6] In fact, Metaverse reflects new form of communication and look as a platform for meaningful possibilities. New technological virtual space providing free ideas for creativity and strong economic benefits with the aim of creative ideas. The current scope of the study showing interest in the prism of law and its connection to Metaverse. Nowadays already circulated meaning of the Meta Law and its trend to be considered as a new legal dimension. The argument supported by the possible needs to have more extended frontier for open innovative creativity ideas that requires new legal norms. Establishing right and sustainable conditions introducing contemporary legal prism for right management of contractual relations within the frame of reality and virtuality concepts details undertaking.

In fact, Metaverse as a new meaning of virtual space directly connected with the IP law since immaterial reflection directly showed IP objects online. In general IP law reflecting new trends in the scope of IP related issues by including trademarks and especially copyright protected objects. As an example, "in copyright law, AI raises the question whether works created by it can still be regarded as a personal intellectual creation, which is crucial for acknowledging copyright protection for a work."[7]

The main objects for Metaverse are also a question of data protection measures, regulative needs for smooth institutional and business functioned.

Conclusion

Thus, consideration of AI and Metaverse connection in the focus of contractual relation shows a distinctive prism of modern needs for dealings and coordination of specific practical parts of legal execution. The level of modern development can be observed as progressive, and trend related through the prism of AI modifications. The current research is dedicated to observing ongoing trends, make an analysis of AI and Metaverse connectivity, its implication in the prism of law and in certain correlation with the IP Law.

[5] Giusella Finocchiaro, 'The Regulation of Artificial Intelligence' [2023] AI & SOCIETY <https://doi.org/10.1007/s00146-023-01650-z> accessed 30 May 2023.

[6] Abbas M Al-Ghaili and others, 'A Review of Metaverse's Definitions, Architecture, Applications, Challenges, Issues, Solutions, and Future Trends' (2022) 10 IEEE Access 125835, 2022, <doi: 10.1109/ACCESS.2022.3225638 > accessed 01 June 2023.

[7] Gerald Spindler, 'Copyright Law and Artificial Intelligence' (2019) 50 IIC - International Review of Intellectual Property and Competition Law 1049 <https://doi.org/10.1007/s40319-019-00879-w> accessed 30 May 2023.

References

Al-Ghaili AM and others, 'A Review of Metaverse's Definitions, Architecture, Applications, Challenges, Issues, Solutions, and Future Trends' (2022) 10 IEEE Access 125835 <https://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=9966605> accessed 01 June 2023.

Calo R, 'Artificial Intelligence and the Carousel of Soft Law' (2021) 2 IEEE Transactions on Technology and Society 171<doi: 10.1109/TTS.2021.3113288> accessed 01 June 2023.

Finocchiaro G, 'The Regulation of Artificial Intelligence' [2023] AI & SOCIETY <https://doi.org/10.1007/s00146-023-01650-z> accessed 30 May 2023.

Sheikh H, Prins C and Schrijvers E, 'Artificial Intelligence: Definition and Background' in Haroon Sheikh, Corien Prins and Erik Schrijvers (eds), Mission AI: The New System Technology (Springer International Publishing 2023) <https://doi.org/10.1007/978-3-031-21448-6_2> accessed 30 May 2023.

Spindler G, 'Copyright Law and Artificial Intelligence' (2019) 50 IIC - International Review of Intellectual Property and Competition Law 1049 <https://doi.org/10.1007/s40319-019-00879-w> accessed 30 May 2023.

Verheij B, 'Artificial Intelligence as Law' (2020) 28 Artificial Intelligence and Law 181 <https://doi.org/10.1007/s10506-020-09266-0> accessed 30 May 2023.

Zhao J and Gómez Fariñas B, 'Artificial Intelligence and Sustainable Decisions' (2023) 24 European Business Organization Law Review 1 <https://doi.org/10.1007/s40804-022-00262-2> accessed 30 May 2023.

Extent and Problems with Regards to Personal Data Protection under Turkish Civil and Criminal Law

Levent Emre Özgüç*
Hüseyin Bahadır Çolak**

Protection of personal data in Turkish law operates on three pillars: Civil, criminal, and administrative. For measures of civil law Personal Data Protection Law [PDPL] confines itself only to referring to violation of "personality right". Thus, civil law sanctions are based on general principles under Turkish Civil Code [TCC]. Criminal law, on the other hand, foresees specific rules permitting processing of personal data in criminal adjudication and crimes on breaches of personal data protection rules. This paper aims to examine and evaluate the scope and efficiency of civil and criminal sanctions for personal data breaches.

Protection Under Civil Law

Conceptualization of Personality Right

While common law protects personality based on torts for different interests such as defamation[1] or with a property oriented individual-based approach[2], Turkish law provides a general personality which is an incongruous concept with common law. It covers different personality interests which are not *numerus clausus*[3]. For personal data protection, the fulcrum of personality right approach is that the legally protected interest is personality of data owner, not data itself[4]. Accordingly, the majority in literature approaches personal data as a part of one's personality right[5].

Pre-Birth and Post-Mortem Protection

Since Turkish law recognizes legal capacity and personal rights retroactively to conception, right to demand protection under civil law exists for unborn[6]. This becomes vital in certain cases such as medical operations on fetus or genetic diseases. Thus, protection of personal data of an

* Research assistant in Criminal Law Department and Ph.D. candidate in Koç University Law School, İstanbul. lozguc@ku.edu.tr. ORCID ID: 0000-0002-4561-1601
** Research assistant in Civil Law Department and Ph.D. candidate in Koç University Law School, İstanbul. hbcolak@ku.edu.tr. ORCID ID: 0000-0001-6274-7175

[1] For UK see Johann Neethling, 'Personality Rights: A Comparative Overview' (2005) 38 The Comparative and International Law Journal of Southern Africa 210, 215-216.
[2] For the US see Rolf H Weber and Dominic Steiger, *Transatlantic Data Protection in Practice* (Springer 2017) 27.
[3] Rona Serozan, *Medeni Hukuk* (8th edn, Vedat Kitapçılık 2017) 454.
[4] Damlar Gürpınar, 'Kişisel Verilerin Korunmasından Doğan Hukuki Sorumluluk' (2017) 19 D.E.Ü. Hukuk Fakültesi Dergisi, Prof.Dr. Şeref Ertaş'a Armağan 679., 684; Işık Aslı Han, 'Veri Sahibinin Kişisel Veri Üzerindeki Hakkının Hukuki Niteliği Işığında Kişisel Verinin Ticarileşmesi' in Uğur Orhan, Mehmet Emir Göka and Ece Göztepe Çelebi (eds), *Genç Hukukçu Araştırmacılar Sempozyumu 11-12 Ekim 2019* (On İki Levha 2020), 531.
[5] ibid 455–456; Hüseyin Can Aksoy, *Kişisel Verilerin Korunması* (Çakmak Yayınevi 2010) 71–72; Hayrunisa Özdemir, *Elektronik Haberleşme Alanında Kişisel Verilerin Korunması* (Seçkin Yayıncılık 2009) 95; Işık Aslı Han, 'Veri Sahibinin Kişisel Veri Üzerindeki Hakkının Hukuki Niteliği Işığında Kişisel Verinin Ticarileşmesi' in Uğur Orhan, Mehmet Emir Göka and Ece Göztepe Çelebi (eds), *Genç Hukukçu Araştırmacılar Sempozyumu 11-12 Ekim 2019* (On İki Levha 2020) 538.
[6] Tülay Aydın Ünver, *Ceninin Hukuki Konumu* (On İki Levha 2011) 32.

unborn child is under the scope of PDPL via their own personality right without need of a special provision[7].

The status of deceased is, on the other hand, is more controversial. Personal rights end with end of personality, or namely with death[8]. Accordingly, personal data of the deceased is, in principle, excluded from the scope of PDPL[9] and data controller's obligations under PDPL ends with the death of data owner as well[10]. Thus, it is argued that heirs cannot demand protection for personal data of deceased[11]. However, since PDPL refers to general regime of personality rights, it is also suggested that the debate of protection of personality after death, under the *memory doctrine* or *post-mortem protection theory,* should be considered[12]. Despite *post-mortem protection theory* is exceptional for certain personality interests and limited to protective actions[13], it should be considered for protection of deceased's personal data.

Protective Scheme

As the *indication theory* suggests, an act breaching personality right is objectively unlawful under Turkish law. Thus, processing personal data is *per se* unlawful[14]. Against breach of personality right, TCC provides the following temporally differentiated protective actions; action for prohibition of potential infringement, action for stopping of infringement and action for declaration of the unlawfulness of infringement.

In addition to protective actions, breach of personal data protection provisions leads to general tortious liability[15] of which requires a faulty breach and material or immaterial damage. However, due to burden of proof resting on data owner in proving processor's or controller's fault and the information asymmetry, general tortious liability has limited application especially in mass processing of personal data. It would be, *de lege feranda,* a favorable legislative policy to make personal data breaches subject to tortious liability without fault, i.e. strict tortious liability. Proof of damage is also a limitation in this respect. Despite European Court of Justice's [ECJ] case-law on *genuine deterrent effect* in the quantification of immaterial damage[16] and evolution of case-law in line with ECJ[17], the benchmark for recognition of immaterial damage's existence is still relatively high and amounts of compensation are low.

Lack of Effective Class Action Procedures

[7] Murat Develioğlu, *6698 Sayılı Kişisel Verilerin Korunması Kanunu ile Karşılaştırmalı Olarak Avrupa Birliği Genel Veri Koruma Tüzüğü Uyarınca Kişisel Verilerin Korunması Hukuku* (On İki Levha 2017) 31; Furkan Güven Taştan, *Türk Sözleşme Hukukunda Kişisel Verilerin Korunması* (On İki Levha 2017) 35–36; Onur Baskın, *Türk Hukuku Bakımından Kişilik Hakkı Kapsamında Kişisel Verilerin Korunması* (Seçkin Yayıncılık 2021) 27.

[8] Kemal Oğuzman, Özer Seliçi and Saibe Oktay-Özdemir, *Kişiler Hukuku* (16th edn, Filiz Kitabevi 2016) 23–24.

[9] Mesut Serdar Çekin, *Avrupa Birliği Hukukuyla Mukayeseli Olarak 6698 Sayılı Kanun Çerçevesinde Kişisel Verilerin Korunması Hukuku* (3rd edn, On İki Levha 2020) para 85.

[10] Murat Uçak, 'Kişisel Verilerin Ölüm Sonrası Korunması' (2021) 6 İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi 97, 112.

[11] Develioğlu (n 10) 32.

[12] Uçak (n 13) 105.

[13] Rona Serozan and Baki İlkay Engin, *Miras Hukuku* (7th edn, Seçkin Yayıncılık 2021) 119; Oğuzman, Seliçi and Oktay-Özdemir (n 11) 25.

[14] Han (n 8) 432–433; Aksoy (n 6) 82.

[15] Baskın (n 10) 133 ff; Gürpınar (n 3) 690; Özdemir (n 6) 107.

[16] Paul Voigt and Alex von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017) 205–206.

[17] See 21st Civil Chamber, Case no. 2018/2474, Decision no. 2018/4840, 15.05.2018; Case no. 2018/1429, Decision no. 3814, 16.04.2018; Case no. 2018/1428, Decision no.2018/3810, 16.04.2018

Although a claim for compensation is an option, the information asymmetry makes the induvial civil litigation ineffective against data breaches. This increased the number of class actions in several jurisdictions recently[18]. Although a class action is permissible under the general provision of Code of Civil Procedure and Law on Consumer Protection, the subject group is limited and only the protective actions are permissible, not actions for compensation. This constitutes another major drawback of Turkish civil liability regime in data protection.

Protection Under Criminal Law

Processing of Personal Data During Criminal Adjudication

Protection of personal data is seen in two distinct methods in criminal law. One relates to specific rules regarding handling of data during criminal adjudication, which gives authority to the police, prosecution, or courts to collect and store personal data relevant to the case at hand. These include physical inspection, collection of body samples such as saliva, hair, blood, their analysis for DNA evidence; recording of photographs, measurements, fingerprints, voice recordings; telecommunications monitoring, video surveillance. An important point regarding handling of personal data in criminal adjudication is that the PDPL is not applicable to these measures. Specific norms found in the Criminal Procedure Code are well-defined and detailed, but several key differences may be seen from the approach taken by the EU Directive 2016/880, among which are the non-applicability of general principles of data protection law and lack of an independent supervisory body overseeing the handling of data claimed during criminal process. These issues need to be solved, as several authors argue that the power given to the police and intelligence forces is immense and restrictions on that power present gaps[19].

Crimes on Breaches of Personal Data Protection Rules

The second method of protection of personal data concerns criminalization of unlawful recording, acquisition, dissemination, transfer of personal data and non-compliance with the obligation to destroy personal data. These acts constitute individual crimes found in the Penal Code and have been part of criminal law in Turkey since 2005, much before the entry into force of the general PDPL in 2016. This paper will shortly describe the scope of these crimes and point out important discussions regarding adjudication of crimes committed by foreign data controllers and possibility of surveillance and recording of work-related data by employers. Afterwards, issues with the implementation of crimes will be evaluated. Firstly, it must be noted that the crimes do not cover all types of personal data processing, excluding unlawful storage, retention, alteration, re-organisation, classification, and prevention of use of personal data from their scope. This may be the result of a conscious choice based on the fragmentary nature of criminal law[20]. Secondly, due to the general principles of criminal responsibility in Turkish law, legal persons may not be held liable for crimes against personal data, but measures such as

[18] Weber and Steiger (n 2) 29.

[19] Turan Atlı, "Kişisel Verilerin Önleyici, Koruyucu ve İstihbari Faaliyetler Amacıyla İşlenmesi" (2019) 2 Necmettin Erbakan Üniversitesi Hukuk Fakültesi Dergisi 4, 20 <https://dergipark.org.tr/en/pub/neuhfd/issue/46494/579600> erişim 17 Şubat 2022; Neslihan Can, "Kolluk ve Adli Makamlar Tarafından Işlenen Kişisel Verilerin Korunması" (İstanbul Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı 2020) 235; Murat Volkan Dülger, "Kişisel Verilerin Korunması Kanunu ve Türk Ceza Kanunu Bağlamında Kişisel Verilerin Ceza Normlarıyla Korunması" (2016) 3 İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi 101 <https://dergipark.org.tr/en/pub/imuhfd/issue/54311/736998>.

[20] İbrahim Korkmaz, "Kişisel Verilerin Ceza Hukuku Kapsamında Korunması" (Ankara Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı 2017) 384; Mehmet Yayla, "Kişisel Verilerin Kaydedilmesi Suçu" (2019) 14 Terazi Hukuk Dergisi 588, 598 <https://app.trdizin.gov.tr/makale/TXpjMU56ZzBOQT09/kisisel-verilerin-kaydedilmesi-sucu>; Dülger (n 19) 163.

cancellation of license permits or seizure of proceeds of crime are applicable. Thirdly, crimes against personal data may only be committed with direct or indirect intent[21], therefore cases of negligent dissemination of personal data would not be considered criminal in Turkish law.

References

21st Civil Chamber, Case no. 2018/2474, Decision no. 2018/4840, 15.05.2018.

21st Civil Chamber, Case no. 2018/1429, Decision no. 3814, 16.04.2018.

21st Civil Chamber, Case no. 2018/1428, Decision no.2018/3810, 16.04.2018.

Aksoy HC, *Kişisel Verilerin Korunması* (Çakmak Yayınevi 2010).

Atlı T, 'Kişisel Verilerin Önleyici, Koruyucu ve İstihbari Faaliyetler Amacıyla İşlenmesi' (2019) 2 Necmettin Erbakan Üniversitesi Hukuk Fakültesi Dergisi <https://dergipark.org.tr/en/pub/neuhfd/issue/46494/579600> erişim 17 Şubat 2022.

Aydın Ünver T, *Ceninin Hukuki Konumu* (On İki Levha 2011).

Baskın O, *Türk Hukuku Bakımından Kişilik Hakkı Kapsamında Kişisel Verilerin Korunması* (Seçkin Yayıncılık 2021).

Can N, 'Kolluk ve Adli Makamlar Tarafından İşlenen Kişisel Verilerin Korunması' (İstanbul Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı 2020).

Çekin MS, *Avrupa Birliği Hukukuyla Mukayeseli Olarak 6698 Sayılı Kanun Çerçevesinde Kişisel Verilerin Korunması Hukuku* (3rd edn, On İki Levha 2020).

Develioğlu M, *6698 Sayılı Kişisel Verilerin Korunması Kanunu ile Karşılaştırmalı Olarak Avrupa Birliği Genel Veri Koruma Tüzüğü Uyarınca Kişisel Verilerin Korunması Hukuku* (On İki Levha 2017).

Dülger MV, 'Kişisel Verilerin Korunması Kanunu ve Türk Ceza Kanunu Bağlamında Kişisel Verilerin Ceza Normlarıyla Korunması' (2016) 3 İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi 101.

Gürpınar D, 'Kişisel Verilerin Korunmasından Doğan Hukuki Sorumluluk' (2017) 19 D.E.Ü. Hukuk Fakültesi Dergisi, Prof.Dr. Şeref Ertaş'a Armağan 679.

Han IA, 'Veri Sahibinin Kişisel Veri Üzerindeki Hakkının Hukuki Niteliği Işığında Kişisel Verinin Ticarileşmesi' in Uğur Orhan, Mehmet Emir Göka and Ece Göztepe Çelebi (eds), *Genç Hukukçu Araştırmacılar Sempozyumu 11-12 Ekim 2019* (On İki Levha 2020).

Korkmaz İ, 'Kişisel Verilerin Ceza Hukuku Kapsamında Korunması' (Ankara Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı 2017) 384.

[21] İzzet Özgenç, *Türk Ceza Hukuku Genel Hükümler* (14. edn, Seçkin Yayıncılık 2018) 248.

Neethling J, 'Personality Rights: A Comparative Overview' (2005) 38 The Comparative and International Law Journal of Southern Africa 210.

Oğuzman K, Özer Seliçi and Saibe Oktay-Özdemir, *Kişiler Hukuku* (16th edn, Filiz Kitabevi 2016).

Özdemir H, *Elektronik Haberleşme Alanında Kişisel Verilerin Korunması* (Seçkin Yayıncılık 2009).

Özgenç İ, *Türk Ceza Hukuku Genel Hükümler* (14. edn, Seçkin Yayıncılık 2018).

Serozan R, *Medeni Hukuk* (8th edn, Vedat Kitapçılık 2017) 454.

—— and Bİ Engin, *Miras Hukuku* (7th edn, Seçkin Yayıncılık 2021).

Taştan FG, *Türk Sözleşme Hukukunda Kişisel Verilerin Korunması* (On İki Levha 2017).

Uçak M, 'Kişisel Verilerin Ölüm Sonrası Korunması' (2021) 6 İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi.

Voigt Pand A von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017).

Weber RH and D Steiger, *Transatlantic Data Protection in Practice* (Springer 2017).

Yayla M, 'Kişisel Verilerin Kaydedilmesi Suçu' (2019) 14 Terazi Hukuk Dergisi 58.

Rethinking Board Liability in the Context of Sustainability: Moving Beyond the Profit-Making Goal of the Company

Pınar Başak Coşkun*

1. Introduction

Over the past decade, there has been a significant shift in the business landscape, with sustainability and Environmental, Social, and Governance (ESG) considerations gaining prominence in corporate decision-making. This has intensified the ongoing debate surrounding the "corporate purpose"[1] and the question of which interest directors should pursue while managing the company. Non-governmental actors such as the United Nations (UN) and the Organisation for Economic Co-operation and Development (OECD) have underscored the need for companies to integrate sustainability considerations into their decision-making processes. Following the lead of these actors, not only have corporations started to undergo a transformation to incorporate ESG considerations into their decision-making processes, but also legislators have taken action by introducing ever more laws on ESG[2], notably on non-financial reporting duties and supply-chain due diligence.

One critical area that was affected by these developments is undoubtedly the corporate fiduciary law and the liability of members of the board of directors.[3] While some still argue that directors should act exclusively in the interest of shareholders, increasing importance of ESG considerations in corporate decision-making has brought a challenge for directors to consider the interests of a broader range of stakeholders, such as employees, customers, and the environment that may not align with the immediate financial interests of the shareholders.[4] As a result, sustainability is shifting the traditional focus on the short-term profit-making goal of companies. This shift has necessitated a re-evaluation of the legal standards, duties, and liabilities imposed on corporate boards.

2. Duty of Care of the Board and BJR as a Safe Harbour

The decision-making process and the liability of the board of directors are shaped by two fundamental duties owed by the directors to the company: duty of care and duty of loyalty.[5] The duty of care is a core element of fiduciary duties and requires directors to make informed decisions with the care of an ordinarily prudent person in a like position would exercise under similar circumstances, while the duty of loyalty requires the boards to take only those actions that are within the best interests of the corporation and not in their own. These duties set the boundaries for the wide margin of discretion of the directors while making managerial decisions.

* LL.M. (Leiden); Bilkent University Commercial Law Department, Research Assistant & Ph.D. Candidate. E-mail: basak.coskun@bilkent.edu.tr, ORCID: 0000-0002-3767-3722.

[1] Corporate purpose is a central corporate governance theme underlining that a company should pursue not only profits for shareholders but also the interests of other stakeholders, including the environment and future generations (Guido Ferrarini, 'Corporate Purpose and Sustainability' (2020) ECGI Working Paper 559/2020, <https://www.ecgi.global/sites/default/files/working_papers/documents/ferrarinifinal.pdf> accessed 20 May 2023).

[2] Thilo Kuntz, 'ESG and the Weakening Business Judgment Rule' in Thilo Kuntz (ed), *Research Handbook on Environmental, Social, and Corporate Governance* (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4395003> accessed 24 May 2023.

[3] ibid.

[4] See Bruno Ferreira and Manuel Sequeira, 'Business Judgment Rule as a Safeguard for ESG Minded Directors and a Warning for Others' in Paulo Câmara and Filipe Morais (eds), *The Palgrave Handbook of ESG and Corporate Governance* (Palgrave Macmillan 2022) 267.

[5] Ferreira and Sequira (n 4) 270. These duties are generally considered under the fiduciary duties.

Breach of these duties gives rise to director liability vis-à-vis the company, shareholders, and creditors.

On the other hand, BJR protects the directors from being liable because of their discretionary management decisions as long as they are preceded by sufficient information, rational and free from any fraud and conflict of interests[6] believing in good faith that the judgment is in the best interest of the company. Therefore, it creates a protection for the board to resort to when an action of the board is under judicial scrutiny and brings a limitation to the judicial review of managerial decisions. The BJR has been originated in the case law of common law jurisdictions but has become a key concept in board liability in many jurisdictions including Germany (Aktiengesetz Art. 93).[7]

Due to the numerous initiatives of non-governmental organizations in defence of ESG, duty of care has been changing in a way that directors need to take ESG considerations into account when making investment decisions.[8] The challenge is to fit ESG within the existing fiduciary duties and achieve the sustainability goals without undermining the financial interests of the company and the demands of the business.[9] The directors will not be able to resort to the BJR protection if they do not take ESG into account, especially in jurisdictions where the stakeholder interests are clearly chanted. As a result, sustainability concerns interfere with the fiduciary relationship between the corporation and the board of directors by introducing new standards of conduct and changing the extent of the duties of the board, giving rise to new claims against directors.[10]

3. Different Views on the Impact of ESG Considerations on Board Liability

There are two prominent different opinions on the impact of sustainability concerns on the protection provided by the BJR to the board of directors. While it is argued by some that ESG will bring even further protection by creating more safe harbours,[11] others assert that it weakens the protection by creating a more extensive body of positive law that should be followed by the board and narrowing down the margin of discretion.[12]

According to the former, as the board now serves more masters, it has the opportunity to resort to any interest for help to justify its decisions.[13] This view takes the long-term consequences into account and asserts that profitability is not disregarded by ESG considerations but supplemented instead by increasing the long-term profitability and value of the company. While we agree that incorporating the interests of stakeholders in the decision-making process will eventually create value for the company, including the shareholders, it is important not to overlook the interests of short-term traders and profit-oriented shareholders.

Those who share the second view express the increasing number of legal norms resulting in an expansion in the board's compliance and oversight duties as it encompasses overseeing the ESG

[6] Ferreira and Sequira (n 4) 284; Kuntz (n 2).
[7] While creating a rebuttable presumption in favour of the board of directors under US law, the BJR provides for a safe harbour that the directors can resort to under civil law jurisdictions.
[8] Ferreira and Sequira (n 4) 279.
[9] Richard Horvath and Stephen Leitzell, 'Environmental, Social & Governance and the Duty of Oversight: A Trojan Horse Attack on the Business Judgment Rule' (*The Legal 500*) <https://www.legal500.com/guides/hot-topic/esg-and-the-duty-of-oversight-a-trojan-horse-attack-on-the-business-judgment-rule/> accessed 24 May 2023.
[10] Ferreira and Sequira (n 4) 269; Kuntz (n 2).
[11] For this view see Janet E Kerr, 'Sustainability Meets Profitability: The Convenient Truth Of How The Business Judgment Rule Protects A Board's Decision To Engage In Social Entrepreneurship', (2007) 29 Cardozo L. Rev. 623.
[12] See Kuntz (n 2), Ferreira and Sequira (n 4), Horvath and Leitzell (n 9).
[13] Kuntz (n 2).

risks. The duty of loyalty is violated when a rule under positive law is breached by the board, as the BJR does not procure any protection when the law is deliberately broken. As a result, board members have higher risks of liability as corporate behaviour is subject to higher juridification.[14] In this respect, supply chain laws and increased regulations on reporting duties constitute prominent indicators in this respect, especially when they provide for direct corporate liability for shortcomings.[15] The recent developments in the EU law[16], supply chain legislations in Germany and France and UK Corporate Governance Code among others should be reviewed in this context. One recent example to the important case law would be the Shell judgment[17] of The Hague District Court, where the court held the board of the Shell liable for breaching the fiduciary obligations by contributing the climate change.

In the presentation, these two views will be addressed critically by analysing the cases and legal texts on which they are based.

4. Conclusion

In conclusion, the evolving landscape of sustainability and ESG concerns has necessitated a rethinking of board liability in terms of expanding duty of care and the business judgment rule. Legal texts of non-governmental actors, the EU, national corporate governance codes, and supply chain regulations have all played a role in shaping this re-evaluation. The changing expectations and legal requirements indicate a broader understanding of the responsibilities of boards and directors, emphasizing the need to consider the long-term impact on society and the environment rather than solely focusing on profit-making goals.

The presentation will begin by providing a general overview of board liability in relation to the duty of care and business judgment rule. It will then explore how ESG concerns impact the traditional understanding of these concepts and discuss the ensuing challenges. It will examine how boards are grappling with their duty to balance the pursuit of profit with the need to address sustainability issues and the potential legal implications of their decisions. By doing so, case law showing how courts are interpreting the board's liability in terms of ESG considerations will be utilised.

References

[14] ibid.

[15] Christoph H Seibt and others 'ESG and the business judgment rule – a narrowed passage to the safe harbour?' (*Sustainability Freshfields*, 11 January 2023) <https://sustainability.freshfields.com/post/102i4xq/esg-and-the-business-judgement-rule-a-narrowed-passage-to-the-safe-harbour#:~:text=The%20%22safe%20harbour%22%20concept%20of%20the%20business%20judgement%20rule&text=It%20serves%20to%20protect%20commercial,decision%2Dmaking%20meets%20certain%20standards.> accessed 24 May 2023.

[16] Among others the legislative initiatives of the EU concerning this issue are as follows: Directive 2014/95/EU of the European Parliament and of the Council, of 22 October 2014, amending Directive 2013/34/EU, requiring large companies to report on their social and environmental impacts; Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement; Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (Disclosure Regulation); Regulation (EU) 2019/2089 amending Regulation (EU) 2016/1011 (BMR) as regards EU climate transition benchmarks, EU Paris-aligned benchmarks and sustainability-related disclosures for benchmarks (Low Carbon Benchmark Regulation); Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation); Directive 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

[17] *Milieudefensie et al. v. Royal Dutch Shell PLC* C/09/571932/HA ZA 19-379 (2021).

Cases

Milieudefensie et al. v. Royal Dutch Shell PLC C/09/571932/HA ZA 19-379 (2021).

Primary Sources

Directive 2014/95/EU of the European Parliament and of the Council, of 22 October 2014, amending Directive 2013/34/EU, requiring large companies to report on their social and environmental impacts.

Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (Disclosure Regulation).

Regulation (EU) 2019/2089 amending Regulation (EU) 2016/1011 (BMR) as regards EU climate transition benchmarks, EU Paris-aligned benchmarks and sustainability-related disclosures for benchmarks (Low Carbon Benchmark Regulation).

Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation).

Directive 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

Secondary Sources

Hacımahmutoğlu S, 'The Business Judgment Rule: İşadamı Kararı mı Yoksa Ticari Muhakeme Kuralı mı?' (2014) 30 BATİDER 99.

Hill JG, 'Directors' Duties and Legal Safe Harbours: A Comparative Analysis' (2018) ECGI Working Paper 351/2017 <https://www.ecgi.global/sites/default/files/working_papers/documents/finalhillconaglen.pdf> accessed 20 May 2023.

Jung C, 'Sustainable Corporate Governance in the United Kingdom: Environmental Sustainability in Directors' Decision Making' (2022) Frankfurt University of Applied Sciences Working Papers 25 <https://www.econstor.eu/bitstream/10419/263241/1/181318044X.pdf> accessed 24 May 2023.

Ferrarini G, 'Corporate Purpose and Sustainability' (2020) ECGI Working Paper 559/2020 <https://www.ecgi.global/sites/default/files/working_papers/documents/ferrarinifinal.pdf> accessed 20 May 2023.

Ferreira B and Sequeira M, 'Business Judgment Rule as a Safeguard for ESG Minded Directors and a Warning for Others' in Paulo Câmara and Filipe Morais (eds) *The Palgrave Handbook of ESG and Corporate Governance* (Palgrave Macmillan 2022).

Horvath R and Leitzell S, 'Environmental, Social & Governance and the Duty of Oversight: A Trojan Horse Attack on the Business Judgment Rule' (*The Legal 500*) <https://www.legal500.com/guides/hot-topic/esg-and-the-duty-of-oversight-a-trojan-horse-attack-on-the-business-judgment-rule/> accessed 24 May 2023.

Kerr JE, 'Sustainability Meets Profitability: the Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship' (2007) 29 Cardozo L. Rev. 623.

Kuntz T, 'ESG and the Weakening Business Judgment Rule' in Thilo Kuntz (ed) *Research Handbook on Environmental, Social, and Corporate Governance* (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4395003> accessed 10 May 2023.

Seibt CH and others 'ESG and the business judgment rule – a narrowed passage to the safe harbour?' (*Sustainability Freshfields*, 11 January 2023) <https://sustainability.freshfields.com/post/102i4xq/esg-and-the-business-judgement-rule-a-narrowed-passage-to-the-safe-harbour#:~:text=The%20%22safe%20harbour%22%20concept%20of%20the%20business%20judgement%20rule&text=It%20serves%20to%20protect%20commercial,decision%2Dmaking%20meets%20certain%20standards.> accessed 24 May 2023.

The ECtHR's Approach on Human Dignity in Its Proceedings by Ensuring the Procedural Fairness

Gunay Ismayilova*

The concept of human dignity encompasses different philosophical perspectives and is applied in different legal contexts. It is based on the belief that human beings have inherent dignity and should be treated with respect and equal consideration.[1] In the legal realm, human dignity is associated with physical and psychological integrity, empowerment, dignity and self-respect.[2]

Although the European Convention on Human Rights (ECHR) does not explicitly mention human dignity, it places great importance on human dignity. On the European Court of Human Rights (ECtHR)'s account, human dignity is a fundamental moral status that is equally high for all people, regardless of their behaviour or circumstances.[3] Therefore, people should be treated with respect, not ignored or ignored in a fundamental sense.

It acknowledges that humiliating treatment, including indifference or disregard, can deepen the suffering and sense of vulnerability of already relatively powerless persons. The question of whether the dignity of the applicant has been respected is evaluated in relation to her/his interaction with the state. For example, in *Kurt v. Turkey*,[4] in light of the fact that the applicant had witnessed her son's detention, instead of informing her of her son's whereabouts, the State's disregard for her complaints caused her feelings of anxiety and fear, as well as feelings of being treated as an object and not as a human being. In this sense, actions that cause emotional stress and humiliation can undoubtedly infringe on the dignity of a person and undermine her/his self-esteem.

The ECtHR's interpretation of human dignity goes beyond Article 3 of the Convention, which protects against inhuman or degrading treatment. The Court accepts that respect for human dignity is an integral part of the essence of the Convention, which lies at the heart of all the rights it protects.[5]

However, along with the substantive human rights, dignity is also well related to the process of exercising those rights. Although not explicitly stated, this approach of the ECtHR on human dignity is applied in its proceedings and in respect to the parties before it. In its proceedings, the ECtHR recognizes an inherent imbalance of power between the applicant and the state. The applicant, as the main subject seeking protection of violated rights, often encounters difficulties in providing evidence in support of her/his claims. Access to critical documents and information is often controlled by the state, which puts the applicant at a disadvantage. In light of this imbalance between the applicant and the state in terms of evidentiary issues, the ECtHR seeks

* PhD Student, University of Birmingham.

[1] Thomas Hill, *Dignity and Practical Reason in Kant's Moral Theory* (Cornell University Press 1992) 47-54; Antonio Autiero, 'Human Dignity in an Ethical Sense: Basic Considerations' (2020)6 (1) IJRTS 9-21; Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge University Press, 1989).

[2] Elaine Webster, 'Interpretation of the Prohibition of Torture: Making Sense of 'Dignity' Talk"(2016) HRR 17, 371–390 <doi.org/10.1007/s12142-016-0405-7> accessed 7 March 2023; Natasa Mavronicola, 'Torture and Othering' in *Security and Human Rights* (2nd edn, Hart Publishing 2019); Jeremy Waldron, 'Inhuman and Degrading Treatment: The Words Themselves' (2010) 23 (2) CJLJ269-286.

[3] *Bouyid v Belgium* App no 23380/09 (ECtHR, 28 September 2015) paras 81-111.

[4] *Kurt v. Turkey* App no 24276/94 (ECtHR, 25 May 1998) paras 130-134.

[5] The ECtHR's approach to human dignity has also extended, for example, to the right to a fair trial in *Bock v. Germany* App no 11118/84 (ECtHR, 29 March 1989) paras 48; to the right to private life *in Christine Goodwin v. the United Kingdom* App no 28957/95 (ECtHR, 11 July 2002) paras 90-91, etc.

to address this discrepancy and ensure that the applicant feels valued and worthy of participating in the proceedings, ensuring procedural fairness between them.

In this regard, the principle of "equality of arms" is crucial to achieving procedural fairness in proceedings before the ECtHR. It requires that each party to a legal dispute have a reasonable opportunity to state its position without placing it at a significant disadvantage compared to its opponent. This includes the right to obtain and present evidence, as well as to examine the evidence presented by the other party. The ECtHR seeks to equalise the parties by providing equal opportunities for the presentation and examination of evidence. This approach ensures fairness and prevents unfair advantage of one side over the other.[6]

In particular, in order to achieve procedural fairness, the ECtHR imposes additional obligations on the state and grants the applicant certain privileges. The Court does not establish any criteria for the admissibility of evidence, nor does it establish strict criteria for assessing evidence, which allows flexibility in assessing the applicant's allegations. The burden of proof is often shifted from the applicant to the state, and the ECtHR allows a wide range of evidence, both direct and circumstantial, to properly assess the applicant's allegations. This helps level the playing field for the applicant, who may otherwise be at a disadvantage to the state.

By equalising the evidentiary position of the parties, the ECtHR demonstrates its commitment to moral values and recognizes the vulnerable position of the applicant. This ensures that the applicant feels that his/her dignity is respected and valued and that he/she is worthy to participate in proceedings where his/her voice can be heard and his/her rights can be effectively restored. This approach is also extremely important as it also restores the applicant's faith in justice and sends a powerful message that she/he remains equal in society and is not powerless against an authoritarian state.

References

Autiero A, 'Human Dignity in an Ethical Sense: Basic Considerations' (2020)6 (1) IJRTS 9-21.

Bouyid v Belgium App no 23380/09 (ECtHR, 28 September 2015).

Hill T, *Dignity and Practical Reason in Kant's Moral Theory* (Cornell University Press 1992) 47-54.

Mavronicola N, 'Torture and Othering' in *Security and Human Rights* (2nd edn, Hart Publishing 2019).

Negri S, 'The Principle of Equality of Arms and the Evolving Law of International Criminal Procedure' (2005) 5 Int'l Crim L Rev 513.

Taylor C, *Sources of the Self: The Making of the Modern Identity* (Cambridge University Press, 1989).

Waldron J, 'Inhuman and Degrading Treatment: The Words Themselves' (2010) 23 (2) CJLJ 269-286.

Webster E, 'Interpretation of the Prohibition of Torture: Making Sense of 'Dignity' Talk"(2016) HRR 17, 371–390 <doi.org/10.1007/s12142-016-0405-7> accessed 7 March 2023.

[6] Stefania Negri, 'The Principle of Equality of Arms and the Evolving Law of International Criminal Procedure' (2005) 5 Int'l Crim L Rev 513.

Achieving Justice in a Changing World: Equity and its Potential in International Law

Rebecca Bruekers*

Equity can be used as a tool that aims to 'reduce the gap between law and justice in a specific case'.[1] This gap can arise particularly when the law in place is not suited to a particular situation because at the time the law was drafted the situation in question was not envisaged. In addition, the consent-based system of international law can pose a challenge to law-making. Given the plurality of states, a more abstract rule will arguably lead to more states consenting to it[2] because when a rule is more general and perhaps even a bit ambiguous, states may feel like these rules 'leave them convenient loopholes to avoid [their] application'.[3] The downside of this is that this general or ambiguous rule might be more contentious when applied to concrete situations, the upside is that the rule is more suitable to adapt to changing realities and to fit different situations. The question then, is what tool to use to fit these general or ambiguous rules to specific situations. This is where equity comes in.

In the field of maritime delimitation, technological advancements that made it possible to explore the seabed and subsoil of the sea spurred the rapid development of the continental shelf regime. This regime awarded sovereignty and thereby exclusive rights of exploitation of the continental shelf to coastal states. This was the subject of the *North Sea Continental Shelf* cases, the first instance in which the International Court of Justice (ICJ) invoked equity to decide a case. One of the parties to the dispute, Germany, had not ratified the Convention on the Continental Shelf of 1958, the legal regime in place at the time, so it could not be applied to that case. The Court therefore had to come up with a different solution: a rule 'that calls for the application of equitable principles'.[4] This invocation of equity became commonplace in maritime delimitation cases and eventually it was codified in the United Nations Convention on the Law of the Sea. This is an excellent example of how equity is used to allow a flexible application of rules by taking into account specific circumstances of a particular case.

The same flexibility was required in different fields of law, such as the law of reparations. In the compensation phase of the *Diallo* case, the Court based the amount of reparations due on the basis of 'equitable considerations'.[5] A flexible approach was taken to the standard and burden of proof in this case as to allow the Court to come to a just outcome. It knew that violations of international law had taken place, but it also recognised the difficulties in providing concrete evidence for these violations and the flexibility therefore required to achieve justice.

Where equity is now a widely accepted concept in the law of the sea, its exact status in the law of reparations remains unclear as the case law on this topic is much more scarce. The expansion of equity from maritime delimitation to reparations raises an important question: how far can equity go in creating flexibility in international law?

Where in the previous examples equity was used as a judiciary tool, Ciarán Burke has proposed to take equity even further. He presented an 'equitable framework' to regulate humanitarian intervention. The use of force by states is regulated in such a way that authorisation by the United Nations Security Council is required – except for cases of self-defence – before a state may have recourse to force.[6] However, due to the veto power that the five permanent members of the Security Council (US, UK, France, Russia and

* PhD student, University of Nottingham, llxrb22@nottingham.ac.uk.

[1] Ruth Lapidoth, 'Equity in International Law' (1987) 81 Proceedings of the Annual Meeting (American Society of International Law) 138, 138.

[2] ibid.

[3] ibid 139.

[4] *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3 [88].

[5] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Compensation) [2012] ICJ Rep 324 [24], [36].

[6] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 2(4), 39-51.

China, known as the P5) have and their ideological and political differences, several proposals for the use of force to intervene in cases of grave human rights violations have been vetoed.[7] For this reason, Burke proposed an 'equitable framework' on the basis of which a state may resort to force, even in the absence of Security Council authorisation. This framework is based on several equitable maxims such as estoppel and the clean hands doctrine, acting as criteria to be met detached from and in the place of Security Council authorisation.

This is a good – yet controversial – example of how equity can work to mitigate difficulties arising from a changing world. When the UN was created as an international organisation in 1945, the political landscape was very different than it is now and the risk of abuse of the veto power for the pursuance of the P5's own interests was perhaps not appreciated to the fullest extent. However, the failure to prevent grave human rights violations show the inadequacy of the regime in place and, in Burke's opinion, equity could mitigate this.

The attempt to introduce equity into a regime as rigid as that on the use of force shows a significant change from the way in which equity has been invoked by the ICJ. Burke's theory – although at this point in time not accepted by the international community – signifies a shift from equity as a form of judicial discretion to a tool employed by states themselves to mitigate the rigidity and ineffectiveness of the law in place. This raises some difficult questions: how far can equity go in contradicting the law in the interest of justice? With the rapid political changes that take place in the world, the use of equity can offer some much-needed flexibility, but the risks of widening (judicial) discretion should not be underestimated.

References

North Sea Continental Shelf cases (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands) [1969] ICJ Rep 3 [88].

Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Compensation) [2012] ICJ Rep 324 [24], [36].

Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

Ruth Lapidoth, 'Equity in International Law' (1987) 81 Proceedings of the Annual Meeting (American Society of International Law) 138.

Jan Wouters and Tom Ruys, Security Council Reform: A New Veto for a New Century? (Royal Institute for International Relations 2005).

[7] Jan Wouters and Tom Ruys, *Security Council Reform: A New Veto for a New Century?* (Royal Institute for International Relations 2005) 16-18.

From Communism to EU-Membership: Legal Transitions and Democratic Backsliding in Poland

Ewa K Garbarz*

Introduction

The thesis will explore the themes of recent democratic backsliding and deterioration of the rule of law in Poland. In a resolution adopted in October 2021, the European Parliament declared the Polish Constitutional Tribunal 'a tool for legalising the illegal activities of the authorities.'[1] It was a result of the gradual undermining and destruction of judicial independence which commenced shortly after the success of the Law and Justice party (PiS) in the presidential and parliamentary elections in 2015. The reach of de-democratisation and its consequences is much wider than judiciary reforms, and includes deterioration of the Polish-EU relations, anti-immigration policies and attitudes and reduced protection of minorities. In an attempt to offer an explanation for these developments, the project looks at the transitions Poland has undergone since decommunization in 1989; focusing on transitional justice mechanisms, as well as the reforms undertaken in order to meet the EU Accession criteria in 2004. According to the European Council, the legal, economic and administrative reforms the Candidate States undertook to satisfy the Accession Criteria, were of such importance that 'peace and security in Europe depend[ed] on the success of those efforts.'[2] This sense of urgency was widely shared by the commentators at the time, and directly linked with inevitable success of the operation. Sadurski believed that Poland accessing the EU 'would render democratisation irreversible.'[3] The thesis will reassess those assumptions with the benefit of hindsight, in particular by analysing the contents, objectives, implementation and possible consequences of the Accession Criteria themselves, all in context of transitional justice.

Poland-EU early relations

There seemed to be a general understanding that the rejection of the Communist regime by Poland was equal to the adoption of the Western system with all its democratic and liberal values, its structures and institutions.[4] The EU Accession was seen by many as the next natural step towards a complete systemic transformation, but that is not to say that everyone was in favour of this process. The elites were of the opinion that expanding the community would prove a more symbiotic relationship and serve the EU interests such as the common economy and security.[5] It is doubtful whether there was any viable alternative course of action for Poland and other Eastern Enlargement states after the fall of the communist regime. This calls into question the freedom of choice of those countries, and therefore their motivation to join the EU.

* PhD Candidate, University of Leicester, ekg@leicester.ac.uk.

[1] European Parliament resolution of 21 October 2021 on the rule of law crisis in Poland and the primacy of EU law (2021/2935(RSP)) (Texts adopted - The Rule of law crisis in Poland and the primacy of EU law - Thursday, 21 October 2021 (europa.eu) (accessed 12/01/2023).

[2] Accession Criteria, section 7A(ii), European Council in Copenhagen 1993.

[3] Sadurski Wojciech, 'EU Enlargement and Democracy in New Member States' in Wojciech Sadurski, Adam Czarnota, Martin Krygier (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer Dordrecht 2006) 27.

[4] Kolarska-Bobińska Lena, 'The EU Accession and Strengthening of Institutions in East Central Europe' (2003) 17 East European Politics and Societies 113.

[5] Trzeciak Sergiusz, 'Polish-EU relations 1990-2003' in *Poland's EU Accession* (Routledge 2011) 40.

The extent to which Poland had the power to decide its accession experience has also been disputed.[6] Trzeciak underlines the presence of asymmetry between the negotiating sides; regarding the decision to the EU as well as the nature and course of the enlargement.[7] Perhaps, the top-down approach of the European Commission and the passivity of the candidate states did not foster the right environment for a consolidated and lasting democracy. Czarnota opposes the common interests theory entirely and suggests that the two main reasons to join the EU shared by the Eastern European Enlargement countries were financial gains and prestige which, in his opinion, have not been attained.[8]This implies a certain disconnect between the candidate states and the EU Community as to their respective expectations, perhaps a degree of disillusion or disappointment on the part of the candidate states. Reasons for this may lie in the way the accession processes have been conducted or more widely the strategy that has been employed to see the Eastern Enlargement through. Another point of grievance, developed by the candidate states and potentially impacting the implementation or observing of the Copenhagen Criteria, was a sense of inequality between them and the existing member states from the very beginning. The existing member states did not have to comply with any fixed criteria or give themselves to extensive monitoring processes. Whether those processes were actually thorough, accurate or needed is irrelevant to the sentiment of imbalance shared by the candidate states, as notes by Sadurski.[9] Without analysing the content of the Copenhagen Criteria, the sheer employment of such a framework have potentially created double standards and could have made the candidate states to feel undeservingly punished.[10]

Copenhagen Criteria – analysis

Perhaps Polish judicial and administrative systems were simply not ready to carry out extensive reforms as required by the Commission. Perhaps, as Matczak argues, the unreformed judiciary in Poland is haunted by the ghost of communism until today, which is also a reason why it cannot defend itself against the populist coups.[11] And whereas this argument is not entirely disputed, 121 new projects of laws were submitted in the years 1997-2001,[12] and further 151 in years 2001-2005.13 These were only the projects adapting the national law to the EU standards, internal projects are not included. It is therefore disputable if requiring a high number of elaborate legal reforms was at all reasonable. It is also worth mentioning that none of these projects directly concerned the justice system, or the judiciary. The effects of carelessly or not in full carried out pre-accession reforms are illustrated by the ever-worsening relationship of Polish national law with the EU law standards; especially the observing of the primacy rule. According to the report requested by the European Parliament's Committee on Legal Affairs, the approach of the Polish

[6]Olgiatti Vittorio, 'The Eastern EU Enlargement and the Janus-headed Nature of the Constitutional Treaty' in Wojciech Sadurski, Adam Czarnota, Martin Krygier (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer Dordrecht 2006) 53.

[7]Trzeciak Sergiusz, 'Two levels of analysis in international negotiations. Domestic versus foreign policy' in *Poland's EU Accession* (Routledge 2011) 24.

[8]Czarnota Adam, 'Barbarians ante portas or the Post-Communist Rule of Law in Post-Democratic European Union' in Wojciech Sadurski, Adam Czarnota, Martin Krygier (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer Dordrecht 2006).

[9]Sadurski (n 3) 30.

[10]ibid 31.

[11] Matczak Marcin, 'The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense' (2020) 12 Hague J Rule Law.

[12] Lists of acts adapting Polish law to EU law - before May 1, 2004 https://orka.sejm.gov.pl/proc3.nsf/wykazy/ust060e.htm (accessed 20/06/2023).

[13] ibid.

Constitutional Tribunal towards the principle of the primacy of the EU law in relation to national law shows a deterioration since Polish accession to the EU in 2004.[14]

In 2004 Polish democracy was in a better condition and human rights were respected to a higher standard compared to today, almost 20 years later.[15] This could mean that the initial reforms and transitions Poland undertook were successful. But the heralded success of democracy in Poland was short-lived and too fragile to survive challenges. Perhaps the problem then is not wrong or incomplete interpretation of the criteria but the fact that the criteria themselves are not adequately guarding against democratic backsliding; they did not probe robust or long-lasting institutional, constitutional and governmental changes. Looking at the content of the Criteria, reference to democracy, the rule of law and human rights can be found in only one provision, 7(iii), requiring the associate countries in general terms to achieve 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities' prior to joining the European Community. The remaining sections of judicial and home affairs mentioned solely matters of the law of competition, environment, labour and consumers. The majority of all provisions considered infrastructure, trade and customs as well as transition to a single market economy. The Accession process has been criticised for being concerned more with quantity of reforms and laws that the candidate state is introducing, rather than their quality.[16] The EU has indeed recently been criticised for allowing to progress in accession negotiations current candidate states without complete and total democratic stability, adequate institutions that uphold and protect human rights, fundamental freedoms or the rule of law, but which had fulfilled the requirements in other areas.[17]

Also crucial for the analysis of the Accession Criteria, their fitness and adequacy, is the element of assistance offered by the EU Commission to Poland in all stages of the procedure. Sources such as the Europe Agreement 1994, the framework of the pre-accession strategy 1998, Agenda 2000, the Comprehensive Monitoring Report 2003, as well as Accession Partnership Agreements, will inform the analysis and definition of the relationship existing at the time between Poland and the EU representatives. It will be analysed whether it was a model of 'co-operation', whether it was well-suited, and if the level of support that EU had offered to Poland was sufficient, considering its needs especially as a young democracy and a transitional state. It has indeed been described as a 'regime' rather than a relationship based on guidance and development.[18]

References

[14]Primacy of EU law and jurisprudence of Polish Constitutional Tribunal, study Requested by the JURI committee (2022) https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732475/IPOL_STU(2022)732475_EN.pdf (accessed 20/06/2023).

[15]ECtHR decisions' implementation rates Poland — European Implementation Network (einnetwork.org) (accessed 20/06/2023).

[16]Dudley Danijela, 'European Union membership conditionality: the Copenhagen criteria and the quality of democracy' (2020) 20 Journal of southeast European and Black Sea Studies 525.

[17]ibid.

[18]Sajo Andras, 'Becoming "Europeans": The Impact of EU "Constitutionalism" on Post-Communist Pre-Modernity' in Wojciech Sadurski, Adam Czarnota, Martin Krygier (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer Dordrecht 2006).

European Parliament resolution of 21 October 2021 on the rule of law crisis in Poland and the primacy of EU law (2021/2935(RSP)) (Texts adopted - The Rule of law crisis in Poland and the primacy of EU law - Thursday, 21 October 2021 (europa.eu) (accessed 12/01/2023).

Accession Criteria, section 7A(ii), European Council in Copenhagen 1993.

Sadurski W, 'EU Enlargement and Democracy in New Member States' in Wojciech Sadurski, Adam Czarnota, Martin Krygier (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer Dordrecht 2006).

Kolarska-Bobińska L, 'The EU Accession and Strengthening of Institutions in East Central Europe' (2003) 17 East European Politics and Societies 113.

Trzeciak S, 'Polish-EU relations 1990-2003' in *Poland's EU Accession* (Routledge 2011).

Trzeciak S, 'Two levels of analysis in international negotiations. Domestic versus foreign policy' in *Poland's EU Accession* (Routledge 2011).

Olgiatti V, 'The Eastern EU Enlargement and the Janus-headed Nature of the Constitutional Treaty' in Wojciech Sadurski, Adam Czarnota, Martin Krygier (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer Dordrecht 2006) 53.

Czarnota A, 'Barbarians ante portas or the Post-Communist Rule of Law in Post-Democratic European Union' in Wojciech Sadurski, Adam Czarnota, Martin Krygier (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer Dordrecht 2006).

Matczak M, 'The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense' (2020) 12 Hague J Rule Law.

Lists of acts adapting Polish law to EU law - before May 1, 2004 https://orka.sejm.gov.pl/proc3.nsf/wykazy/ust060e.htm (accessed 20/06/2023).

Primacy of EU law and jurisprudence of Polish Constitutional Tribunal, study Requested by the JURI committee (2022) https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732475/IPOL_STU(2022)732475_EN.pdf (accessed 20/06/2023).

ECtHR decisions' implementation rates Poland — European Implementation Network (einnetwork.org) (accessed 20/06/2023).

Dudley D, 'European Union membership conditionality: the Copenhagen criteria and the quality of democracy' (2020) 20 Journal of southeast European and Black Sea Studies 525.

Sajo A, 'Becoming "Europeans": The Impact of EU "Constitutionalism" on Post-Communist Pre-Modernity' in Wojciech Sadurski, Adam Czarnota, Martin Krygier (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer Dordrecht 2006).