

## **Protecting the rights of Purchasers in Condominium Properties in Sri Lanka: A Comparative Analysis with United States of America**

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### **Abstract**

This research is to identify rights and issues of condominium property purchasers in Sri Lanka and to suggest recommendations to make its condominium property sector more friendly towards the Purchasers. Condominium property can be defined as a building subdivided into separate units which are built on a single land. Therefore, in condominium property, there is an Apartment building which each Apartment is owned separately by the people living in it, but also containing shared areas such as elevators, swimming pools or the community garden, allocated for common purposes. Concept of condominium living was introduced to the Sri Lanka in 1950s and still novel to the society. During the last 2 decades, Condominium living attracted most of Sri Lankan urban population. However, in comparison to protection provided for condominium property developers and other related stakeholders, Sri Lankan condominium law become detrimental to protection of the interests of purchasers in pre-sale condominiums. In Contrast, in the United States of America, condominium properties largely utilize as a mean to solve the housing problems and introduce numerous legal safeguards to protect the rights and interests of condominium property purchasers. Hence, this research will comparatively analyze the legal framework pertaining to condominium properties in Sri Lanka with USA, in order to propose reforms for Sri Lanka to make its

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### **Article History**

Received: 10th February 2022

Accepted: 08th June 2022

Received in revised form: 12th May 2022

Published Online: 30th June 2022

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**DOI:** 10.31357/sljre.v19i1.6023.g4456

condominium property sector more friendly towards the Purchasers. The main research objective of this research is to identify rights and issues of purchasers of condominium properties in Sri Lanka and to see whether we can get benefit from the developments of the USA. Research methodology of this legal research is mainly a qualitative approach and therefore doctrinal research method was employed. In order to provide more insightful recommendations, findings from the ideas of condominium property developers, purchasers, Officials of the Condominium Management Authority, Officials of Condominium Management Corporations, legal professionals and professionals working in the industry have been taken into account. Research identified that Sri Lanka has failed to tackle modern-day deceptive selling practices by unscrupulous developers towards the purchasers. Therefore, this research recommends to Condominium Management Authority (CMA) and the government to implement timely policies and actions to equip the CMA with necessary powers and resources to regulate the industry and minimize the shortcomings.

**Keywords:** condominiums, apartments, property purchasers, rights of condominium property purchaser

## **INTRODUCTION**

### **Background of the Study**

The term ‘Condominium’ first emerged in 17<sup>th</sup> Century through the combination of two Latin words ‘Con’ (together) and ‘dominium’ (ownership) and more broadly ‘Joint’ or ‘Co’ ownership. In the Merriam-Webster Dictionary, Condominium defined as ‘An Apartment building which each Apartment is owned separately by the people living in it, but also containing shared areas (Merriam-Webster, 2019). According to the Sri Lankan Apartment Ownership Act 11/1973 (AOA), Condominium is a building subdivided into separate units which are built on a single land (Eliyadura, 2017; Eliyadura, 2017). It means there are units (housing or commercial) situated in one property which are adjacent to each other horizontally or vertically (Merriam-Webster, 2019; Eliyadura, 2017). In a condominium, while Unit holders are having separate freehold ownership

for the Unit, simultaneously they enjoy the common ownership over common elements of the property.

Condominium living was introduced to Sri Lanka few decades back and still novel to the society. First applicable law enacted in 1970. However, condominium living attracted Sri Lankan urban population during the last two decades. Condominium property purchasers can be divided into two categories as people who looking for an actual housing solution in urban areas and investors, who make monetary investments for better future returns from re-selling or renting their respective properties (Hewamanne, 2019; Eliyadura, 2017). Authors have recognized through literature and their practice that the gaps in Sri Lankan condominium law become detrimental to the protection of the interests of investors in pre-sale condominiums. In USA, condominium properties largely utilize to solve housing problems of the citizens in middle- and lower-income levels. Reportedly world's first condominium was built in New York City in 1881 and then promoted condominiums as low-cost housing solutions. Parallel to this development, number of statutes such as Condominium Statute of 1958 in Puerto-Rico, known as world's first condominium legislation, was pushed through to legislative enactments with independent analysis on the problems that likely to occur.

Therefore, this research aims to comparatively analyze the Sri Lankan law relating to condominiums with special attention to rights of the condominium property purchasers (Purchasers). The outcomes will be comparatively analyzed with USA condominium laws and policies, in order to provide better recommendations to bridge the gaps in Sri Lankan system.

### **Research Problem**

Sri Lanka now has a prime market for vertical growth, and the private sector become the main condominium property developer (developer) (De silva N, 2015). Authors identify three key issues face by the Purchasers following their investments in Sri Lankan condominium property sector (Hewamanne, 2019) (LBO, 2021).

First, although Purchasers pay all their installments on time, developers may fail to complete the constructions or delay the completion of the Project or in sometimes fail to initiate the project (Edirimane, 2020) (Hewamanne, 2019).

Second issue occurs when the physical characteristics or the facilities of the relevant condominium mismatch with the specifications provided in the agreements. In practice, developer required to get necessary approvals/ clearances from the regulatory authorities before start selling condominiums to the Purchasers (Hewamanne, 2019) (Eliyadura, 2017). However, currently there is no mechanism available in regulatory bodies to do a final assessment checking whether all the features and facilities constructed in condominium going in par with the agreement. Authorities check the final product only with approved building Plans and not with 'Agreements to sell' entered with Purchasers. It leads to insecurity of the Purchaser.

Thirdly, when purchasing condominiums, it is natural that purchasers expect completed units with agreed specification together with free hold title. During the last couple of years, there were instances where the Purchasers receive the possession of the condominium while title of the property mortgaged to banks and not released.

In these instances, Purchasers get trapped since they made the partial or total payment without seeing the final product. Therefore, considering all the above factors, authors aim to answer the following research problem:

**Weather the Rights of Pre-Sale Purchasers in condominium properties are adequately protected in Sri Lanka?**

### **Research hypothesis**

'Sri Lankan condominium property law does not provide adequate protection for the local or foreign pre-sell Purchasers who invest in condominium property sector.'

## **Research objectives**

### ***General Objective***

To identify rights and issues of purchasers of condominium properties in Sri Lanka.

### ***Specific Objectives***

- To compare and contrast the existing legal framework pertaining to the condominium properties in Sri Lanka with USA
- To identify the shortcomings pertaining to condominium property law and practice in Sri Lanka.
- To make suggestions and recommendations for Sri Lankan condominium property sector towards the Purchasers.

## **Significance of the Research**

According to the Survey on Condominium Market carried out by Central Bank of Sri Lanka (CBSL), in year 2020, Sales transactions of condominiums shown drastic increase. Among these investments, 55% were made for the ongoing projects those currently under constructions. As further reveal by the survey, Developers' equity contribution for these projects are between 28-30 % of the total cost and balance 70-72% expecting to collect from pre-sales and Bank Loans.

In such context, it is important to take institutional and non-institutional mechanisms to make this sector more friendly towards purchasers. More specifically, there should be mechanisms to recognize the rights of the Purchasers and protect their financial security. However, currently there is minimal legal and policy interventions to protect the rights of Purchasers in Sri Lanka. Outcomes of this research could be effectively utilized by the Sri Lankan law and policy makers to protect the rights and financial security of the investors and make condominium property sector more friendly towards Purchasers.

## **Limitations of the study**

This research was carried out during the Covid-19 period and economic crisis in the country. There were no face-to-face interviews and participants

were also limited. Due to limited time period as well as the approved word limit, limited literature was referred. Legal analysis also limited into few pieces of legislations and reported cases, since the Sri Lankan condominium law evolved in a short period of time. In addition, comparative analysis also limited to USA.

## **LITERATURE REVIEW**

This research is an in-depth analysis on law relating to condominium property in Sri Lanka and the USA, with special attention to rights of purchasers. Law relating to condominium property has been conceptually developed through the multiple scholarly works. Condominium property has become cornerstone of modern-day property industry. Numerous researches have carried out on recent developments in condominium property sector and their effects towards real estate companies, governments and purchasers. Therefore, it is important to examine how the condominium property and related legal implications portrayed in literature.

### **Condominium Property and Its Modern-Day Importance**

Section 2 of the Apartment Ownership Law 11/1973 defines ‘condominium property’ as “any building erected on alienated land held as one land parcel and capable of being subdivided into parcels”. Various scholars argue that this definition must have to read with well-grounded Roman Dutch maxim *'Omne quod inaedificatur solo cedit'* (All that is built on the soil belongs thereto), *'Superficies solo cedit'* (Things attached to the earth go with the immovable property) and *Cujus est solum ejus est usque ad caelum* (He who possesses land possesses also that which is above it), hence the Roman Dutch law is the country’s residuary law (Cooray, 2008; Cooray, 1975). In United States, ‘Condominium property’ defined in two layers of statutes. The Uniform Condominium Act provides federal law while individual states provide their own sets of statutes pertaining to construction and maintenance of condominium properties in their respective states. In Singapore, there are two types of condominiums, first the ‘executive condominiums’ come up with the public private partnership and ‘private condominiums’ as a country which giving extraordinary value to space and

the real-estate and the owners of the private condominiums providing strata title to owners. Strata Title gives separate ownership to Lots (Apartments) together with parking lot. In India, condominium defined as a collection of individual home units alone with the land in which situated. However, India clearly differentiates condominiums from housing apartments, in which the Condominiums owned by individuals and in Apartments, developers retain the ownership and rent out the individual units.

These legislations provide multiple types of definitions and flexibilities, in order to meet the interests of the property developers and purchasers. In comparison to Sri Lanka, India and the USA, Singapore have established an inherent system, where state retains the ownership of all condominium properties, while offering registered owners a limited ownership (PropertyAsiaDirect, 2018).

First quarter of the twenty first century marked a rapid growth in condominium property sector. Reasons for this growth are increasing demand for shelter, urbanization and lifestyle changes, requirements to provide housing for people and developing & purchasing condominiums as investment opportunities.

Various scholars also attempted to define 'condominium property' while giving reference to pros and cons of condominium dwelling. James Cheng defines condominium property as a large property complex comprised of separately owned individual units. Accordingly, living in a condo gives its owners a mix bag of results. While ability to access luxury amenities and free security services are positive outcomes, owners are mostly required to pay price with extra maintenance costs, less privacy and use their own property with restrictions (CHEN, 2021). Since living in a high-rise building, condominium life comes with greater potential for risks and accidents. The risk of fire (Wahi, 2018), damages caused by neighboring unit owners (Adamu, 2012), poor workmanship and injuries caused to visitors (BBA-Management, 2016) and users of common facilities are few of them (LBO, 2021).

## **Condominium Property Through the Lens of Right to Private Property**

The right to own property, and to enjoy such property in association with others, recognized in article 17 of the Universal Declaration of Human Rights. Due to substantial disagreements on the concept of property and the restriction which the right should be subjected to, right to property was omitted in both International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights. However, article 5 of the Convention Against All Forms of Racial Discrimination 1965, Convention on the Elimination of all forms of Discriminations Against Women 1979, and Convention on Protection of the Rights of the Persons with Disabilities recognize the right to property. (Jayawickrama, 2002).

Sri Lankan Constitution is expressly non-discriminatory on ownership of property for its citizens. Therefore, any person (over 18) can legally own, transfer, inherit and dispose of land and property and may enter any economic activity/business or employment if not contrary with law and public policy. Against this backdrop, scholars suggest that article 16 of the Constitution provides a loophole allowing the existence of inequalities with regards to ownership of land and property under personal laws (Wickremarathna, 2015; De silva N, 2015). Under said provision, certain discriminatory customs and practices existed in special laws gained the legitimacy (Cooray, 1975; Ponnambalam, 1982). In a context where the condominium culture interestingly challenges efficacy of formalization of property rights because it disregards cultural and social variations (Weimer, 1997) (Chen & Kielsingard, 2012). In Sri Lanka, neither academics nor practitioners made substantial contribution pertaining to the applicability of personal laws to the field of condominium property.

In contrast with the detached house ownership, owners face limitations and obligations over their own condominium to the extent which agreed in the covenant (Hewamanne, 2017). Such limitations include general right to sell and freely use the property (Grimsley, 2020). However, with the detached residential house, condominium property owner obliges to share the ownership over the common amenities, where all members irrespective of

amount or type of their usage share the costs and maintenance of such common areas (Grimsley, 2020).

### **Management of Condominium Property**

As described earlier, condominium owners enjoy two tier ownership. This two-tier system of ownership created complications on its owners, relating to the management and repair of such homes, as larger condominiums equipped with sophisticated facilities becoming increasingly popular (Qadeer, 2019). Although condominium in developed countries provide success stories, in developing countries poor governance structures made condominium management a tragedy (De silva N, 2015). Therefore, manager of a condominium property currently receive grater responsibilities somewhat than it was before (Adamu, 2012). These roles and responsibilities include but not limited to operational management, maintain horizontal and vertical communication between condominium management corporation and individual owners (Odenthal, 2018), dispute resolution (Ostrom, 1990), performance supervision (Qadeer, 2019) and finance management. Presently, scholars often blend the aforesaid functions and responsibilities with institutional crafting to find out the robust and enduring principles for common property resource management (Ostrom, 1990; Adamu, 2012). According to Yip et al, there are two condominium property management functions, namely decision control function and decision-making function (Yip, et al., 2007). for Chen and Kielsingard, condominium property management intrinsically linked with concepts of “collective action, mutual dependence and democratic participation” (Chen & Kielsingard, 2012). After studying numerous high-rise condominiums across Asia, Yip and others recognize four ideal types of condominium property management modes.

For Chen and Kielsingard, any given management system must provide conduct rules of the scheme which lay down all the important conditions and mechanisms to address possible issues. (Chen & Kielsingard, 2012).

In Sri Lanka, according to the Apartment Ownership Law of 1973 and its amendments in 1982 and 2003, Management Corporations appoint a Management Council for make decisions of all common elements. However

major decisions such as sale of a Common Elements must approved at a general meeting of a Management Corporation. Two schedules of the Act describe the constitution of the Management Corporation and the house rules within the condominium.

### **Beyond Other Property Issues**

The successes of housing projects do not only depend on better provision and distribution of housing units, but on other factors that fulfill the needs of residents (Wahi, 2018). Generally, high rise condominiums are built by targeting two sets of individuals and families. While super luxury condominiums are built for upper middle class and upper class families with extravagant facilities (CHEN, 2021; Cohen, et al., 1981), low cost condominiums built to replace the slums, providing decent work and adequate living for lower income families (Adamu, 2012) (Wahi, 2018) (Ariyawansa, et al., 2018). While all researches and policy developers targeting property issues and investment needs associate with condominiums, limited attention pay for the residential satisfaction (Wahi, 2018), which go beyond mere property management issues (Ariyawansa, et al., 2018) (Adamu, 2012). Following the field survey carried out amongst the residents of low-cost condominiums in Malaysia, Wahai suggest that roof leakage, issues of safety while walking under the uncovered corridors, poor condition of the stair cases and fire door, poor internal ventilation and poor accessibility facilities for the persons with disabilities are foremost reasons leading to resident dissatisfaction (Wahi, 2018). For Adamu, absence of detailed information pertaining to existing condominium laws, lack of guidelines for the city administration and diversity of unit users, become major impediments for satisfactory community life (Adamu, 2012). Giving reference to Condo Education survey, Hewamanne also reveals that 68% of the surveyed condominium owners dissatisfied about the ever-fluctuating nature of condominium fees (Hewamanne, 2019). In addition , difficulty to obtain loan including high loan-to-value (LTV) ratios (HAMILTON, 2021), some fairly oppressive restrictions such as restrictions on pets, noise levels, hanging out laundry, parking, and internal improvements within owner's own unit (Warden, 2021) also recognized as factors affecting the comfortability of condominium life.

Therefore, available literature on condominium property and recent trends towards its development suggest that the nature of Condominium Projects and size/ Specifications of Condominium Units together with their management structures reflect the modern-day socio-cultural fabric of the society.

### **Research gap**

In comparison to overseas literature, authors identified several gaps existed in the local literature, that need to be fulfilled through the empirical research. For an instance, Sri Lankan Apartment Ownership Act defines ‘condominium property’ based on material facts without considering factors relating to quality of living. In contrast, countries like USA, India and the Singapore provide broad definitions to the ‘condominium property’ that covers most of its aspects. Failure to recognize right to property as a fundamental right exists as a legal gap in Sri Lanka’s system. Authors recognize that right to property is imperative to strengthen the rights of the purchasers.

Literature also suggests that numerous factors caused to make the condominium life unhappy in comparison to life in the single house. Given the rapid development of condominium property sector and increasing intrinsic link between condominium property management and the technology, it is important to conduct more research on means and methods of condominium property management in Sri Lanka, which is currently lesser in quantity.

## **RESEARCH METHODOLOGY**

### **Data Collection**

For the purpose of obtaining effective findings, gaining the support of both theoretical and practical aspects of the particular area is very essential. Thus, this paper can be considered as an outcome of a library research, as well as a field survey.

### ***Library Research***

This paper depends on the Library Research, although conducted a field survey. Researchers used Internet and library sources for study legislations

of Sri Lanka and USA as primary sources. Textbooks, law reports, journal articles, law reviews, encyclopaedias, dictionaries, newspapers have also been referred.

Using such sources, the primary aim of this research is to gather information in relation to rights and remedies which are available to purchasers and how the existing statutory and regulatory framework protect the interests of investors in pre-sale condominiums. Overall approach of the research will be blend with doctrinal research where the research will be theoretical basis. Also, the research will demonstrate the aspect of positivist paradigm.

### ***Field Survey***

To obtain general and specialized views on **rights of Purchasers in Condominium properties in Sri Lanka**, the ideas of condominium property developers, purchasers, Officials of the Condominium Management Authority, Officials of Condominium Management Corporations, legal professionals and professionals working in the industry have been taken into account. The researchers selected a purposive sample. The ideas of interviewees were obtained through qualitative interviews and used two questionnaires for the study (One for Lawyers / officials and other one for Apartment owners/ Industry professionals). Due to ongoing Covid-19 pandemic and economic related restrictions, interviews were conducted through emails and Telephone. Consent of all participants were duly collected prior to interviews taking place.

### **Research Design and Implementation**

The research had three stages. First stage allocated to examine different laws, regulations and practices in relation to protection of the interests of purchasers, whom are sometimes get oppressed and unfairly prejudiced by mismanagement by condominium property developers.

The second stage was a comparative analysis which compare the Sri Lankan laws and policies with the laws and policies in USA to give a better understanding of the scope of the research. The researchers employ the

black letter methodology as this part will focus on substantial legal doctrine contained in primary written sources (Salter & Mason, 2007).

At the final stage the evaluative research methodology, would lay the foundation to evaluate the adequacy of Sri Lankan laws and policies relating to condominium properties with any need for reforms that will need to fill the gaps in the current law to make the condominium property sector more friendly and hassle free towards the Purchasers.

## **RESULTS AND DISCUSSION**

This chapter provides detailed overview on Sri Lankan law governing condominium properties with brief history. Thereafter, Sri Lankan laws and policies will be comparatively analyzed with condominium property laws and policies of the United States, as a country which currently become one of the international best examples. Even though legal, social, and cultural aspects of Sri Lanka do not totally tally with the USA context when it comes to ‘protection of rights’ authors have investigated the best available role model. Moreover, condominium living does not recognize cultural and social barriers. Foreigners can also buy condominiums in Sri Lanka.

### **Condominium Properties in Sri Lanka: Laws and Legal Implications**

#### ***Evolution of Condominiums in Sri Lanka***

Considering the development of condominium properties in Sri Lanka, the expansion of condominium property regime can be divided into four eras. First era goes from year 1950 to 1989, in which the condominium properties started to popularize among middle income and lower middle-income families. In 1978, government established the National Housing Development Authority (NHDA), which constructed numerous multi-story buildings including Maligawatta flats, Bambalapitiya Flats and Soysapura Flats, which mostly were occupied by lower-middle income families such as businessmen and government servants and low-income families who were lived in highly populated areas in the Colombo city.

Between 1990 to 2000 can be marked as the second era of Sri Lankan condominium property development. Two categories of apartments can be

identified during this period. One of it were apartments constructed to provide shelter for the people affected by the civil war. These buildings were basic apartment units and mostly situated in Colombo 6 and suburbs. Many of war effected minority families from North and East migrated to these Apartments. In addition to, the condominium property sector moved to high end residential users' segment during this period. These condominiums equipped with modern facilities, and largely constructed by private developers. The first of these is the 'Royal Park Residencies' Rajagiriya, consisted with 24 floors and 240 individual units with luxury facilities. Second was Crescat Residencies, built in 1998 with 24 floors and 150 individual units.

Third era starts from 2000 and goes up to year 2020. In this era, high rise condominiums were recognized as the lasting solution for the ever-growing housing demand in the urban areas (Shivanka-de-Zoysa, 2021). During this period Luxury condominium complexes such as Havelock City, Fairway - Rajagiriya, Empire- Colombo 2, Hyde-Park Residencies - Colombo 2 and Emperor- Colombo 3 were completed. Few Ultra-Luxury condominiums including international brands Shangri-la, ITC, Ritz-Carlton and local giants Abans, John Keels entered into the market. Their target market was upper middle-income holders, foreigners and expatriates. Also new developers such as Prime Lands, Home Lands, Blue Ocean, Global Housing and Capital Trust developed many condominiums targeting the market of Middle Income during the said period. Along with said developments, Government continues its Condominium Developments through NHDA and UDA to cater the low-income urban population. Further, the Government built much large-scale condominiums to resettle people who lived in slums.

In this context, fourth era of the Sri Lankan condominium property sector initiate from 2020 and will demonstrate a remarkable growth within next few years. As of 2018, while Sri Lanka having over 15000 residential units, there are more than 13,000 residential units to come through 200 upcoming apartment projects (Ariyawansa, et al., 2018). Most of these are going to be completed before 2025. Within the 'Colombo Port City' Project, there will be 5,000 condominium units will be built within the next decade and there

will be housing demand of 50,000 future workers at Port City within Colombo City and suburbs and their first option will be condominiums. Furthermore, number of local and foreign individuals started to recognize investing condominium property sector as a good investment vehicle in the real estate market. Therefore, it is high time to revisit through all the applicable legislations and regulations, to ensure hassle free industry environment even though it is too early to comment on the country's situation with Covid-19 and Economic stress.

### ***An Overview of the Legal Framework Relating to Condominium Property in Sri Lanka***

History of Condominiums in Sri Lanka goes back to 1950s, where most of the condominiums were low rise buildings, and governed without specific laws or regulations (Ariyawansa, et al., 2018). These condominiums were known as 'flats or housing schemes and government was the foremost developer. In early 1970s the first piece of legislation governing condominiums was introduced through the Condominium Property Act 12/1970. Subsequently it was repealed and replaced by Apartment Ownership Law 11/1973. The law was amended in time to time by enacting subsequent pieces of legislation (Ariyawansa, et al., 2018) (Edirimane, 2020) (De silva N, 2015). Those amendments came to effect in 1982, 2003 and 2018.

According to the Amended Act 39/2003, Section 2 divides Condominium Properties into three main categories; (I) Condominium Properties; (II) Provisional Condominium Properties; and (III) Semi Condominium Properties.

Most significant amendment bought in the 2003 amendment was introduction of Provisional Condominium Properties. It is "any building erected on alienated land held as one land parcel and capable of being subdivided into parcels" (Swaminathan, 2019) According to section 3 of the Act, it is the duty of the developer to register the Provisional Condominium Plan prepared before initiating constructions. The plan should be prepared in line with the specifications provided in section 5 of the Act (Athula-Vimalaratne, 2021) (Indika-Samarasinghe, 2021). According to Sec. 3 B

(2), the owner shall make a declaration on I) availability of funds for construction of the building supported by a certificate from a reputed financial institution, II) the amount already raised by mortgaging the condominium property III) a financial report confirming the cost of the Construction and iv) project implementation Plan. However, unfortunately, this provision was not mandatory and very few developers follow this process.

Upon the submission of the application for registration of a Condominium Plan according to Sec. 5 of the Act, registrar shall register the Condominium Plan according to Sec. 6. For Section 9 and 11 of the Act, upon the registration of condominium plan, the common amenities and facilities become a shared property of all the residents. Section 13 and 15 of the Act prescribe provisions relating to statutorily applied servitudes relating to condominium property. For Section 16, owners of all the parcels can direct the management corporation to transfer any part of the common element. Section 17 and 18 set out provisions relating to acceptance of any land and amalgamation of condominiums govern by two or more management corporations (Jagath-Wickramanayake, 2021).

Section 20 of the Act provides the duties and responsibilities of the Management Corporation. It is the duty of the corporation to act in accordance with rules provided under the first schedule of the Act and ensure that all the dwellers enjoy comfortable living (Swaminathan, 2019) (Kapila-Gamage, 2021) (Shan-Yahampath, 2021). However, if the Condominium Management Authority satisfied that the management corporation is not carrying their duties, The Authority may take over the function and perform such duties until the appointment of administrator under the subsection 20(e) of the Act (Swaminathan, 2019).

The Gazette Extraordinary bearing No. 2026/25 dated 5<sup>th</sup> July 2017 is the only regulations issued under Apartment Ownership Act by the subject minister and it discusses about the registration of condominium plan and nothing about protecting the purchasers.

To regulate the Industry, National Assembly of Sri Lanka enacted Common Amenities Board Act 10/1973 and established the 'Common Amenities

Board'. Originally its primary role was looking after the Common Elements. The said Act was amended in year 2003 by the Act 24/2003 and changed the name to 'Condominium Management Authority Act'. By the amendment, Common Amenities Board Converted to 'Condominium Management Authority' (CMA) with the mandate to act as the main agency governing condominium properties (Karunarathna & Liyanage, 2021). Inter-alia, CMA has the responsibility to supervise ongoing constructions (only if Provisional Condominium Plan Registered), ensure the common amenities and elements are well managed and controlled by the duly established corporations and regulate other activities relating to management of condominium properties.

Initiating inquiries and constitute legal action against the developers in cases where deeds of housing units have not been granted; are some of the services provide by the CMA. Although the CMA granted broader powers to regulate the industry, lack of resources and bureaucracy bar the authority from involve at its fullest capacity (Athula-Vimalaratne, 2021)

### ***Rights of the Purchasers in Sri Lanka***

Although Sri Lanka enacted first condominium laws in 1970s, the condominium industry blooms very recently (Wijesinghe, 2021). Sri Lanka now has a prime market for vertical growth, and the private sector become the leading developer (De silva N, 2015) (Karunarathna & Liyanage, 2021) (Edirimane, 2020). However, with the improvement of condominium property, law and regulatory authorities appears to be lacking in carrying out its expected roles (Wijesinghe, 2021). In this context, it is imperative to upgrade the necessary laws and regulations to address the pressing needs and ensure all the parties involved in condominium property development adhere to such regulations (Nisansala-Ileperuma, 2021). Relevant laws and regulations should protect purchases who mostly come spending their hard-earned money on a lifelong investment with lesser knowledge on hassles in the industry (Edirimane, 2020; Wijesinghe, 2021). Currently there are only two kinds of legal protections available for purchasers (Athula-Vimalaratne, 2021) (Deepal-Suriyarachchi, 2021) (Shan-Yahampath, 2021). First, Act stipulates that the developers should handover the title to purchasers prior to expiration of 18 months after signing first sales

agreement. Failure to do so will permit authority to initiate legal proceedings against the developer (Shivanka-de-Zoysa, 2021) (Indika-Samarasinghe, 2021). Secondly, if purchaser thinks that condominium does not comply with the specifications provided in the sales agreement, he can seek court remedies for the violation of such agreement (Jagath-Wickramanayake, 2021) (Nisansala-Ileperuma, 2021).

In the existing condominium market, there are numerous factors which make purchasers less protected from potential risks arise out of the investment (NewsFirst, 2019). Authors will discuss three key problems face by the Purchasers following their investments in Sri Lankan condominium property sector.

Firstly, Sri Lankan condominium property law still failed to recognize rights and concerns of the prospective purchasers (Deepal-Suriyarachchi, 2021) (Indika-Samarasinghe, 2021). Given situation sometimes compel prospective Purchaser to pay all his installments without knowing the consequences of the agreement (Edirimane, 2020). Due to lack of strict guidelines governing the sales agreement, purchases have to put their signature to the document which provide no estimated completion date, and even no indication what relief can be provided if there is an unreasonable extension of the estimated completion date (Edirimane, 2020) (Hewamanne, 2019). This results the prospective purchasers get into the trap of fraudulent developers. (Edirimane, 2020) (Hewamanne, 2019). For an instance, in 2019, it was revealed that high rise condominium (Achilleion project) initiated to build by a well-known real estate developer abundant the project before the commencement, after collecting nearly two billion from the prospective buyers (NewsFirst, 2019).

Second issue occurs when the physical characteristics or the facilities of the relevant condominium mismatch with the specifications provided in the agreements. In practice, developer required to get necessary approvals/ clearances from the regulatory authorities before start selling condominiums to the Purchasers (Hewamanne, 2019) (Eliyadura, 2017). However, currently there is no such mechanism available in regulatory

bodies to do a final assessment checking whether all the features and facilities constructed in condominium going in par with the agreement. Authorities are checking the final product only with approved building Plans and not with Agreements to sell entered into with Purchasers.

Thirdly, the advancing for purchase condominiums, it is natural that the Purchaser expect completed unit with agreed specification together with free hold title. During the last couple of years, there were instances where the Purchaser receives the possession of the condominium while title of the property mortgaged to Banks and not released. In most of these instances, Purchasers get trapped since they made the partial or total payment without seeing the final product (NewsFirst, 2019) (Edirimane, 2020).

### ***Areas to Be Reformed***

In addition to the above-mentioned legal loopholes, number of institutional and bureaucratic delays in Sri Lanka stand as a barrier to make condominium property sector a hassle-free industry. At present, manual or paper-based property registration system made the real estate market sluggish and lack of transparent at all. If proper digitalize land registration process exists, buyers could easily access the correct detail of the owners of the particular property; whether the condominium is under litigation; and whether the building is adhered to all regulations or not (Razeek, 2019).

Apart from slow digitization process, bureaucratic issues also lead to delays in registering the condominium property and executing Deeds of Transfer (Edirimane, 2020) (Karunarathna & Liyanage, 2021). As a result, presently condominium property management in the country are ill-equipped to deal with the complexities arising due to rapid growth of the market (Siriwardena, 2012).

Furthermore, lack of strict guidelines to govern the framework of sales agreements provides fertile soil for developers to draft the contract with strong non-liability clauses. Due to these clauses, the developer is in position to refer to said clauses and claim that purchasers have accepted the conditions that were laid out to them (Wijesinghe, 2021; Athula-Vimalaratne, 2021; Edirimane, 2020).

It is high time to intervene into way of collecting money by the developers from the prospective buyers (Wijesinghe, 2021) (Edirimane, 2020). Current law provides no provision preventing developer from collecting money from the buyers before initiating the project. This practice set the avenue to get innocent buyers defrauded losing their money. In contrast, in the United States, often this money is held in “escrow”, an account managed by a neutral third party which will be held and only released to the developer when the building in question has been constructed to a certain level (Hewamanne, 2017) (Wijesinghe, 2021).

Therefore, the existing condominium property law lacks mechanisms to protect the purchasers from the fraudulent or ill capacitated developers. Although there is far more potential with the CMA, it was not being utilized in a satisfactory manner.

### **Condominium Properties in USA: Laws and Legal Implications**

#### ***An overview of the Legal Framework Relating to Condominium Properties in USA***

In the United States, condominium properties largely utilize as a mean to solve the housing problems of the citizens in middle- and lower-income levels. Reportedly world’s first Condominium was built in New York City in 1881 and then promoted condominiums as low-cost housing solutions (Adamu, 2012) (CHEN, 2021). Parallel to this development, number of statutes such as Condominium Statute of 1958 in Puerto-Rico, known as world’s first condominium legislation, was passed. (CHEN, 2021) (Cohen, et al., 1981). The condominium dwelling receives much of public attention in 1960s and in early 70s as these developments were taken place in major recreational areas. Retirement developments in California and the mountain ski resort developments in the Rockies are two of such notable examples (Minahan, 1975). This rapid growth in condominium property market induced unscrupulous developers to employ deceptive selling practices that inter-alia made the purchasers vulnerable. This results the increasing number of consumer complaints over numerous issues, which include misleading sales representations, hidden clauses in agreements, shoddy constructions, and excessive cost of ownership (Minahan, 1975). Public

outrage over these issues resulted the passage of Uniform Condominium Property Act in 1977, which was latterly supported by the series of state level second generation condominium statutes (Cohen, et al., 1981).

The Uniform Condominium Property Act (UCPA) consists with four articles with optional fifth article. Article 1 contains general provisions alone with definitions of terms applied in the Act. These general provisions cover the aspects such as taxation, eminent domain and relationship with other statutes. The article 2 set out provisions on creation, alteration, and termination of the condominium. In addition, article 2 provides clear guidelines and flexibilities for developers to initiate projects and at the same time provides restriction on certain practices that proven potentially harmful for the condominium purchases (Cohen, et al., 1981) (Minahan, 1975). Article 3 set provisions relating to administration of the unit owner's association. This allows the use of simplified language for all the declarations and agreements. Inter-alia, this provision ensures the active participation of all the unit owners. Furthermore, according to article 3, owners have the right to participate with the declarant as members of the executive board from the early stage of the development. Article 4 specifically deals with consumer protection. Based on the lessons learned from past incidents, Article 4 requires that substantial declarant disclosure be made available to consumers before a sale of a unit. Specially in Section 4-110 of the Act, Purchasers reservation deposits must be deposited in an Escrow Account. Article 5 is an optional article which set out provisions for the establishment of administrative agency to supervise the activities of the condominium property developer. However, discretion granted upon the states to decide whether they incorporate this section or not based on their individual ability to establish and maintain such agency. At present, most of the states went in favor of usurping this section, as the cost of funding agency override the tax income, and establishment of such agency would duplicate the duties of the existing governmental units (Cohen, et al., 1981).

Following the passage of UCPA, problem arises how and to what extent it covers old condominiums. Two conflicting policies encountered when deciding the applicability of the UCPA for the old condominiums. On one hand, it was inevitable that the applicability of the Act for all the

condominiums regardless of the date which developed. However, such intervention had the potential of violating constitutional prohibition of the impairment of contracts. In addition, automatic application of UCPA had the likelihood of harm the multiple interests of the parties to the condominium (CHEN, 2021) (Cohen, et al., 1981). Section 1-102 therefore provided that the UCA applies prospectively to all condominiums created after the effective date of its enactment into state law (Cohen, et al., 1981).

At present, all the states in USA have implemented their own pieces of legislation within the parameters provided under the UCPA. For an instance, residential condominiums, cooperatives and homeowners' associations are generally subject to state law. Thereby, states generally provide rules on how the homeowners associations should operate (Home-Owners-Protection-Bureau, 2020). Here, United States legal system generally view land use restrictions with suspicion (Minahan, 1975). Therefore, it is the duty of home owners' associations and developers to justify such rules and bylaws benefit the community as a whole and do not explicitly discriminate individuals based on protected grounds such as race, color, gender, religion or the disability.

### ***Rights of the Purchasers in the United States***

As described in the aforesaid paragraph, UCPA introduced numerous measures to protect the interests of the purchases. In United States, legislations drafted to protect the purchases in two different stages namely: (I) protection granted for prospective purchasers, and (II) condominium property owners (Morris, 2019).

In order to protect the buyers before building the condominium, state legislations provide mandatory duty on property developers to disclose extensive list of documents, before concluding the sales agreement. For an instance, Florida condominium Act (1963), "Developers are prohibited from closing on sale less than 15 days following delivery of the documents to the buyer and the statute requires a signed receipt for the documents" (Morris, 2019). If buyer intends that he was not fully disclosed the relevant particulars, buyer can unilaterally void the contract within three days. In addition, in states including Illinois and Florida, it is the duty of developer to

provide prospective purchasers the detailed declaration on its articles of association and year-end financial obligations. Also have to disclose articles of condominium property association, rules and by laws of the association (Cohen, et al., 1981) (Morris, 2019).

In USA, protection provided to the purchaser against the developer remains even after handing over the condominium. In this context, all the subsequent matters govern in accordance with terms and conditions in the declaration. These declarations generally include promises between individual owners and the condominium associations, use limitation and prohibited activities and general powers and duties of the board of directors. Condominium association can pass bylaws, prescribing the way of electing board of directors, way of collecting assessments from unit owners, powers to enter into contract with external parties and powers and procedures pertaining to acting on behalf of the association in legal, contractual, and financial matters. An association's board of directors and officers almost always has a fiduciary duty toward the association and its members.

### ***Lessons for Sri Lanka***

Being the Pioneer in building condos as well as drafting the first Condominium legislature, condominium property law system in the United States became a role module for developing Condominium Legal Systems in the World. Therefore, it is high time to explore the lessons Sri Lanka can learn from the United States to make its condominium property sector is a safe haven for purchasers.

As discussed in early paragraphs, there are numerous instances in Sri Lanka which held purchasers less protected, that can be replicated by following the systems enforced in the United States.

First, given the fact that Sri Lanka does not recognize the contractual rights of the purchasers, he or she will be compelled to sign the agreement without knowing any particulars, including estimated completion date and the relief can be provided in the event of unreasonable extension of the construction. However, in contrast, article 4 of the UCPA makes it is mandatory the developer to provide substantial declarant disclosure be made available to consumers before the conveyance of a unit. Such declaration includes

detailed information pertaining to creation, alteration, and termination of the condominium.

In Sri Lanka, another instance which makes the prospective developers less protected is the event which facilities of the relevant condominium mismatch with the specifications provided in the agreements. In United States, since the UCPA ensure active participation of the unit owner and establish the condominium management association from the construction stage, prospective purchasers get the opportunity to be aware about the gradual development of the condominium.

In addition, due to legal loopholes in Sri Lanka, during the last couple of years, there were instances where the Purchaser receives the possession of the condominium while title of the property mortgaged to Banks and not released. In most of these instances, Purchasers get trapped since they made the partial or total payment without seeing the final product. In United States, this money is held in “escrow”, an account managed by a neutral third party who will be held and only released to the developer when the building in question has been constructed to a certain level.

In addition to the above, digitized land registration system with up-to-date information, efficient bureaucracy, non-discriminatory laws to protect condominium property purchases, and strong consumer protection mechanisms made the United States condominium property law much favorable towards the purchasers.

**Table 1: Summary of the Comparison**

USA	Sri Lanka
One uniform law (UCPA) and number of state’s laws	One law with only two amendments
Article 4 specifically deals with consumer protection	No provision
Purchasers’ reservation deposits must be deposited in an Escrow Account	No provision
protection provided to the purchaser against the developer remains even after handing over the condominium	No provision

article 4 of the UCPA makes it is mandatory the developer to provide substantial declarant disclosure be made available to consumers before the conveyance of a unit	Sri Lanka does not recognize the contractual rights of the purchasers,
In United States, since the UCPA ensure active participation of the unit owners	relevant condominium mismatch with the specifications provided in the agreements.
digitized land registration system, efficient bureaucracy, non-discriminatory laws	Not yet implemented

## **CONCLUSION AND AREAS FOR IMPROVEMENT**

### **Conclusion**

In Sri Lanka, condominium living has become popular among high- and middle-income individuals. However, physical, and financial security or/and rights of the purchasers have not given the paramount importance.

Although existing condominium laws of Sri Lanka enacted in late twentieth century (1973) condominium industry bloomed very recently. This resulted the failure of law to tackle modern-day deceptive selling practices by unscrupulous developers towards the purchasers. Moreover, failures from the side of the CMA to fulfill its mandate also provide a fertile soil for the developers to continue such practices. Based on the available Sri Lankan literature as well as the key informant interviews, this research differentiates failures of the authority into two distinctive categories. First, as an institution, CMA has failed to implement the clear-cut legislative powers provided by the Condominium Property Law and other subsidiary pieces of legislation to protect the rights of purchasers. Secondly, there are failures on the side of subsequent governments to implement timely policies and actions to equip the CMA with necessary powers and resources to regulate the industry and minimize the shortcomings. Therefore, this research recognizes following key areas need rapid improvement to strengthen the protection provided for the purchasers.

## **Areas for Improvement**

### ***Core Areas for Improvement***

#### **(I). Internal Measures**

- Amend the existing condominium property laws (both AOL and CMA laws) to provide more protection to purchasers and specially introduce following laws and practices
  - ◇ Introduce Developer registration scheme at CMA prior to commence any Development and financial evaluate the Project and the Developer at the registration
  - ◇ Introduce and enforce standardize Sales Agreement for all Condominiums with more Purchaser protective clauses and check the fulfillment of all conditions prior to registration of the Condominium Plan
  - ◇ Make the compulsory of existing ‘Provisional Condominium Plan’ registration procedure
  - ◇ Introduce and make compulsory of ‘Escrow Accounts’ for advances collect from the Purchasers and Escrow agent should be CMA or Licensed Bank
- Prepare and implement the roadmap relating to optimum use of human and material resources of the CMA to achieve its legislative mandate.
- Provide advanced learning and training opportunities for the officers of the CMA to increase their understandings on latest available technologies and practices relating to condominium property sector.
- Speed up the land digitization process under proposed ‘e- State Land Information Management System’, with specific mechanisms to register all the important details relating to condominiums.

#### **(II). External measures**

- Provide necessary funds and budgetary reliefs for the speedy completion of the ongoing land reforms and digitization projects.
- In order to enhance transparency, CMA should be encouraged to proactively disclose (in keeping with the Right to Information Act

of 2016) the up-to-date procedures relating to granting approval, hearings against condominium property developers, and financial capability of each developer, publicly accessible.

### ***Auxiliary Areas for Improvement***

- provide specific guidelines for developers to follow green technology in future condominium development to ensure sustainable living for all the dwellers in upcoming condominiums.
- Conduct frequent surveys on the existing condominiums and flats to repair their outdated features in order to comply with modern-day standards of living.
- Provide trainings to Condominium Dwellers and specially to office bearers of Management Corporations regarding the relevant laws regulations and practices in Sri Lanka and compare them where relevant with other countries

In addition, a panel of lawyers/committee or ombudsman can be appointed at the very outset of creation of a condominium to safe guard the rights of prospective purchasers.

### **List of Legislation**

Apartment Ownership Law 11/1973

Apartment Ownership (Amendment) Act 45/1982

Apartment Ownership (Amendment) Act 4/1999

Apartment Ownership (Amendment) Act 39/2003

Apartment Ownership (special provision) Act 23/2018

Condominium Management Authority Act 24/2003

Land (Restrictions on Alienation) Act 38/2014

Land (Restrictions on Alienation) Amended Act 21/2018

Illinois Condominium Property Act, ILL.REV.STAT.ch.30, §§301-31 1979

Uniform Condominium Act 1977 Specify the country

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