JSA LAW JOURNAL

PUBLISHED BY JUDICIAL SERVICE ASSOCIATION OF SRI LANKA

2017 VOLUME V

JSA LAW JOURNAL
VOLUME V

web: www.jsasl.org | mail: editor@jsasl.org

Published by the Judicial Service Association of Sri Lanka

ISSN 2357-2884

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Printers:
Sanghinda Printers & Publishers
No. 06, Wijerama Road,
Gangodawila,
Nugegoda.

e-mail: sanghindapubs@gmail.com
Tel: 011-2802679 / 4542725

Cover Designer:
MoLa Senevirathne

Page Layout:
Amila Sandamali Kannangara

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1st November 2017

l have great pleasure in sending this message to the 5th Volume of the Law Journal, published by the Sri Lanka Judges' Institute in association with the Judicial Service Association. Since its launch in 2013, the Law Journal has become a medium for judicial officers and domestic and international experts, for sharing their views on issues pertaining to law and justice, and particularly to engage in the research of the law.

Judicial learning is a continuous process aimed to strengthen the administration of justice and thus continues till a judge demits his office or probably till he breaths his last. Judicial education has therefore experienced an extraordinary growth in recent years and the recognition of the need for judiciat education is now firmly entrenched in many jurisdictions around the world. In today's globalized world judicial officers are required to maintain an acceptable level of competence, new judicial skills and to keep abreast of new laws to maintain quality performance.

l commend the collaborative efforts of the Sri Lanka Judges' Institute and the Judicial Service Association for providing a forum through the Law Journal to seek to influence the body of law, to make it more responsive to the society at large and to also highlight the change that is required to better serve the common object of the law and the society.

I convey my best wishes for the continued success of the Law Journal.

Priyasath Dep, P.C.
Chief Justice

MESSAGE OF THE HONORABLE DIRECTOR OF SRI LANKA JUDGES' INSTITUTE

It is appropriate to appreciate the successful continuation of the annual journal of the Judicial Service Association.This journal gives an invaluable opportunity to the members of the judiciary to get their research works, ideas and visions published.While enhancing the writing and analytical skills of our judges, publication of this journal stimulates the thoughts of its readers to think deep into the issues and principles of law as well the matters related to administration of justice.Without any doubt I can say that this type of exercise will richly contribute to the development of legal literature of our country.

I hope a fruitful conversation will be developed over the views expressed by some of the articles of this journal which will at the end of the day contribute to the betterment of the society at large.

I take this opportunity to extend my congratulations to the editor, writers and all others who spent their time and labour to make this journal a success.

Gamini Amarasekara,
Director,
Sri Lanka Judges' Institute

MESSAGE OF THE PRESIDENT OF THE JUDICIAL SERVICE ASSOCIATION OF SRI LANKA

It gives me a great pleasure to address you from 5th Volume of the "JSA Law Journal", which I initiated in 2013 as the Editor of the Judicial Service Association.

It was evident that the member judges of the JSA are paying much attention on their academic career development while engaging in their routine work. Accordingly during the recent past most Magistrates and District Judges tend to follow post graduate studies. Instead of adopting legal concepts on their day to day practice, they went beyond it and made researches on such legal concepts. This resulted in judges writing more and more articles and research thesis. It created a great necessity for exchanging such knowledge among the judicial officers. Since research and academic knowledge gained by the judges cannot be shared among the general public and their writings cannot be submitted to the outside publications, a necessity for a journal for judicial officers became very much essential. "JSA Law Journal" came into light with that aim in 2013 and by now has completed its 5th year. When we examine the past journals, it is evident that the journal had been very much helpful for the judges to improve their academic studies on legal concepts and writing of research papers. It is also apparent that there has been a great encouragement among judges in writing more and more articles.

"Justice Nimal Gamini Amarthunge Memorial Award for the best article" which commenced together with the law journal in year 2016, resulted in enhancing the endurance of submitting articles to the journal. The articles appear in the journal are themselves stand proof to that. Thus our aim of introducing the Law Journal has been very much successful at present.

I take this opportunity to extend my best wishes to the Editor Mr. Isuru Neththikumarage and the editorial board for their dedication to publish the JSA Law Journal Volume V successfully. I also earnestly wish that the JSA will be able to publish the Journal throughout the years ahead too.

Ranga Dissanayake,
President,
Judicial Service Association.

PREFACE

JSA is proud to present the fifth publication of its Law Journal. Over the past five years, the teams responsible for the journal have strived to contribute to the academic discourse surrounding legal issues encountered by local legal system which is making an effort to keep abreast with the new trends of global developments.

We have seen a steady increase of quality of articles received for publication and by any measurable standard in the Sri Lankan legal sector, our journal has been successful in many ways. Our reputation and visibility in the academic sphere continues to broaden and our successive editors, year by year, constantly reassesses and revises the editorial process to ensure the maximum benefit for the readership. This year too, with the consultation of Sri Lanka Judges' Institute JSA continued its mission of advancing the quality of academic writing.

Thanks to the hard work of our writers and the interest of our readers that we are able to publish the Law Journal Volume V to coincide with the second consecutive Justice Nimal Gamini Amarathunga Memorial Award. The editorial board has made an initial screening of articles received and ear-marked articles were reviewed by a panel of eminent justices to select the best article for the Award. The said panel consisted of His Lordship Justice Anil Gunarathne, the Judge of the Supreme Court, His Lordship Justice Gamini Amarasekara, the Judge of the Court of Appeal & the Director of Sri Lanka Judges' Institute and Hon. Prashantha Silva, the Judge of the High Court. The entire process for the competition was supervised by the Sri Lanka Judges' Institute. Interestingly, selected best article suggests that the traditional way of Sri Lankan Judiciary was structured similar to that of modern-day corporations, provides an intriguing comparison and insight into the use and importance of continuous studies along with legal sectors of developed countries. JSA is proud to be on the cutting edge of not only legal issues, but also in other disciplines that present important inferences for the legal community.

At this juncture we are deeply indebted to honorable members of the selection panel for courteously volunteering to work hard for a period of more than one month as resource persons to select the best article. We express deepest gratitude to Mr. Wasantha Kumara, who presently serves as the Academic Coordinator of Sri Lanka Judges' Institute for his tremendous support and guidance at the said process. We are also grateful to Mr. Asanka Bodaragama, judicial officer presently on overseas leave who was the editor of the previous journal and initiator of the Justice Nimal Gamini Amarathunga Memorial Award for his kind corporation at the entire process of the printing of this journal. Guidance and support of many individuals made our journal possible and we are deeply

indebted to them for the time and effort that they put in to our journal. We as members of JSA 2017 have dedicated ourselves in improving its law journal and in continuing its tradition of academic excellence.

JSA owes a very special acknowledgement to its members for their financial contributions, if not for their magnanimity this journal would not have seen the light of the day. However not having the luxury of abundance we had to curtail the number of articles that went into publication. It is our fervent belief that we would have the necessary resources next time around and wish to encourage all our members to send in their literature for the next publication. We hope that the incoming executive committee will strive to honor the efforts of the past five years and pass down the work ethic and appreciation of academic standers of JSA members.

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INDIVISIBILITY OF CREDIBILITY - A NOTE IN ABSTRACT

Justice Buwaneka Aluwihare PC
Judge of the Supreme Court

Evaluation of evidence is *sine qua non* for judges before we buckle down to write judgements. It is only upon evaluation of the testimony, that one can decide as to whether the witness is credible or not. Evidence given by a witness can be acted upon only if in one's mind, the opinion is formed, that it is safe to act on the evidence in deciding the issues in a case. The common yardstick that is used for this purpose are the three tests: consistency, contemporaneity, and probability.

It can so happen that, upon evaluation, one may form the opinion that part of the evidence given by a witness is truthful but the rest of the evidence is not so. Naturally the dilemma that is created in one's mind, faced with this vexed issue, is it possible to act on part of the testimony that appears to be truthful and use that evidence to determine the issues while jettisoning the rest of the testimony which does not appear to be truthful?

From the perspective of a judge, this vexed issue cannot be decided by the gut feeling so to speak, it is necessarily an issue that needs to be addressed applying the accepted evidentiary rules with regard to the indivisibility of evidence. I have used the term "indivisibility" for the reason that there is a view that if a person lies as to one fact he is a liar as to the others. To put it in another way the reputation of a witness for credibility cannot be partial or fractional. The credibility, thus is not divisible, hence the phrase "indivisibility of credibility". Thus, the maxim *"falsus in uno falsus in omnibus"* what is false in one is false in all.

This issue needs to be considered from the perspective of a testimony of a witness whose credibility is tarnished and also from the perspective of a witness who had been treated hostile in terms of section 154 of the Evidence Ordinance.

All or nothing rule appears to be the position in the United Kingdom. The maxim developed over the years in U.K has now gained recognition as an evidentiary rule. In the case of ***R. Vs. Golder***[1], the court held "when a witness is shown to have made previous inconsistent statements, the jury should be directed that the witnesses' evidence at the trial should be disregarded as unreliable". This position was further amplified in the case of the ***R. Vs. Mann***[2] where the court held that "if a witness is finally discredited by being treated as hostile, it is essential that the judge should advise the jury to pay no regard whatsoever to his evidence".

Is the position same in Sri Lanka? The jurist Norton expresses the view that it is dangerous to apply the maxim in countries like India, as in the majority of cases, the evidence of a witness will found to be tainted with some falsehood and there is almost always a fringe or embroidery to a story, however, true in the main. Wigmore has expressed the view that the maxim *"falsus in uno falsus in omnibus"* is in itself worthless, first in point of validity and secondly in point of utility, because it merely tells the jury what they may do in any event, not what they must do or must not do.

In this context, the decision of the Indian Supreme Court in the case of ***Ugar Vs. State of Bihar***[3] is significant. The Supreme Court notes that, one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments, the court pointed out that, it is neither a sound rule of law nor a rule of practice. Where does, then the rule stand from an Indian perspective? One could glean the following from a another decision handed down by the Supreme Court of India in the case of ***Nisar Ali Vs. State of Uttar Pradesh***[4]. The position in India is that the maxim has not received general acceptance in different jurisdictions in India, nor has it come to occupy the status of a rule of law.

- It is merely a rule of caution
- The testimony may be, and not that it must be, disregarded.
- It only affects the question of weight

In considering the application of the maxim in the Sri Lankan context, one decision that cannot be ignored is the case of ***Nalliah Vs. Herath***[5] which in my view is still very much valid law. Consider a situation where a person is charged with, more offences than one and the prosecution relies on a single witness to establish the elements of the offences against the person charged with. If the court finds that the testimony of the witness is not credible in relation to the elements of one offence the accused is charged with, can the accused be convicted of other offences based on the same evidence? Justice Gratiaen in the case referred to held that, "where an accused is tried on two connected but different charges in the same proceedings, a conviction on one count cannot be based on evidence

which has by implication been rejected by an order of acquittal, on the other count". One needs to bear in mind that this is a peculiar situation where the maxim can be applied in full force. The principle laid down in the case of ***Nalliah Vs. Herath*** found favour in a subsequent judgement in ***R Vs. Vellasamy***[6] and the court held that "Where evidence of a witness is disbelieved in respect of one offence, it cannot be accepted to convict the accused of any other offence."

Position in Sri Lanka

Gardiris Appu Vs. The King[7] was a case decided in the middle of the last century and the court held "where false evidence has been introduced into a case for the prosecution it is open for the jury

(a) To say it is unsafe to act on the evidence

(b) If they think fit, to separate the falsehood from the truth and to found their verdict on the evidence, which they accept to be the truth."

The maxim *"falsus in uno, falsus in omnibus"* was considered in the case of ***Samaraweera Vs. Attorney General***[8] and the court held that "..The maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When such evidence is given by a witness, the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so. The court also made two other significant pronouncements, one is that, the credibility of witnesses can be treated as divisible and accepted against one and rejected against the other and the other pronouncement was that the maxim does not apply to cases of testimony of the same point between different witnesses."

Before the case of Samaraweera was decided Justice T.S Fernando in the case of ***Francis Appuhamy Vs. The Queen***[9] commented about the characteristics of the witnesses in our society and stated "*Certainly in this country, it is not an uncommon experience to find in criminal cases, witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are either members of the family of that person or enemies of such witness… In that situation the judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the truth*"

Matters for consideration!!

There should be **no arbitrary rejection** of the evidence, on the basis of the maxim.

Evidence has to be weighed in each case and not adopt an arbitrary formula or yardstick in measuring its worthlessness.

The main consideration is whether there is proved **falsehood** on a **material point**. In which case there must be a good reason **(such as corroboration)**, to act on the other evidence given by the witness. Thus, judges must ensure that decision to act on such evidence is supported by reasoning and such reasons must be clearly stated in the judgement so that in the event of a review, the appellate court will have the benefit of the reasoning in deciding whether acting on such evidence was arbitrary or not.

Lord Parcq in the case of ***Noor Mohamed Vs. R*** set some guidelines on this aspect and stated "..in all such cases the judge ought to consider whether evidence is sufficiently substantial, having regard to the purpose which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If so as far as the purpose is concerned, it can in the circumstances have only trifling weight, judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible"

With regard to evidence of witnesses who had been treated adverse, the law is yet to settle. The majority of the decisions favour rejection of such evidence and for good reason.

The Two views prevailing are: -

1) The evidence is of "some value" and not to be disregarded.

2) The evidence is of "no value" and cannot be relied upon by the party who called the witness.

I have cited below some of the cases that considered this question but do not wish to cling on to a particular view on the issue.

In the case of ***King Vs. N.A. Fernando***[11] it was held that "the jury is not bound by law to place no reliance on the evidence and it's for the jury to examine the whole evidence…"

In ***Douglas Tilakawardena Vs. The Republic***[12] the court followed two English cases which held "if a witness is discredited by being treated as hostile, it is essential that the judge should advise the jury to pay no regard whatever to his evidence."

I wish to reiterate that this article is presented in abstract on this topic and one needs to consider the judgements in full to appreciate as to how the courts have grappled with this vexed issue.

Endnotes

1 *1960 W.L.R 1169*

2 *1972 Cr.A. R 750*

3 *A.I.R 1955 SC. 277*

4 *A.I.R 1957 366*

5 *54 N.L.R 473*

6 *63 N.L.R 265*

7 *52 N.L.R 344*

8 *1990 1 SLR 256*

9 *68 N.L.R 437*

10 *1949 A.C 182*

11 *46 N.L.R 254*

12 *72 C.L.W 62*

JUSTICE NIMAL GAMINI AMARATHUNGA MEMORIAL AWARD

WINNING ARTICLE

A CALL FOR A RATIONAL MECHANISM FOR THE ASSESSMENT OF JUDICIAL PERFORMANCE IN SRI LANKA

Chanima Wijebandara[1]
Additional Magistrate, Colombo

Abstract

In Sri Lanka, performance evaluation of judicial officers comprises of an annual assessment for the purpose of granting periodical salary increments. This evaluation process directly affects the career advancement of a judicial officer as having duly earned these increments is a salient requirement for consideration of promotions. The criterion adopted for evaluation is mainly, if not solely, based on a specified minimum number of judgements to be written within a period of one year. While recognising the importance of judicial performance evaluation for the advancement of administration of justice in a country, this article ventures upon the complex, controversial and sensitive, yet timely, task of critically evaluating the current criteria adopted in Sri Lanka. It is argued that due to a number of reasons, the current criterion is flawed, irrational, unscientific and counterproductive. In conclusion, the dire necessity of developing a more systematic and credible performance evaluation methodology for Sri Lankan judicial officers is highlighted for the benefit of the community of judges and the entire system of administration of justice at large. Having considered the systems of other jurisdictions and international standards, it is proposed that the policy makers take in to consideration the unique characteristics of different categories of courts of first instance, specialised subject matter of each court, the diversity of the nature of work and the disparity of workload allocation among judicial officers and formulate a rational policy based on well-grounded scientific research.

Key Words: Administration of justice, Judicial studies, Judicial performance evaluation, Judicial accountability, Judicial independence, Efficiency, Competency.

Introduction

"It is the quality of our work which will please God and not the quantity."

- Mahatma Gandhi -

The Bangalore Principles of Judicial Conduct 2002, designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct, holds that "competence and diligence are prerequisites to the due performance of judicial office"[2]. *The Commonwealth (Latimer House) Principles on the Three Branches of the Government 2003* also states that a "competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice"[3]. In this light, a competent and diligent judiciary is unarguably an absolute necessity for the proper functioning of the administration of justice in any country.

Judicial performance evaluation is a highly complex and controversial topic. It is complex in the sense that there could be many external factors and variables affecting the quality and quantity of work of a judicial officer that there may not be a clear cut principle readily applicable to gauge performance of an individual judge. It is controversial as it involves the analysis and criticism of a policy formulated by a body of superior judges for evaluation of the minor judiciary. Thus, it is an area that no judicial officer would dare to tread upon, for the fear of offending the policy makers, under whose direct supervision they come. It is an area that no legal scholar or academic outside the judiciary would have access to conduct research on. Yet, this article ventures upon the task of questioning this policy in an academic sense for the greater good of the community of judicial officers and the administration of justice system of the country at large.

This article discusses the importance of judicial performance evaluation for maintaining and improving the quality of the administration of justice. It critically evaluates the current criteria adopted by the Sri Lankan judiciary in evaluating the performance of judicial officers, with special focus on judges of Magistrate's Courts. It will be shown that the number of judgments written during a specified time period does not accurately mirror the efficiency or capability of a judge. It is shown that this method does not fulfil the purposes of performance evaluation such as uplifting accountability, self improvement, increase in disposal of cases and clearance of backlogs and is in fact counter productive. It is argued that as each courthouse is unique in nature in terms of subject area, procedure, complexity, gravity and quantity of cases, a blanket criteria cannot be applied for assessment of judicial performance.

Significance of this Article

The European Commission for the Efficiency of Justice (CEPEJ)[4] in its report "European judicial systems Efficiency and quality of justice"[5], states that the quality and efficiency of justice depend very much on the training of judges, their number, the status that guarantees their independence, and the number of staff working in courts or directly with them as assistants or in the exercise of jurisdictional activity. However, in this country, the judges are the scapegoats for all deficiencies of the justice system, laws delays, case backlogs, prison overcrowding etc. This is mainly because we lack scientific researches which are balanced and unprejudiced. Our academics mostly concentrate on the substantive law and do not venture on judicial studies per se. Unlike in countries such as the United States and England, the relatively new academic discipline of judicial studies is alien to the academia of our country. Research on "judicial performance assessment methods" form an important part of judicial studies. It requires studies evaluating and assessing the judiciary based on empirical data concerning the judges which are unheard of in our country. For example, in a study on the topic of "Court Performance around the World"[6] by Maria Dakolias, a counsel in the legal department of the World Bank, data from first instance commercial courts in eleven countries and three continents on; 1) number of cases filed per year; 2) number of cases disposed per year; 3) number of cases pending at yearend; 4) clearance rate (ratio of cases disposed to cases filed); 5) congestion rate (pending and filed over resolved); 6) average duration of each case; and 7) number of judge per 100,000 inhabitants, have been analysed extensively for the purpose of providing data to countries that are designing or considering reforms to judicial performance evaluation mechanisms.

Even in the developed countries, judicial performance evaluation is treated as a complex task beset with judicial conservatism, the threat of executive intervention, and methodological issues[7]. Therefore, it is time that we realise that performance evaluation of judges for whatever the purpose, may it be for granting annual salary increments, grade promotions or elevation to the superior courts, is no task to be taken lightly. There is a need to engage in serious academic and professional discussion in order to fill the lacuna in literature in the Sri Lankan contest in this regard.

Objectives

The main objective of this article is to raise concern and to highlight the fact that there are serious shortcomings in the method of performance assessment of judicial officers and to initiate an academic debate paving way for a more suitable method to be formulated. It also aims to draw attention to the importance of empirical research and data collection in relation to judicial studies in Sri Lanka.

What is Judicial Performance Evaluation?

Judicial performance is a controversial topic, even in other countries where extensive research is conducted. Dr. Stephen Colbran in his article examining the judicial performance evaluation in the United States, Nova Scotia, England and Australia, states that "for many judges performance evaluation is fearsome prospect, one hell bent on undermining judicial independence and centuries of legal tradition while others take a more liberal view and see the potential for performance evaluation as a useful tool for professional self-development[8].

The report "International Standards on the independence, efficiency and quality of Justice", by the International Commission of Jurists, January 2017 states that there is no universal approach to evaluation of judicial performance[9]. It states that methods of evaluation of judges vary and are linked to the way the judicial system has evolved in a particular country.

> "Evaluation may include formal and structured evaluation systems applying defined criteria or more informal systems for gathering information about the quality of work of a judge. In a formal evaluation there is a defined aim, criteria for evaluation, structure of the evaluating body and its procedures as well as legal and/or practical consequences as a result of an evaluation. An informal evaluation does not have these elements and may not necessarily have direct consequences for the judge evaluated. An informal gathering of information about a judge's performance for promotion may also be considered as an evaluation."[10]

Dr. Stephen Colbran[11] classifies judicial performance evaluation into three distinct types.

1. Traditional forms of judicial accountability including the principle of 'open justice', parliamentary accountability and appellate review.

2. Analysis of judicial attributes such as legal ability, impartiality, independence, integrity, temperament, communication skills, management skills and settlement skills, based on the opinions of those directly involved with the legal system.

3. Court and administrative performance measurement – with it's focus on time and motion of judicial activity, often linked with case management initiatives.

He states that the "Traditional approaches to judicial accountability are necessary to maintain public confidence in the administration of justice, but they do not offer a thorough model for performance evaluation of individual judges. The analysis of judicial attributes has the potential to assist judges with judicial self-improvement. Court and

administrative performance measurement offers the prospect of useful self- management tools. Both these components, when added to the traditional approaches, afford a firm basis for analysis of the performance of a court"[12].

The Importance and Purpose of Judicial Performance Evaluation

The notion that Judicial evaluation (and hence competence frameworks) is likely to be an increasingly important issue for the judiciary in all jurisdictions, as public and government demands grow for guarantees of quality standards and accountability in the justice system[13], holds true in the Sri Lankan context as well. It is believed that the assessment of the work of judges, case assignment, quality of judgments and their enforcements are intrinsically linked to the fairness of the proceedings and judicial independence depends directly on these aspects of the functioning of the judiciary[14].

> "The aim of any kind of evaluation should be to maintain and improve the quality of the work of judges and therefore the judiciary as a whole and to maintain "total respect for judicial independence"[15].

Judicial self-improvement is said to be the primary object of analysis of judicial attributes in the commonwealth context[16]. "Without performance standards and strategies to evaluate judicial performance evaluation judges are not in a position to objectively evaluate their own performance and skills"[17]. It is also believed that measurement may identify shortcomings and encourage self-improvement[18]. The mere fact of an evaluation is a pointed reminder to the judiciary that all participants in the justice system and the public are entitled to superior performance from the judiciary[19].

The Present Approach of Performance Evaluation in Sri Lanka and its Shortcomings

In Sri Lanka, performance evaluation of judicial officers comprises of an annual assessment conducted for the purpose of granting periodical salary increments. The assessment is based on data provided by the judge concerned by him or herself in accordance with the required criteria. The main element considered in this assessment process is the production of a specified minimum number of judgements and orders within the period of assessment. A number of issues are identifiable in this method of judicial evaluation.

The Disparity of work load Distribution among the Judges

It can be observed that the workload of each court in Sri Lanka is different in terms of the number, nature and complexity of cases. Where there are more than one court house in a particular jurisdiction, cases are divided mostly on a subject-wise basis. Thus, if one court house is allocated cases that do not require trials such as Non-Summary inquiries,

cases based on certificates filed by various governmental departments for recovery of money where the magistrate has a mere ministerial function and cases filed for care and protection orders for juveniles there will be no judgements for that judicial officer to write. Expecting a judge to produce a target number of judgments within a specified period where there does not exist cases that bring home judgments is asking the judge to do an impossibility. On the other hand it is also not proper to grant automatic increments and promotions without any assessment of work for these judges on this ground. Thus, the existing system fails to address such situations and the necessity arises in adopting different criteria to assess the performance of judges in such situations.

The number of cases allocated to each judicial officer also varies largely from court to court. In a situation where there are a large number of calling cases on a daily basis, there may not be sufficient time to adjudicate all cases by way of a fully fledged trial. Thus, in fairness to judges who are overburdened with a large number of cases, assessment of performance should be proportionate to the number of cases in each court.

Further, the speed and manner of disposal of cases may differ on many grounds. The outcome of a case would depend and vary on factors such as attitudes of lawyers, provincial practices of each court, trends unique to each court. For example the willingness of parties in compounding cases, trends in pleading guilty, stance of prosecution authorities in withdrawal of non compoundable cases where parties wish to settle, and the individual traits and social status of the people in a particular geographical area of the country may all contribute to the output of a judges performance.

The "work load" is a factor that affects not only the quantity but quality of judgments as well. The report on International Standards on the independence, efficiency and quality of Justice", International Commission of Jurists, states that the quality of judicial decisions is related to reasonable working conditions including the caseload for judges. Adequate time for the consideration of each case is one of the conditions for ensuring the quality of a judgement. It further states that the caseload of every judge should allow her or him to administer justice by adopting adequately reasoned decisions[20].

The Propriety of the Requirement of a Specific Number of Judgments

The attempt of increasing the number of judgments by imposing a target number of judgments to achieve may result in a reduction in the application of alternative dispute resolution methods that are legally enforceable by existing legal provisions. In order to reach the required number of judgments, a judge may have to discourage compounding of offences and guilty pleas. This may result in a backlog of trials and bring down the disposal rate. A judge is expected to use empathy and calculate the human gains and losses resulting from his sentence and be ready to act as a rehabilitator and a mentor[21].

The efforts of a judge who goes an extra mile to identify a fit case for a settlement and persuades the parties to compound the case according to the law rather than blindly proceeding for a fully fledged trial should be appreciated.

Official functions other than Adjudications

In addition to adjudicating, some judicial officers have to handle various other duties both judicial and administrative, specially in the case of magistrates. For example; magisterial inquests, crime scene visits, mortuary visits, inspecting hospitalised suspects, holding identification parades, recording statements and confessions of suspects, testifying in high court trials in relation to these functions, administrative functions such as holding public auctions for the clearance of confiscated court productions, destroying perishable and illicit items day to day, destroying old case records and documents form a large part of the work load of a judicial officer working in the capacity of a Magistrate.

Due to this unique nature of magisterial duties the same evaluation method adopted for judges of District Court and High Court cannot be applied to the Magistrates. The indictments filed in High Courts are refined by a filtering system and catered before the High Court ready to be adjudicated while it is the magistrates who know the smell of fresh blood in a crime scene and the odour of a maggot infested putrefied body behind those cases. It is the magistrates who drench in rains and scorch in sun visiting crime scenes. It is doubtless, that some may have even travelled in tractors, crossed rivers in boats, climbed mountains and walked in leech infested jungles to reach a dead body in remote areas. Sometimes, the crime scene may still be in risk of explosives as it was in the time of war, and at times the magistrates face agitated hostile victims who are ready to unquestioningly assault persons of any authority who comes to their territory irrespective of the purpose. Therefore, assessing the performance of a magistrate based solely on the number of judgments and final orders written after trials and inquiries in court clearly undermines their other duties.

Contributions made to the Judiciary in addition to the Judicial Duties

Various other additional work of non judicial nature are also allocated to individual judges from time to time which consume judicial time. For E.g. Setting exam papers for recruitment of court staff, setting papers for efficiency bar examinations of the court staff, correcting these exam papers, holding interviews for the recruitment of court staff, conducting training programmes for the non judicial staff on law and administration etc. These intellectual contributions should be given credit in the performance assessment criteria as they help increase the quality of the administration of justice system of the country. It is a well recognised principle that "A judge shall devote the judge's professional

activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operation"[22]. Thereby, disregarding the contribution made by these other duties amounts to an undermining of the said principle enshrined in The Bangalore Principles of Judicial Conduct.

Academic Credentials

In the present system, no credit is given to credentials such as higher studies and qualifications gained on related subjects, research conducted, scholarly publications and other academic achievements earned by judges during the assessment period. This undermines the value of continuing education and self development that contribute to better performance of the official duties. It would discourage the judges to engage in such academic involvement and in the long run deteriorate the quality and high standards of the judiciary. In an era where the judiciary is subjected to constant media scrutiny and the image of the judiciary is crumbling before the face of the public, it is important to build an academically sound judiciary.

Assessment of Judicial Officers holding posts of Non Judicial Nature

Judicial officers are also appointed to other posts such as the Deputy Secretary and the Senior Assistant Secretaries to the Judicial Service Commission, the Registrar of the Supreme Court, the Secretary to the Chief Justice, Academic Coordinator of the Sri Lanka Judges Institute and the Additional Secretary (Judicial) to the Ministry of Justice. The duties of these posts are of non-judicial nature and do not involve court sittings, hearing cases or writing judgments and orders. In the absence of judgments and orders, the criteria of assessment based solely on a minimum number of judgments inevitably fall short and the need arises for the application of a different yard stick based on the nature of their work. However, presently there is no formal procedure or transparent criteria applicable to these officers. Therefore, the granting of their salary increments and promotions seem almost automatic. On the other hand, assuming that an assessment is actually made based on the quality or quantity of specific work they do, the question arises as to why the same theory cannot be applied to other judges based on the nature of work in individual court house without insisting on a target number of judgments. This argument clearly points out a discrepancy in the system.

Assessment of Judicial officers who return after Foreign Employment and Foreign Studies

It is observed that there is no formal method to evaluate performance of Judicial Officers who return after serving in other countries and those who have been engaged

in foreign studies for a number of years. The mandatory requirement of producing a specific minimum number of judgments criteria and the necessity of having earned the annual increments cannot be applied to them. However, they are known to be given their promotions despite the fact that they have not contributed to the countries judicial system during this period. In doing so, they gain an undue advantage over those who have worked in the country right throughout. Thus, there should be special criteria to assess the work of these judges when granting promotions.

Quality Vs. Quantity

The above discussion indicates that the number of judgments a judge can produce within a specified period does not solely depend on the efficiency of the particular judge but depends on a number of external variables beyond the control of the judge. Therefore, it is evident that "While judgment writing is an important yardstick to look at the efficiency of a judge, it cannot be the sole yardstick to measure performance[23]." It can be stated that quantitative measurement of judgments disregarding the quality and complexity is not a good criterion. Crude measures of performance based upon turnover of cases, regardless of their length or complexity, or based upon comparisons between courts, regardless of their comparative workloads and resources, have clearly been held inappropriate[24]. International Commission of Jurists states as follows in this regard:

> "The criteria for evaluation should not be purely quantitative. For example, the Kyiev Recommendations specify that: "[t]he evaluation of judges' performance shall be primarily qualitative and focus upon their skills, including professional competence (knowledge of law, ability to conduct trials, capacity to write reasoned decisions), personal competence (ability to cope with the work load, ability to decide, openness to new technologies), social competence (ability to mediate, respect for the parties) and, for possible promotion to an administrative position, competence to lead. These same skills should be cultivated in judicial training programmes, as well as on the job.[25]"

Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, states in relation to the inappropriateness of using quantitative criteria[26];

> "The quality of a judge's performance cannot be measured by counting the number of cases proceeded regardless of their complexity, or the number of judgements upheld at higher instance. While it was acknowledged that statistics regarding case processing and reversal rate can be useful for the purposes of judicial administration, management and budgeting, they should not be used to the detriment of the individual judge".

Judicial Performance Evaluation in Other Jurisdictions

Comparative studies on judicial performance evaluation have reflected that when it comes to judicial appraisal or evaluation schemes and competence frameworks for the judiciary, common law countries do not have much to offer in the way of models[27]. However, in many Civil Law jurisdictions as judicial evaluation or appraisal is part of the professional life of a judge and is an integral part of career progression and promotion the European academics have been engaged in extensive studies on the development of "quality standards" for the judiciary and comparative studies of evaluation[28]. As a result, much more advanced and versatile evaluation methods are seen to be applied for the assessment of judges in these developed countries. For example, France, Germany and Austria are known to have the most highly developed institutionalised evaluation programmes where virtually all judges are evaluated by judicial superiors at regular intervals[29]. The systems of some of these countries of both civil law and common law will be highlighted briefly here as they can be used as guidance for our country.

France

With the view that evaluating individuals, especially members of the judiciary, is neither an easy task nor an exact science, France is said to have developed a system that use a plurality of criteria and a plurality of evaluators[30]. In the French system, all judges are subjected to a compulsory evaluation every two years based on a competence frame work that includes four main criterions by the president of Court of Appeal in consultation with other evaluators[31]. The four main criteria are as follows:

1. General Professional ability: for example, capacity to decide, to listen and exchange views with others, and to adapt to new situations
2. Legal and technical skills: capacity to use one's own knowledge; capacity to preside
3. Organisational skills; capacity to lead a team, to manage a court
4. Other abilities: working abilities; professional relations with other institutions.

It is interesting to note that there is a requirement for full transparency in that every aspect of the evaluation must be communicated in advance to the individual judge. The evaluation is said to be always preceded by a personal conversation between the judge and the evaluator, which is summarised and included in the evaluation. After having shown the whole set of documents to the individual judge, they are filed in to their personal file. These evaluations form the basis for decisions about promotions and transfers. A judge who is dissatisfied, has the right to challenge an evaluation.

Germany

Germany has an evaluation system that varies according to Lander but, shares a basic structure designed to rank judges in order to make promotions decisions. Evaluation is done judiciary-wide every 4-5 years and judges-specific outside of these regular intervals when individual judges apply for promotions[32]. The general criteria for evaluation are laid down in judicial administration regulations in the Lander which comprises of four main competences namely; Professional competence, Personal competence, Social competence and Competence to lead. Under these four main competences, a number of Lander have developed more detailed lists of qualifications and abilities on which evaluation is to be based[33].

USA

Although the evaluation of performance of judges is done with a very different purpose in the United States due to the elective system of appointing and retaining judges, their evaluation criteria and methods holds great importance to us as it is comprehensive and intensive. It is important to note here the eight primary criteria suggested by The American Bar Association to judge judicial performance[34]. These are: 1) Integrity, 2) Knowledge and understanding of the law, 3) Communication skills, 4) Preparation, attentiveness, and control over proceedings, 5) Skills as a manager, 6) Punctuality, 7) Service to the profession and the public and 8) Effectiveness in working with other judges of the court. For each of these criterions a number of measures are proposed.

Integrity is measured by: Avoidance of impropriety and appearance of impropriety; Freedom from personal bias; Ability to decide issues based on the law and the facts without regard to the identity of the parties or counsel, the popularity of the decision, and without concern for or fear of criticism; and Impartiality of actions.

Knowledge and understanding of the law is measured by: The issuance of legally sound decisions; The substantive, procedural, and evidentiary law of the jurisdiction; The factual and legal issues before the court; and The proper application of judicial precedents and other appropriate sources of authority.

Communication skills are measured by: Clarity of bench rulings and other oral communications; Quality of written opinions with specific focus on clarity and logic, and the ability to explain clearly the facts of a case and the legal precedents at issue; and Sensitivity to impact of demeanour and other nonverbal communications.

Preparation, attentiveness, and control over proceedings are measured by: Courtesy to all parties and participants; and Willingness to permit every person legally interested in a proceeding to be heard, unless precluded by law or rules of court.

Skills as a manager are measured by: Devoting appropriate time to all pending matters; Discharging administrative responsibilities diligently; and Where responsibility exists for a calendar, knowledge of the number, age, and status of pending cases.

Punctuality is measured by: The prompt disposition of pending matters; and Meeting commitments on time and according to rules of the court.

Service to the profession and public[35] is measured by: Attendance at and participation in judicial and continuing legal education programs; and Consistent with the highest principles of the law, ensuring that the court is serving the public to the best of its ability and in such a manner as to instil public confidence in the court system.

India

The issue of performance evaluation of judges is an ongoing debate in India and has been the subject of much media criticism. In India the lower court judges are evaluated through a system of Annual Confidential Reports (ACRs) prepared by the senior-most judges of the lower court and reviewed by the State High Court. These are said to be neither filled up regularly nor is the evaluation process transparent[36].

International Standards

International standards require that "evaluation of judges" should not be seen as a tool for policing judges, but on the contrary, as a means of encouraging them to improve, which will reflect on the system as a whole"[37]. It is recognised that general conditions of the work of judge should be taken into account in the evaluation, so that poor working conditions of judges that are beyond their control do not negatively impact upon the evaluation[38].

The Venice Commission commenting on the inappropriateness of measuring duration of examining of cases has stated[39]:

> "Who is to say that a judge who takes longer over a case is not doing a more thorough job than the speedier colleague? The use of such a managerial tool in the evaluation process should be approached with great caution, as it will affect the judge's independence. The judge seeking to meet these time frames might be tempted to disregard what would normally be seen as necessary under the law and his or her interpretation of it."

It also states that if there were to be a measurement of workloads, systems would need to be in place to evaluate the weight and the difficulty of different files. "Any judge requires an assessment of the optimum time that should be allocated to each case. Every manager of professionals will (or should) be aware that the person who takes longer over work may do a more thorough job. Simply counting the number of cases dealt with is crude and may be completely misleading"[40].

International standards require that evaluation should be based on objective criteria published by a competent judicial authority. The Opinion 17 the Consultative Council of European Judges (CCJE) explains that "objective standards are required not merely in order to exclude political influence, but also for other reasons, such as to avoid the risk of a possible impression of favouritism, conservatism and cronyism, which exist of appointment/evaluations are made in an unstructured way or on the basis of personal recommendations" and these criteria should "be based on merit, having regard to qualifications, integrity, ability and efficiency"[41]. These standards should be taken in to account when considering a suitable system for Sri Lanka.

Conclusion

In the light of the above brief discussion, it can be concluded that the current criteria for assessment of performance of judicial officers in Sri Lanka is very much flawed, irrational and unscientific as the mere number of judgments delivered within an year does not accurately mirror efficiency or performance of a judge. As a result of this rigid criterion, it is inevitable that the career advancement of certain judges would be adversely affected and result in serious consequences such as loss of seniority and denial of promotions to higher courts. This would lead to lose of faith in the system and create despair in those judges which would in turn hinder their performance.

An evaluation criterion should not be formulated merely as a short term solution for the public outcry and governmental pressure on clearing backlog of cases in courts. A judicial performance evaluation is a delicate and complex issue that needs to be treated with a scientific approach. Thus, the need for a rational scientific methodology to evaluate the performance for salary increments and grade promotions for the Sri Lanka Judiciary is felt very strongly. It is best that the respective policy makers familiarise themselves with the reality in various different grass root level court houses and issues endemic to each court house by conducting extensive research before formulating a policy.

Endnotes

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2 *Value 6*

3 *The first paragraph of principle IV*

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28 *ibid, page115*

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30 *Ibid , page 120*

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32 *Supra note 12, page 121*

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LIFTING THE COPORATE VAIL: INSTANCES AND LIMITATIONS

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What is a Company?

As the law recognizes, an artificial or fictitious person; a company is a commercial entity created by an individual or by collection of individuals for the purpose of doing business. Depending on formation of individuals involved in creation of a company, nature of the company varies. Control of assets as well as liabilities of the entity depends on nature of a company. According to the Companies Act a company is a body corporate and a juristic person having a distinct personality separate from its shareholders having the rights, powers and privileges and the capacity necessary to carry on or undertake any business or activity, do any act or enter into any transaction.[1]

Basically, a company is owned by shareholders and managed by Directors. The concept of limited liability ensures that liability of shareholders is limited to the "Issue Price" of the company's shares. Hence, personal estates of shareholders are not at risk even in event of the company's insolvency[2]. Directors, on the other hand are appointed to a company to manage its affairs as a company is inanimate. This separation establishes the principles of good governance within a company and demands the directors of the company to do their best for the benefit of the company. Directors' duties and responsibilities and the liabilities are thus created[3].

The separate legal status of a company offers distinct economic advantages to its investors, facilitating entrepreneurship by encouraging persons to engage in business without fear that failure of business could lead to personal bankruptcy. Another advantage is that a company continues its existence even if there is a change in shareholders, unlike in case

of a partnership where the whole entity has to be reconstituted. These features facilitate pooling of resources for business activity and increase the ability to raise large amounts of capital.

However, this concept of a company as a legal person as recognized before the law, separated the company from the individuals who manage the company.[4]

The distinction between the director and the company was well recognized in the case of ***Salomon Vs. Salomon & Co.***[5] wherein the House of Lords held that "*Either the limited company was a legal entity or it was not. If it were, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and nothing to be an agent [of] at all; and it is impossible to say at the same time that there is a company and there is not".*

This concept was also recognized in the case of ***Lee Vs. Lee's Air farming Ltd.*** by the Privy Council by holding that Lee and his company were distinct, although Lee was the governing director of the company, which had entered into a contractual relationship when he became an employee of the company. Both these cases with other legal materials introduced the concept of "corporate veil".

What is "Corporate Veil"?

Corporate veil is an instrument which protect the personnel who run the company or who are behind the corporation, from personal liability. The rule that a corporate entity has a separate existence is usually sacrosanct. However, with growing economy and expansion of corporate world, and since most companies use public money for their businesses, exceptions to this rule emerged and necessity to look through this "veil' arose. Therefore, necessity to lift the veil became inevitable. This was well discussed by Phillip Lipton[6] in his essay[7] as follows;

> *"Recent developments in tort law have seen a number of cases where holding companies were held liable to employees of their subsidiaries by the imposition of a duty of care owed by the holding company. In this respect tort law and corporate law are uneasy bedfellows where each addresses the issue of tort liability in corporate groups from an entirely different viewpoint. The law of torts has been more responsive to modern social expectations than company law in addressing the social and economic issues raised in mass tort cases where a holding company exercises close control and dominance over a subsidiary."*

As a general rule a corporation is a legal entity distinct from its shareholders. But Court may disregard this principle by considering the company as a mere agent or puppet of its controlling shareholders or Parent Corporation.[8] When a company engages in fraud or operates in a wrongful manner or uses the resources or profits of the company for

personal benefit of the directors or officers of the company, or selective shareholders, the Court has the power to disregard the concept of separate entity and impose the personal liability on the directors or the persons concerned. This doctrine is recognized as lifting of the veil.

Arguments against the concept of limited liability have always been centered on misuse of the corporate personality given to companies. If Court can be satisfied that a third party's position is jeopardized as a result of the corporate veil of a company, it can order an investigation into the "powers behind the veil"[9] in varying degrees.

Under normal circumstances, Court requires an act of fraud, misrepresentation or illegality to lift the corporate veil. In additions if the owners disregard the prevailing formalities or fail to keep up with necessary corporate requirements, Court can disregard the existence of the veil. In such instances lifting the veil or the piercing the veil is essential to meet justice. This sometimes explains the challenges to the doctrine of separate legal personality. Furthermore it is discussed in the modern company law along these lines;

> *"Challenges to the doctrines of separate legal personality and limited liability at common law tend to raise more fundamental challenges to these doctrines, because they are formulated on the basis of general reasons for not applying them, such as fraud, the company being a "sham" or "façade", that the company is the agent of the shareholder, that the companies are part of a "single economic unit" or even that the "interest of justice" require that result[10]".*

It is obvious that the intervention of Court to lift the corporate veil is inevitable where a company is used as a tool for fraud or technique of escaping from existing law. In 1933 the Court of Appeal of England issued an injunction against one Mr. Horne and a company under the name of his wife in the case of ***Gilford Motor Company Ltd Vs. Horne***[11] deciding that his wife's company "was a mere cloak or sham for the purpose of enabling the defendant to commit a breach of his covenant against solicitation" because Mr. Horne started soliciting the clients of his former company, where he was the managing director, after he left the company because of the discontinuation of employment contract.

The above cases show how Courts of law look in to the grounds of lifting the corporate veil in given situations. Courts have ignored the corporate form when it has been used to cover deliberate wrong-doing[12] and applied the "agency and the alter ego doctrine" on occasions where the circumstances demanded that the corporate entity should be treated as an agent of a holding company or other controlling power[13]. The veil of incorporation has also been lifted by Court to prevent fraud[14]. In case of group of companies, Court has looked at the business realities of the situation and treated some or all of the entities in the group as one[15].

Court may also pierce the veil of incorporation in various other instances, including; to determine a company's place of residence for the application of specific statutes such as tax laws[16].

Courts will generally not lift the corporate veil unless the law sets it out in clear and specific language[17] to prevent deliberate evasion of contractual obligations[18]; to promote interests of national security[19] or to ensure conformity with public policy[20].

In Sri Lanka the rule of lifting the corporate veil and its limitations has been broadly discussed in many cases. In the case of ***Hatton National Bank Limited Vs. Samathapala Jayawardena and 2 others***[21] it was held that;

> *"In my considered opinion, the 1st and 2nd Respondents cannot hide behind the veil of incorporation of Nalin Enterprises (Pvt.) Ltd, while being the "alter ego" of the said Company of which the 1st Respondent has been the Managing Director and the 2nd Respondent who is the wife of the 1st Respondent has been a director. Although the independent personality of the Company as distinct from its directors and shareholders has been recognized by the Court since the celebrated decision of* ***Salmon Vs. A. Solomon & Co. Ltd*** *(1897) AC 22, Courts have in appropriate circumstances lifted the veil of incorporation."*

And the supreme court of Sri Lanka further went to say that;

> *"To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a Company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a Company for some legal purpose"*[22].

Conclusion

Lifting the veil of incorporation is the rare exception to the rule since the corporate form is a vehicle meant to facilitate commercial activity and investment. Undue interference with this principle would result in unpredictability and would stifle the ability to plan business operations negating the very purpose of the corporate form. It is important to note that the corporate veil has not always been lifted to impose liabilities on shareholders. On certain occasions it has been lifted for the purpose of providing benefits to the members[23]. It is therefore safe to say that it is settled law that courts will not lift the veil of incorporation without a very good reason[24].

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Endnotes

1 *Companies Act No.7 of 2007, section 2*

2 *In the event there is an unpaid amount of shares, the shareholder would be liable to only such amount. Similarly in certain situations there could be a liability to repay recoverable distributions as provided in Sections 31 (4) and (5) of the Companies Act No.7 of 2007*

3 *The current company law regime seeks to codify the directors' duties and responsibilities, which, up to the enactment of the Companies Act No.7 of 2007 have been based on common law principles.*

4 *Company Law of Sri Lanka by Kimarli Wickremasinghe (Revised 2nd edition) at P.9*

5 *[1897] A.C. 22 Page 55: Salomon was a successful leather merchant who manufactured leather boots. For many years he ran his business as a sole trader. By 1892, his sons had become interested in taking part in the business. Salomon decided to incorporate his business as a Limited company, Salomon & Co. Ltd. Salomon owned 20,001 of the company's 20,007 shares and the remaining six were owned by his wife, daughter and four sons. Salomon sold his business to the new corporation for almost £39,000, of which £10,000 was a debt to him. When the company went into liquidation, the liquidator argued that the debentures used by Mr. Salomon as security for the debt were invalid, on the grounds of fraud. The judge, of the High Court accepted this argument, and decided that the company and Salomon were one unit. In The appeal, The Court of Appeal also ruled against Salomon, on the grounds that Salomon had abused the privileges of incorporation and affirmed the Ruling of the High Court. Unsatisfied with both rulings Mr., Salomon appealed to the House of Lords and the House of Lords unanimously overturned this decision, rejecting the arguments from agency and fraud deciding that "Either the limited company was a legal entity or it was not. If it were, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and nothing to be an agent [of] at all; and it is impossible to say at the same time that there is a company and there is not."*

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11 *1933 1 CH 935*

12 *See generally, Jones v Lipman [1962] 1 All ER 442; Gilford Motor Co. Ltd. v Horne [1933] Ch 935*

13 *Re RG (Films) [1953] 1 All ER 615. But see, Trade Exchange Ceylon Ltd. v Asian Hotels Corporation Limited [1981] 1 SLR 67*

14 *Jones v Lipman [1962] 1 All ER 442; Re Darby, ex p Brougham [1911] 1 KB 95*

15 *Lubbe v Cape Plc. (No.2) [2000] 4 All ER 21 at 28, where Roskill LJ opines that previous decisions on "groups" was bad law, stating that it is "long established and now unchallengeable by judicial decision …… that each company in a group of companies is a separate legal entity possessed with separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of*

the exercise of those rights would ensure beneficially to the same person or corporate body"; Adam v Cape Industries Plc [1991] 1 All ER 929

16 *Section 79 of the Inland Revenue Act No.10 of 2006. See also Adam v Cape Industries*

17 *See Dimblebye& Sons Ltd v National Union of Journalists [1984] 1 All ER 751*

18 *Gilford Motor Co. Ltd. v Horne [1933] Ch 935*

19 *Daimler Co. Ltd. v Continental Tyree& Rubber Co. (Great Britain) Ltd [1916] 2 AC 307 - Court went behind the veil of incorporation to determine if a company was to be categorized as an "enemy" in the time of war*

20 *R v Secretary of State for Transport, ex p Factortame Ltd [1991] 3 All ER 769; Re FG (Films) Ltd [1953] 1 All ER 615; Guilford Motor Co. Ltd. v Horne*

21 *2007(1)SLR 181*

22 *Ibid*

23 *See for instance, Trebanog Working Men's Club and Institute Ltd. v MacDonald [1940] 1 KB 576 (incorporated club treated as unincorporated to grant exemption from liquor license rule;) DHN Food Distributors Ltd v Towers Hamlets London Borough Council [1976] 3 All ER 462 (to permit a parent to claim compensation under planning legislation*

24 *See generally, Yukong Lines Ltd of Korea v Rendsburg Investments Corporation of Liberia, the Rialto (No.2) [1998] 4 All ER 82; Re Poly Peck International Plc. [Administration] (No.4), [1996] 2 All ER 433; Adams v Cape Industries Plc. [1991] 1 All ER 929*

LET YOUR CASE SPEAK FOR ITSELF MAKE THE DOCTRINE *RES IPSA LOQUITUR* WORK FOR YOU

Jayaki De Alwis *
Additional District Judge, Colombo

res ipsa loquitur

[The thing speaks for itself.]

A rebuttable presumption or inference that the defendant was negligent, which arises upon proof that the instrumentality or condition causing the injury was in the defendant's exclusive control and that the accident was one that ordinarily does not occur in the absence of negligence.

res ipsa loquitur, or *res ipsa,* as it is commonly called, is really a rule of evidence, not a rule of Substantive Law.

res ipsa loquitur is one form of circumstantial evidence that permits a reasonable person to surmise that the most probable cause of an accident was the defendant's negligence. This concept was first advanced in 1863 in a case in which a barrel of flour rolled out of a warehouse window and felt upon a passing pedestrian. *res ipsa loquitur* was the reasonable conclusion because, under the circumstances, the defendant was probably culpable since no other explanation was likely. The concept was rapidly applied to cases involving injuries to passengers caused by carriers, such as railroads, which were required to prove that they had not been negligent.

The principal of *res ipsa loquitur* was first presented by Baron Pollock J. in ***Byrne Vs. Boadle*** [159 Eng.Rep.299 (1863)], where the plaintiff suffered injuries from a falling barrel of flour while walking by a warehouse. At the trial, the plaintiff's attorney argued that the facts spoke for themselves and demonstrated the warehouse's negligence since no other explanation could account for the cause of the plaintiff's injuries.

As it has developed since then*, res ipsa loquitur* allows judges, and juries to apply common sense to a situation in order to determine whether or not the defendant acted negligently.

"In personal injury law, the concept of *res ipsa loquitur* operates as an evidentiary rule that allows plaintiffs to establish a rebuttable presumption of negligence of the defendant through the use of circumstantial evidence. This means that while plaintiffs typically have to prove that the defendant acted with a negligent state of mind, through *res ipsa loquitur* ,if the plaintiff puts forth certain circumstantial facts, it becomes the defendant's burden to prove that he or she was not negligent."

Inference of Negligence

The plaintiff's injury must be of a type that does not ordinarily occur unless someone has been negligent. This requirement, which is the inference of negligence, allows *res ipsa loquitur* to be applied to a wide variety of situations, such as falling of elevators, the presence of a dead mouse in a bottle of Soda, or a street car careening through a restaurant. Although many of the cases involve freakish and improbable situations, ordinary events, such as where a passenger is injured when a vehicle stops abruptly, will also warrant the application of *res ipsa loquitur*. Commercial air travel became so safe in the late twentieth century that planes engaged in regularly scheduled commercial flights generally do not crash unless someone has been negligent. Vehicular accidents caused by a sudden loss of control, such as a car suddenly swerving off the road or a truck skidding on a slippery road and crossing into the wrong lane of traffic, justify the conclusion that such an event would not normally occur except for someone's negligence.

Contrast to *prima facie*

res ipsa loqitur is often confused with *prima facie* ("at first sight"), the common-law doctrine that a party must show some minimum amount of evidence before a trial is worthwhile.

The effect of this is that an inference of negligence is drawn from the very occurrence of the accident itself. The difference between the two is that *prima facie* is a term meaning there is enough evidence for there to be a case to answer. *res ipsa loquitur* means that because the facts are so obvious, a party need not explain any more.

For example:

> "There is a *prima facie* case that the defendant is liable. The defendant controlled the pump. The pump was left on and flooded the plaintiff's house. The plaintiff had informed the defendant, and was away leaving the house in control of the defendant. *res ipsa loquitur*"

Typical in Medical Malpractice;[1]

A person goes to a doctor with abdominal pains after having his appendix removed. X-rays show the patient has a metal object the size and shape of a scalpel in his abdomen. It requires no further explanation to show the surgeon who removed the appendix was negligent, as there is no legitimate reason for a doctor to leave a scalpel in a body at the end of an appendectomy.

The Trustees of Fraser Memorial Nursing Home Vs. Olney **[45 NLR 73] (a medical negligence case)**

- The plaintiff, a minor suing by her next friend, claimed damages from the defendants, the trustees of a Nursing Home for injuries caused to her by the negligence of the Sister-in -Charge of the defendant's X - Ray plant.
- It was admitted that plaintiff had been screened on two occasions at the Nursing Home for screening.
- It was proved that the plaintiff had sustained serious and painful X-ray burns on her abdomen and back

Held;

That the defendants were liable for the negligence of the Sister- in Charge who was acting within the scope of her employment and that the principle of respondent superior applied even where the work the servant was employed to do was of a skilful or technical character as to the method of performing which the employer was himself ignorant.

In the circumstances of this case the proper and natural inference was that the injury complained of was the result of negligence unless the defendants could show that they were caused apart from negligence.

> However, Soertsz J. stated in this case that,
>
> '…. when there is reference to this maxim, and that is that it does not mean that a plaintiff alleging negligence is ever absolved from establishing it'

The essential element is that the mere fact of the happening of the accident should tell its own story so as to establish a prima facie case against the defendant.

Elements of *res ipsa loquitur*

Since the laws of personal injury and evidence are determined at the state level, the law regarding *res ipsa loquitur* varies slightly between states. That said a general consensus has emerged, and most states follow one basic formulation of *res ipsa loquitur*.

Under this model for *res ipsa loquitur*, there are three requirements that the plaintiff must meet before a jury can infer that the defendant's negligence caused the harm in question:

- The event doesn't normally occur unless someone has acted negligently;
- The evidence rules out the possibility that the actions of the plaintiff or a third party caused the injury; and
- The type of negligence in question falls with the scope of the defendant's duty to the plaintiff.

The Presence of Negligence

As mentioned above, not all accidents occur because of someone else's negligence. Some accidents, on the other hand, almost never occur unless someone has acted negligently.

> Going back to the old case of the falling-barrel, it's a piece of shared human knowledge that things don't generally fall out of warehouse window or hasn't ensured that items on the warehouse flour are properly stored. When something does fall out of a warehouse window, the law will assume that it happened because someone was negligent.

***George Vs. Eagle Air Services Ltd* [2009] UKPC 21 WLR (D) (Aviation case)**

- In the first instance the trial judge dismissed the claimant's claim for want of any evidence as to how the crash occurred.
- The claimant appealed and raised the argument that since the aircraft was airworthy when it took off the maxim of res ipsa loquitur should apply in this case
- The defendant did not produce any explanation as to why the air crash occurred.
- The privy council determined that the maxim did apply, holding that:

> "major improvements in design and manufacturing
> Technology, in pilot training and in ground control,
> Communications navigational aids, among other things,
> Have combined to give air travel an estimable safety
> record… Logic, experience and precedent compel us to
> reject the argument that airplane crashes ordinarily occur in
> the absence of default by someone connected with the
> design, manufacture, or operation of the air craft"

Only the Defendant is Responsible

The second component of a *res ipsa* case hinges on whether the defendant carries sole responsibility for the injury. If the plaintiff can't prove by a preponderance of the evidence that the defendant's negligence causes the injury, then they will not be able to recover under res ipsa.

Van Wyk Vs. Lewis **[1924 AD 438]**

In this action against the defendant (a doctor) for damages for negligence in failing to remove the swab, the court held that negligence could not be inferred from the mere fact that the accident happened; the onus of establishing negligence lay upon plaintiff. Although the defendant, in performing the operation, was bound to exercise all reasonable care and skill, it was a reasonable and proper practice to leave the duty of checking the swabs to the theatre sister, so the defendant, in following that practice, was not guilty of negligence. Assuming, without deciding, that the sister was negligent in checking the swabs, the court held that the defendant was not liable for the result of such negligence.

It seems that the South African court is reluctant to apply the maxim to their cases based on negligence. If the accident or occurrence would ordinarily not have happened unless there had been negligence, the court is not entitled to infer the maxim of *res ipsa loquitur.*

Law sometimes examine whether the defendant had exclusive control over the specific instrumentality that caused the accident in order to determine if the defendant's negligence caused the injury. For example, if a surgeon leaves a sponge inside the body of a patient, a jury can infer that the surgeon's negligence caused the injury since he had exclusive control over the sponges during the operation.

In some cases, a closed group of people may be held in breach of a duty of care under the rule of *res ipsa loquitur.*

Ybarra Vs. Spangard,[2] a patient undergoing surgery experienced back complications as a result of surgery, but it could not be determined exactly which member of the surgical team had breached his or her duty, and so it was held that they had all breached, because it was certain that at least one of them was the only person who was in exclusive control of the instrumentality of harm.

The Defendant Owes the Plaintiff a Duty of Care

> In addition to the first two elements, the defendant must also owe a duty of care to protect the plaintiff from the type of injury at issue in the suit. If the defendant does not have such a duty, or if the type of injury doesn't fall within the scope of that duty, then there is no liability.
>
> For example, in many states, landowners don't owe trespassers any duty to protect them against certain types of dangers on their property. Thus, even if a trespasser suffers an injury that was caused by the defendant's action or inaction and that wouldn't normally occur in the absence of negligence, *res ipsa loquitur* won't establish negligence since the landowner never had any responsibility to prevent injury to the trespasser in the first place.

Today, courts ask two questions when deciding if *res ipsa loquitur* applies to a case;

1. Is this the kind of accident that would be caused by negligence?
2. Did the defendant has exclusive control over whatever caused the accident?

If the answer to both questions is "yes" the court may hold that *res ipsa loquitur* applies. If so, the parties do not have to argue over whether the defendant was negligent. Instead, they may focus on whether defendant's negligence caused the plaintiff's injury and how to measure the plaintiff's damages.

Court ask whether the defendant had exclusive control because *res ipsa loquitur* may not apply if the plaintiff's own negligence caused his injury or made it worse. For instance, suppose a worker at a construction site negligently parks a wheelbarrow so that it blocks the whole sidewalk. A bicyclist runs into the wheelbarrow, which he didn't see because he was sending a text message on his Mobile phone and not watching where he was going.

In this situation, a court may apply either rule of contributory negligence or the rule of comparative negligence. In contributory negligence, if the plaintiff was negligent at all, he cannot win his case, even if the defendant was more negligent than the plaintiff can win if his negligence is less than 50% responsible for his injuries, but his damages will be reduced by the percentage that he was negligent. *res ipsa loquitur* does not apply in either contributory negligence or comparative negligence cases because the cause of the plaintiff's injury was not in the defendant's exclusive control. That is the plaintiff controlled part of what caused his injury.

This less rigid formulation of exclusive control, this element subsumes the element that the plaintiff did not contribute to his injury. In modern case law, contributory negligence is compared to the injury caused by the other. For example, if the negligence of the other

is 95% of the cause of the plaintiff's injury, and the plaintiff is 5% responsible, then the plaintiff's slight fault cannot negate the negligence of the other. This new type of spilt liability is commonly called comparative negligence.

A defendant may argue that *res ipsa loquitur* does not apply because the event that caused the plaintiff's injury was an Inevitable occurrence that the defendant could not have prevented. An inevitable occurrence also defeats *res ipsa loquitur* because the defendant lacked control over what caused the injury.

Here the claimant has to show that;

- The object which caused the damage was under the control of the defendant or a person for whose negligence the defendant will liable, (consider vicarious liability)
- Causation is unknown

Without negligence, the accident would not normally occur.

Ref. ***London and St. Katherine Docks Co. (1865) 3 H&C 596 (E.R.159 page 665*)**

"where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management to use proper care..."

In the classic words of Erle C.J., ***" There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants…"***

Rebutting *res ipsa loquitur*

re*s ipsa loquitur* only allows plaintiffs to establish the *inference* of the defendant's negligence, not to prove the negligence completely. Defendants can still rebut the presumption of negligence that *res ipsa loquitur* creates, by refuting one of the elements of the doctrine, stated above.

For example, the defendant could prove by a preponderance of the evidence that the injury could occur even if reasonable care took place to prevent it. An earthquake could shake the specific place only where the item is kept and item loose and it could fall out of the warehouse window, for instance.

A defendant could also demonstrate as earlier said, that the plaintiff's own negligence contributed to the injury. To go back to the flour - barrel example, if the defendant shows that the plaintiff was standing in an area marked as dangerous it could rebut the presumption of negligence created by *res ipsa loquitur.*

The defendant could establish that he did not owe the plaintiff a duty of care under the law, or that the injury did not fall within the scope of the duty owed. For example, if the law only imposes limited duty on the defendant not to behave recklessly, then *res ipsa loquitur* will not help the plaintiff by creating an inference of negligence since a negligent action would not violate the duty owed to the plaintiff.

Applicability of the Maxim in Sri Lanka

Safeena Umma Vs. Siddick [37 NLR 25]

Shift of burden of proof

Onus on the defendants to show that they were not guilty of any want of care -

Dolton J.;

In this case a bus which was being driven at a fast rate of speed went off the road and hit a boy who was standing on the steps of his house, the occurrence itself, in the absence of a reasonable explanation by the driver, provides prima facie evidence of negligence.

In ***Ellor Vs. Selfridge Co.*** [46 Times L.R. 236], where a motor vehicle got into the pavement and injured the persons standing there, the maxim was invoked to find the driver guilty.

In ***Punchi Singho Vs. Bogala Graphite Ltd.***[73 NLR 66.], the defendant's vehicle swerved on to the wrong side of the road and collided with the Plaintiff's vehicle which was being driven on the correct side of the road. The driver's explanation was that the steering mechanism of the lorry got locked and the vehicle got out of control. The trial judge found that this was the cause of the accident and accordingly the driver was not negligent but held that the owners' failure to maintain the vehicle in proper mechanical condition brought the case within the maxim, and the inference of negligence arising from the event has not been properly displaced.

What is the reasonable explanation to displace the prima facie inference of negligence arising from the nature of the incident?

That the accident was to a mechanical defect is a good explanation.

But a mere statement that the accident was due to a mechanical defect was insufficient. As held in the case of ***Saffena Umma Vs. Siddick*** (Supra) such evidence must be supported by evidence that there was in fact a mechanical defect.

Wije Bus Co. Ltd. Vs. Soysa **(50 NLR 350)- 'reasonable explanation'**

Plaintiff would have to show actual negligence on the part of the defendant.

In this case, the bus went off the road and overturned on impact with a culvert. The driver's evidence was that when the bus was driven at a speed of 20-25 mph, the steering lock had given way and the vehicle went out of control. The trial Judge has accepted this evidence. The evidence of the Examiner who had examined the vehicle was that the steering lock had given way but that he was unable to say whether it had happened before or after the accident. He was of the opinion that if it had happened while the vehicle was being driven, it could get out of control. This evidence was accepted as sufficient to displace the inference of negligence of the driver arising from the nature of the accident.

The defendant must give an explanation consistent with the absence of negligence; see.

Cabral Vs. Aberatne **[(1995) 57 NLR 368]**

Punchi Singho Vs. Bogala Graphite (supra)

In ***Luisa Perera Vs. Gamini Bus Co. Ltd*** *[40 CLW 49],* Gration J. has held that an admission of complete ignorance of what happened amounted to a failure to give or even suggest an explanation which is sufficient to rebut the inference of negligence arising from the fact that the rear wheel of a bus ran over a person who had just alighted at a halting place.

As an example, where a bus swerved on to the wrong side of the road and collided with an oncoming[3] vehicle which was on its correct side, evidence that the bus suddenly skidded and went on to the wrong side can be considered to be sufficient to rebut the inference of negligence arising from the way the accident had taken place.

Application of *res ipsa loquitur*

This Maxim is an inappropriate form of circumstantial evidence enabling the plaintiff in certain cases to establish the defendant's likely negligence. Hence the doctrine properly applied does not entail any covert form of strict liability. It just implies that the court doesn't know and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of causes of the type or category of accidents involved.

The application of the maxim means that some plaintiff prima facie establishes negligence where; it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but on the evidence as it stands at the relevant time it is more likely than not that the effective cause of this accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety.

The essential element is that the mere fact of the happening of the accident should tell its own story so as to establish a prima facie case against the defendant. There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care[4]. So, the elements control an accident of a type which does not normally occur without the defendant's fault.

Control is required because the absence of control by the defendant makes it less likely that the accident arose from his fault.

***Roe Vs. Minister of Health*[5]**

In this case the plaintiff was admitted to the hospital for minor operations. The plaintiff was administered spinal anaesthetics by injections of nupercaine and developed spastic paraplegia. The anaesthetics were stored in glass ampoules immersed in a solution of phenol, and the judge found that the injuries were caused by phenol, which could have entered the ampoules through flaws not detectable by visual examination. The plaintiff contented that the doctrine of *res ipsa loquitur* be applied against the hospital as the injury would not have occurred had the hospital not been negligent. The court held that the doctrine cannot be applied and the defendant cannot be held liable as the very occurrence of the injury or damage was not foreseeable. And the cause for the injury was beyond the defendants. It was to be a case of unknown tort-feasance.

Thus, in case of offences which are unintended and the commission of the offence itself was not known, the defendant cannot be held liable as in this case it's an unidentified tortfeasor.

***Walsh Vs. Holst & Co. Ltd.*[6]**

The occupier of premises adjoining the highway was carrying out works of reconstruction, which involved knocking out large areas of the front wall. He employed for that purpose a contractor who employed a sub-contractor. Since it was reasonably foreseeable that such a work on the highway could cause injury to a passer by the workers had taken all care to ensure that other road users are safe. However, on one particular day when there was only worker working at the premises one brick escaped the safety netting and hit pedestrian who proceeded against the defendants for the injury sustained on the basis of *res ipsa loquitur.* However, the defendants were able to establish that they were not negligent as they had taken all care to ensure that in no way a road user is injured and what had happened was beyond the ordinary control of the defendants.

The knowledge of mode in which the injury/ accident is not necessary to apply *res ipsa loquitur* does not apply in cases where reasonable care has been taken and what has happened is beyond the ordinary control of the defendant.

Conclusion

In *res ipsa loquitur,* the defendant will lead evidence. There is a two-step process to establish *res ipsa loquitur.*

1. Whether the accident is the kind that would usually be caused by negligence.
2. Whether or not the defendant had exclusive control over the instrumentality that caused the accident.

If found, *res ipsa loquitur* creates an inference of negligence.

The maxim finds its applicability in a variety of situations. It is mostly applied in cases of commercial air plane accidents and road and traffic accidents.

Generally, it is applied in cases of medical negligence where it cannot be ascertained as to which specific act of the hospital had caused the injury and where the situation is never outside the control of the hospitals.

res ipsa loquitur is finding increasing applicability in the modern era. It is applied in cases of industries like the use of the maxim in the ***M.C. Metha Vs. Union of India***[7] popularly known as the Olium gas leak case, in India.

This case is a public interest litigation regarding the establishment of enterprises involved in hazardous works in thickly populated areas in the light of the Olium gas leak. The Olium gas leak had occurred in the work premises of Shriram Mills. Olium is a hazardous gas and this nature of the gas had caused the death of many people and causing serious injuries to the health of others staying the close vicinity. It was not possible to establish negligence of the mill owners and *res ipsa loquitur* was applied to shift the burden of proof on the mill owners to show that they were not negligent. It was pleaded that any industry involved in cases of injuries/ damage due to the hazardous activities it undertakes then the onus must be on them prima facie to establish that they were not negligent. In this case the maxim was made use of to establish negligence and they were held liable for the damage and injury caused. It was further held that any company involved in hazardous activities will be held negligent prima facie and it is up to them to lead the evidence and prove how they are not negligent failing which they will be held liable.

Generally, all cases where the rights of the public are violated and they have been aggrieved and is not possible for them to establish negligence. So, the onus of not proving negligence is shifted to the defendants.

res ipsa loquitur is applied primarily in all prima facie cases, where at first instances the negligence on part of the defendant is evident and without which the injury would not have occurred. In such a case, it is presumed that the defendant is negligent and it is up to him to prove why he is not negligent.

Endnotes

* *LLM (University of Colombo), Additional District Judge, Colombo.*

1 *Wikipedia, the free encyclopaedia*

2 *93 Cal. App2 43 (1949)*

3 *Udapadi Liyanage,senior lecturer,Faculty of Law University of Colombo*

4 *Erle C. J;Scott v London and St. Katherine Dock Co.(1865)3 H .@ C.,596*

5 *[1954] 2 All ER 131*

6 *To be read from Tony Weir, A Casebook on Tort. (Sweet & Maxell, London, 8th edition, 1996) p322*

7 *(AIR) 1987 SC 965*

WHY BUDDHISM SHOULD BE GIVEN FOREMOST PLACE IN THE CONSTITUTION OF SRI LANKA?

Maniccavasagar Ganesharajah*

Magistrate, Batticcoloa

Introduction

> *The contribution of Dr. B. R. Ambedkar in the framing of Indian Constitution is a well-known fact. He comprehended Buddha's love for humanity and wished to incorporate freedom, equality, fraternity and social justice in the constitution -opined Prof. D. Dominik of Kannada Research Centre, University of Bengaluru.*[1]

The Republic of Sri Lanka shall give to Buddhism the foremost placein the new constitution of Sri Lanka.

Article 9

"The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, while assuring to all religions the rights granted by Articles 10 and 14(1)(e)."[2]

Gautama Buddha ever mentioned that his teaching is not a religion. This position is substantiated by Mahathera Narada who explains that Buddhism is neither considered a religion nor a belief.

> *"Buddhism is not strictly a religion in the sense in which that word is commonly understood, for it is not 'a system of faith and worship,' owing any allegiance to a supernatural god."*[3] *"In Buddhism emphasis is laid on 'seeing', knowing, understanding, and not on faith, or belief. Gotama wandered about the valley of Ganges meeting famous religious teachers, studying and following their systems,*

methods, and submitting himself to rigorous ascetic practices. They did not satisfy him. So he abandoned all traditional religions and their methods and went his own way" .[4]

On the other hand Buddhism is not considered a religion but only as the dhamma of the Buddha.[5]

It was King Asoka a convert to Buddhism, in about 250 BCE or 2250 years ago proceeded to establish a model for the relationship between state and religion that became predominant in the Theravada Buddhist world.[6]

Teachings of Buddha

The principal teaching of Bhagwan Buddha is eternal but in spite of this fact Buddha did not claim any status for himself, nor did he claims His principles to be infallible. He never claimed divinity for himself or for his religion. Buddha did not say that he was the son of God or the last prophet-messenger of God. On the contrary he said, "My father and my mother are ordinary mortals" [7].

Buddha to his followers asprinciples of conduct and they observe them not necessarilybecause they are Buddha's injunctions but becausethey have accepted them out of their free will, firmly believingthat they are conducive to the general welfare ofhumanity as well as to the preservation of their humandignity. No external authority drives them to the moralcourse of life. It is their own moral judgment that makesthem accept the Precepts and the Buddhist communitywhich they have chosen to join because of their spiritualsignificance. As regards the first moral injunction "not to kill,"-thesis observed by everybody belonging to any civilized community. One who violates it is not only legally punished asa civil criminal, but is also morally condemned as inhumanly-minded.[8]

To the Buddhist mind the murderous deed is not connected with the authority of any outside agent who commands us to do this or that, or not to do this or that. Man has a certain innate feeling, according to Buddhism, which makes him refrain from committing deeds of violence. The innate feeling is rooted inhuman nature equally shared by all sentient beings live in group-life.

In the *Dhammapada*(verses 129 and 139) we read:

"All shrink from violence,

All fear death.

Putting oneself in another's position,

One should neither kill nor cause to kill.

All shrink from violence,

To all life is dear.

Putting oneself in another's position,

One should neither kill nor cause to kill

It is this human consciousness that makes the author of the *Dhammapada*(v. **5)** declare:

"Hatreds never cease by hatred in this world.

By love alone they cease.

This is an eternal law."

This eternal law grows out of the eternal ground wherewe all stand. Indeed, we can stand nowhere else. If we did come from somewhere else, there would be no such laws that could be called eternal. It is also our consciousness of this eternal ground that establishes the inevitableness of *karmic* relationships:

"Not in the sky, nor in mid-ocean,

Nor in entering a mountain cave,

Is found that place on earth,

Where abiding one may escape from the

consequence of an evil deed."

When the Mind moves, there is the functioning of the law:

If with a pure mind a man speaks or acts,then happiness follows him even as the shadow that never leaves him."

Dhammapada, 1, 2.The Mind moves! No human thought can fathom the reason why. We simply see it move, and the movement translates itself into infinite multiplicities of relative minds, each one of which acts freely and yet in conformity with laws called by Buddhists *karmic* relationship. One such law is that good deeds increase happiness cosmic as well as individual.

The Buddhist work ethic and business and professional ethics would ideally be closely tied to respect for the environment. It is well described in E.F.Schumacher's book "Small is Beautiful":

"While the materialist is mainly interested in goods, the Buddhist is mainly interested in liberation. But Buddhism is the Middle Way and therefore in no way antagonistic to

physical wellbeing. The keynote of Buddhist economics is simplicity and non-violence. From an economist's point of view, the marvel of the Buddhist way of life is the utter rationality of its pattern - amazingly small means leading to extraordinarily satisfying results."[9]

Ken Jones in a paper called "Buddhism and Social Action" comments: "Schumacher outlines a 'Buddhist economics' in which production would be based on a middle range of material goods (and no more), and on the other a harmony with the natural environment and its resources.[10]

The above principles suggest some kind of diverse and politically decentralised society, with co-operative management and ownership of productive wealth. It would be conceived on a human scale, whether in terms of size and complexity of organization or of environmental planning, and would use modern technology selectively rather than being used by it in the service of selfish interests. In Schumacher's words, it is a question of finding the right path of development, the Middle Way, between materialist heedlessness and traditionalist immobility, in short, of finding Right Livelihood'". Going back to the early history of Buddhism,[11]

As may be seen from the foregoing, Buddhist ethical principles are very noble and in an ideal world their practice would lead to peace and harmony.

The Buddha did not convert people from other religions to his teachings, but told his disciples to be an example to others. It was through example of discipline that great Kings and wise men came into the fold of Buddhism.

Emperor Asoka and Buddhism

Emperor Asoka, who, after a bloody but successful military campaign, ruled over more than two thirds of the Indian subcontinent, suffered great remorse for the suffering that he had caused, banned the killing of animals and exhorted his subjects to lead kind and tolerant lives. He also promoted tolerance towards all religions which he supported financially. The prevalent religions of that time were the sramanas or wandering ascetics, Brahmins, Ajivakas and Jains. He recommended that all religions desist from self praise and condemnation of others. His pronouncements were written on rocks at the periphery of his kingdom and on pillars along the main roads and where pilgrims gathered. He also established many hospitals for both humans and animals. Some of his important rock edicts stated:

1. Asoka ordered that banyan trees and mango groves be planted, rest houses built and wells dug every half mile along the main roads.

2. He ordered the end to killing of any animal for use in the royal kitchens.

3. He ordered the provision of medical facilities for humans and beasts.
4. He commanded obedience to parents, generosity to priests and ascetics and frugality in spending.
5. All officers must work for the welfare of the poor and the aged.
6. He recorded his intention to promote the welfare of all beings in order to repay his debt to all beings.
7. He honoured men of all faiths.[12]

Everyone knows the true story of the eminent ruler in the Indian history, the emperor, the great King Ashoka, building his kingdom of righteousness in the regions which came under his custody, after nearly 280 years of parinirvana of Gautama Buddha the emperor Ashoka came in to the throne in India by conquering the Greeks. First, the great king Ashoka conquered the East India, West India and then North India finally he turned towards the South Indian region. Final and the bloodiest battles planned by him was the Kalinga war. The slain was in thousands, a similar number of people were taken in to the prisons and finally he was able to stretch his reign up to river Kaveri.[13]

He heard and knew about the rich culture prevailed in *Hela Diva* and his armies were sent from Kalinga to conquer *Hela Diva*. Though he sent the armies several times to *Hela Diva*, they could not even reach *Hela Diva*.

By this time, *Buddha Dhamma* was well established in many parts of *Hela Diva*, *Bhikkus* could be seen frequently even in South India. Buddha *Dhamma* was extended up to river Kaveri in South India. Asoka the Great was able to know about Buddhist *Bhikkus* and also about principles of non-violence found in Buddha *Dhamma*. After the battle in Kalinga, King Ashoka was exhausted and then a special incident happened and that brought him a great mental relief and total change in his life. That is to see the *Bhikkus* and to know about the principles of non-violence found in Buddha *Dhamma*. The emperor, by this time, was able to know certain things about *Hela Diva* and Buddha *Dhamma* from the *Bhikkus* themselves.[14]

All the attempts he made to conquer *Hela Diva* using his armies were not successful. "I could conquer this big land, *Barath Desha*, but not this very small land, what is the strength behind that?", King Ashoka asked from the *Bhikkus*.

The *Bhikkus* replied, "Oh great king, Janbudveepa is that island. It is a land of Buddha. It is *Dhamma* prevails in that land. The land of Buddha cannot be conquered by the strength of the military force. And it is then better to give up the idea of conquering *Hela Diva* by war". The King Ashoka kept aside the idea of a war against the island totally and came out

with a new thought. That new thought was to building a model kingdom of Buddha, a kingdom of *Dhamma* within his own land with this idea he ended up ruling his kingdom by war and started to run the kingdom by the righteousness. *Chandashoka* – Ashoka the fierce became *Dharmashoka* – Ashoka of *Dhamma*.

The great King Asoka of India, was grief stricken after the wars he fought to unify India, which caused the deaths of countless number of persons. He turned himself to spirituality to seek mental solace. He entertained eight thousands Nigantakas in his Royal palace, offering them food and alms. The teachings of the Buddha changed the history of India. The King Asoka made Buddhism the venerated spiritual teaching to be followed by the people of his kingdom

Protecting Buddhism in Sri Lanka

When Sri Lanka was colonised the British gave a solemn undertaking to protect Buddhism, which was reflected in the Constitution which became an institution since then. It is correct that Buddhism takes a foremost place and protected by relevant provision in the Constitution, whoever wants to writes a Constitution to replace the one that existed before.[15]

Since Buddhism (as preached by the Gautama Buddha) is a philosophy that should be active in practice there is indeed the need for it to be given foremost place in the country in how it is inculcated through deed and action, thereby making Sri Lanka a truly Buddhist nation. This country desperately needs weekly, nay daily, statements to be made to that effect, calling for Buddhism to be given the foremost place in the country i.e. to be visible as a living characteristic and reflected in how all living beings that inhabit this nation are treated (i.e.) with unselfish love, sympathetic joy, compassion and equanimity.[16]

Buddhism, a philosophy that is undoubtedly the richest among philosophies and a science into the vast realms of the human mind, shows us the path to wisdom through recognising the futility of delusions, the futility of attachment and the futility of revenge and hopefully the new constitution that is being considered for better inclusion of all communities of Sri Lanka would be a reflection of Buddhism being indeed given the foremost place…in practice. [17]

A long history stands behind demands to giving Buddhism its rightful place (Nisitaena) and to guarantee fundamental rights to religious freedom for all persons.Giving special status to Buddhism in Sri Lanka's constitution has long been a popular demand among Buddhists on the island. Requests for a special place for Buddhism in the constitution have also reflected bona fide desire to recognise the important role that Buddhism has played in Sri Lankan history. [18]

By including carefully-worded protections for Buddhism in the new constitution one might simultaneously satisfy the desires of Buddhists from across the political spectrum and thereby enhancing the popularity of the constitution as a whole while also helping insure that the language for expressing those desires is framed.

By creating a constitutional clause that suggests both the special status of Buddhism and the general rights of all religions, the Constitutional Assembly may be more successful in satisfying a broader swathe of politicians, interest groups, and the public. Historically, this was the strategy of all previous constitutional revision exercises after the 1940s, including those undertaken in 1957, 1967, 1972, 1978 and 2000. [19]

Conclusion

(1) The new constitution could declare Sri Lanka to be a "Buddhist state";

(2) It could declare Buddhism to be "the state religion" (e.g., as is done in Cambodia);

(3) It could create special administrative bodies for administering Buddhism (such as the "Supreme Council" proposed in the Kumaratunga government's 2000 Draft Constitution);

(4) It could retain the basic architecture of Article 9, while adjusting the adjectival modifiers (e.g. including a phrase that specifies that Buddhism is "the religion of the majority of the people" as appears in the 2008 Constitution of Thailand). In the Republic of Sri Lanka, Buddhism, the religion of the majority of the people shall be given its rightful place and accordingly, it shall be the duty of the State to protect and foster Buddhism, while assuring to all religions the rights granted by Basic Resolution 5(4).[20]

Buddhism is not a religion with a creator god, but it is a way of life that respects not only human being but all living beings. It is a way of life that could be adopted by any one whatever their belief system.

Buddhism directs only to identify the teachings of the compassionate Buddha, who was not a God, but a Man that achieved the highest purity of Mind to see the reality of suffering and find the way out of that suffering.

The teachings of the Buddha not being a religion should be protected as a world heritage for the welfare of the future generations. Buddhism should not only be protected by the Sinhala Buddhists of Sri Lanka, but also by all wise and intelligent people of the world, as Buddhism could be the saving force in a world given to inhuman cruelty, belligerence, the stupidity of wars, and aggression.

Since Buddhism (as preached by the Gautama Buddha) is a philosophy that should be active in practice there is indeed the need for it to be given foremost place in the country in how it is inculcated through deed and action, thereby making Sri Lanka a truly Buddhist nation.

This country desperately needs weekly, nay daily, statements to be made to that effect, calling for Buddhism to be given the foremost place in the constitution i.e. to be visible as a living characteristic and reflected in how all living beings that inhabit this nation are treated (i.e.) with unselfish love, sympathetic joy, compassion and equanimity.[21]

Therefore it is in the interest of the man kind that Buddhism should be protected in Sri Lanka and Sri Lankan constitution where the Buddha's pure teachings exist for the intelligent people of the world to share.

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SENTENCING GUIDELINES FROM DECIDED CASES ON SENTENCING

Mahie Wijeweera
District Judge, Tangalle

It is universally accepted now that uniformity on sentencing is an essential requirement. Principle of ***just deserts*** (meaning "that which one deserves") unarguably shall be the rationale for a uniformed sentencing policy as it embraces the more modern 'principle of proportionality'.

Advantages of Sentencing Guidelines

1. Sentencing guidelines make sentencing fairer.
2. Sentencing guidelines will make sentencing more predictable and transparent.
3. Prison overcrowding can be controlled.

Disadvantages of Sentencing Guidelines

There may be critics for enforcing a sentencing policy on the basis it takes away the discretion availed with the sentencing judge. But the sentencing guidelines are considered as presumptive not mandatory.

Summary of appropriate Offences as indicated by the Superior Courts: Categorized by Offense

I. Causing loss of Human Life while Driving Negligently

Bandara Vs. Republic of Sri Lanka [2002 (2) SLR 277]

Ratio Decidendi

In some case accused deserves a longer period of imprisonment to deliver a message to all those who have no respect for other persons right to life and property. This Court will never hesitate to use its powers under s. 336 of CrPC in appropriate cases.

"Sentence should have deterrent effect and it should carry a message to the society" per His Lordship Amaratunge J.

Outcome: Accused's original sentence of 30 months was enhanced to 60 months in appeal.

II. Causing hurt using a weapon

M. K. Fernando Vs. The Queen [74 NLR 159]

Ratio Decidendi – Where the accused is convicted of voluntarily causing grievous hurt under section 317 of the Penal Code, a sentence of imprisonment is mandatory.

Solicitor-General Vs. Kritnasamy [42 NLR 342]

Ratio Decidendi - It is not an inflexible rule that a first offender should not be sent to prison when crimes of violence are concerned. An Accused person who uses a knife should not be treated with leniency unless there are good grounds for so doing.

III. Contempt of court

AG Vs. Vaikuntha Vasan [53 NLR 558]

Ratio Decidendi - An offender guilty of contempt of court should not be permitted to go unpunished merely because he acknowledges his offence and expresses regret.

IV. White collar crimes (CBT, Criminal Misappropriation, Cheating)

***AG Vs. Janak Sri Uluwaduge and Another* [1995 (1) SLR 157]**

Facts of the case - The two accused pleaded guilty to charges and, the High Court Judge having recorded that the State Counsel does not object to a suspended sentence, imposed suspended sentences on the accused. The Attorney-General has filed application in revision.

Ratio Decidendi

- In determining the proper sentence, the Judge should consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged.

- He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective.
- Incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also matters which should receive due consideration.
- The Judge should also take into account the nature of the loss to the victim and the profit that may accrue to the culprit in the event of non-detection.
- Another matter to be taken into account is that the offences were planned crimes for wholesale profit.
- The Judge must consider the interests of the accused on the one hand and the interests of society on the other; also necessarily the nature of the offence committed, the machinations and manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organisation in respect of which it has been committed, the persons who are affected by such crime, the ingenuity with which it has been committed and the involvement of others in committing the crime.

Outcome - the suspended sentences were substituted with custodial sentences in the revision filed by the Hon. AG.

AG Vs. Mendis [1995 (1) SLR 138]

Facts of the case – The Accused was indicted for conspiring to cheat People's Bank, in respect of two loans. Accused pleaded guilty to the charges leveled against him and was imposed, inter alia, with a suspended sentence.

Ratio Decidendi

- In assessing punishment, the judge should consider the matter of sentence both from the point of view of the public and the offender.
- The judge should first consider the gravity of the offence, as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other Statute under which the offender is charged.
- He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective.
- The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration.

- Two further considerations are the nature of the loss to the victim and the profit that may accrue to the accused in the event of non-detection. For some offences generally speaking longer sentences of imprisonment are appropriate such as for example most robberies, most offences involving serious violence, use of a weapon to wound, burglary of private dwelling houses, planned crime for wholesale profit, active large-scale trafficking in dangerous drugs and the like.

Aggravating circumstances – 1st Accused has committed this crime with much premeditation, pre-planning and pre-concert.

Mitigating circumstances - the Accused was a first offender and a married man with six children and he was a heart patient.

Per His Lordship Gunasekera, J

"Whilst plea bargaining is permissible, sentence bargaining should not be encouraged at all and must be frowned upon. No trial should permit and encourage a situation where the accused attempts to dictate or indicate what sentence he should get or what sentence he expects."

Outcome – The suspended sentence was set aside and 4-year RI was ordered.

Don Percy Nanayakkara Vs. The Republic **[1993 (1) SLR 71]**

Facts of the case - The accused was the Deputy Commissioner of Examinations and was convicted of the offence of making false documents under section 353 of Penal Code.

The accused-appellant was 60 years old person suffering from renal failure, hypertension and an ischemic heart disease.

Ratio decidendi

- In assessing punishment, the Court has to consider the matter from the point of both the offender and the public.
- The accused had held high public office and exercised extensive statutory power in conducting public examinations in this country. Thousands of students who face public examinations, every year, should have complete confidence in the fairness and accuracy of every process of the examinations.
- The accused has subverted the very basis of this confidence by his conduct in dishonestly showing favour to persons with whom he was acquainted.
- Public interest demands that he should be imposed a deterrent punishment.

- The fact the accused has violated bail conditions by staying away from the country was considered adversely when looking in to the application of the accused for reduction of the sentence.

AG Vs. H. N. De Silva [50 NLR 481]

Facts of the case - The accused, a clerk in the Food Control Department, pleaded guilty to charges of forging certain documents. Having regard to the age, antecedents, and previous good character of the accused, the trial Judge, acted under section 325 (present 306).

Ratio Decidendi

A Judge should, in determining the proper sentence,

- First consider the gravity of the offence as it appears from the nature of the act itself
- should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged.
- He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective.
- If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment.
- Difficulty of detection
- The reformation of the criminal - subordinate to above mentioned factors as the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender

V. Culpable homicide

The King Vs. Paulu Peiris **[45 NLR 95]**

Ratio Decidendi

When Accused is found guilty of culpable homicide on the ground that he has exceeded the right of private defence, a sentence of ten years may be regarded as having erred on the side of severity.

If, however, he is found guilty of culpable homicide because he had lost his self-control by reason of grave and sudden provocation or because he inflicted the fatal injury in a sudden fight, the sentence may be regarded as a proper one.

VI. Rape

AG Vs. Ranasinghe [1993 (2) SLR 81]

Ratio Decidendi: In a contested case of rape, a figure of 5 years imprisonment should be taken as the starting point of the sentence subject to aggravating or mitigating features. An offence of rape calls for an immediate custodial sentence.

Reasons are

(1) To mark the gravity of the offence

(2) To emphasize public disapproval

(3) To serve as a warning to others

(4) To punish the offender

(5) To protect women.

Aggravating factors would be

(a) Use of violence over and above force necessary to commit rape

(b) Use of weapon to frighten or wound victim

(c) Repeating acts of rape

(d) Careful planning of rape

(e) Previous convictions for rape or other offences of a sexual kind

(f) Extreme youth or old age of victim

(g) Effect upon victim, physical or mental

(h) Subjection of victim to further sexual indignities or perversions

(6) The aggravating circumstances in the case were removal of the prosecutrix when she was sleeping with her mother, the fact that she was very young (11 years old), below the age where she may consent to sexual intercourse, the degree of preplanning and the repeated commission of the offence for 2 days before rescue by the Police. Public interest demands a custodial sentence in such circumstances.

Highlight of the decision

Although a period of 10 years has lapsed after the commission of the offence, on the whole we are of the view that public interest demand that a custodial sentence be imposed in this case.

Outcome – sentence was set aside and accused were imposed RI.

VII. Robbery of Public Property

AG Vs. Gunarathna and Others [1995 (2) SLR 240]

Rational of the decision

- "As regards the sentence of imprisonment to be imposed we note that the circumstances of the offence that was committed (writer's note: daylight robbery), the fact that it was committed in respect of public property (money to paid to public officers as salary) and by police officers (2 of the accused are Police officers) whose function it is to uphold law and order, warrant the imposition of a deterrent punishment." Per S.N. Silva J (as he then was)
- However, we have to take into account the fact that the accused pleaded at a very early stage and that by virtue of the conviction they will lose their employment. It has also been submitted that they are young persons.
- The suspended sentence imposed by original court was set aside and custodial sentence of 2 years has been imposed to the accused, in addition to the fine under Public Property Act.

VIII. Assaulting a Public Officer on Duty

Jamel Vs. Haniffa [35 NLR 8]

Facts of the case - The Sanitary Inspector noticed in the garden of house fresh goat's dung which suggested to him that goats had been slaughtered there. He entered the garden and saw the carcasses of three goats hanging in the house and a hand balance. The Accused lost his temper, pulled the notebook from the Inspector and threw it away and struck him. The Inspector ran away and he says the appellant threw a brick at him.

Ratio Decidendi

Given the fact the appellant disturbed and attacked a sanitary inspector, while on duty, he deserves a longer period of imprisonment. a sentence of 2 months RI is inadequate.

Outcome- sentence changed to 6 months RI.

IX. Gang Rape

Sujeewa alias Ukkuwa and Others Vs. AG **[2004 (2) SLR 263]**

Ratio Decidendi

First offender should receive some kind of mitigation of sentence in most offences. There is good and valid reason for dealing more leniently with an offence that can be interpreted as an isolated lapse. However, if an accused is found guilty for a heinous crime, i.e. Gang Rape, there is no reason for mitigation of his sentence.

X. Bigamy

S. E. De Zoysa Vs. IP of Police, SCIB [74 NLR 425]

Ratio Decidendi

On the question of sentence, the Court should be guided by what the accused in good faith and honestly believed to exist and not the actual facts proved by the prosecution. Only such a view could give full scope to the doctrine of Mistake. (It is interesting to note that the counsel who appeared for the accused-appellant was none other than the eminent justice F. N. D. Jayasuriya, when his Lordship was a practicing advocate.)

XI. Stealing a Motor Car

Gomes Vs. W. V. D. Leelaratna [66 NLR 233]

Facts of the cases – Accused was charged with theft of two cars, in two cases.

Ratio decidendi – It has been repeatedly pointed out that Section 325 of the Criminal Procedure Code would not be applicable to grave offences. In dealing, at least with the second case, the antecedents of the accused should have influenced the Magistrate. It was decided the incidence of crimes of the nature of which the offender has been bound to be guilty and difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others.

"Stolen cars, it is well-known, are used for committing other offences, like burglary, abduction, and so on."

Outcome – Accused was ordered to undergo 2 years RI in each case.

XII. Offense committed using a Gun

The Queen Vs. H. G. Haramanis [58 NLR 228]

The Facts of the Case - Accused committed number of very grave offences. He invaded the house of his victims, four of whom are women, armed with a gun and shot them despite the fact that they made every endeavor to escape from his attack.

Ratio Decidendi- The sentence passed on the appellant is utterly inadequate. Accused who has committed grave offences deserves a long prison term.

SALIENT POINTS DECIDED BY SUPERIOR COURTS ON SENTENCING: SUBJECTWISE

A. Reformative approach in sentencing - Prison should be the last recourse

Kumara Vs. The Attorney-General [2003 (1) SLR 139]

Facts of the case - The accused in this case was indicted with having committed the murder. He pleaded guilty on the first date of trial and offered compensation to the aggrieved party.

Ratio Decidendi – "No offender should be confined to a prison unless there is no alternative available for the protection of the community and to reform the individual. Mitigatory factors included, not having previous convictions, surrendering to the police, pleading guilty on the first date of trial and offering compensation to the aggrieved party."

Outcome – custodial jail term was substitute with a suspended sentence.

AG Vs. Dewapriya Walgamage and Another **[1990 (2) SLR 212]**

Facts of the case - The Accused was found guilty of having committed Criminal Breach of Trust. The learned High Court Judge has imposed a sentence of 2 years R. I.

Ratio Decidendi - A term of imprisonment is not warranted in this case, because,

(i) 13 years have lapsed since the commission of the offence

(ii) The accused will lose his employment and related benefits

(iii) A substantial fine would meet the ends of justice.

B. Conditional Discharge (Sec.306 of present Criminal Procedure Code)

Emanis Singho Vs. IP of Police, Dompe [64 NLR 158]

Facts of the case - The magistrate had convicted the accused of criminal trespass and mischief, after trial. Journal entry was entered as "I find the accused guilty on both counts and convict them, reasons and sentence on 21st of March." On that day, instead of passing sentence, he made the following order under Section 325 (2).

Ratio Decidendi - An order of conditional discharge under section 325 (1) of Criminal Procedure Code (Presently sec. 306) cannot be made in a case where the accused is convicted of an offence. What the Magistrate intended to do under this subsection was to discharge the appellants conditionally on their entering into recognizances to be of good behavior and to appear for conviction and sentence when called on at any time during a period of one year. But it was not open to him to make such an order, for he had already convicted the appellants.

O. A. Pemadasa Vs. L. David [58 NLR 308]

Facts of the case - The accused in this case was on his own plea convicted under section 326 of the Penal Code and ordered to enter into a bond of good behaviour for a period of two years. The accused was subsequently convicted for using obscene words under section 287 of the Penal Code. The Magistrate then proceeded to vacate the bond and sentenced the accused to a term of 6 months R. I.

Ratio Decidendi –Before a court can proceed to act under section 327 (4) of the Criminal Procedure Code, the recognizance entered into must be in conformity with the provisions of section 325. Magistrate should either have forfeited the bond or not done so.

The King Vs. Caspersz [47 NLR 165]

Facts of the case - Accused, an executive engineer, was put in charge of work on a road which was of great urgency and in which speed was more important than cost. The accused instructed Overseers to insert items in their bills for work which was not done, and made payments accordingly.

Ratio decidendi- The fact that the Accused may have thought that he was acting in the interests of the country in getting the work done has been properly taken into account by the Supreme Court of Ceylon in reducing the sentence. However, it was relevant only on the question of sentence.

The outcome - the appeal for enhancement of the sentence was dismissed and order made under sec 326 affirmed.

Ghouse Vs. Eliatamby [48 NLR 557]

Facts of the case - The accused was charged under section 345 of the Penal Code & convicted on his own plea. He was sentenced to undergo 6 months RI. The accused was 18 years of age with a good character attending the Royal College.

Ratio Decidendi – An order can be made under section 325 of the criminal procedure code (currently sec. 306) only where the offence committed is a trivial one. Sentenced was reduced to simple imprisonment of 6 weeks from 6 months. The principle that first offenders should not be sent to jail is not one that should be applied where the offence committed is of a grave nature.

Solicitor-General Vs. Alwis **[41 NLR 101]**

Facts of the case - The first accused was dealt with under the provision of section 325 of the Criminal Procedure Code.

Ratio Decidendi - the principle when acting under sec 325 (presently sec. 306) is that the Magistrate is required to look at the matter primarily in the interests of the accused.

Per Hearne J. "The section does not mean that it is essential that the accused must be young, or the offence must be trivial, it merely indicates the lines on which the discretion of a Court is to be exercised, and those lines, it is important to note, relate to the accused and the circumstances and nature of his crime."

Outcome - the exercise by the Magistrate of his discretion was not improper and interference by appeal Court was held undesirable.

Gomes Vs. Leelaratna [66 NLR 233]

Ratio Decidendi- The provisions of section 325 of the Criminal Procedure Code are not applicable to grave offences.

C. What factors the sentencing judge may not look into before passing the sentence

Kasinathar Thangarasa Vs. Sambonather Arronachari [46 NLR 283]

Facts of the case - The accused was convicted on charges of theft and assaulting. The Magistrate sentenced him to 4 months RI. Accused was previously convicted when he was a young man of twenty.

Ratio decidendi - A previous conviction is relevant when a Court has to consider the applicability of some Ordinance, as the Prevention of Crimes Ordinance. Otherwise, it is not right to take such a conviction into consideration in imposing a sentence. That is dangerous like punishing a man twice over for one offence.

D. Extraordinary delay in passing the sentence after committing the offence: Mitigatory Factor

- **Special note** - This principle was not followed in ***AG Vs. Ranasinghe*** by S. N. Silva, J. although there was 10 years time gap between committing of the offence and the sentence. Special leave to appeal from that judgment.

Karunaratne Vs. State [78 NLR 413]

Facts of the case – Accused was sentenced to serve a term of 2 years RI. The only ground urged for the suspension of the sentence is the delay of 10 years between the date of the offence and the final disposal in appeal of the case.

Ratio Decidendi - delay of 10 years between the date of the offence and the final disposal in appeal is generally regarded as mitigating factor when it comes to sentence.

Per S. N. De Silva J. "I cannot disregard the serious consequences and disorganization that it can cause in the accused's family. If there was a final determination of this case within a reasonable time, the accused by now would have served his sentence and come out of prison to look after his family."

Outcome - the sentence of 2 years rigorous imprisonment was suspended.

Ananda Vs. AG [1995 (2) SLR 315]

The facts of the case - The Appellant was charged with causing grievous hurt on 20.12.76. He was convicted on 9.2.82, to a term of 10 months rigorous imprisonment. The appeal came up for argument on 28.4.95.

Ratio Decidendi

(1) An accused has a right to be tried and punished for an offence committed within a reasonable period of time, depending on the circumstances of each case. A delay of over 18 years to dispose of a Criminal Case is much long period by any standard; delays of this nature are generally regarded as mitigating factors.

(2) It appears that the Appellant has turned over a new leaf.

(3) The time the appellant spent in remand custody, being 9 months, in connection with the instant case, should have been considered in passing the sentence.

The outcome – Ends of justice were met by substituting a term of ten months rigorous imprisonment suspended for a period of five years.

E. The sentence should not be excessive – It should be proportionate to the offence

The King Vs. Paulu Peiris [45 NLR 95]

Ratio Decidendi

Where a jury finds an accused guilty of culpable homicide on the ground that he has exceeded the right of private defence, a sentence of ten years may be regarded as having erred on the side of severity.

D. D. Weerasinghe Vs. The Queen [58 NLR 177]

The facts of the case – The appellant found guilty for attempted murder, with a knife. The appellant's case was that these wounds had been inflicted by him in the exercise of a right of private defense.

Aggravating circumstances – The trial judge has taken into account the number of the injuries accused has inflicted and sentence him accordingly. It's true that number of injuries have been inflicted.

Rationale of the decision – the accused should be given the benefit of any doubt as to the way injuries were inflicted.

The outcome - the sentence was reduced

The King Vs. Punchirala [48 NLR 227]

Facts of the case – A plea was accepted by the trail Judge of culpable homicide, not amounting to murder and, a sentence of 12 years RI was imposed upon the accused.

Ratio decidendi – the only eye witness has stated facts to establish the defense of the exercise of the right of private defense. The deceased man had come there carrying a gun. It appeared accused was taking direct action against the paramour of his mistress who was trying to break into the house. the sentence of 12 years' RI is excessive given the fact the accused acted in self-defense.

The outcome - the sentence was reduced to 4 years from 12 years.

The King Vs. E. M. T. De Saram [42 NLR 528]

Ratio Decidendi - The Court of Criminal Appeal will not interfere with the discretion of the trial Judge with regard to the sentence unless the sentence is manifestly excessive. Judge lost sight of the fact that the accused was of previous good character and, also the most important point of all, received severe injuries when the deceased met with his death.

Outcome - The sentence was reduced to one of 5 years RI.

The King Vs. Edwin

Facts of the case - There was trouble about the foot-path and Police was notified even on the very day of this conflict; but the Police, in characteristic fashion, contended themselves merely with warning both parties to keep the peace and be of good behavior.

Ratio Decidendi - Points to consider in sentencing,

- Accused's extreme young age or an aged accused with a clean record
- Good character
- Previous animosity led to complaining to police but their failure to take an appropriate action which led to escalation of the situation

- Nature of the weapons used - Weapons used were used-sticks or clubs which indicate no concrete planning or prearranged plan.

The King Vs. Rankira [42 NLR 145]

The facts of the case - Accused was charged with attempted murder and the jury found him guilty of attempted homicide, not amounting to murder, on the ground that he had committed the act under grave and sudden provocation. They also found that he was exercising the right of private defence which he had exceeded.

Ratio decidendi- judge should have considered mitigatory factors present in the case.

Outcome - Judge had exercised his judicial discretion on wrong principles. Sentence reduced

Talaisingham Vs. Muttiah [39 NLR 140]

Facts of the case - The appellant was convicted of having in his possession 5 pounds and 4 1/2 ounces of ganja. Accused was a first offender.

Ratio Decidendi – imposing a sentence of three-quarters of the maximum term of imprisonment which can be inflicted under the Act, leaving very little margin for an appropriate punishment for any subsequent offence committed by the offender especially in a case for a first offender is bad in Law.

Outcome - sentence of imprisonment was quashed, the fine and the default sentence left untouched.

F. Deterrent Effect: When certain type of crime is prevalent it may be necessary to impose a rather heavier sentence than one otherwise would in order to deter others from committing such crimes.

Don Cornelis Vs. Perera [28 NLR 383]

Facts of the case- The accused in this case has been convicted of the theft of a calf and has been sentenced to three months RI and a fine.

Ratio Decidendi – The rationale relied by the magistrate when imposing a severe sentence, "Crimes of this nature are common in the district but convictions are rare" has been admitted by the appeal court as correct principle of law. Where it is difficult to secure a conviction in a class of crime, which is of frequent occurrence in a district the imposition of a heavy sentence in the nature of a deterrent is justified.

G. The judge should give reasons for imposing sentence

Gunapala Vs. Attorney General [2000 (2) SLR 130]

Facts of the case - The first prosecution witness appellant was the first witness for the prosecution in a murder case. In the course of his evidence the prosecution treated him as an adverse witness. Thereafter, Court had purported to act in terms of S.449(1) of the CrPC, convicted the Appellant for contempt of Court and, sentenced him to 2 years RI.

Ratio Decidendi - In terms of Section 449(1) of the Code of Criminal Procedure Act it is a mandatory requirement that the judge should give reasons for imposing sentence. Failure to do so is a grave error of law.

Outcome - the appellant was acquitted of the charges.

H. An accused person who claims to be tried and is convicted ought not to be placed in a worse position than one who pleads guilty

Seyatu Vs. Appuwa [2 NLR 212]

Facts of the case - some of the accused in a Police Court case pleaded guilty to the charge against them and were fined Rs. 5 each. Others claimed to be tried & convicted. Those convicted were sentenced to 1 months RI each.

Ratio Decidendi – A man ought not to be in a worse position because he claims to be tried. The Magistrate has given no reasons for the finding or sentence. The Supreme Court reduced the sentence on the latter to one of a fine of Rs. 6.

I. Prevention of Crimes Ordinance – Limitations

The Queen Vs. V. Premadasa [63 NLR 293]

Ratio Decidendi –

- If there's there is no evidence that particular accused played a prominent part in the robbery that accused should be sentenced lightly compared to other accused.
- The power to impose the imprisonment prescribed in section 6 of the Prevention of Crimes Ordinance is in addition to any punishment other than imprisonment to which the convicted person may be liable. It has no application to a case where the Court has power to impose a long term of imprisonment in respect of the offence of which the accused has been found guilty.
- It is not permissible, when imposing sentence, to take into account previous convictions alleged against the accused in case those are neither proved nor admitted.

- In proceedings against accused persons with previous convictions the procedure prescribed in section 2 of the Prevention of Crimes Ordinance and in section 253 of the Criminal Procedure Code should be strictly followed.

Per His Lordship Basnayake CJ.

"We wish to take this opportunity of drawing the attention of all Magistrates to the necessity of complying strictly with the requirements of section 2 of the Prevention of Crimes Ordinance. It should be borne in mind that sub-section (5) of that section provides that any statement or evidence recorded and any document tendered under it may be put in and read as evidence at the trial at such time after the conviction as it becomes material to inquire into the past record and character of the accused."

J. A false allegation made by accused in the course of trial cannot be taken in to account when imposing the sentence

John Vs. Police [47 NLR 359]

Facts of the case - The accused has been convicted of having had in his possession stolen goods and sentenced to 3 months RI. Accused made utterly false allegations against the Police during the trial.

Ratio Decidendi – A Court when imposing sentence on an accused should not be influenced by the circumstance that the accused made some false allegations against the police.

The outcome - sentence of imprisonment quashed and fine imposed.

K. A trial Judge has power to revise an illegal sentence imposed per incuriam

The King Vs. P. A. Kadiresu et al [46 NLR 4]

Facts of the case – The three accused in this case have been convicted of robbing, on the highway, a certain medical officer and his wife. The sentence originally passed was 10 years RI and 10 lashes. The sentence of lashes was irregular in view of section 57 of the Penal Code. The trial Judge, therefore, altered the whole sentence subsequently to 5 years RI and 10 lashes.

Ratio Decidendi – A trial Judge has power to revise an illegal sentence imposed per incuriam.

L. Previous conviction – Definition

Lilian Malinee Vs. The Attorney-General [1986, 2SLR, 143]

Facts of the case – Two accused persons pleaded guilty to the charge of the robbery of gold chains on the highway in four cases. There were no previous convictions against them. Heavier punishment was imposed in one case than in the other three. There was no doubt the Magistrate acted so taking into account the convictions in the other three cases although the offences in those cases were committed on dates after the date of the offence of that particular case.

Ratio Decidendi - For the purpose of passing an enhanced sentence 'a previous conviction as contemplated by the Prevention of Crimes Ordinance is a conviction of an offence committed on a date prior to the date of offence of the crime charged.'

M. The judicial discretion vested in a Judge on sentencing cannot be challenged unless that discretion has been exercised on a wrong principle

T. P. Veerappen Vs. AG

Ratio Decidendi – The Judicial Committee of the Privy Council does not as a rule interfere with sentences.

Solicitor-General Vs. Alwis [41 NLR 101]

Ratio Decidendi – the exercise by the Magistrate of his discretion was not improper and interference by appeal Court was held undesirable.

The King Vs. E. M. T. De Saram [42 NLR 528]

Ratio Decidendi - The Court of Criminal Appeal will not interfere with the discretion of the trial Judge with regard to the sentence unless that discretion has been exercised on a wrong principle or unless the sentence is manifestly excessive.

The King Vs. Rankira [42 NLR 145]

Ratio Decidendi - The Court of Criminal Appeal will not interfere with the judicial discretion of a Judge in passing sentence unless that discretion has been exercised on a wrong principle.

N. Whatever may be the appellant's character, regard must always be had to the nature of the offence in passing sentence

Cader Vs. Amarasekera, S. I. Police [53 NLR 429]

Facts of the case – The appellant was convicted of stealing from a dwelling house a sarong and a shirt. He was sentenced, in view of his previous convictions, to undergo a 2 years RI. The appellant has 14 convictions.

Ratio Decidendi – Whatever may be the appellant's character, regard must always be had to the nature of the offence in passing sentence. Regard must first be had to the intrinsic nature of the offence proved and not to the previous record of the accused.

Outcome – the sentence of 2 years RI was substituted for a sentence of 6 months RI.

GOOD FENCES DO GOOD NEIGHBOURS MAKE...

THE ACTION FOR DEFINITION OF BOUNDARIES OF LANDS; APPLICABILITY IN SRI LANKA.

Chinthaka Srinath Gunasekara[1]
District Judge, Bandarawela

The famous American poet Robert Frost in his famous poem "mending walls" says that good fences do good neighbors make. In deep analysis, the poem is a sad reflection on today's society, where man-made barriers exist between men, groups, nations based on discrimination of race, caste, creed, gender and religion[1]. At a glance, one's desire of living in harmony without walls with neighbors seems admirable, but the reality is in the contrary. In the present context, it is safe to have clear boundaries over the immovable property to keep peace and good neighborhood.

Background

The main resort for the boundary disputes is the litigation, like in most other civil matters. The high number of disputes have increased the amount of court cases especially over the land disputes connected with criminal cases. That is consequent with the urbanization and the increasing of population. Boundary disputes are a threatening and a disturbance to the right of enjoyment of private property. Under such circumstances it's true that nobody can enjoy their own property at his own will. Subject to the adherence of existing laws, rights of public (specially neighbors), by- laws of local authority, everybody has a right to possess and enjoy their own immovable property. Hence, encroachments, disturbances are considered, as civil wrongs against the people/propertyand existing laws are helpful to safeguard such rights.

Not only in Sri Lanka, boundary disputes are a common issue all over the world. Many countries face the same problem without viable solutions. Kachchatheevu island crisis was the Sri Lankan experience with regard to a boundary dispute between Sri Lanka and

India up to 1974. The maritime boundary agreements of 1974 and 1976 between the prime ministers of both countries (Ms. Indira Gandhi and Ms.Sirimavo Bandaranaike) solved the crisis resulting Kachchatheevu Island recognized as part of Sri Lanka. Boundary disputes may lead international conflicts whilst the citizens are involved in legal actions to resolve same problems over their private lands.

The value of lands in Sri Lanka continues to rise, as it is a limited resource. The optimum utilization and management of lands is a matter of high priority. At the same time a considerable amount of the population has been pulled to the court process, which is increasingly becoming a social problem. It is high time to identify and consider the factors that could guide the state's responsibility of overcoming this social problem. Under such circumstances it's a timely endeavor to study the existing laws, whether they are adequate to meet the challenges today and tomorrow. Alternative dispute resolution mechanisms, strong statutory provisions could be of help to minimize litigation but not to dissuade the litigation. The requirement is to expedite and minimize the disputes with solutions that preserve time, money and mental satisfaction of litigants, preventing their long-termsuffering. Further, litigation should be the last resort. This article does not intend to consider the state responsibility but to focus on the scope of the action of definition of boundaries, which is applied by the District Courts of Sri Lanka.

1. Sri Lankan Legal Framework

Before getting in to the definition of boundaries it is better to focus on legal and institutional framework of Sri Lanka in a nutshell.

1.1 Statutory Provisions

The Definition of Boundaries Ordinance[2](before 173 years) was enacted under the British administration to ascertain the boundaries of propertied estates, which were possessed by his majesty's subjects within colony. Government agent of relevant province may require claimants to produce title deeds over the lands claimed as owners. Where there is no deed or a survey plan, he may instigate a survey at the cost of claimant and grant a certificate to the effect that the Crown has no claim to such land. Section 14 of the ordinance provides criminal liability to the persons who shall willfully or knowingly remove destroy, or efface landmark or boundary. The said ordinance contains further provisions with regard to demarcation of boundaries[3].

In addition to that several attempts were made for registration of the titles in the past. Registration of Documents Ordinance[4] (before 155 years) was enacted for the purpose of registration of title and registration of deeds. But it was made redundant,when registration of title was repealed later. A Cadastral survey was commenced in 1907 in Wellawattha, Kirulapona areas for the title registration. That is 110 years ago. Thereafter Registration

of Documents Ordinance was enacted in 1927[5] (before 70 years) for the purpose of registration of deeds. All those provisions were related to registration of documents. There are many provisions and regulations enacted for the demarcation of boundaries of lands belonging to the state under the Land Development Ordinance[6]. Further,Crown Lands Ordinance[7], Land settlement ordinance[8], Land Acquisition act[9], Land Grant (special Provisions)[10] Ordinance were enacted with the provisions for demarcation of boundaries. All said enactments are applicable to state lands. The repealing of statutory provision of attaching the survey plan to the grants issued under the Land Development Ordinance and the ability of issuing a grant without a survey plan has created many boundary disputes even over the state lands.

According to the information collected in working areas it has been found that in terms of land parcels only 35-40% land have a clear title where 20% are co-owned, 10% is state owned and balance amount does not have a clear title[11]. Even the owners under the inheritance and intestate do not have taken steps to clear their titles to plots of land. On the other hand, measurements of lands are still in old measures like kuruni, pela, amuna, bushel etc. Therefore, deeds registration is not a complete solution over the boundary disputes. The Registration of Title Act was enacted in 1998[12](before 2o years) for enabling the issue of a registration certificate which became the conclusive evidence of ownership. Commissioner of Land settlement, Survey General, Registrar General are empowered under this programme to register the certificate after each allotment is surveyed and a cadastral map is prepared. Survey General is mandated to fulfil the requirement of preparation of Cadastral maps[13] under section 11 of the act and under the section 10 of the Survey Act No. 17 of 2002. But regrettably, it seems that said conversion process has taken a long time and only about 20% of the lands were converted so far. Said process is still in progress under the "Bimsaviya" program. Uncertainty of ownership, lengthy process of proving ownership, difficulties of identifying actual land and the boundaries, are among the factors that cause negative social impacts[14]. Mediation Board Act[15] also made some provisions to mediate some land disputes subjected to limitations.

Above framework shows that even after the elapse of a century, the social problem is getting worse and still continues through the 21st century. Proper coordination among the institutions with proper management, periodic monitoring and evaluation and expeditious court process parallel with statutory provisions are crucial to overcome these problems.

1.2 Remedial Actions through the Court Process.

Rei-Vindicatory action, Action for Declaration of Title, Action for Definition of Boundaries, Partition Law are the main actions with regard to the land disputes whilst Possessory action is available for restoration and preservation of the possession. Beside

the Partition Law all other actions are based on Roman Dutch Law principles. Sections 3 and 4 of the Prescription Ordinance will be applicable to above actions at appropriate occasions.

2. Action For Definition of Boundaries of Lands

2.1 Introduction

Action for definition of boundaries is a separate action withseveral elements and limits,which is not a remedy for all kind of boundary disputes. That action is completely different from the demarcation of new boundaries and unascertainable boundaries with encroachments. It should be done under the action of a declaration of title or under the Rei Vindication Action. It seems that in some cases both actions are coupled with impracticality and much confusion has arisen with such misjoinder of parties and causes of action resulting no benefit to anyone. It is essential to select the relevant action, which fits to the existing facts. In other words, this attempt here is to clarify it from other actions.

This action is mostly known as "*action finium regundorum*" in Latin[16]. It simply means that "action at law for the definition of boundaries". In Roman law, a lawsuit brought to delimit the borders between neighboring in the civil law. Anyway, dictionary meaning of it is mentioned as "the name of an action which lay between those who had lands bordering on each other, to settle disputed boundaries"[17].

2.2 History

Even seven decades after obtaining independence, legal system still sails with high amount of Latin terms which is not a familiar language of Sri Lanka. Though it is high time to deviate from Latin terms (but not from the legal principles), for the sake of considering the history, the original Roman term *actio finium regundorum* is being used here. Ancient Rome is the origin of this action. The reported oldest legal code Twelve tables[18] had made provisions with regard to boundary disputes though the history of boundary disputes is indefinite. It is included under the Table vii of Twelve tables headed as "LAND AND THINGS AFFIXED THERE TO" (per translations). Gaius[19] has mentioned that "It is understood that in an action for determining boundaries that must be observed which was written (in the Twelve Tables) as patterned after, to a certain extent, that law which it is said Solon promulgated at Athens: If anyone a fence etc."[20]. The Twelve tables continued to be recognized for many centuries as the fundamental law of the Romans; they did not formally lose this character until it was taken from them by the legislation of the Justinian[21]. The pandects[22] which was a compendium in 50 books of the Roman Civil Law was made by order of Justinian in the 6th century. The book "Private Law among the Romans from the pandects"[23] explains the basic structure of the action. It is not a secret that civil legal principles are based with Roman Dutch law principles influenced with

English law. The writings of Voet[24], and Grotius[25], continues the action furthermore and it is a settled part of Roman Dutch Law later and applicable here as a part of the common law.

2.3 Basic Structure

According to the above book "Private Law among the Romans from the pandects"[26] it says that when disputes arose between the possessors of *"praedia rustica"* as to boundaries of their property they were settled by the *"action finium regundorum"* which either fixed the precise limits or if that could not be done divided the land in dispute which was looked upon as common property among the litigants[27].

Voet says, whenever the boundaries of lands belonging to different owners had become uncertain, whether accidently or through the act of the owners or of some third persons, and action for definition and settling them was provided by the Roman Dutch law.[28] Action for demarcation of boundaries lies even where the two lands are divided by a private stream, but not a public road or river intervene between them; nor does it obtain in the case of building. In regards to the garden of adjoining buildings, however a person may proceed by this action if the boundaries have become confused. Such action may lie against contiguous occupier of land, whether they be owners, usufructuaries, mortgagees, emphyteutic tenants or *bonafide* possessors. It is not allowed to *mala fide* possessors nor to one co-owner against another, when a boundary of the common property and one of a property belonging exclusively to one of the co-owners have become mixed up. (Voet 10.1.5,6).

Grotius says that the question as to the correct boundaries and demarcation of limits frequently arise between owners of contiguous lands where lands adjoin without any visible or recognizable line of division. The obligation attaches to each owner to allow the ancient boundary, in so far as the same can be ascertained from deeds, landmarks, witnesses or tradition, to be fixed, or new boundary to be laid down; and if for the sake of convenience more is assigned to one than to another, the same must be compensated for by a money payment[29].

It reveals that when boundaries are uncertain, effaced, or indefinite whether accidently or act of third party boundaries could be settled between adjacent owners. It seems that Grotius's interpretation is wider. However, elements and present scope could be considered under the Sri Lankan Court decisions.

3. Applicability in Sri Lanka

Under our procedure an action for the definition of boundaries would be a proceeding in the nature of an application for relief referred to in section 6 of the Civil Procedure

code, the fact justifying the application being that the boundary between the lands of the parties has become uncertain. No specific "cause of action" as the term is defined in section 5, is necessary in a case like this. This position has mentioned in the case of ***Maria et al Vs. Fernando et al***.[30] That case was reported in 1917, hence it is clear that even before a century it has been identified as an "*action*" in Sri Lanka.

The elements of the action and the nature has been reiterated in several court decisions. In the case of ***Deeman Silva Vs. Silva and others***[31] Justice Wigneshwaren has mentioned the nature of the case and elements in following way that,

> An action for definition of boundaries lies only to define and settle boundaries between adjacent owners. whenever the boundaries have become uncertain whether accidentally or through the act of the owners or some third party. The plaintiff must come into Court stating (1) that an ascertainable common boundary previously existed on the ground and (2) that such boundary had been obliterated subsequently.

That has been mentioned in the case of ***Thambimuththu Vs. Rathnasingham***[32] case too. In the recent case, ***Somawathi Vs. Illangakoon***[33] Hon. Justice Amarathunga Judge of the Supreme Court mentioned that,

> Action for definition of boundaries, known to the Roman Dutch Law as *actio finium regundorim* lies whenever the boundaries between the lands of adjacent owners have become uncertain either by chance or by the act of adjoining owners or of a third party. Common law remedy of an action for the definition of boundaries presupposes the prior existence of a common boundary which has been obliterated by subsequent events.

It is very clear that under the requirement of the action there should be previous existed common boundary and that should be obliterated later. That should be averred in the plaint and Lands must be adjacent.

Then the question of burden of proof comes. Voet says *onus* of the proof of the essential facts in such an action lies on the plaintiff (voet. 10.1.3)[34]. In the case of ***Deeman Silva Vs. Silva and Others,*** it was held that,

No plaintiff should be allowed to come into Court and ask the Court to unveil the defendants case unless the law recognizes such a right. It is a burden cast upon the plaintiff under our law to prove his assertions in such cases.The plaintiff must fight his own battles not with the weapons and armaments of his adversary. He cannot come into Court and ask the Court to use its jurisdiction to compel the defendant to prove title to the land the defendant is in occupation, or to identify its boundaries as per the defendant's plans and deeds.

In the case of ***Thambimuththu Vs. Rathnasingham*** it is clearly stated that,it cannot be sought for the purpose of creating on some equitable basis a line of demarcation which had never been there before. According to the facts of ***Ponna Vs. Muththuwa***, it is a case which a person conveyed Northern one-third share of his land to the plainjff and southern two-third share to the 1st defendant stating two land marks which were away (13 feets) from each other as common boundary in the same land. It was held by hon. Justice Gratiaen that Plaintiff was entitled to bring **action of partition** and that an action for definition of boundaries does not apply.

In the case, ***Leelawathi Hamine and Another Vs. Gnanasiri***[35] it was held that an action for definition of boundaries lies only where parties are admittedly owners of contiguous lands and the common boundary between two lands has become uncertain. When the disputes to lots have arisen, the appropriate action is an **action for declaration of title** and not one for definition of boundaries (at p.324). Similar view has been expressed in the case of ***Deeman Silva Vs. Silva and Others*** that the right of the judge to fix new boundaries arises where the old boundary cannot conveniently be restored. In this case new boundaries are sought where the old boundary was never known to the plaintiff. If there was no ascertainable boundary to be redefined, this action (*action finium regundorum*) should have been terminated. The action should have beenthen under the circumstances one of '**declaration of title'** and not definition of boundaries.

Therefore, it is clear that no one can vindicate his title in the action of definition of a boundary and also to demarcate fresh boundaries. Interpretations given by the higher courts reveal that this action has been limited to its basic structure not to be mixed up with actions based with ownership. In other words, no one can claim soil rights under the platform of the action. Even pleadings should be in conformity with the elements of the action though the pleadings recede back after framing issues. Otherwise action cannot be maintained. This principle has been elevated in the recent above-mentioned case of ***Somawathi Vs. Illangakoon.***

According to the facts of the case, five plaintiffs claiming to be co-owners of the land described in the schedule to the plaint filed action against the defendant alleging that the latter who was in possession of a land adjoining their land forcibly entered the southern portion of their (the plaintiffs) land and prepared the ground to construct a building. In their plaint, they have pleaded that in view of the said act of the defendant a cause of action has accrued to them to sue the defendant for the demarcation of the boundaries of their land and to eject the defendant therefrom and to recover damages. In the prayer of the plaint, the plaintiffs have prayed for an order demarcating the boundaries of their land, ejectment of the defendant from that land and for damages as quantified in prayer ' C ' of the plaint.

After trial, the learned District Judge gave judgment for the plaintiffs holding that the plaintiffs have proved their title to the property but the defendant has failed to establish theprescriptive title. It was the conclusion of the learned High Court Judges that since the plaintiffs' case lacked the facts and evidence necessary to maintain an action for definition of boundaries the plaintiffs had no right to maintain this action against the defendant as an action for definition of boundaries. Accordingly, the learned High Court Judges have set aside the judgment given by the learned District Judge in favor of the plaintiffs and dismissed the plaintiff's plaints with costs. The plaintiffs sought leave to appeal against the judgment of the High Court and leave to appeal was granted on the following question of law. "Have the learned Judges of the High Court erred by holding that this is an action for definition of boundaries and not a revindication action? Hon. Justice Amarathunga held that,

It is clear that the plaintiffs were attempting to vindicate their title to the portion of land forcibly occupied by the defendant through an action designated as an action for the definition of boundaries. The proper remedy for them would have been an ***action for declaration of title*** *to the disputed portion of land. As already stated the first prayer of the plaint was for the demarcation of the boundaries of the said land and premises described in schedule to the plaint. Granting of all other reliefs prayed for in the plaint depended on the definition of the boundaries of the plaintiffs' land.* ***Since the plaintiffs had not averred in their plaint the ingredients necessary to constitute an action for the definition of boundaries, their action was misconceived in law and the court should not have proceeded with the action in the form it was presented to Court[36].*** *At the time of framing issues, plaintiffs have framed issues to convert their case into a reivindication action.*

It is noteworthy that the pleadings should be drafted and considered carefully with regard to the revealed legal principles from above case.

In ***Jacolis Appu Vs. David perera***[37] it was revealed that case has been filed seeking a definition of boundaries between two lots and seeking declaration of title to one lot. Itwas held that it must be noted that in an action to define a boundary parties cannot seek declaration of title. Such an action cannot be maintained in a court of requests. This principal was followed in the case of ***Alfred Fernando Vs. Julian Fernando***[38]. Inthis case it was held that in the guise of an action for definition of boundaries plaintiff cannot vindicate his title to an encroachment. This case has focused on the possibility of bringing action for definition of boundariesagainst a co-owner by another co-owner. Court held that it is possible to sue but the defendant co-owner must be his neighbor of adjacent land. But he (plaintiff) takes the risk because even if he is successful, the decree in his favor will not bind the other co-owners of adjacent land.That is a development of the action to solve a dispute up to undisputed extent by co-owners whereas the Voet says

that this action is not allowed to one co-owner against the another when a boundary of common property and of a property belonging exclusively to one of co-owners have become mixed up. (Voet 10.1.6)

4. Damages

According to Voet, in an action for demarcation of boundaries the plaintiff may maintain a claim for damages also against the owner of contiguous if he was responsible for the confusion that had occurred. He may also claim the restoration of every benefit and whatever other personal claims may have to be satisfied[39].Then it is clear that monetary claim could proceed in the same action.

Conclusion

Boundary disputes may arise and brought to the court in many ways but identifying the relevant action is the most significant thing. That should be done at the earliest possible stage enabling the people to take alternative causes of action where it is necessary. The court's duty to apply the law accurately with expeditious manner would enhance the confidence level of the public. It is true that only statutory provisions are not sufficient to overcome the social problems, but until proper and updated codifications are availed, existing legal principles should be activated.

Endnotes

1. *https://beamingnotes.com*
2. *No. 1 of 1844*
3. *Wijedasa Rajapaksa PC, The law of property (2006), Vol iii, Actions. P.367*
4. *No. 8 of 1863*
5. *No. 23 of 1927*
6. *No. 16 of 1969*
7. *No. 8 of 1947*
8. *No. 20 of 1931*
9. *No. 9 of 1950*
10. *No. 43 of 1979*
11. *P.M.P. Udayakantha, Survey General, Land Titling and Registration Systems in Sri Lanka, www.ips.lk*
12. *No. 21 of 1998*
13. *Cadastral surveying is the sub-field of surveying that specialises in the establishment and re-establishment of real property boundaries. It is an important component of the legal creation of properties, https://en.wikipedia.org*
14. *P.M.P. Udayakantha, Survey General, Land Titling and Registration Systems in Sri Lanka, www.ips.lk*

15. *No. 72 of 1988 (severally amended)*
16. *An Italic language spoken in ancient Rome, fixed in the 2nd or 1stcentury B.C., and established as the official language of the RomanEmpire. www.dictionary.com*
17. *www.dictionary.law.com*
18. *he earliest attempt by the Romans to create a code of law was the Laws of the Twelve Tables. A commission of ten men (Decemvir) was appointed (c. 455 B.C.) to draw up a code of law binding on both patrician and plebeian and which consuls would have to enforce. The commission produced enough statutes to fill ten bronze tablets. The plebeians were dissatisfied and so a second commission of ten was therefore appointed (450 B.C.) and two additional tablets were added. What follows are a selection from the Twelve Tables. http://www.historyguide.org*
19. *Gaius also spelled as Caius (130-180AD) Roman Jurist whose writings become authoritative in the late Roman Empire. www.britannica.com*
20. *THE LAWS OF THE TWELVE TABLES. An Introductory Note and Translation. By E. B. Conant assisted by Florence Reingrube, www.openscholarship.wustl.edu*
21. *https://www.ancient.eu/ Twelve Tables/ James Hadley. /Introducing to Roman Law 74-75 (1881).*
22. *https://en.oxforddictionaries.com*
23. *By John George Phillimore Q.C., Macmillan And Co. 1863, Cambridge.*
24. *Johannes (Jan) Voet (3 October 1647 to 9 September 1713) was the renowned Dutch Romanist and author of the Commentarius ad Pandects (that most revered and oft quoted source of Roman Dutch law).*
25. *Hugo Grotius, also known as Huig de Groot or Hugo de Groot, was a Dutch jurist. Along with the earlier works of Francisco de Vitoria and AlbericoGentili, Grotius laid the foundations for international law, based on natural law. Wikipedia*
26. *By John George Phillimore Q.C., Macmillan And Co. 1863, Cambridge.*
27. *At p. 277*
28. *voet 10.1.1*
29. *Grot. 3.28.18*
30. *1917 NLR 65, Quoted from the text book "A Modern Treatise on The Law of Delict (Tort) By V.L. Abdul Majeed, Former High Court Judge.*
31. *1997(2) SriLR 382 (Court of Appeal)*
32. *1940 NLR 253*
33. *2013 (1) SriLR 94*
34. *Wijedasa Rajapaksa pc, The law of property (2006), Vol iii, Actions. P.368*
35. *1989(1) SriLR 322*
36. *emphasis added by me*
37. *1969 NLR 548*
38. *1987(2) SriLR 78*
39. *(voet.10.1.8)*

CONSECUTIVE RECOGNITION OF FUNDAMENTAL RIGHTS IN SRI LANKA

A Comparative Study of Constitutions since Independence

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Introduction

Rights that are believed to belong justifiably to every person are Human Rights.

Human Rights are features in people's lives that everyone should enjoy simply because they are Humans but neither for anything they do nor possess. Although the notion Human Rights may seem to attract a huge interest in the recent times, its' emergence relates to the very inception of the man kind and only of its codification is man made since the first Human Rights Charter in the history, The charter of Cyres[1] of Persian Empire.

Fundamental Rights as well, are Human rights. Those are inherent rights of people of life, liberty, property, freedom of speech, assembly, press and religion[2] which are rigorously tested by Courts to ascertain the soundness of purported governmental justifications[3]. Further they are a group of rights that have been recognized by the Superior Court as requiring a high degree of protection from government encroachment and which are specifically identified in the Constitution (especially in a Bill of Rights), or have been found under Due Process.[4]

In 1789, France included the Declaration of the rights of the Man in the preamble to its Constitution codifying fundamental rights constitutionally. Although United States Constitution of 1789 does not included any specific reference to fundamental rights, a Bill of Rights was introduced in 1791 followed by many States for centuries including India in 1950 following Sri Lanka.

Fundamental Rights have been many a times referred to as conscience or the soul of a constitution nevertheless there exits the requirement for modelling of its exercise by the Constitution itself or by the Judicial intervention. As Justice Bhagwati stated in the case of ***Menaka Gandhi Vs. Union of India*** [5] Fundamental Rights, even though are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent, these freedoms are not and cannot be absolute, for absolute and unrestricted freedom of one may be destructive of the freedom of another.

Nonetheless it is undoubted that the part of the Constitution which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction.[6]

This paper outlines the germane constitutional provisions on Fundamental Rights in the three consecutive constitutions since independence in Sri Lanka with a comparative study of their verbatim effectiveness and judicial inventiveness.

Rights under the Soulbury Constitution of 1947

Interestingly even after more than one and half century in emergence of Bill of Rights, First Constitution of Sri Lanka which was a British grant together with Independence which followed the report of the Soulbury Commission, had no comprehensive chapter on fundamental rights.

Instead the Constitution included a preventive provision against discrimination on grounds of race and religion and infringement of religious freedom as follows in section 29.

29. (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.

(2) No such law shall -

(a) prohibit or restrict the free exercise of any religion; or

(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or

(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions, or

(d) alter the constitution of any religious body except with the consent of the governing authority of that body, so, however, that in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body:

(3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention, be void.

It is apparent at the most onset that the Constitutional protection of the right is extremely limited to discrimination against ethnicity and religion and also to violation of such rights by way of legislation only. According to some Authors, the British according to their own constitutional conventions at that time, omitted a bill of Rights since they believed that people had inherent rights which need not be enumerated. As such, enumeration of rights would mean that only certain rights were applicable and others were not[7].

Nonetheless the legal protection for such further and other rights were presumably provided with due process of law.

For example, Justice Dr. Shirani A. Bandaranayake points out, irrespective of the fact that there was no Bill of Rights, the Courts reviewed the acts and interpreted legislation according to the Rule of Law[8]. The decision in Bracegirdle[9] is a classic example upholding Human right to freedom from arrest and detainment for deportation where the Supreme Court held that the Governor could exercise power given to him under the provisions of the Order in Council of 1896, only in a state of emergency contemplated by the preamble to the Order. It further held that the Court was entitled to inquire whether the condition necessary for the exercise of such power existed and that in the absence of a state of war or grave civil disturbance, such power could not be invoked.

All laws made in contravention of section 29(2) of the Soulbury Constitution shall, to the extent of such contravention, be void in one hand and the amendment or repeal of this Order was appallingly limited to a majority vote not less than two-thirds of the whole number of Members of the House including those not present[10]. Even the limitations[11] posed on the section was transitional and thus the rights guaranteed in the section was not limited by any constitutional provision.

This post enactment Judicial Review of laws was the most salutary provision in Sri Lankan post-independence constitutional history which was solely limited to Soulbury Constitution. Nevertheless, whether the constitutional guarantee of the right against discrimination based on ethnicity was perceived by the Courts in its spirit is an issue.

For example, the effectiveness of section 29(2) when tested against the Citizenship Act No 18 of 1948 and Ceylon (Parliamentary Elections) Act No. 48 of 1949, which informally disenfranchised more than 800,000 Indian Tamils who earlier voted under British Government in the goose of the definition "Citizen", at the Supreme Court of Ceylon in ***Mudannayaka Vs. Shivachanasundaram***[12] in which the petitioner moved for writs of certiorari, it was held that

> ..... *it is a perfectly natural and legitimate function of the legislature of a sovereign country to determine the composition of its nationals.*
>
> .....*We are of opinion that, even if it was the intention of the Soulbury Commission to make section 29 (2) a safeguard for minorities alone, such intention has not been manifested in the words chosen by the legislature.*
>
> .....*The conditions for the avoidance of a law under this provision (section 29(2) of the Constitution)*[13] *are both (1) and (2)*[14]*. If (1) is satisfied in any particular case but not (2) the law is not void. Both conditions must exist to render the law void.*

When moving the Privy Council in appeal in ***Kodakkanpillei Vs. Mudannayaka*** [15] it was held Citizenship and Franchise Acts are intra vires of the Ceylon legislature stating as

> *With much of the reasoning of the Supreme Court of Ceylon their Lordships find themselves in entire agreement but they are of opinion that there may be circumstances in which legislation though framed so as not to offend directly against a constitutional limitation of the power of the legislature may indirectly achieve the same result, and that in such circumstances the legislation would be ultra vires.*
>
> .....*It must be shown affirmatively by the party challenging a Statute which is upon its face intra vires that it was enacted as part of a plan to effect indirectly something which the legislature had no power to achieve directly.*
>
> .....*If there was a legislative plan the plan must be looked at as a whole and when so looked at it is evident in their Lordships' opinion that the legislature did not intend to prevent Indian Tamils from attaining citizenship provided that they were sufficiently connected with the island.*

By both Supreme Court and the Privy Council in this matter, has interestingly observed that it is a perfectly natural and legitimate function of the legislature of a sovereign country to determine the composition of its nationals not with standing a portion of population once given recognition may be disqualified due to a consequent act of parliament.[16],[17] Even though the lucidity of reasoning reflected in both judgments are exceptional, it is also noted that both Benches have given an originalist or stern literal interpretation to words of Statutes and the section 29 of the Constitution as well despite giving a substantial and purposive construction in view of giving effective protection through section 29.

Similarly, the Official Languages Act No. 33 of 1956 which provided Sinhala the one official language of Ceylon[18], was challenged in ***Attorney General Vs. Kodeswaran***[19] where Kodeswaran was a government clerical officer who refused to present himself for a Sinhala proficiency test on the basis that the particular Act violates section 29(2).

While notably both the Privy Council and the Ceylon Supreme Court abstaining from deciding the constitutionality of the Official Languages Act, considered the issue whether a civil servant has any right of action against the Crown and decided differently, in favor of Kodeswaran in later case. The case although sent back to the Ceylon Supreme Court to consider the Constitutionality issue, the First Republican Constitution of 1972 was in force when it reaches back.

As some have argued the Kodeswaran case is a widely known and rightly critiqued illustration of judicial cowardice on the part of the Supreme Court in failing to recognize language rights of the Tamil community[20].

Fundamental Rights under the Republican Constitution of 1972

First Republican constitution of 1972 as opposed to the earlier constitution, was autochthonous and a product of all elected members of the House who assembled exterior of Parliament as Constituent Assembly.

It provides for Fundamental Rights and Freedoms while codifying fundamental rights for the first time in constitutional history in Chapter VI as follows.

18. (1) In the Republic of Sri Lanka-

(a) all persons are equal before the law and are entitled to equal protection of the law;

(b) no person shall be deprived of life, liberty or security of person except in accordance with the law;

(c) no citizen shall be arrested, held in custody, imprisoned or detained except in accordance with the law;

(d) every citizen shall have freedom of thought, conscience and religion.

(e) every citizen has the right by himself or in association with others, to enjoy and promote his own culture;

(f) all citizens have the right to freedom of peaceful assembly and of association;

(g) every citizen shall have the right to freedom of speech and expression, including publication;

(h) no citizen otherwise qualified for appointment in the central government, local government, public corporation services and the like, shall be discriminated against in respect of any such appointment on the ground of race, religion, caste or sex:

(i) every citizen shall have the right to freedom of movement and of choosing his residence within Sri Lanka.

(2) The exercise and operation of the fundamental rights and freedoms provided in this chapter shall be subject to such restrictions as the law prescribes in the interest of national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others or giving effect to the Principals of State Policy set out in section 16.

(3) All existing law shall operate notwithstanding any inconsistency with the provisions of subsection (1) of this section.

As opposed to the Constitution of 1947, the Republican constitution contained a range of fundamental rights including right not to deprive of life arbitrarily which could be presumably claimed only against the State. Though these rights and freedoms are mainly civil and political rights of the old natural rights tradition[21] as some scholars noted.

Notwithstanding the widening and recognition of rights than the earlier Constitution, all rights contained were constitutionally restrained on grounds set out in section 18(2). It is interesting to note that according to the letter of the constitution, even the right to freedom of thought and conscience, nonetheless how un-realistic it is, was restrained under such grounds. On the other hand all fundamental rights were subject to restrictions designed to give effect to the Principles of State Policy contained in Section 16 which provides only a guide to the making of laws and the governance[22]. Provisions of section 16, although it declares that the Republic is pledged for full realization of all rights and freedoms of citizens including group rights[23], were not enforceable in any court of law and as such any issue of inconsistency with such provisions were beyond scrutiny[24].

Quite opposing to the section 29(3) of the earlier constitution, section 18(3) of the 1972 Constitution provided that all existing laws to operate notwithstanding any inconsistency with the provisions of subsection (1).

Similarly the Constitutional provisions regarding the amendment of Constitution and legislation of laws in contravention of the Constitution were eccentric. As per section 51(5) no replacement, repeal or amendment of the Constitution shall be certified unless it is passed by two-thirds at least of the whole number of members of the National State Assembly including those not present voting in its favor. Nevertheless the National State Assembly could enact a law which is inconsistent with any provision of the Constitution without amending or repealing such provision, with a two thirds majority afore mentioned[25]. However it is interestingly noted that the Constitution provided for an establishment of a Constitutional Court[26] to decide when an issue arises as to whether

any provision in a Bill is inconsistent with the Constitution[27] except for bills which are, in the view of the Cabinet of Ministers, urgent in the national interest, and bears an endorsement to that effect[28].

As remarkably oppose to Soulbury Constitution, post enactment judicial review of any or all laws was exterminated by section 48(2) by stating that No institution, person or authority shall have the power or jurisdiction to call in question the validity of any law of the National State Assembly while providing for retrospective operation of any or all of provisions of such laws[29].

The tenancy of the 1972 Constitution was limited to six years. On the other hand enforceability of the fundamental rights in a Court was thought to be difficult as there was no special or any procedure indicated in the Constitution itself or in any other statute for their enforcement against the State. During the period the 1972 Constitution was in existence, only one case was filed based on the infringement of a fundamental right by an employee of the People's Bank who was required to resign from membership of the Trade Union to which he belonged to qualify for promotion from Grade IV to Grade III. He refused and filed a declaratory suit in the District Court which decided in his favour, later which was revised by the Court of Appeal. In his appeal[30] against the judgment of the Court of Appeal to the Supreme Court, it was held

> *The right of all employees to voluntarily form unions is part of the law of this land. It exists both in the Constitution and in statute form. No employer can take away this statutory right by imposing a term to the contrary in a contract of employment. But of course where the State considers a restriction of this right is necessary for good cause it is enabled to do so by s. 18(2) of the 1972 Constitution such restriction can be imposed only by law and only for grounds set out in s. 18(2) and no other.*
>
> *…….The analysis of the law should be on the basis that the impugned acts or provisions constitute an invasion of fundamental rights and not on the basis that they fall within the exclusive domain of the private law of employment[31].*
>
> *…….Although the guarantee contained in section 18(2) is only against State action and not violations by individuals the concept of State has been extended today to include almost any institution performing public functions. The People's Bank represented the plaintiff here as part of the management. Within this function the People's Bank would constitute the State or the Government within the meaning of s. 18 of the 1972 Constitution for the purpose of enabling the maintaining of a declaratory action for violation of fundamental rights under that Constitution.*

> *…..The argument that the imposition of the impugned condition was valid under the Constitution of 1972 because existing law was kept alive by the Constitution notwithstanding inconsistency with the provisions relating to fundamental rights is untenable.*

In one hand it is noted that appropriate judicial remedies for the enforcement of fundamental rights were available through writs, actions for damages, injunctions and declaratory actions[32] though this was apparent only after the repeal of the 1972 Constitution that a declaratory action in the District Court was available to challenge the violation of a fundamental right[33]. On the other hand nevertheless the judgment in ***Ariyapala Gunarathne Vs. People's Bank*** has well recognized and further widen the scope of fundamental rights under 1972 Constitution, regretfully it was only after repeal of the same, displaying the utmost need of prompt relief for fundamental right violations.

Fundamental Rights under the II[nd] Republican Constitution of 1978

The second Republican Constitution of 1978 reserves its Chapter III for Fundamental Rights and following is the summary of the Chapter III.

10. Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

11. No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

12. (1) All persons are equal before the law and are entitled to the equal protection of the law.

(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds:

(3) No person shall, on the grounds of race, religion, language, caste, sex or any one such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

13. (1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of a judge made in accordance with procedure established by law.

(3) Any person charged with an offence shall he entitled to be heard, in person or by an attorney- at-law at a fair trial by a competent court.

(4) No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law.

(5) Every person shall be presumed innocent until he is proved guilty:

(6) No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.

14. (1) Every citizen is entitled to

(a) the freedom of speech and expression including publication;

(b) the freedom of peaceful assembly;

(c) the freedom of association;

(d) the freedom to form and join a trade union;

(e) the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice or teaching;

(f) the freedom by himself or in association with others to enjoy and promote his own culture and to use his own language;

(g) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise;

(h) the freedom of movement and of choosing his residence within Sri Lanka; and (i) the freedom to return to Sri Lanka.

15. (1) The exercise and operation of the fundamental rights declared and recognized by Articles 13 (5) and 13 (6) shall be subject only to such restrictions as may be prescribed by law in the interests of national security.

(2) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.

(3) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (b) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony.

(4) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (c) shall be subject to such restrictions as may be prescribed by law in the interests, of racial and religious harmony or national economy.

(5) The exercise and operation of the fundamental right declared and recognized by Article 14 (1) (g) and 14 (1) (h)[34] shall be subject to such restrictions as may be prescribed by law in the interests of national economy

(7) The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1) 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just. requirements of the general welfare of a democratic society.

16. (1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.

17. Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter.

In contrast to both earlier Constitutions Fundamental Rights chapter of the 1978 Constitution[35] is vivid of rights and included specific provisions as to enforcement mechanism.[36] Interestingly Rights were guaranteed against infringement or imminent infringement, only against executive except the President of the Republic[37] or administrative action and thus again as oppose to Soulbury Constitution post enactment judicial review was ousted although Parliament shall have power to make laws, including laws having retrospective effect[38]. As stipulated further in Article 80 (3) where a Bill becomes law upon the certificate of the President or the Speaker, no court or tribunal shall inquire into validity of such Act on any ground whatsoever.

Although provisions regarding constitutional amendment of section 29 of the Soulbury Constitution was unyielding, both later constructional provisions on amendment even of fundamental rights were lenient except for the comparatively severe requirement of a not less than two thirds majority vote including those not present and approval of People at a Referendum for Article 10 and 11[39].

On the other hand, quite opposing to both earlier Constitutions, the present Constitution contained Article on Fundamental duties[40] of citizen, in addition to Directive Principles

of State Policy[41], although both provisions neither confer or impose legal rights or obligations which are enforceable nor question of inconsistency of them shall be challenged[42]. It is also noted that it does not include judicially enforceable economic, social and cultural rights, even though the Supreme Court has decided on matters regarding these rights by interpreting equality clause[43].

Shockingly the IInd Republican Constitution has omitted to guarantee right to life for Republic's citizens. The rights guaranteed by Articles 10, 11, 12(1), 12(3) and 13 are available to all natural and juristic persons, whereas the rights guaranteed in Articles 12(2) and 14 are available only to citizens even though the Constitution of 1972 did not made any demarcation.

As oppose to clash on the jurisdiction on fundamental rights in the 1972 Constitution, the 1978 Constitution is extremely explicit and vests the Supreme Court with exclusive jurisdiction in respect of a person's fundamental right. Article 17 read with Article 126 provides direct access to the Supreme Court of any infringement or imminent infringement of a fundamental right.

As oppose to the non-limitation and common limitation imposed on rights respectively by the Soulbury Constitution and 1972 Constitution, limitations on fundamental rights of 1978 Constitution are moderate as prescribed in Article 15. However as oppose to Soulbury Constitution, both Republican Constitutions provided for existing laws to be valid and operative notwithstanding any inconsistency with the fundamental rights Chapter.[44]

The IInd Republican Constitution is still in force for almost forty years. Even though there have been about twenty constitutional amendments, the fundamental rights chapter has been kept unblemished until this day.

Fascinatingly as oppose to constitutional interpretation of both earlier Constitutions, Supreme Court of Sri Lanka under the 1978 Constitution has exaggeratedly widen the scope of the jurisdiction on Fundamental Rights.

Following are some examples of this most cautious and speculative jurisdictional isometrics.

As provided by Article 17 Fundamental Rights jurisdiction shall be invoked in respect of the infringement or imminent infringement of them by executive or administrative action. Further the Article 126 strictly confines the locus standi to a victim or an attorney-ay-law on his behalf within one month of the alleged infringement of the Right.

In ***Leo Fernando Vs. Attorney-General***[45] when the related question as to whether a judge would be amenable to the Article 17 read with Article 126 arose, where the matter was examined by a Bench consisting of 5 Judges of the Supreme Court, Colin Thome J, stated[46]

> ……..a judicial order does not become converted into an administrative or executive act merely because it is unlawful.[47]

In ***Victor Ivan and Others Vs. Hon. Sarath N. Silva and Others***[48], where the Petitioners sought to challenge an appointment made by the President to the office of Chief Justice the Court upheld a preliminary objection taken by the Attorney General that by holding

> ……. office and functioning as the Chief Justice, the person so appointed had not violated any fundamental right of the Petitioners by what may be termed as "executive or administrative action"
>
> ……. but the act of the President of appointing the Chief Justice or a Judge of the Supreme Court or Court of Appeal would attract the immunity conferred by Article 35(1) of the Constitution.

On the other hand in ***Bandara Vs. Wickramasinghe***[49] the Supreme Court held,

> ……. Seriousness of the dereliction and the issues involved, the claim of the Respondent that the impugned acts involved disciplinary action not violative of Fundamental Rights cannot be accepted….

Similarly in the case of ***Jayakody Vs. Sri Lanka Insurance and Others***[50] Fernando J. referring to his Lordship's own judgement in ***Samson Vs. Sri Lanka Air Lines Ltd*:** held interpreting executive or administrative action" that

> ……. the state may set up a Corporation which it owns and controls; that corporation may set up a limited liability company which it owns and controls; the company in tern may set up another company or other entity……. and so on. But however long the chain maybe, if ultimately it is the State which has effective ownership and control, all the entities- every link in that chain – are State agencies.

Locus standi or the party's standing has been strictly defined by most of earlier Supreme Courts judgements in giving a strict literal interpretation. For example it was held in ***Nareendra Kumar Vs. Ziyad and Others***[51] that

> …….Although these rights and freedoms are common to everybody or every citizen, as noted above the right to invoke the constitutional remedy in Article 126(1) upon an infringement of such a right is individual to the person who is aggrieved by such infringement. This is the necessary inference of the words contained in Article 17 and 126(2) of the Constitution……

When the question arose in the context of the appointment of a Supreme Court Judge in ***Edward F William Silva and Others Vs. Shirani Bandaranayake and Others,*** P. R. P. Perera J. expressed the following view at pages 99 to 100 of his judgment,

> *The violation of Article 12(1) involves two or more persons who are similarly placed or circumstanced. The grievance of the petitioner in relation to the respondent must be directly related to the impugned act. A petitioner will not have locus standi if he is not one who could have claimed a right in relation to this particular respondent. …….*

Nevertheless, in ***Bulankulama Vs. Secratery, Min. of Industrial Development***[52] the Courts observed that

> *On the question of standing …. The petitioners as individual citizens, have a constitutional right given by Article 17 read with Article 12,14 and 126 ….. they are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka…….*

In ***Sriyani Silva Vs. Iddamalgoda***[53] in a case where the wife of the deceased who was arrested on open warrant and found dead allegedly by torture in police custody has revoked fundamental rights jurisdiction, the Supreme Court quoted from ***Lyons Vs. Tucke***r that

> *…….. the golden rule of plain, literal and grammatical construction has to be read subject to the qualification that the language of the statute is not always that which a grammarian would use…….*

And accordingly, the Court spectacularly held that

> *……. Articles 11 and 13(4) by necessary implication recognize the right to life. Hence if a person died by reason of torture or unlawful death, the right of any person to complain against violation of a fundamental right guaranteed by Article 17 read with Article 126(2) should not be interpreted to make the right illusory; but …… broadly especially in view of Article 4(d) which requires the Court to respect, secure and advance Fundamental Rights…….*
>
> *…….. the right of every person recognized by Article 17 to apply under Article 17 apply under Article 126 in respect of the infringement of a fundamental right is an independent fundamental right…….*

The one-month time period specified by Article 126(2) has severally been indorsed to be mandatory by the Supreme Court for number of cases including ***Gamaethige Vs. Siriwardena And Others***[54].

In contrast in ***Sugathapala Mendis and Others Vs. CB Kumarathunga and Others***[55] the Courts articulated the nature of the injustice which sought to avoid and decided that in a nature of an alleged violation of the Right continued over time, the exact commencement of such violation could not fairly be regarded as the point from which time begins.

Similarly in ***Dilanka Wijesekara and Others Vs. Gamini Lokuge and Others***[56] Thilakawardena J. refusing the preliminary objection of time bar held that

> *…….the instance case involves violation of the Petitioner's fundamental rights in the context of a situation, which by definition, continues this violation. Indeed, in a matter where the violation is of a serious nature, affecting material rights which are pertinent and critical to the petitioner, where mala fides, bias or caprice can be established and if it is a continuing violation this court will not dismiss the case in limne without at least considering the grievance of the Petitioners……*

Conclusion

It is manifest by carefully examining above decisions that as oppose to earlier state of affairs before 1978, there had been a golden glimmer in Fundamental Rights jurisprudence in Sri Lanka since then, not only broadening its scope but determining its inclusions as well.

Nevertheless it is noted that one may exaggerated the Supreme Court determination on ***Nallarathnam Singarasa Vs. The AG***[57] in contrast of the above position although the judgement in *Singarasa* is a cautious reflection not limited to fundamental rights but as to sovereignty of the people exercised through executive, legislative and judicial wings of the State and separation of power therein, which needs a lengthy discussion in the opinion of the writer.

Yet, Sri Lanka is in the hope of the dawn of a new Constitution. There are several appeals from all segments of the society for an enhanced Bill of Rights, while they cherish the post enactment judicial review of laws under Soulbury Constitution and entrench of the Right to Life by 1972 Constitution.

Tranquilly mere recognition of a right in a bill of rights or a law is inadequate. The textual formulation of the right, the limitations that may be imposed on such right, and the mechanisms to ensure that the scope and extent of the right cannot be limited unreasonably or disproportionately, are key to assessing whether the rights are effectively protected and implemented[58].

Endnotes

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10 *Section 29(4)*

11 *Proviso to section 29(2)*

12 *(1953) 53 NLR 25(SC)*

13 *Emphasis added*

14 *(1) persons of any community liable to disabilities or restrictions; (2) to which persons of other communities are not made liable*

15 *(1953) 54 NLR 433 (PC)*

16 *Emphasis added*

17 *At Pg. 45 We think it is irrelevant to urge as a fact that a large section of Indians now resident in Ceylon are disqualified because it is not the necessary legal effect which flows from the language of the Act.*

18 *Section 2*

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25 *Section 52(1)*

26 *Section 54(1)*

27 *Section 54(2)*

28 *Section 55(1)*

29 *Section 48(1)*

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31 *As oppose to consideration of the Court of Appeal*

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33 *Op cit 22*

34 *Article 15 (6)*

35 *Chapter IV of the Constitution includes provision of Language Rights which has purposely omitted in this study.*

36 *Article 17*

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APPLICABILITY OF CRIMINAL LAW IN CHEQUE BOUNCING CASES

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Introduction

History of a cheque is derived from the ancient banking system of the world and bankers would issue orders at the request of their customers, to pay money to identified payees. The cheque system of Sri Lanka is governed by the Bills of Exchange Ordinance. Dealings in cheques are vital not only for banking purposes but also for the commercial, industrial and the economical affairs of the country. As a negotiable instrument cheques are exchanged among the parties as currency, until it is dishonored. Dishonor of cheques disturbed credibility of this instrument and now it has become a burning issue in the commercial world. The Central Bank of Sri Lanka has reported that out of total number of cheques presented daily for clearing at Lanka Clear Pvt. Ltd[2], about 5.6% are returned unpaid[3].

A cheque is a negotiable instrument and a form of bills of exchange. Section 73 of the Bills of Exchange Ordinance in Sri Lanka has interpreted the word "cheque" as "a bill of exchange drawn on a banker payable on demand".

Also "Bill of Exchange" is defined in the Bills of Exchange Ordinance as,

"an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to another, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specific person, or to bearer".

Hence an instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange. According to the law all cheques are considered as bills of exchange, but all bills of exchange are not cheques. Person in whose favour, the cheque is drawn is called 'payee', and the bank who is directed to pay the amount is known as 'drawee'. Legally, the author of the cheque is called 'drawer',

A cheque becomes due for payment on the date mentioned on it. Before issuing a cheque author of the cheque should ensure that he has sufficient funds in his account. As a result of insufficient fund, the cheque may dishonored (bounced) and that creates the legal issue.[4]

It is an essential requirement that the cheque should be dated. Normally the person who draws a cheque will put on the cheque the date in which it is drawn. If the drawer put a date earlier on which it is drawn called an ante-dated cheque. On the other hand the person drawing the cheque places a future date on it is called postdated cheque. However the cheque is not invalid by reason only that it is ante-dated or post-dated[5]. Though the cheque is antedated or postdated, it does not affect the validity of the cheque.

Once a cheque is dishonored, the aggrieved parties are used to lodging police complaints as an expeditious remedy for recovering their money. According to the value of the default amounts police stations, Special Crime Investigation Bureau and Criminal Investigation Departments accepted the complaints. As per the Circular No. 2238/20 dated 28.10.2008 issued by the Inspector General of Police, complaints with monetary value less than Rs. 500,000 go to the relevant police stations, monetary value between Rs. 500,000 to Rs. 5,000,000 go to relevant Special Crime Investigation Bureau of the area and Colombo Fraud Bureau in Colombo and monetary value more than Rs. 5,000,000 go to Criminal Investigation Department for investigations. Regardless of the value when the police fail to settle the dispute in an amicable manner, criminal matters are instituted in Magistrate's courts and High Courts. It is a common ground that the defence of the accused shows that the cheque transaction is a part of a series of transactions. Then there is a high probability to turn the criminal matter in to a civil matter. Here the most important thing is to differentiate the Criminal and Civil nature of the matter. However, it is common to see that some transactions are purely in civil nature and the main aim of the complainant is to recover the entire amount of money. Therefore it is very important to differentiate the criminal and civil nature of these transactions and categorize criminal offences under the Penal Code and Debt Recovery Special Provisions Act No. 2 of 1990.

In most of the cheque cases filed by the police, they are reporting facts under section 386, 388 and 400 of the Penal code and Debt Recovery Special Provisions Act. Therefore the main purpose of this article is to discuss overview of criminalizing a cheque bounce cases and its practical difficulties.

Present Criminal Law of Sri Lanka relating to the Cheque Transactions

A crime is an act that the law makes punishable; the breach of a legal duty treated as the subject matter of a criminal proceeding6. Cheque transactions are considered as white collar economic crimes and they are also nonphysical crime committed to obtain financial gain or undue advantage.

A criminal offence under the Penal Code of Sri Lanka generally consists of two elements, i.e. mental (mens rea) and physical elements (actus reus). A certain mental state viz. intention, knowledge, negligence or rashness is ordinarily necessary for committing a legally forbidden act. As other criminal matters, this offence also must be proved by the prosecution beyond reasonable doubt.

The Bankers have their own remarks when the cheques are dishonored.

1. Stop Payment

   Stop payment order is issued by the account holder and it can only be enacted if the cheque or payment has not already been processed by the recipient.

2. Bank Account Closed

3. Refer to the Drawer

4. Post dated Cheques

   A "post dated cheque" is a bill of exchange when it is written or drawn, it becomes a 'cheque' when it is payable on demand. A post-dated cheque cannot be presented before the bank and as such question of its return does not arise. It is only when the postdated cheque becomes a cheque with effect from the date shown on the face of the said cheque,

Once the cheque is bounced with any of above mentioned remarks, that can be used as a proof to prove *actus reus* and/or *mens rea.* Then the accused can be charged under the Penal Code of Sri Lanka as well as under the section 25 of the Debt Recovery (Special Provisions) Act No. 2 of 1990.

1. Relevant Provisions in the Penal Code of Sri Lanka -

   (a) Cheating -

During cheque transactions, when the cheque has been bounced, the most common term that is used by the parties is cheating. Section 398 of the Penal Code gives the definition of the cheating.

"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain

any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or likely to cause damage or harm to that person in body, mind, reputation or property or damage or loss to the government, is said to cheat."

According to above mentioned definition, the ingredients of the offence of cheating are as follows[7],

1. Deception of any person by the accused,
2. The carrying out of the deception frequently or dishonestly,
3. By means of the deception, inducing the person deceived,
   (a) To deliver any property to any person, or
   (b) To consent that any person shall retain any property, or
   (c) To do or omit to do anything which he would not otherwise to do or omit.
4. The causing of loss or damage, or likelihood of causing loss or damage, of the kind envisage, to the person deceived or to the Government by reason of the act or omission contemplated by element 3(c).[8]

The fundamental question arises from the above mentioned facts is whether an offence of cheating was committed. It is depend on the intention of the parties and nature of the transaction, that is whether the cheque was tendered instead of cash or as an agreement[9].

Dishonour of a cheque is not always an indication that it itself institutes an offence of cheating. The prosecution has to prove that at the time of giving of cheque the intention of drawer was dishonest or fraudulent and he did not intend to pay, but dishonestly induced the complainant to delivery of property.[10] This liability of a cheque transaction is properly discussed in the Sri Lankan case of ***Subramanium Sivapalanathan Vs. Attorney General***[11]**,**

> "……As far as the 1st charge is concerned it is necessary to examine whether "deception" the essential ingredient of the charge of cheating was established. The main question is whether the accused by tendering the cheque deceived the complainant and induced her to vacate the premises. The evidence is that the Complainant on her own vacated the premises after three months in occupation as she found it difficult to live in that premises due to the prevailing situation…….If there was a charge under section 25 of the Debt Recovery Act for issuing a cheque without funds, on the available evidence there is a possibility of convicting the accused for that offence"[12]

Indian courts also clearly differentiate the civil and criminal nature of dishonored cheques with offence of cheating. In the case of ***Manoranjan Halder Vs. Mechfab Engineering Industries***[13] S. M. Ali J has stated,

> " ….It is therefore clear that the intention to cheat must have been there with the accused at the time of the initial transaction. Where the accused had an intention to pay against delivery of goods, the fact that he did not pay would not convert the transaction into one of cheating. On the other hand, if he had no intention to pay but merely expressed his intention to pay in order to induce the complaint to part with the goods, then in that case cheating would be established. Then again, if there be no intention to, cheat at the time when promise of payment is made, subsequent inability to pay or perform the promise will not amount to any offence. It is of course settled principle that intention of an accused may be judged by his subsequent act or conduct. But still such conduct or act cannot be the criterion to judge his intention at the time of initial representation. There are two main elements of offence of cheating. Namely deception and dishonest inducement to do or omit to do anything. At the same time, there deception is not criminal offence nor is mere dishonesty. In between these two concepts there is yet a line though very thin giving rise to breach of contract for which remedy lies in a civil action".

Therefore, it is clear that the mere issuing of a post dated cheque and subsequently dishonor of it is not creating an offence of cheating. Proof of mental element of the offence is always with the prosecution'

(b) Criminal misappropriation

In our Penal Code, these offences are considered as offences against the property. Section 386 of the Penal Code defines the criminal misappropriation as,

"Whoever dishonestly misappropriates or converts to his own use any movable property shall be punished with imprisonment of either description for term which may extend to two years or fine or both".

The *actus reus* and *mens rea* of this section must be properly identified. That is the misappropriated property is not in the possession of the owner at the time of conversion and this conversion should be done in moral turpitude.

In the case of ***Walgamage Vs. Attorney General***[14], Justice Sarath Silva has clearly described the ingredients of offence and comparatively discussed with the cases of ***Attorney General Vs. Menthis***[15] and ***Ranasinghe Vs. Wijendra***[16]. It says that initial taking did not constitute an offence for criminal misappropriation and subsequent conversion of the property constitutes the offence of misappropriation if the conversion is dishonest. This is the mental element of the offence.

If prosecution has proved that the accused has misappropriated the due amount of money, that charge can be established. The *actus reus* of the offence requires that the property should be used or exploited for the benefit of some person who is not legally entitled to property[17]

Hence it has been properly understood that the criminal misappropriation charge is established not merely the reason of cheque and because of the misappropriation of money. As an example in the case of goods entrusted to salesmen for the purpose of sale are reported as cases of misappropriation when the salesmen, after the sale, do not pay money to the owners as expected. In this instance, the money has been misappropriated not goods[18]. In the case of ***Subramaniam Sivapalanathan Vs. AG***[19] it was stated that the accused had misappropriated the balance sum due to the complainant which was part of the advance rent.

(c) Criminal Breach of Trust-

Definition of the Criminal Breach of Trust is mentioned in the section 388 of the Penal Code and it is also an offence against the property.

"Whoever, being in any manner entrusted with property, or with any dominion over property, with any domain over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or dispose of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits the offence"

In this offence, the dishonest conversion is committed in respect of entrusted property. Proof of this entrustment is the additional ingredient of the offence with criminal misappropriation. Prosecution must prove this entrustment and dishonest intention of the accused in a postdated cheque bounced case. In this kind of a case, the accused can raise a reasonable doubt that the good in question has been lost without his intention and control. Hence it is clear the difficulty of proving dishonest intention of the accused with his abovementioned defences.

2. Debt Recovery (Special Provisions) Act No.2 of 1990 -

Considering the difficulties faced by the prosecution when establishing under the Penal Code relating to this subject, with an idea to eradicate this barrier, the legislature has introduced section 25 of Debt Recovery (Special Provisions) Act No. 2 of 1990 was amended by the Debt Recovery (Special Provisions) (Amendment) Act No.9 of 1994. In simple language *mens rea* that wanted to be proved in the case of this subject under the Penal Code is lifted. This statute legislates on matters connected with cheques. Section 25 of the Act makes offence,

1. To draw a cheque knowingly that there are not sufficient funds in his bank account to honour such cheques,

2. To draw cheques and then countermand their payment so that the cheque will not be honoured. [20]

The penalties also mentioned in the same section of the Debt Recovery (Special Provisions) Act. Section 25(1) (d) is as follows,

> "Accordingly the offender shall be guilty of an offence under this Act and shall on conviction by a Magistrate alter summery trial be liable to punishment with imprisonment of either description for a term which may extend to one year or with fine of ten thousand rupees or 10% of the full value of the cheque, order, authority or inland bill in respect of which the offence is committed, whichever is higher, or with both of such fine and imprisonment".

As discussed, section 25 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 was introduced as a remedy for the lacuna in initiating criminal actions against this kind of commercial transaction. Intention of introducing this provision is to provide an alternative recourse to the aggrieved party that is both effective as well as quick remedy. The party is free to prosecute the defaulter under Sri Lanka Penal Code and Section 25 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as well. Both the remedies are extensive and not mutually exclusive.

Shortcomings of Present Law in Sri Lanka

In present economy commercial transactions as well as cheque transactions are being increased day by day. Number of cheques are bounced by the same percentage or above. Unfortunately, the matters relating to the bounced cheques are not disposed by the same ratio as a result criminal courts are flooded with cases relating to this aspect. The insertion of the provisions to Debt Recovery Act for criminalizing the cases of cheque bouncing was done with an intent to deter people from dishonoring cheques and to ensure credibility of cheques, for protecting the trust of the Banking system. However, as a result of the increasing number of cases and more complicated way of cheque transactions this expectation of the Debt Recovery Act becomes futile.

It is pathetic to mention that some cases before the Magistrate's Courts are settled to repay "millions" by "thousands" installments. Then the penalty goes to aggrieved complainant, not the person who has cheated the money. As a result of this, the criminal courts are flooded with cheque bounced cases. It is understood even the Debt Recovery Act is also not a blanket solution to this burning problem. Therefore these kind of cases are becoming money recovering cases and some are dragging several years. Magistrate's Courts are now

called upon to decide civil disputes which are purely contractual in nature. Practically, compensate the complainant is the main target of filing a cheque bounced case. As soon as the case has been filed complainants are prepared to recover money in installment and entire deterrent aspect of criminal law becomes futile with present practice.

Even in the present law, section 17(7) of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 14 of 2000, the maximum amount of compensation ordered by a Magistrate's court is Rs.100,000. Within this limited authority, complainants are expecting to recover millions of rupees. Although there are provisions in Civil Law for compensating the victims, they are selecting criminal law as an expeditious way of recovery and overcoming procedural defects of their mutual agreements with suspects.

Some of these defects in the complainant's case negatively affect to the prosecution case also. It is common to see that the suspects are produced to the courts for series of cheque transactions during long term business or accepting third party cheque. They are supplying goods or services on postdated cheques and cheques were dishonored subsequently. Although the chequse given by the suspects were bounced, the practice of the business world is continuing further cheque transactions with same suspects. Thereafter they are coming to court to find legal solution for number of default transactions among them. When questioning the complainants, it is revealed that the cheque was accepted by them as a security. Unfortunately, in these kinds of situations, it is very difficult to prove conventional Penal Code charge against the accused.

In the Court of Appeal case of ***W. H. Thulyananda Vs. Attorney General***[21], Justice Salam has properly differentiated the civil and criminal nature of these kind of offences and validity of admission recorded before filing a plaint in the Magistrate's court. Considering the default amount of money and period, Magistrate's court is unable to deviate from accepted legal procedure. The most important thing understand by this judgement is that the Magistrate's courts are not compensative courts and existing legal provisions are not sufficient to compensate complainants.

In the case of ***W. H. Thulyananda Vs. Attorney Genaral*** , it was stated that "in constructing the relevant legal provisions relating to conduct of prosecution, we cannot throw in to jeopardy the entire fabric of administration of law and justice and directly or indirectly encourage or condone extra judicial approaches to take precedence over the time tested Law and established procedures. Such innovative practices, if disregarded would lead to a disruption of the Rule of Law and Administration of Justice which this court and all other courts including the Magistrate's courts are committed to preserve".

Practice in Other Legal Systems

Above discussion clearly described that Criminalizing Cheque Bounce Cases is not an effective remedy in most complicated commercial transactions. Therefore, an efficient way of recovery procedure and preventive mechanism should be introduced to our legal system. It is important to study the procedures adopted in other countries against cheque bounced offenders and analyze possibility of their effective implementation in Sri Lanka.

India

Similar to Sri Lanka, the Indian Penal Code contains two sections under which the holder of a dishonored cheque can prosecute the drawer. The aggrieved party can initiate proceedings under section 406 (Criminal Breach of Trust) and Section 420 (Cheating) of Indian Penal Code. Indian legislature also introduced similar provisions in the Indian Negotiable Instrument Act of 1881. Sections 138 to 142 are inserted by Banking Public Financial Institutions and Negotiable Instruments Clause (amendment) Act 1988 to the Negotiable Instrument Act. This was done by making the drawer liable for penalties[22] in case of bouncing of the cheque due to insufficiency of funds with adequate safe guards to prevent harassment of the honest drawer.

Section 138 of the abovementioned Act creates this statutory offence in matter of dishonor of cheques on the ground of insufficiency of funds in the account maintained by a person with the banker without considering the guilty intention of that person. This provision can be considered as a summery mode of enforcing a civil right. Normally in criminal law, existence of guilty intention is an essential ingredient of a crime. However, the Legislature can always create an offence of absolute liability or strict liability where *mens rea* is not necessary.[23]

The Supreme Court in the case of ***Sangeetaben Mahendrabhai Patel Vs. State of Gujarat*** (Criminal Appeal no. 645 of 2012) held that the proceedings can be initiated under both the Indian Penal Code as well as the Negotiable Instruments Act. The Court said there is no double jeopardy as envisaged in Article 20(2) of the Constitution of India as the ingredients of offences in both the acts are different and hence a drawer of a dishonored cheque can be prosecuted under both the Acts (Double Jeopardy in India). This means that the criminal liability of the drawer of a dishonored cheque exists regardless of the amendment made in the Negotiable Instruments Act criminalizing dishonored cheque.[24]

However, in India the criminalizing the cheque bounce cases have not proved to be successful with their huge number of cases.

France

In developed countries which are with many complicated cheque transactions have adopted much flexible and expedite procedure. As an example, in France, it is called "cheque sans provision". According to the law person is liable to fine and banned from being able to use write a cheque for up to five years. Also the Bank may insist on the return of the cheque book until the account has been restored in to credit. Within the statutory limits Banks are free to charge their own fees for unpaid cheques and fine from "Tresor Public". If the offender fails to regularize the situation his name will be added to a central register called the "Fichier Central de Cheque" (FCC) and will then banned from issuing cheques for five years[25].

According to the law of France, bearer of the cheque may claim the following from the person against whom he exercises his right of recourse:

1. The amount of the unpaid cheque
2. Interest with effect from the day of presentment at the legal rate applicable in France
3. The costs of the protest and notices given, as well as other costs[26].

Singapore

Singapore is the one of the top-rated countries in the business world. According to the Singapore law there is civil liability enforced by the law on the cheque defaulting party and no criminal liability. The holder of the cheque can recover the value from any party liable on the bill. They are amount of the bill, if the bill is payable on demand, the interest from the time of presentment of payment and maturity of the bill and expenses of protest. The drawer who has been compelled to pay the bill may recover from the acceptor, and an endorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior endorser.

United Kingdom

As a common law country, there is civil remedy available to the holder and he can bring in a civil action to get the damages. Here too interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case, the expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest (Bills of Exchange Act, 1882) can be recovered by the holder of the cheque. Hence the drawer and endorser are liable for payments.

Suggestions for Expedite Resolution to Sri Lanka

It is very important to educate the parties about available civil and criminal legal remedies in our legal system before they come to court. Mere criminalization of cheque bounce incident is not a permanent solution for entirely compensate. First the case has to be proved beyond reasonable doubt. The main purpose of criminal law is to prevent undesirable behavior of culprits and punish those who commit an act deemed undesirable by society. Five objectives of criminal law enforcement are punishments, retribution, deterrence, incapacitation, rehabilitation and restoration. Among abovementioned theories, restoration is returning the victim to his or her original position before the injury occurred. Although restoration is victim oriented theory of punishment in criminal justice system, the court has to follow its own legal framework when compensate the victim. On the other hand, Civil Law is a body of rules that defines and protects the private rights of citizens, offer legal remedies that may be sought in dispute, and covers area of law such as contracts, torts, property and family law[27]. The most important thing is that the Civil Law does not restrict the amount of compensation.

In order to find a favorable solution to this cheque bouncing problem, we must adapt a practical way of legal procedure. Before coming to court the mandatory alternative dispute resolution and arbitration method can be considered as one of them.

Also Banks can be authorized with relevant preventive mechanisms for cheque dishonour due to insufficient money. As system adopted in France, the Banks can ban repeat offenders from issuing cheques and the Bank may insist on the return of the cheque book until the account has been restored in to credit.

According to the above-mentioned discussion it is clear that the cheque transactions are very much complicated and some instances drawing a cheque becomes a mode of security. As a result, that public confidence pertaining to cheque transactions with Banking system are decreasing. It gives negative impact on the economy of the country. However we all know that online electronic money transactions are very popular among people today. Therefore providing sufficient security to data protection and encourage online money transaction help to reduce cheque transaction and it will be a solution to this problem.

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1 *LLM (Colombo),BSc, Magistrate, Kalutara.*

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LEGAL STATUS OF WOMEN UNDER THE LAW OF THESAWALAMAI – A PERSPECTIVE FROM FEMINIST JURISPRUDENCE

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Introduction

The history of woman has been a history of oppression, resistance and celebration. According to leading feminist, American historian and author Gerda Lerner[1] "in the early stages of human development women had a more equal role within the tribal society and were considered as "the gathers" and were the first agriculturalist and with the growth of agriculture, female goddess were worshiped as divine interveners in the arbitrary process of nature". However, with the growth of trade and the emergence of state structure, the goddess were diminished and tamed and the male patriarchal emerged as supreme and at the same time since women were rarely leaders or decision makers they were seldom figured in the history books. Feminists believe that history was written from a male point of view and thus does not reflect women's role in making history and structuring society; and also that male-written history has created a bias in the concepts of human nature, gender potential, and social arrangements.[2] Feminists also opine that the language, logic, and structure of the law are male-created and therefore reinforce male values, by presenting male characteristics as a "norm" and female characteristics as deviation from the "norm" thereby reinforcing and perpetuating patriarchal power.[3] As such, from the nineteenth century to the present, feminists have organized to end this historic misconception that men are superior to women and have endeavored to prove that social inequality is not ordained by the laws of God or nature, but results from societal conditions that can and should be changed. Feminists therefore seek legal, political, educational and other reform that will allow women to choose lives that are compatible with their own interests and talents and not those imposed on them by family, religion or stereotype.

Equality under Feminist Jurisprudence

The term "equality" means several things, in humanities it means: equality of outcome, equality of opportunity, equality of treatment, equality before law, racial equality, sexual equality and social equality. On the other hand "gender equality" is based on the belief in basic equal rights and opportunities for members of both sexes within legal, social, or corporate establishment. According to European Institute of Gender Equality, "it implies that the interests, needs and priorities of both women and men are taken into consideration, recognizing the diversity of different groups of women and men".

Feminism is defined as "both a theory and practice of advocating equality against a series of oppressive systems manifested in diverse forms. Economic survival, physical safety and security, reproductive and sexual self determination, equality of status in all spheres of activities are the essence of what feminism stands for"[4]. But this expression has found many forms with cultural and geographical limitations and has also found diverse manner of expressions. But its ideology runs through all countries, eastern and western. Feminist jurisprudence is therefore, based on the political, economic and social equality of sexes and follows a twofold approach. Firstly, it explains ways in which the law plays a role in women's subordinate state and secondly it is dedicated to change women's status through reworking of the law and its approach to gender.

There are three major schools of thought within feminist jurisprudence. Each model provides a distinct view of the legal mechanisms that contribute to women's subordination, and each offers a distinct method for changing legal approaches to gender.

The traditional feminists assert that women are just as rational as men and therefore should have equal opportunity to make their own choices, while the liberal feminists challenge the assumption of male authority and seek to erase gender based distinctions recognized by law thus enabling women to compete in the marketplace.[5] The radical feminists focus on inequality and assert that men, as a class, have dominated women as a class, creating gender inequality.[6] For radical feminists gender is a question of power. Radical feminists urge us to abandon traditional approaches that take maleness as their reference point. They argue that sexual equality must be constructed on the basis of woman's difference from man and not be a mere accommodation of that difference.

Equality under International Instruments

The concept of equality is enumerated in various international instruments such as the United Nations Charter (UN Charter), the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR)[7] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[8].

The UN Charter and the UDHR recognized the importance of protecting human rights and have since given definition and effect to this commitment. UDHR in Article 3 states that "*Everyone has the right to life, liberty and security of person.*" In Article 7 it is stated that "*All are equal before the law and are entitled without any discrimination to equal protection of the law", and Article 8 declares that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*"

Thereafter, the two main Human Rights Instruments signed in 1966, ICCPR and the ICESCR, prohibited discrimination on the basis of sex. Article 2 of the ICCPR provides as follows:

> *"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*[9]
>
> **Article 23**[10] **of ICCPR states thus:**
>
> *"States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution..."*
>
> **In Article 26 it is stated that:**
>
> *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*
>
> **Further, Article 3 of ICESCR provides as follows:**
>
> *"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".*

However, despite this since the international community felt that there still continued to exist extensive discrimination of woman, the Convention on the Elimination of All forms of Discrimination against Women[11] (CEDAW) was introduced in 1979. CEDAW is the most comprehensive women's rights treaty in the world, acknowledging the political, civil, economic, cultural, and social rights of women. It has been described as an international 'bill of rights" for women as it sets out detailed information which helps to

recognize discrimination against women and the measures that have to be taken in order to eliminate such discrimination. In Article 1 of CEDAW it is stated that the " … *the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*" Further, Article 1 and 5 of CEDAW explicitly enact that neither culture nor any form of stereotyping should directly or indirectly categorize women as having lesser rights or of being inferior to men. Other salient provisions are contained in Article 15[12] and 16 [13]of the CEDAW dealing with equality.

However, as Sri Lanka is a "dualist" state, international instruments are at the best "soft laws" and are not directly enforceable unless enacted by Parliament. They are nevertheless are of the greatest value, as they indicate the international obligations of the State, give a sense of direction to policy makers, provide lawmakers with a basis for legislation and also assist judges in the interpretation of laws.[14]

Equality under National Laws

Our 1978 Constitution guarantees equality in Article 12 and in addition to protection of "equality before the law" as a Fundamental Right, it is further recognized through principles of State Policy. Article 27 of the Constitution "assures an equitable and justifiable legal system as well as equal and unrestrained access to all who seek redress of the law" are recognized as fundamental principles of State policy in Sri Lanka. As a directive principle of State policy, the Constitution also guarantees that "no citizen shall suffer any disability on the ground of sex," among other factors.

Though technically our Constitution confers equality of status to all citizens the Constitutional guarantees of the right of freedom of conscience, religion and to promote one's cultural affairs, when read with Article 16(1)[15] has the negative effect on the right not to be discriminated and in the efforts to achieve gender equity.[16] This is by reason of the fact that the above constitutional provision imports a strategy that all personal laws existing at the time of the Constitution cannot be made subject to fundamental rights enshrined in the Constitution.[17] Therefore, in the event any provision in a personal law is in violation of fundamental rights to gender equality, under the present provisions of the Constitution our courts have no power to declare it as such.

Thesawalamai Law

A detailed analysis of the Law of Thesawalamai is outside the scope of this article. However, what is attempted in this article is to provide a conspectus of the provisions, customs and traditions within the Thesawalamai system that discriminate women.

Origin of Sri Lankan Personal Laws

Sri Lanka's legal system was significantly influenced by colonial powers that conquered and ruled the country for centuries. Today the personal laws in effect in Sri Lanka include a combination of English common law, Roman-Dutch civil law and customary laws such as Kandyan Law, Thesawalamai Law and Muslim personal Law. Customary laws are applicable to various communities: the Kandyan Sinhalese, Tamils of Jaffna and Muslims respectively. Without exception, the customary practices and customary laws of all these communities have transformed with time.

Development of Thesawalamai Law

The customary laws of the Tamils in Jaffna are called Thesawalamai. It literally means "the customs of the land"[18]. When analyzing the development of Thesawalamai Law it is evident that this special system of law applicable to Tamil inhabitants from Jaffna evolved from a system of customary laws applicable to ancient Tamils who had a matriarchal system of society[19]. The first migration of Tamils from the Malabar District of India brought with them customary usages peculiar to a matriarchal society and subsequent emigrants from South India brought with them customs and manners influenced by the Aryan system and Hindu Law based on patriarchal system of society and at some point of time a compromise was effected and therefore in Thesawalamai we find rules peculiar to a matriarchal system of society blended with rules based on patriarchal system[20]. According to Tambiah "The customary laws of Thesawalamai appear to have been moulded by various other systems of law such as Hindu, Mohammedan and Roman Dutch law and the Dutch and Portuguese changed the customary laws in certain respects".

The customary laws applicable to Tamils living in the Northern Province were codified during the Dutch period and by Proclamation of September 23, 1799, however, it continued to be administered during the British rule. A few statutes have actually altered Thesawalamai, namely the Matrimonial Rights and Inheritance (Jaffna) No. 1 of 1911 and subsequent amendment by Ordinance No. 57 of 1947.

The primary source of the law of Thesawalamai[21] is the Thesawalamai Code.[22] Thesawalamai is the body of laws applicable to the Tamil inhabitants of the Northern Province. Even though in Section 3, the Thesawalamai Regulation No 18 of 1806, refers to this system of law as applicable to all questions between Malabar inhabitants of the province of Jaffna or where a Malabar inhabitant is defendant, it is now accepted that the word "Malabar" is used as synonymous with "Tamil" in that context.

In this regard Ennis J, ***in Spencer Vs. Rajaratnam***[23] made the following observations: *"…..Thesawalamai apply only to Tamils of Ceylon who are inhabitants of a particular*

province." Further, according to Dr. H.W. Tambiah[24] "*historical research also shows that the present Malabars of India were Tamils and that the Tamils during the early period had three kingdoms, namely, the Chola, Pandya and Chera Kingdoms. Part of the Chera Kingdom corresponds to the Malabar District. Hence in their origin the Malbars and Tamils were one*." That could be the reason the Jaffna Matrimonial Rights and Inheritance Ordinance No 1 of 1911, in Section 2 omits the word "Malabar" and uses the word "Tamil" instead.

Therefore, it is now settled that Thesawalamai is a customary law which is both territorial and personal in character and applies only to the Tamil inhabitants of the Jaffna Province, in respect of their movable and immovable property, wherever situated. Though there are some positive features relating to women under Thesawalamai there are also other provisions that discriminate against them in relation to marriage, property rights and inheritance.

Status of Women

The concept that a woman is deemed to acquire her husband's domicile and personal law still remains a part of Thesawalamai. The Jaffna Matrimonial Rights and Inheritance Ordinance clearly states that a woman governed by Thesawalamai ceases to be governed by that system, when she marries a man who is not subject to that system. However, if a woman to whom Thesawalamai does not apply marries a man to whom Thesawalamai does apply then she shall during the subsistence of the marriage be subject to Thesawalamai. There has been much discussion on this topic in the present day context particularly as there are large numbers of Tamils who have migrated from Jaffna to foreign countries due to the conflict situation that prevailed in this country and many among them have got married to foreigners. However, despite being married to a foreigner, a Tamil man who maintained his Jaffna inhabitancy could still be able to bring his wife as well as the issue of the marriage within Thesawalamai[25]. However, a Jaffna Tamil woman who marries a foreigner would acquire the domicile of her husband. Here we see a clear form of discrimination against women.

Therefore within the framework of Thesawalamai the legal status of the woman is dependent on the legal status of her husband and she is not a legal personality in her own right. This issue of dependant domicile is inconsistent with both the international and national standards[26] set to eliminate discrimination against women and the Women's Charter[27] which states that "*neither marriage to an alien, nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband*".

Further, under Thesawalamai property is divided into *Chidenam* (dowried property), T*hediatettam* (acquired property) and M*udusam*[28] (ancestral property). The institution

of Dowry is deeply rooted in Jaffna society. *Chidenam* is the property given to a woman as a marriage settlement by her parents on the occasion of the daughter's marriage. *Chidenam* under Thesawalamai has an independent origin and took its form in a matriarchal system of society.[29] According to Voet "*the responsibility to grant a dowry was derived from the parental duty to secure for one's daughter the best possible marriage*". The Thesawalamai Code too reveals an obligation on the part of the parents to provide a dowry to a daughter when she got married[30]. However, subsequent socio-economic developments coupled with change of human attitude resulted in transforming the usage devised for the protection of women into an institution which operated detrimentally to them[31]. In other words over the years "*Chidenam*" became "*Dowry*" in the modern sense.

Under the old Thesawalamai it was the duty of parents to give dowry and if the dowry property was sold by decree of Court against the parents they were required to make good the loss by giving something out of their property to compensate for the loss. The reason being, "*it was by this means only that most of the girls managed to obtain husbands, as it is not for the girls but for the property that most of the men marry*"[32]. Patriarchy and dowry therefore seems to go hand in hand. According to Vidyamali Samarasinghe "In South Asia the manifestation of patriarchy is demonstrated in the demand for *dowry* in India and Sri Lanka."[33]

Dowry was originally given from the mother's property but later due to the changes that took place during the Portuguese period *dowry* was given indiscriminately from the property of the mother, the father or the acquired property. The father being the manager of the property belonging to the mother had the right to give *dowry* from the mother's property[34] and after the death of the father mother was not given the right to give *dowry* out of her husband's property, except to the extent of the life interest she had over it. But in a later case it was held that she could do so.[35] Although under the old Thesawalamai she had this right, the Matrimonial Rights and Inheritance Ordinance (Jaffna) states that subject to the payment of debts, the property of the deceased parents vests in the children. Though it is encouraging to note that provisions relating to *dowry* are obsolete now and there are no legal obligations on the part of the parent to provide *dowry* for their daughters, even today this system is practiced among Tamils. The increased money flow into Jaffna from earnings of the youth employed in the Middle East and Western countries has also made *dowry* to sky-rocket to unprecedented heights[36]. Today, there is therefore a crying need to stop the practice of *Chidenam* as it results in social abuses and leads to commercialization of marriages.

The Matrimonial Rights and Inheritance Ordinance (Jaffna) incorporated rules regarding *dowry* and forfeiture thereby depriving a dowered daughter of rights to parental inheritance in Section 33. In terms of this section the daughters who receive *dowry* must content themselves with the *dowry* given… and are not at liberty to make any further

claim on the estate after the death of their parent, unless there are no more children, in which case the daughters succeed to the whole estate[37]. The Courts have interpreted this provision in a narrow manner, which has resulted in the deprivation of the rights of the daughter to inherit parental property if she has been dowered. Their interpretation has been narrowed to the extent that they have declared that if a widowed daughter receives a gift described as a *dowry* gift, she then loses her right to inherit parental property. Therefore, in terms of the above provisions the inheritance rights of the son has been protected at the expense of the inheritance rights of the daughter.

Under the Roman Dutch Law husband was given extensive rights in relation to the community assets of the marriage and even when community property was excluded by ante nuptial contract the husband could still administer the wife's property by virtue of marital power, unless of course the marital power was also excluded. However, this is no longer the position under the general law and today married women have acquired unfretted rights over their property and those aspects of marital power which restricted acquiring, holding or disposing of separate property has been repealed. However, the only matrimonial property regime which has an entrenched concept of community is Thesawalami where one half of the *Thediatettam* devolves on surviving spouse on death. *Thediatettam* is strictly defined[38] and entitlement is restricted to those situations where the property has not been disposed of by will.

Only significance of this concept is that each party can only donate his or her half-share of the *Thediatettam* and upon the death of one spouse, one half of the *Thediatettam* of the deceased spouse shall devolve on the surviving spouse and the other half on the heirs of the deceased. Property inherited or obtained through donation is not *Thediatettam*. In ***Kumarasamy Vs. Subramanium***[39] the question was whether the undivided share in a property bought by the husband in his own name automatically vested in the non-acquiring spouse, the wife. Gratien J ruled that the said property vested in the wife and she was entitled to an undivided half share of the property which in turn passed on to the heirs.

Though *Thediatettam* property embodies the concept of marriage as a partnership and assets acquired during the marriage is shared, it is severely flawed when it comes to the administration of such property. Further apart from the husband's power in relation to *Thediatettam* (similar to Roman Dutch Law), under Thesawalamai the wife needs to obtain the consent of her husband to dispose her movable property. The woman then is not viewed as an individual by the law instead her legal status is tied to that of her spouse. This protective and patriarchal attitude clearly demonstrates that in the eyes of the law the woman is incapable of making rational decisions about the disposition of her property.

The Jaffna Matrimonial Rights and Inheritance Ordinance in Section 6 makes it mandatory that the wife obtains the written consent of the husband to deal with her immovable property inter vivos. However, when the husband's written consent is not forthcoming, section 8 allows the District Court in which the woman resides or in which the property to be alienated is situated, to dispose of or deal with such property without the husband's written consent, i.e. the Court supplies the consent required by section 6. This is done if it is deemed that the husband is unreasonably withholding consent or is unable to give consent and the interests of the wife and children of the marriage require that such consent should be dispensed with. The husband cannot validly give general consent for future disposition as it is deemed that it would amount to the release of his protectorship, the purpose of the provision.

Further, under the Thesawalamai one cannot contract with the women without including her husband, since the husband remains the manager of the *Thediathettam* property during the subsistence of the marriage and he is regarded as the sole and irrevocable attorney of his wife. It is thought that the wife's persona "is merged with that of the husband's". According to the decision in ***Chellappa Vs. Kumarasamy***[40] a married woman is deemed incompetent to deal with her immovable property without the consent of her husband. Under the law of Thesawalamai it has also been held that the wife cannot be sued alone without her husband being joined.

The Thesawalamai Law also recognizes the father and on his death, the mother as the guardian of the child, so long as they do not contract a second marriage. However, if the father remarries, the custody of the children has to be handed over to the maternal grandparents, who are in turn entitled to give as *dowry* to the female child their mother's separate property and half of the acquired property.

These are but a few principles of Thesawalamai law that openly discriminate against women and rob women of the right to make decisions about their life and property. It is therefore evident that in the eyes of Thesawalamai women are deemed weak objects in need of protection. Feminist believe that this could probably be due to patriarchal thinking of society who consider woman to be not world-wise and as such needing to be checked and authorized before they undertake major transactions. However, many women subject to Thesawalamai are today professionally qualified and earning separate incomes. Therefore, the role of the husband as the sole and irremovable attorney of the wife badly needs to be reformed. It is ironic for example, that women subject to Thesawalamai can function as Chartered Accountants and deal with millions of rupees in investment on behalf of their employer but are unable to do the same with regard to their own personal investments. This also poses a question in the current post war context as to whether in cases where the husbands have disappeared a woman is required to go to courts to dispose her property?

In the light of the above it is therefore clear that a woman governed by Thesawalamai has less control over her property than her counterparts governed by General Law and other Personal Laws. Yet unlike her counterparts she has vested interest in the acquired property of her husband.

Further, according to customs and traditions prevalent among the Jaffna Tamils a women's ideology is usually associated with chastity and looking after her husband, children and home was considered a woman's most important duty. Marriage was commonly viewed as the ultimate goal in a girl's life and as such girls were persuaded, emotionally blackmailed and sometimes even threatened by parents and elderly relatives to consent to marry against her will as a social and family obligation. Scrutiny of customs under Thesawalamai reveals male bias and sex stereotypical constructions. On gender discrimination as part of an observed social reality, a proverb says that *a son's child is carried and a daughter's child is walked*. A good example is the meaning of the word "*vall*" (to live) which has acquired a gendered social dimension far removed from the original meaning. The word is used to mean to live with the husband or in the state of being married. Hence if the word is used with a male it simply means to live and if used with the feminine gender it means to live with a husband. The patriarchal construction implies a meaning that life for a woman is meaningless if not lived with the husband. In the olden days, as testified to by the Thesawalamai, there were no elaborate marriage rites and ceremonies. The central rite was the tying of *tali*[41] and a custom of stepping on the grinding stone[42]. This rite represents the fallen status of a woman who was turned into a stone on the grounds of infidelity to her sage husband.[43] Women who lost their husbands had to be ritually pronounced a widow by breaking their bangles and taking off the *pottu* and excluded from sacred rites and ceremonies thereafter.

Therefore, according to feminist legal theory the institution of marriage makes a woman an absolute dependant and incapacitates her for life's struggle, paralyzes her imagination and then imposes its gracious protection, which in reality is a travesty on human character[44]. Feminist believe that instead of apologizing for being a "mere housewife", as many women do, women should make society realize that upon the housewife now fall the combined tasks of economist, nutrition expert, sociologist, psychiatrist and educator[45]. Then society would confer upon the status of housewife the honour, recognition and acclaim it deserves[46].

Feminists further argue that basic equality between men and women should be reflected in the law, legislature etc. Injustice to women continues in the name of cultural identity. The personal laws relating to marriage, divorce, inheritance, custody of children are determined by religious and ethnic practices and differ from community to community. These are discriminatory to women as cited above. In fact the ideology of patriarchy stems from this private realm of family and extends to public roles that woman play. Women's

public roles and their secondary status are legitimized, sustained and restructured from the familial role of the private realm. Therefore, any changes necessary for women's emancipation are meaningless without first effecting changes and improving the basic and fundamental structures. Laws should be viewed as tools of social change and not as static inviolable sacred codes. In the words of Sharvananda CJ, *"It is the bounden duty of the Legislature to revoke or rescind rules, practices or laws which are detrimental to the interests of its subjects or which create an absurd or difficult situation*."

Conclusion

The argument that customary laws which are unique to a state or region must be preserved, even where it is discriminatory, in order to protect cultural and customary heterogeneity is no longer available argument for sustaining discriminatory laws.[47] According to Amnesty International "*inequality in the enjoyment of human rights by women throughout the world is often deeply embedded in tradition, history and culture, including religious attitudes. In achieving true gender equality it is therefore necessary to develop the essential cultural and societal structure that will support a woman who is throwing off those traditions that may prevent her from fully realizing her human rights*".

Studies show that a customary law which is codified, unless it is regularly amended will not be able to fulfill the aspirations and expectations of the society in which it exists and an examination of the law exhibits that women are discriminated under Thesawalamai Law. Hence, it is evident that reform is required to ensure that the rights of women are secured and the customary law is harmonized to keep with international legal obligations.

Endnotes

* *LLM (Colombo), Post Attorney's Diploma in International Trade Law (Sri Lanka Law College), Post Graduate Diploma in Airline Studies (IATA Singapore)*

1 *Gerda Hedwig Lerner was an Austrian-born American historian, author and one of the founders of the academic field of women's history*

2 *"Feminist Jurisprudence", available at https://www.law.cornell.edu/wex/feminist_jurisprudence, last accessed on 18.09.217*

3 *Ibid.*

4 *Andrea Hinding, Feminism: Opposing View Points at p153*

5 *Supra note 2*

6 *Ibid.*

7 *Sri Lanka acceded to the Covenant on 11 June 1980*

8 *Ibid*

9 *Emphasis added*

10 *ICCPR Article 23 – "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.2. The right of men and women of marriageable age to marry and to found a family shall be recognized.3. No marriage shall be entered into without the free and full consent of the intending spouses.4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."*

11 *Sri Lanka ratified the CEDAW on 5 October 1981*

12 *CEDAW Article 15 –*

"1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. 3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void. 4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile."

13 *CEDAW Article 16 "1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a)The same right to enter into marriage; (b)The same right freely to choose a spouse and to enter into marriage only with their free and full consent; …….(g)The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h)The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration….."*

14 *A.R.B. Amarasinghe, Gender and the Law at p 1*

15 *1978 Constitution Article 16 (1) - "All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter"*

16 *Kamala Nagendra in her introduction in the book titled Matrimonial Property and Gender Inequality :Study of Thesawalamai opines*

17 *Ibid.*

18 *Dr. Selvy Thiruchandran, The Social Implications of Thesawalamai and their Relevance to the Status of Women in Jaffna, at p.78*

19 *Dr. H.W. Tambiah, The Laws and Customs of the Tamils of Jaffna, at p. 25*

20 *Ibid. at p. 19*

21 *Lakshman Marasinghe and Sharya Scharenguivel, Compilation of Selected Aspects of the Special Laws of Sri Lanka, at p. 337*

22 *The " Thesawalamai Code" is a compilation of the customs of Jaffna by Dissawa Isaaksz on the order of the Dutch Governor Joan Simons in 1707. The Thesawalamai is a rough and primitive compilation and Pereira J. in Chellappa V Kanapathy borrowed the words of Tennyson to describe it as, "a wilderness of single instances."*

23 *16 N.L.R. 321*

24 *Supra note 18 at p. 46 – 57*

25 *Section 2 of the Jaffna Matrimonial Rights and Inheritance Ordinance No 1 of 1911*

26 *This is in clear violation of Article 15.4 of CEDAW to which Sri Lanka is a signatory, and provides that "State Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile."*

27 *Women's Charter was approved by the Government of Sri Lanka on 3rd March, 1993. In Section 2 it is stated " The State shall take all appropriate measures to eliminate discrimination against women in the Public and Private Sectors, in the political and public life of the country, and ensure to women, on equal terms with men, the right……"*

Section 4 i) "The State shall take all appropriate measures to ensure that women enjoy equal rights with men to acquire, change or retain their nationality. The State shall in particular ensure that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband. ii)The State shall ensure that women enjoy equal rights with men in deciding on matters which may have a bearing on the nationality of their children. iii)In the case of a mixed marriage, the State shall ensure that the spouses shall have the right to choose to be governed by the General Law. iv) The State shall ensure that men and women enjoy the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile."

28 *Supra note 24 , Section 15*

29 *Supra note 17 at p. 411*

30 *Kamala Nagendra , Matrimonial Property and Gender Inequality :Study of Thesawalamai at p. 97*

31 *Ibid.*

32 *Ibid at p.98 and 107*

33 *Gender Inequality in Developing Countries, in Women at the Cross roads: A Sri Lankan Perspective, (New Delhi Vikas publishing House, 1990) at p 13*

34 *Nagaratnam v. Alagaratnam 14 N.L.R. 60*

35 *Sinnethamby v. Poopathy 36 N.L.R.103*

36 *Supra note 29 at p. 155*

37 *Lyall Grant J, in Eliyavan V Velan 31 NLR 356 at 358 stated that "The admitted principle of the Thesawalamai is that if a daughter is dowered she loses her rights to her parent's inheritance."*

38 *Section 19 Matrimonial Rights and Inheritance Ordinance (Jaffna) "No property other than following shall be deemed to be thediatheddam of a spouse :— (a) Property acquired by that spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse. (b) Profits arising during the subsistence of the marriage from the separate estate of that spouse.*

39 *56 N.L.R. 44*

40 *18 N.L.R. 435*

41 *Supra note 18*

42 *Ibid. at p.79*

43 *Ibid.*

44 *Supra note 4 at p.71*

45 *Ibid.*

46 *Ibid.*

47 *Kishali Pinto Jayawardena and Jayantha de Almeida Guneratne, Is Land Just For Men?, at p 48*

APPEALS AGAINST THE ORDERS OF THE LABOUR TRIBUNALS - AN OVERVIEW.

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Introduction

Labour Tribunals were introduced to the legal system of Sri Lanka by Act No. 62 of 1957 amending the Industrial Disputes Act No. 43 of 1950. Consequently, the first Labour Tribunal was established on 02nd May 1959. During the last 57 years the Labour Tribunals have evolved to form a major branch of the administration of justice system of this country.

Since the aforesaid amendment in 1957 the Industrial Disputes Act has been amended many a time to facilitate and provide for the smooth functioning of labour tribunals. Appellate procedure with regard to Labour Tribunal applications went through a rapid transformation during the last decade especially with the enactment of the Industrial Disputes (Amendment) Act No. 32 of1990.

Consequent to the 13th Amendment passed by the Parliament and certified by the Hon. Speaker on 14th November 1987, High Courts of the Provinces were established by the Article 154P of the Constitution. Prior to the aforesaid Act No. 32 of 1990 any party who dissatisfied with the order of the Labour Tribunal had the right to appeal to the Court of Appeal on a question of law. However, Section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 stipulates "A High Court established by Article 154P of the Constitution for a Province shall, subject to any law, exercise appellate and revisionary jurisdiction in respect of orders made by Labour Tribunals within that province and orders made under section 5 or section 9 of the Agrarian Services Act, No. 58 of 1979, in respect of any land situated within that Province"[1]

In order to meet the aforesaid legal requirement, the legislation amended the Industrial Disputes Act by Industrial Disputes (Amendment) Act No. 32 of 1990, where it laid down for the first time, a comprehensive appellate procedure with regard to the Labour Tribunal applications.

Industrial Disputes (Amendment) Act No. 32 of 1990

Industrial Disputes (Amendment) Act No. 32 of 1990 was enacted by the Parliament and came in to operation on 31st August 1990. Section 4 of the said Act repealed the existing Section 31D, which recognizes the right of appeal and introduces a new Section 31D.

31D (3) where the workman who, or the trade union which, makes an application to a labour tribunal, or the employer to whom that application relates is dissatisfied with the order of the tribunal on that application, such workman, trade union or employer may, by written petition in which the other party is mentioned as the respondent, appeal form that order on a question of law, to the High Court established under Article 154P of the Constitution, for the Province within which such labour tribunal is situated.

Who are the Parties to the Appeal ?

In terms of the above section any party (either the workman, trade union on behalf of the workman or the employer) who dissatisfied with the order of the Labour Tribunal is entitle to prefer an appeal on a "question of law" to the High Court (of the province), within which such Labour Tribunal is situated.

It is the duty cast upon the party appellant to name the correct parties as respondents in the petition of appeal before the appellate court, and failure would amount to a dismissal of such appeal. Court of Appeal in ***Hewagamkorale East Multi-Purpose Co- operative Society Ltd, Hanwella Vs. Hemawathi Perera***[2], held that the failure of the employer to name the trade union which acted on behalf of the workman who had instituted the proceedings in the Labour Tribunal as a respondent would warrant the dismissal and further, held that " When a vital step is prescribed by law to be taken for the constitution of a valid appeal and it is not so taken the appeal is deemed to be rejected and an application to include the trade union as a party respondent after the expiry of the prescribed period for filing the appeals cannot be permitted".

In ***General Manager of Ceylon Electricity Board Vs. Gunapala***[3] parties who were named as respondents in the application were not juristic persons. However, the petition of appeal has been signed by the Ceylon Electricity Board which is set up by Ceylon Electricity Act No. 17 of 1969 and invested with the right to sue and be sued in the corporate name. Thus, court held that the error in the caption does not affect the validity of the appeal.

Question of Law

The phrase "question of law" has not been defined in the Industrial Disputes Act or any of its subsequent amendments. There had been many judicial decisions by the Superior Courts interpreting the phrase "question of law"[4]

According to the decision of ***Abesundara Vs. Samel*** Labour Tribunal acting contrary to the principles of natural justice constitutes a point of law inviting interference of the appellate courts.[5] Failure of the Labour Tribunal to consider the version of the appellant would also amounts to a breach of natural justice which entitle the appellant to appeal on a question of law[6]. In ***Ceylon Steel Corporation Vs. National Employees Union*** court took the view that where the labour tribunal erroneously taken the view that there was no evidence at all on a certain point and when in fact there was, it would amount to a question of law.[7] Where the labour tribunal misdirects itself on the facts, such misdirection too, amounts to a question of law within the meaning of section 31D of the Industrial Disputes Act.[8] According to Thennakoon J in ***Watareka Multi Purpose Co- operative Society Vs. Wikramachandra*** when a workman's services was terminated by the employer on the ground of inefficiency, there is no burden on the employer to prove that he acted without malice in dismissing the workman. In such a case, if there was neither illegality nor any finding that the dismissal for inefficiency was an unfair labour practice it is an error of law to award any compensation to the workman under Industrial Disputes Act and thereby it is a misdirection on the burden of proof and also an error of law.[9] Where a labour tribunal makes a finding of fact for which there is no evidence, a finding which is both inconsistent with the evidence and contradictory of it, amounts to a question of law warranting the intervention of the appellate forum.[10] When the Tribunal awards a sum of money as compensation to an employee whose services have been terminated, the failure on the part of the Tribunal to consider the basis of computation in awarding the sum amounts to a question of law.[11]

There are several judicial decisions on the issue whether it is required by the appellant to form and plead the question of law in the Petition of Appeal. In ***Thilakarathne Vs. Moosajee Ltd***[12] His Lordship, Justice Alles held that the "question of law should be averred in petition of appeal and not left to Court to discover it". But later the Court of Appeal in ***M/S Lanka Walltiles Ltd Vs. K.A.Cyril*** (supra) held that"Section 31 D…… does not require that a statement of the questions of law to be determined should be specifically set out in the petition of appeal; nor is it necessary to set out the questions of law in the petition of appeal in a particular form". In that case the Court of Appeal having carefully considered the earlier judgment of Justice Alles in **T*hilakarathne Vs. Moosajee Ltd*** choosed not to follow the same. This view taken by the Court of Appeal was later endorsed by His Lordship Justice Gunasekara in ***General Manager, Ceylon Electricity Board Vs. Gunapala,*** where His Lordship held that "it is sufficient if the question of law

is apparent from the body of the petition. The failure to set out specifically the question of law to be determined does not affect the validity of the petition of appeal"[13] As the law stands today a question of law could be raised and argued before the Court of Appeal although such a question is not specifically set out in the petition of appeal.[14]

Which Court has the Jurisdiction to Hear the Appeal ?

Prior to the enactment of the Act No. 32 of 1990 the Court of Appeal, in terms of the Article 138 of the Constitution had the jurisdiction to hear the appeals from Labour Tribunals. However, consequent to 13th Amendment the legislature amending the section 31D of the principle enactment by the aforesaid Act No. 32 of 1990 made the High Court established under the Article 154P of the Constitution as the appellate court for Labour Tribunals.

Section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Articles 111, 138 and 154P (3) (c) conferred concurrent appellate and revisionary jurisdiction on the High Court in respect of orders of Labour Tribunals, and Section 31 D (3) of the Industrial Disputes Act as amended by Act No. 32 of 1990, made that jurisdiction exclusive, thereby taking away the jurisdiction of the Court of Appeal in that respect[15]. The appellate jurisdiction of a Provincial High Court over the orders of Labour Tribunals has been conferred upon it by s.3 of Act No. 19 of 1990 (enacted pursuant to the provisions of Article 154 P3(c) of the Constitution). The right of appeal to such court is conferred by section 4 of the said Act and section 31D(3), as amended by Act No. 32 of 1990, of the Industrial Disputes Act.[16]

In ***Coconut Research Board Vs. Fernando***,[17] question arose as to whether the High Court of the Western Province has jurisdiction to hear the appeal filed by the employer–appellant against the order of the President of the Laboure Tribunal of Negambo sitting in the Chilaw circuit. Fernando J, while addressing the issue interpret the term situated in section 3 of the Act No. 19 of 1990 in a more liberal way. He held that 'Situation' is far more appropriate to refer to the physical location of the Tribunal rather than to some other place where the President happened to exercise some of his functions on a particular occasion. Thus Court took up the view that the High Court of the Western Province sitting in Negombo has jurisdiction to hear the appeal. In the more recent case of ***Premasundara Vs. Seemasahitha Galoya-Madapalatha Vivida Seva Samupakara Samithiya***,[18] Sureshchandra J, distinguishing the factual situation of the Coconut Research Board case held that the High Court of the Province where the Labour Tribunal is situated deemed to have jurisdiction to hear an appeal from a tribunal situated within the province.

Mode of Preferring the Appeal

In terms of the Section 31D (3) the mode of appeal is a written petition. There were several judicial decisions on the applicability of the Section 322 (2) of the Code of Criminal Procedure Act to the appeals from Labour Tribunals.

322 (2) Where the appeal is on a matter of law the petition shall contain a statement of the matter of law to be argued and shall bear a certificate by an attorney-at-law that such matter of law is a fit question for adjudication by the Court of Appeal.[19]

It appears that there are several conflicting decisions of the Superior Courts in this area. In ***United Workers' Union Vs. Ceylon Fisheries Corporation & Another***[20] it was held that such certificate as contemplated in section 322(2) is not necessary in appeals from Labour Tribunals. However, later in the case of ***Thevarayan & Two others Vs. Balakrishnan***[21], Court of Appeal dismissed the appeal for non compliance of section 322(2). But two years later the Court of Appeal in ***M/S Lanka Walltiles Ltd Vs. K.A.Cyril***[22] took a different view and held that "a certificate by an Attorney-at-Law required by section 322 (2) of the Criminal Procedure Code in criminal cases does not apply to appeals from Labour Tribunals".

However, in terms of Section 31D(9), of the Industrial Disputes Act the provisions of Chapter XXVIII of the Code of Criminal Procedure Act are applicable to appeals preferred to High Court from Labour Tribunals in regard to all matters connected with the hearing and disposal of such appeals. Wherefore one can argue that filing the appeal is intentionally kept out of the area covered by said provisions of the Code of Criminal Procedure Act, hence section 322(2) has no application.

Time Limit and Security to be Deposited

Prior to the aforesaid amendment came in to effect every appeal had to be filed in the Court of Appeal within a period of 14 days reckoned from the date of the impugned order. (including the date of the order and excluding all Sundays and Public Holidays). This was subsequently repealed by Section 4(6) of the Act No 32 of 1990, and thereby introduced new Section 31D (6) to the principal enactment, which dealt with the time limit in filing of appeal.

However, the Industrial Disputes (Amendment) Act No. 11 of 2003 by section 4 (2) amended the aforesaid provisions of Section 31D(6) to an extent and by Section 6 (1) of the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act No. 13 of 2003 [both certified by the Hon. Speaker and came in to effect on 20.03.2003] stipulated that an appeal has to be filed within Thirty days from the impugned order.

Section 6 (1) A petition of appeal made under section 3ID of industrial Disputes Act against an order made by a Labour Tribunal, shall be filed within a period of thirty days (including the day on which the order appealed from was made, but excluding Sundays and Public Holidays) of the date of the making of the order from which the appeal is preferred.

In terms of the section 31D(4) any such party who prefers an appeal to the High Court is required to furnish security computed according to the mechanism provided therein. The deposit of security is considered as mandatory, and unexplained failure would warrant the rejection of such appeal.[23] However, the time limit of thirty days for the deposit of security laid down by section 31 D read with section 6 (1) of the aforesaid Act No. 13 of 2003 is not mandatory.[24] In other words that the High Court has the discretionto entertain the appeal after considering the nature of and reasons for such delay, the circumstances in which it occurred, and the prejudice to the other party. Every appeal or application referred to in section 31D (4) has to be accompanied by a certificate issued by the President of the Labour Tribunal, to the effect that the appellant has furnished security as required by law to invoke the appellate jurisdiction of the High Court.

Conclusion

During the last couple of decades authorities in the Justice Ministry and Judicial Service Commission were contemplating in establishing a separate High Court for each province for the hearing and determination of appeals from the Labour Tribunals. However, this discussion proved to be a futile endeavor due to several practical and procedural elements, which should be discussed at length elsewhere. Such discussion recognizes the need of a separate mechanism or restructuring of the existing mechanism in Labour Tribunal appeals, where such appeals to be heard and disposed expeditiously given the plight of the workmen who are faced with financial and psychological trauma due to the termination of their services.

Endnotes

1 *Section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.*

2 *Hewagamkorale East Multi-Purpose Co-operative Society Ltd, Hanwella Vs Hemawathi Perera – 1986 (2) SLR 173*

3 *General Manager of Ceylon Electricity Board Vs Gunapala (1991) 1SLR 304*

4 *Collets Ltd. Vs Bank of Ceylon – 1982 (2) 514*

5 *Abesundara Vs. Samel – SC 113-123/67 SC minute 6.12.1968.*

6 *Carolis Appuhamy Vs. Punchirala – 64 NLR 44.*

7 *Ceylon Steel Corporation Vs. National Employees Union – CLW 76 page 64.*

8 *Ceylon Transport Board Vs. Abdeen – 70 NLR 407.*

9 *Watareka Multi Purpose Co-operative Society Vs. Wikramachandra – 70 NLR 239.*

10 *Ceylon Transport Board Vs. Gunasingha – 72 NLR 76.*

11 *Nanayakkara Vs. Hettiarachchi – 74 NLR 185*

12 *Thilakarathne Vs. Moosajee Ltd SC 60/70, LT 2/744/1969.*

13 *General Manager, Ceylon Electricity Board Vs. Gunapala 1991 (1) SLR 304.*

14 *Ilanki Tholiar Kazagahan Vs. The Superintendent, Ragala Group & others CA 324/1984 Decided on 20.01.1994.*

15 *Swasthika Textiles Industries Ltd Vs. Thanthrige Dayananda – 1993 (2) SLR 348*

16 *Kumarasingha & another Vs. State Development & Construction Corporation – 1994 (3) SLR 204.*

17 *Coconut Research Board Vs. Fernando – 1994 (1) SLR 219*

18 *SC Appeal 44/2011, Decided on 28.02.2012*

19 *Section 322 (2) of the Code of Criminal Procedure Act No. 15 of 1979.*

20 *United Workers' Union Vs. Ceylon Fisheries Corporation & another II SRISK LR 62.*

21 *Thevarayan & Two others Vs. Balakrishnan 1984 (1) SLR 189.*

22 *M/S Lanka Walltiles Ltd Vs. K.A.Cyril 1986 2 CALR 344.*

23 *Wimalasiri Perera Vs. Lakmali Enterprises & others 2003 (1) SLR 62*

24 *Sri Lanka General Workers Union Vs. Samaranayake 1996 (2) SLR 268*

MONEY LAUNDERING AND SRI LANKAN LEGISLATURE

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Introduction

Financial crimes more prevalent than ever in the world, it is vital that both companies and governments develop strategies to curb it. Probably the most common way of doing so is to implement anti-money laundering policies/laws that prevent the smuggling of illegally-obtained finances. Most countries now have their own anti-money laundering policies, and many require that all financial institutions strictly abide by these policies in order to support efforts against financial crimes.

Anti-money laundering policies typically require most entities that complete financial transactions to keep thorough historical records of their clients' accounts and activities. If financial institutions come across any information that appears to be suspicious, they are required to report it to the relevant government for further investigation. Financial institutions are crucial for the collection of financial intelligence, and the public sector greatly depends on them in order to compile data.

The main global policy making body for anti-money laundering controls frameworks and controls, the Financial Action Task Force (FATF) sees this as a hot topic at the moment. Thus there is an urgent need for anti-money laundering mechanisms/ Laws, especially in Sri Lanka, a country eradicate from terrorism. Here it is going to discuss historical background of this ongoing global issues on money laundering.

Historical Background

The term Money Laundering was originated in 1920, (Zaharias, 2010) and organized

criminals in the United States got greatly involved in the profitable alcohol smuggling industry and for the legalization of their profits. They have started to combine such gains with the profits of legislative businesses. According to Robinson, this term was first used in 1973 in relation with the Watergate scandal. He says that this case describes the money laundering perfectly despite of its origin. In that case the dirty or illegal money was put through a series of transactions and the money appears clean or legal at the other end. (Robinson, Jeffrey 1995)

Definitions

> According to the Central Bank of Sri Lanka, Money Laundering is the process by which proceeds from a criminal activity are disguised to conceal their illicit origin. Money launderers send their illicit funds through legal channels in order to conceal their criminal origin and convert them into legitimate assets (FIU of Sri Lanka, 2014). Money laundering can be broadly defined as the process of disguising the financial earnings of the crime. The U.S Custom Service defines "Money laundering is the legitimization of proceeds from the illegal activity". (FBI Atlanta, 2015) and the International Monetary Fund (IMF) defines Money Laundering as a "process in which assets generated or obtained by criminal activities are concealed or moved to create a link between the crime and the assets which is difficult to understand."(IMF index 2016) With the introduction of term Money Laundering, the types of money was created, firstly the money derived from illegal activities that is call black money and the money derived from the legal activities that is called white money. The ultimate goal of the Money Laundering is to serve the financial link between a crime and the persons behind that crime, allowing them unnoticeable enjoyment of funds.

However it's difficult to visualize the difference between the two. The basic idea behind visualizing the difference is that the black money cannot be spent easily particularly on high value goods as compared to white money as now a day's merchant cannot sell high valuable goods on cash as he is liable for the clarification and if the criminal displays his wealth without an obvious legal source, it may raise the suspicion about the criminal, therefore, the criminals have setup the Money Laundering scheme to convert their illegal gains into legally earned money.

Tages of Money Laundering

According to Financial Intelligence Unit of Sri Lanka, Money Laundering can be divided into three stages.

Placement

This preliminary stage of the procedure involves placement of unlawful money into financial system, frequently through a financial institution. This can be accomplished by placing money deposits into bank accounts or cash purchase of shares or insurance contracts.

Layering

The second money laundering stage, layering occurs following the illegal funds have entered into the monetary system, at which point the funds, securities or insurance contracts are converted to other institutions further unraveling them from the relevant criminal sources.

Integration

The third money laundering stage involves the integration of funds into the lawful segment and this is accomplished through the purchase of assets.

Impact on Sri Lankan Economy

As a result of Money Laundering, Sri Lankan financial institutions have to suffer a lot. This was connected illegal activities and connection with unlawful elements mixed up with Money Laundering tends to expose employees of such institutions to corruption. This would even extend to the extent of such institutions being controlled by criminals so this would ultimately result in a state of affairs where the public has no assurance in these institutions any more. In this regard it is very important to note that a country's financial expansion depends on sound domestic financial institutions, therefore the break down in public assurance in banks owing to Money Laundering activities and the consequent retardation of the development of these institutions would have negative implications on a country's economy. Nevertheless it is to be noted that unlike banks, some of the financial institutions, especially those who carry out such institutions in breaking with the stipulated Government regulations and laws, may find themselves in a superior position with the vast amounts of monies deposited and engaged in such institutions by the online money launderers and they would of course be benefitted in the shorter run. Reported incidents such as Mr. Lalith Kotalawala's Golden Key crisis, (lankanewspapers 2008) Yoshitha Rajapaksha's CSN case (B 9823/2015 MC Kaduwela) and the running away of Mr. Sakwithi Ranasinghe, who was an owner of "S. R. Property Sharing Investment (Private) Limited" (Island 2008), with the money of depositors, many which had been unaccounted money, offer valuable insights into this matter in this regard.

At the moment every bank in Sri Lanka has a trained officer to collect information regarding Money Laundering activities thus lack of knowledge among people and no proper monitoring or evaluation mechanism is a great disadvantage in the society.

International Conventions about Money Laundering

The Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("the Vienna Convention") the measures included the criminalization of money laundering and enhanced international cooperation together with the commitment of signatories to procure that the laws of their jurisdictions should be amended to bring this about. In addition, an international body was established to oversee the implementation of the principles of the Vienna Convention. This organization is known as the Financial Action Task Force (FATF). Later, what began as an international effort to combat the laundering of proceeds of drug crime was formally extended to the laundering of proceeds of other serious offences at the meeting of FATF in June 1996.

Much of the success of the Convention depends on enhanced mutual legal assistance and extradition processes. Given the variety of legal systems, languages and political interests in the world such matters are not simply resolved. To assist Nation States in seeking solutions in these areas, the UN has developed two model treaties for countries to use as they negotiate arrangements.

The United Nations Model Treaty on Mutual Assistance in Criminal Matters and the United Nations Model Treaty on Extradition are designed to recognize differences in legal systems and suggest bridges between them.

Financial Action Task Force (FATF)

This independent international body was established in 1989 at the Organization for Economic Co-operation and Development (OECD) economic summit held in Paris (Financial Action Task Force). Its purpose is to develop and promote national and international strategies to combat Money Laundering. As a policy-making body, it attempts to generate the necessary political will to bring about national legislative and regulatory reforms to combat Money Laundering. Now FATF has become the main international driving force in setting standards in the fight against Money Laundering and financing of terrorism. (Hopton Doug, 2010) At the movement FATF has issued forty recommendations and it is the basis of most domestic laws on Anti Money Laundering. Based on recommendations given by FATF, Central bank of Sri Lanka is set up Financial Intelligence Unit (FIU) as a national agency for the receipt and analysis of suspicious transaction reports and collect other information about Money Laundering.

Introduction of Sri Lankan Law

During the last decade Money Laundering has been increased and as a result of it world leaders specially, US wants to control Money Laundering. Therefore developed countries introduced new legislature to control Money Laundering and put pressure for developing nations to introduce new legislature to their domestic legal systems. As a member of United Nations, Sri Lankan parliament introduced three new legislatures to the country. Those are Convention of the Suppression of Terrorist Financing Act, Prevention of Money Laundering Act and Financial Transactions Reporting Act.

Convention of the Suppression of Terrorist Financing Act No. 25 of 2005

Sri Lanka, which was already a signatory to the International Convention on the Suppression of Terrorist Financing adopted by the General Assembly of the United Nations, joined the global effort to combat Money Laundering and the financing of terrorism by enacting the Convention of the Suppression of Terrorist Financing Act No. 25 of 2005 (CSTFA) in mid 2005. Up to now this Act has been amended through Act No. 41 of 2011 and Act No. 3 of 2013. Application of this Act was expand through section 2A of No. 41 of 2011, it applies to a person, who being a citizen of Sri Lanka or a person who not being a citizen of Sri Lanka, who commits an offence present in Sri Lanka or outside Sri Lanka. According to Section 6, the High Court of Colombo, Sri Lanka, shall have jurisdiction about offences under this Act.

Prevention of Money Laundering Act No. 5 of 2006

In January 2006, the Sri Lankan Parliament enacted the Prevention of Money Laundering Act No 5 of 2006 (PMLA), whereby the act of Money Laundering, as well as attempting to and aiding and abetting Money Laundering are criminal and extraditable offences. The offence of Money Laundering is defined as – receiving, possessing, concealing, investing, disposing of, bringing in to Sri Lanka, transferring out of Sri Lanka or engaging in any other manner in any transaction in relation to any property derived or realized directly or indirectly from "unlawful activity" or from the proceeds thereof, knowing or having reason to believe such is the case. "Unlawful activity" is defined to include offences under statues/laws dealing with drug and arms trafficking, bribery, exchange control, terrorism, transnational organized crime, cyber crime, trafficking of persons, etc. The PMLA also provides for mechanisms to enable the tracking, freezing and confiscation of tainted assets.

Financial Transactions Reporting Act No. 6 of 2006

The Financial Transactions Reporting Act No. 6 of 2006 (FTRA) was enacted to support the investigation and prosecution of offences under the CSTFA and PMLA. Central Bank of Sri Lanka plays a major role on the implementation of this law. Under this law, a new regulatory authority – the Financial Intelligence Unit (FIU) was set up under the Central Bank of Sri Lanka, to collect, analyze and disseminate information pertaining to possible instances of Money Laundering required for enforcement purposes, monitor suspect financial transactions and conduct investigations thereon. This law also provides for co-operation between other regulatory authorities and the FIU both locally and internationally. Currently FIU is assessing the existing law provisions and propose necessary law amendments collaboration with Attorney Generals Department. The new laws requires financial institutions to identify their customers when they enter into business relationships or conduct transactions and to maintain records of customer identification and transactions together with related documents for a period of six years. They are also required to conduct ongoing due diligence on customers and to report cash transactions and electronic fund transfers above a specified limit as well as any suspicious transactions to the FIU. This places a significant responsibility on the financial sector and bankers have already expressed concern on being called upon to do a policing job. The aforesaid obligations also apply to designated non-financial businesses and professions, including lawyers and accountants. However, a lawyer need not disclose any privileged communication of a confidential nature between a lawyer and a client or between two lawyers for the purpose of obtaining legal advice or assistance, provided the communication was not made for the purpose of committing or furthering the commission of some illegal or unlawful act. It is yet to be seen whether the implementation of the Anti-Money Laundering legislation would lead to a substantial increase in the cost of financial products and servicing of financial transactions. The writer is going to discuss recommendations to prevent Money Laundering activities in Sri Lanka.

Recommendations

The Success of the Attempts to Prevent Money Laundering in Sri Lanka

Misconceptions that supported a policy of inaction in relation to Money Laundering in the early period were that crimes pertaining to Money Laundering occur in developed countries and therefore developing countries like Sri Lanka should not waste scarce resources to establish a strong Anti-Money Laundering regime and that Money Laundering represents a flow of capital from developed countries to developing countries and therefore developing countries should not deter this flow of capital which would contribute to the country's development (Jayasuriya, 2007). Though, these misconceptions have been refuted by pragmatic evidence as well as the unenthusiastic financial crash of money laundering on overseas straight reserves.

Yet is must be borne in mind that a person's freedom to have unlimited accounts, funds and free movement of capital has been restricted by the limitations imposed by the statues (***Squirell Vs. National westminister Bank 2005***). Similarly a Company directors' privilege of limited liability is affected by Section 18 of the Prevention of Money Laundering Act whereas the right of silence of the accused is restricted in view of the presumption expressly stated under Section 4 of the Prevention of Money Laundering Act.

Consequently, many people universal still have concerns about Anti-Money Laundering events, particularly concerns about reaching into lawful business actions. For example, an individual or business which handles money with no awareness of any illegal source could end up in suit for Money Laundering in Courts.

Are the Laws Properly Enforced?

In the circumstance it is pertinent to note that the mere enactment of the relevant laws and the creation of the required institutions to implement an Anti-Money Laundering regime alone are not sufficient. Strict enforcement of the laws is equally vital.

The regime ought to closely be monitored to deter deficiencies if any and to assess the programs conducted at an exacting time. For example, the Sri Lankan Anti-Money Laundering regime and its institutional preparations, legal framework and the law enforcement mechanisms were broadly reviewed in the mutual assessment exercise conducted by the Asia Pacific Group on Money Laundering (Banks for international settlement 2012).Larger awareness of the general public is the next essential feature to have an effective Anti-Money Laundering regime.

FATF Recommendations

The FATF in its revise recommendations, extended the scope of reporting persons and entities to cover up professionals such as lawyers and accountants when acting in an exacting capacity and entities such as money changing companies, companies involved in dealing with valuable metals and valuable stones and casinos. Thus not only the banks and other financial institutions but moreover these non-financial institutions should always work out due diligence to fight against Money Laundering. All trades must be intelligent to be alert to Money Laundering methods and tactics, for their own protection, businesses should various other forms of security.

It is also recommended that identification of the risks beforehand is of paramount importance and policies must be developed to counter such risks, and further give more powers and responsibilities for the relevant authorities such as law enforcement authorities.

Public Awareness

Further the transparency and availability of information of beneficial ownership information of legal persons is important and with the passing of the Right to Information Act No. 12 of 2016, it has to be extended to cover the information of the above persons. Further it is recommended that the public may be made aware of the Money Laundering and they may be empowered with the knowledge so they can act swiftly.

Conclusion

Money Laundering is to be looked as a worldwide hazard that involves communal security aspects. Therefore collaboration of all Financial Institutions worldwide is required to restrain the Money Laundering as it is common knowledge that money launderers would eventually move from jurisdictions where effectual law enforcement takes place to economies where less constraints prevail. As a result the global community ought to be amalgamated at all times to bring an idle to the crime of Money Laundering.

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BALANCE THE RIGHTS OF THE SUSPECT AND THE VICTIM; A CRITICAL ANALYSIS OF FAIR TRIAL RIGHTS OF SUSPECT AND VICTIM IN CRIMINAL JUSTICE SYSTEM OF SRI LANKA

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Abstract

Right to fair trial is a concept which was evolved for many years in both international and domestic legal systems. Most jurists have drawn their attention to the rights of the accused rather than the rights of the victim. All necessary protections were given to safeguard the rights of an accused where public and social movements protest and cry in individual cases for the protection of the rights of the victim. However; the concept of fair trial is not a concept solely for the accused. Dispense Justice means Justice for everyone in the society and hence it is required to consider the well-being of the victim as well. Attention is paid through this article as to the available legal provisions and how to balance the rights of an accused and a victim in a fair criminal trial in an adversarial criminal justice system of Sri Lanka.

Introduction

Fair trial is a twofold concept which was evolved for many years in the legal arena. The concept of "Right to Fair Trial" initially considered about the rights of an accused in a criminal trial. Hence; the protection of the rights of the accused is well established in most of the legal systems in the world. It is observed that number of rights for the suspect/ accused are guaranteed under the Sri Lankan Constitution and other statutes as well. Recent developments of the law demonstrate that, another concept by the name of "A fair

trial" is developed for the protection of the rights of victims in a criminal Justice System. This unique concept aims at the protection of the rights of the victims as opposed to the accused. The importance of a victim based criminal justice system is often emphasized in criminology where root causes of the crimes are of much concern. The aim of this article is to analyse critically the rights of the accused and victim in judicial proceedings in Sri Lanka and to determine the best approach in balancing the rights of the accused and victim in an adversarial criminal justice system.

Mere glance at the judicial proceedings in Sri Lanka reveals the imbalance of the rights available for an accused and victim. Hence it is required to balance it by providing a greater voice for victims. Assistance to and protection of victims of crimes and witnesses Act No. 04 of 2015 provides basic safeguards for victims of crime and witnesses. It is impossible to dispense justice, if the rights of the victims are totally neglected. Hence it is required to strike a balance between the rights of the accused and the rights of the victim. This must be the reason for certain scholars promoting Victim centred legal system.

What is Fair Trial?

> *"There is no more important right in the law than the right to a fair trial; for, without a fair trial all the rights vouchsafed by the substantive law are worthless"*
> *-Vanderbilt C.J.*[1]

In Buddhism; when settling the disputes among monks, certain concepts of fair trial is observed (sapthadikarana- samatha.). Fair trial norms were included in the Justinian's twelve table as well. In the trial of Jesus Christ, he has been given an opportunity to reply and produce evidence by ancient Roman emperors. However, the first written law relates to fair trial was the Code of Hammurabi king of ancient Babylon which stated that, judges should hear both sides of a case and it discussed the concept of presumption of innocence as well.[2]

However, the concept of right to fair trial initially has been developed in both international and domestic jurisprudence only to protect the offender's rights during a criminal trial. But within the context of modern criminal law; not only the offender's rights but also the victim's rights should be ensured for a fair criminal trial. Henceforth; it is clear that both offender's and victim's rights should be protected in an effective and fair criminal justice system. Denial of a fair trial is an injustice to the offender, victim and also to the society at large.

Right to fair trial is an important tool to establish the rule of law in a democratic society. This is also a component of due process as well. As per the due process of law, person's right to life, liberty, and property should not be deprived of arbitrarily or discriminatorily. 'For hundreds of years the right to fair trial has been considered as the cornerstone of

major legal systems founded on the rule of law and concerned for the protection of human rights.'[3]Hence it is clear that; dispense of justice is based on protection of the rights of the accused as well as the rights of the victims of crime.

Evolution of the International Laws to Protect the Rights of Suspect/Accused

The concept of right to fair trial of an offender in a criminal proceeding is recognized and developed by many international human rights law instruments. The Magna Carta was the landmark document which has thrown the light for the development of modern international law. However, the first attempt in international law to prepare a legal framework for right to fair trial is the promulgation of the Universal Declaration of Human Rights (UDHR) which was adopted on 10th December 1948 by the United Nations General Assembly. Article 10 and 11 of the UDHR mainly discuss about the right to fair trail norms while Article 8 and 9 are complementary to the above two articles.

After the promulgation of UDHR, numerous international instruments speak about the concept of right to fair trial. Article 14 of the International Covenant on Civil and Political Rights (ICCPR,1966) further expanded the parameters of this concept. International instruments such as Convention against Torture and the Cruel Inhuman Degrading Treatment or Punishment, Rome Statute of International Criminal Court hardened the existed soft laws and constituted binding obligations on state parties to ensure the right to fair trial. These instruments introduced several supervisory mechanisms to enhance the applicability of the norm and hence the state parties are strictly bound to ensure the fair trial concept. Further, the regional human rights law instruments such as The European Convention for the protection of Human Rights and Fundamental Freedoms, The African Charter on Human and Peoples' Rights and the American Convention on Human Rights included legal provision and supervisory mechanisms to protect the right to fair trial norm in their respective regions. Apart from those conventions there are many international documents which are non-binding but ascertain the right to fair trial in criminal proceedings.[4]

Evolution of the International Laws to Protect the Rights of Victims

The early victimological notions developed, neither by the criminologist nor by sociologist but by the poets, writers and novelists.[5] Since 1940 many international researches were done in relation to the rights of the victim[6]. In early 1970, the debate of protection of victims in criminal justice system was evolved and after thirty-seven years of introducing UDHR, the UN General Assembly adopted the law to protect the rights of victims. On 29th of November 1985 the UN General Assembly promulgated the declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power to ensure the victim's

rights. However, there are several other international instruments introduced by the UN for similar purposes.

(a) Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice.[7]

(b) Guidelines on Justice in Matters involving Child Victim and Witness of crime[8]

(c) United Nations Convention against Transnational Organized Crime (2000)

(d) United Nations Convention against Corruption (2003)

The aim of the above mentioned international instruments is to provide a guidance and establish some binding obligation to protect the victim's rights. Regional standards such as 'The EU Directives which was adopted on 25th November 2012 clearly ensure the rights of the victims. Article 68 of the Rome Statute ensures the rights of victims during the trials before international criminal court and it states that when personal interest of victims is affected; they can present their views during the proceedings.

International Laws to Protect the Rights of a Suspect in a Fair Criminal Trial

As per the International Human Rights Law, a suspect / an accused is entitled for the right to fair trial from the beginning of an investigation to the end of the final decision of a court. Rights in a fair trial can be divided in to three basic parts.[9]

(a) Pre - Trial Rights

(b) Rights at the/during the Trial

(c) Post - Trial Rights

Pre-trial rights ensure the suspect's rights from the date of arrest to the date of the beginning of the trial. A person arrested should be aware of the grounds for his arrest and cannot be kept or detained in the custody of the person arrested for more than the period prescribed by law without producing before the Judicial Officer. Any person arrested or detained should not be subjected to ill - treatment or torture and he should always be treated with humanity. Not only that; they have right to access to their families and doctors, and right to communicate and receive visitors while they remain in custody or detention. Further, any arrested or detained has a right to obtain legal assistance from a legal counsel. Any one charged with a criminal offence should essentially be guaranteed all the pre- trial rights.

Rights at the trial/rights during the trial means the fairness of a trial (fair proceeding) which should be observed without any distinction as to the nature of the offence or the

status of the persons. Presumption of innocence, freedom of self- incrimination, equality before the law, right to a fair and public hearing, the right to be present at trial, to call and examine witnesses, to be tried without undue delay, the prohibition of retroactive criminal laws and double jeopardy, right to have an interpreter or translator, and right to a judgement are basic rights at trial that an accused is entitled.

Post – trial rights are rights which can be exercised by a suspect after the final judgment of the competent court or tribunal. Right to have a lawful punishment, right to file an appeal/revision and compensation for miscarriage of justice are post - trial rights that are guaranteed in a fair trial.

International Laws to Protect the Rights of a Victim in a Fair Criminal Trial

International researches divide the rights of the victim in to two categories.

(1) The rights of the victims before they were victimized

(2) The rights of the victims after they were victimized."[10]

There seems an overall responsibility to protect human beings from being victimized. When that obligation is breached; such victims' rights must be protected at least after they being victimized. The first category is not given much prominence since it shows the inability of the government agents. Hence almost all the laws are concerning only about the second category. As per the international laws, victim is entitled to the right to be treated with respect and fairness, right to receive prompt and fair redress, right to be informed of remedies available, right to receive medical and social services and other assistance, right to be present at all judicial proceedings, right to be reasonably protected and right to be represented in criminal proceedings with legal assistance. Further, the victim should be compensated for physical mental and property damages and human rights violations.

Sri Lankan Laws to Protect Suspect's/ Accused's Rights in a Fair Criminal Trial

(a) Constitution and suspect's Rights

Chapter three of the constitution enshrines the fundamental rights of the peoples and accused's rights to a fair trial. Article 13 of the constitution discusses the protection of the rights of an accused whether he is a Sri Lankan citizen or not. "This article is an important provision in the constitution. There is nothing more sacred than personal liberty, and that is protected by this article."[11] As per the article 13, protection against illegal arrest, right to liberty, the right to be brought promptly before a judge, presumption of innocence, right to have an attorney at law, trial by a competent court, and right to a fair hearing are inherited rights to an accused in a criminal trial. However, article 15 of the constitution

introduces several restrictions to article 13 where the rights can be prohibited for national security, public order, and the protection of public health or morality.

(b) Code of Criminal Procedure Act No.15 of 1979 (CCPA) and suspect's Rights

Section 23 to 43 of the CCPA describe the procedure established by law to arrest a suspect. Section 37 of the CCPA includes that every suspect who is arrested without a warrant should be brought before the nearest magistrate within 24 hours. Section 114 says that when the evidence is insufficient suspect should be released by the officer in charge of the police. Section 120 empowers magistrate to discharge the accused. Section 260 of the CCPA recognizes the right of an accused to be defended by an attorney at law. As per the section 272 the evidence should be taken in the presence of the accused and right to examine witnesses is identified in the 255(1). Section 314 of the CCPA states that no person to be tried twice for the same offence. Section 195 empowers that high court to assign an attorney at law on behalf of an undefended accused. Section 353 of the CCPA states that, the court of appeal can appoint attorney at law to an accused or to enable him to obtain legal aid.

(c) Other Statutes and the suspect's Rights

Bail Act No.30 of 1997 is a complete shield for an accused to protect his rights. Section 2 of the Bail Act provides that the grant of bail is the rule and refusal to grant bail is exception. If the offence comes under the Bail Act, an accused should be released on bail unless the circumstances of the case does not fall under section 14. Anticipatory Bail application is another mechanism for the benefit of the suspect.

Confession by an accused is not admissible unless it falls under sec.26 or 27 of the Evidence Ordinance. As per the section 101 of the Evidence Ordinance, prosecution must prove the case. After the prosecution case, an accused can elect to remain silent, make a dock statement, give evidence by himself and/or to call witness on behalf of him. Further, as per the section 120(6) of the evidence ordinance an accused is not a compellable witness, but he is a competent witness in his own behalf.Sec.146 allows to shake the credit of a witness by injuring his character while the credit of a witness can be impeached as per Sec.155. However; as per sec.54, leading bad character of the accused is prohibited unless he leads evidence on his good character.

Section 41 of the Judicature Act recognizes the right of the accused to be represented by an attorney at law. Section 4 of the International Covenant on Civil and Political Rights Act, No.56 of 2007 further embodies the accused rights in a criminal trial. Right to have legal assistance, right to examine witnesses, right to have an interpreter, freedom of self- incrimination, right to appeal and the doctrine of autrefois acquit and autrefois convict are recognized in section 4 of this Act.

(d) Judicial Intervention to Protect Suspect's Rights

In plethora of cases; our courts interpreted and recognized the rights of an accused in a broader context. In ***Namasivayam Vs.Gunawardane***[12] the petitioner was arrested by police officers while he was travelling in a bus and they asked him to accompany them to the police station. However; police did not inform any charge against him at that moment. Supreme Court held that it is a violation of the right to fair trial included in article 13(1) of the constitution. The application of section 37 of the CCPA and article 13(2) of the constitution is clearly elaborated by the superior courts in cases such as ***Kapugeekiyana Vs. Hettiarachchi***[13] and ***Pananwela Mudiyanselage Nihal Pathmasiri Vs. Police Inspector H.A. Illangasir***i[14].

Further, the presumption of innocence is recognized in ***Pananwela Mudiyanselage Nihal Pathmasiri Vs. Police Inspector H.A. Illangasiri*** and supreme court stated that " Even a burglar has rights and they cannot be abused at the whim and fancy of a person in authority even in the course of bona fide investigation……the common law presumption of innocence now found recognition in the constitution operates in favour of every person until he is found guilty of a crime by due process of law"[15]. Concept of fair trial in section 13(3) of the constitution has been widely interpreted by Justice Mark Fernando in the case ***Wijepala Vs. AG***[16] . court held, "that article not only entitles accused to a right to a legal representation at a trial before a competent court, but also to a fair trial, and that includes anything and everything necessary for a fair trial, that would include copies of statements made to the police by material witnesses".

Right to have an attorney at law is also recognized in many cases[17] and in ***Jayasingha Vs. Munasingha*** supreme court stated that deprivation of this right is a violation of the concept of fair trial[18]. Evidence to be taken in the presence of an accused has been clearly identified by our superior courts[19]. In many cases doctrine of double jeopardy is recognized[20] and in ***Varghees Vs. Wijesinghe***[21] the accused charged ,convicted and sentenced for section 315 of the penal code and again fresh charge was framed under the section 300 of the penal code. Court held that in such a situation plea of autrefois convict is available for an accused.

Sri Lankan Laws to Protect Victims' Rights in a Fair Criminal Trial

(a) Assistance to and Protection of Victims of Crimes and Witnesses Act No. 04 of 2015

The prime law to protect victims' rights in Sri Lanka is embodied in the "Assistance to and Protection of Victims of Crimes and Witnesses Act No. 04 of 2015. Section 03 of the Act recognizes the rights of victims of crime and their entitlements. The victim's right to be treated with respect and fairness, right to receive prompt and fair redress, right to be

informed of remedies available, date of the case, progress and disposal of the case, release on bail, discharge of the suspect, conviction, sentencing or acquittal of the accused and release from the prison, available medical and social services and other assistance, right to be present at all judicial proceedings, right to be reasonably protected and right to be represented at the several stages of the criminal proceedings with legal assistance are included in the section 03 of the Act.

This Act established the national authority for the protection of victim of crime and witnesses and also a protection fund for physical mental and property damages and human rights violations damages of victims. As per the section 28 of the Act Court is empowered to order the convicted person to pay compensation in an amount not exceeding one Million rupees or a sum of money not exceeding 20% of the maximum fine payable for that offence or both the compensation and fine. In ordering this compensation court will thoroughly look at the facts of the case and the loss caused. Section 8, 9, and 10 of the Act have introduced some offences relating to victims and witnesses.

(b) Provisions in the CCPA and Penal Code

As per the Section 260 0f the CCPA; every aggrieved party has the right to be represented in any court by an attorney at law. Section 17 (4) and 17(7) states that magistrate can grant compensation for a victim upon the conviction of an accused. As per the section 136 (1) (a); private pliant can be filed before a magistrate. Sec. 223 of the CCPA provides witnesses to be called in rebuttal. Section 364 of the Penal Code provides for compensations to be paid to the victims in rape cases.

(c) Judicial intervention to protect victim's rights

In ***Bandaranayaka Vs. Jagathsena***[22] aggrieved party's right to appear before appellate courts is recognized and justice Colin- Thome states that "It is clear that the legislature intended that the right of representation shall be extended to an aggrieved party. The right to address court and to make submission is implicit in the right of representation." In ***Robo*** *Vs.* ***James***[23] court stated that magistrate is empowered to impose a fine on the accused and to give a part of the fine to the complainant. Technical objections and prescription sometimes destroy the rights of the victim. However; our courts interpreted the law in a progressive manner where technical objections were rejected for the betterment of the victim.

Adversarial Criminal Justice System and Role of the Accused and Victim

"Adversarial system represents far more than a simple model for resolving disputes. Rather it consists of a core of basic rights that recognizes and protect the dignity of the individual in a free society".[24] In the adversarial criminal justice system, an offence is considered as

an act against the State or Society. The State prosecutes the Case to punish the offender, considering the social interest. In this system victim is forgotten and considers just as a witness. The victim's private interest of the case is neglected and public interest is much highlited. In an adversarial system judge plays the role of a neutral referee and the judgment is given considering the evidence brought before the court. All the rights which are ensured by the law for the accused is observed in an adversarial legal system since the non-observance of the same would itself be a ground for an Appeal. However; non observance of the rights of the victim is not considered in the same way. Hence, this system is clearly based on the rights of the offender rather than to protect the rights of a victim.

The procedural criminal laws in Sri Lanka clearly shows that Sri Lankan criminal justice system is adversarial and it is clearly stated by justice Gratiaen in ***De Mel*** *Vs.* ***Haniffa***[25]. Hence, though there are certain laws to protect victim's rights, it is completely a suspect centred criminal justice system. "Our criminal justice system, based on principles of English Law, to a very great extent, does not recognize the rights of victims adequately. It has sometimes been said that the criminal justice system of Sri Lanka is unduly favourable to accused person"[26].

Imbalance of the Rights of Suspect/Accused and Victim in Sri Lankan Criminal Justice System

(a) Imbalance of the Law

As discussed above; plethora of substantive laws and procedural laws are available in Sri Lanka to protect the rights of an accused. These laws are progressively and widely interpreted by our superior courts to safeguard the rights of the accused. Only the Assistance to and protection of victims of crimes and witnesses Act and very few substantive laws are discussing about the victim's rights. Examples of Judicial intervention to ensure the victim's rights are also limited to few cases. Further, when we peruse the assistance to and protection of victims of crimes and witnesses Act carefully, it is crystal clear that, though the act covers basic areas; it is not providing full and adequate assurance/ protection that victim should be given in a fair criminal trial. The Act mainly focused on the pre- trial rights and post-trial rights of a victim. However, it is controversial where the rights enshrined in the Act are practically achievable within our criminal justice system. Victims' rights at the trial is limited to mere participatory rights. Act recognizes the right of participation and obtaining assistance during the investigation and trial process[27]. But it doesn't describe as to what type of participation and assistance is entitled by a victim. Hence, the question arises whether there is a practical and proportional law to protect victim's rights in a fair criminal trial in Sri Lanka.

(b) Time consume for the trial

There seem well-worn cases in criminal courts. By the time the case is taken up for trial, either the victim/witness dies or can't give evidence due to poor memory. Sometimes the accused dies prior to the conclusion of the trial and victim is not satisfied in either way of punishing the culprit or getting a compensation. There can't be dispense of justice without a speedy trial. This is so for both the victim and the accused. Proper punishment after a speedy trial is essential and this would satisfy both the accused and the victim. Whether the rights of the victims could be practically observed in a court house with heavy case load is also questionable.

(c) Lack of infrastructure

It is observed that technical facilities are not available in court houses to give effect to the existing legal provisions for the protection of the victims of crime. Section 124 of the CCPA provides that a witness can make his identification in an identification parade from a concealed position. However; there seems no infrastructure even in the new court houses built recently to the effect. Hence it is difficult to give effect even to the available provisions for victims' protection.

(d) Re victimization and related issues

Re-victimization and lack of socio-legal support for the victim is often observed in an adversarial criminal justice system where the victim mentally suffers since the incident should be reiterated to various authorities. In camera proceedings at the National Child Protection Authority in certain child abuse cases is the only exception. Whether the third party victims[28] are covered under the interpretation of "victims of crime" is questionable?

As discussed above, it is not easy to strike a balance between the rights of an accused and victim in our criminal justice system. However, the Assistance to and protection of victims of crimes and witnesses Act has established a strong base to ensure the victims' rights. This Act has given a voice for victims; but it is not proportional comparing with the rights of an accused. So, it is arguable whether the victim can be given a stronger voice to ensure fair trial within the available legal provisions in Sri Lanka.

How to Balance the Imbalance?

(a) providing a stronger voice to the victim

Mere participation or representation in the trial will not make any change of the rights of a victim. Hence, it is required the victim or his attorney at law actively participate in a trial. This must essentially include the right to conduct trial by an attorney-at- Law on behalf of the victim. This representation is specially required in our Magistrate's courts where prosecution is conducted by police officers or in limited cases by state's agents.[29]

Comparing the legal knowledge and the expertise of the suspect's lawyer, the prosecution is in a weaker position. "Justice" depends on the investigation done in a particular case and it totally relies on the knowledge and the competence of the investigating officer. Representation is different in the high court due to the availability of states counsels. Prosecutor is a government agent who wants to safeguard the rights of the government rather than the victim. State Counsel would not speak with the victim in order to safeguard the independence and impartiality of their profession. It is obvious that this practice would not render justice to the victim and it further victimizes the innocent aggrieved party. Hence it is required the prosecuting officers be made aware of the legal developments and Sec.191 of the CCPA or Assistance to and Protection of Victims of Crimes and Witnesses Act should be amended enabling Attorney-at-Law of the victim to conduct trials.

Irrespective of the nature of the charge, victim's rights must be protected in the court. if a victim feels after the conclusion of a case that his rights have been violated and he has not been given a proper opportunity to be heard then the right to fair trial for him cannot be preserved. In Ireland this matter has been progressively answered in sexual related cases and there the complainant is given a fair opportunity to be represented by a separate legal counsel[30].

(b) Mechanism to challenge the discretion of AG

The Attorney General's discretion to prosecute or not to prosecute a case is wide and sometimes it is badly affected to the rights of victims. However; there seems no legal provision in Sri Lanka to challenge or to question the decision of the Attorney General. If public prosecutor decided not to prosecute in countries like France and Israel, victim can challenge that decision. If the victim win the case state should initiate the action. So, this is also a progressive step which can be introduced to protect the victims' rights in Sri Lanka.

(c) Introducing a proper channel for victim to appeal/ revision

Once the culprit is found guilty and punishment is given after the trial, he will move to the higher forum by way of an appeal or revision. That right is personally exercised on the expense of the accused. However; after an Acquittal, victims don't have any right to move to the higher forum unless Attorney General moves in very limited number of cases or where the case is filed before the court as a private plaint.

(d) Taking Step to speed up the proceedings

Speedy trial should be emphasized for each and every matter where specific time limitations must also be introduced. Backlog clearing project was successful up to certain

extent. Cases are dragged for years due to non-availability of the medico legal reports / post mortem reports, Government Analyst Reports and sometimes without taking steps under 192/416 of the CCPA. Introduction of specific time limitations would solve this problem and guarantee a speedy trial.

(e) A streamed line policy in punishment

Not having a monotonous policy in punishment is another area where victim has to suffer. Even though there are provisions in the Code of Criminal Procedure Act as guidelines in giving punishments; finally, it depends on the discretion of the Judge. It is required to introduce a policy of giving punishments. Suffering of the victim in a particular case must be considered in punishing a culprit and compensating the victim.

(e) giving an equal opportunity to get ready for the trial

According to Sri Lankan law a suspect/ accused is permitted to obtain a copy of the first information[31] and in ***Wijepala Vs. AG*;** court held that an accused is entitled to obtain all the statements given by the material witnesses to the police. But the complainant can obtain the proceedings of the case[32] and victim can only get the certified copies of cause of death forms, post mortem reports, medico legal reports, reports of the registrar of the finger print etc.[33]So, both parties should be given same kind of rights to obtain documents needed to ensure the concept of fair trial.

(f) providing necessary infrastructure to court houses

Necessary infrastructure should be provided to court houses where novel technical developments can be made use of. Technology brings the whole world together. If a material witness has gone abroad; that should not be the end of the case. If skype or other media is used with necessary precautions[34], we can consider about the rights of the victim.

(g) Availability of legal aid for victims

Certain victims are provided with legal aid by the Legal Aid Commission and other institutions. However, it depends on the nature of the offence, sexuality of the victim or income of the victim. It is required to have a common protection for the victim without discrimination and it is expected that, this target could be achieved through the proper functioning of Authority established under the Assistance to and protection of victims of crimes and witnesses Act.

Critiques for giving prominence to Victim in a Trial

The main critique is more rights for the victim in criminal trial will undercut the suspect's rights. Specially, when giving an opportunity to victim or his legal counsel to examine

witnesses and make statements, it makes the trial lengthy. Hence, some opponents argue that it deprives of the accused's right for the speedy trial. However; it can be overcome by the interference of the bench since dragging of cases are controlled at present by the presiding Judge.

Further critique is that among the two types of rights named pubic rights and private rights, only the public rights are questioned in an adversarial criminal justice system. Any person whose private rights are violated can seek the civil remedies. So, some scholars argue that there is no necessity to give victim any special rights in criminal trials. Further; it is argued that sometimes the accused is the real victim where fake victim has made a false complaint. However; these criticisms can be rejected based on the prevailing legal provisions[35].

Conclusion

Plato praised justice as one of the four virtues necessary to support the perfect states, the other virtues being wisdom courage and temperance[36]. Justice is the most important and ultimate goal in a fair criminal justice system which ensures the freedom of every individual in the society. It is clear that not only the rights of an accused but also the rights of the victim and rights of the whole society should be protected in a fair and efficient criminal justice system.

Initially international laws and domestic laws developed to protect offender's fair trial rights. Novel laws have been later introduced within the boundaries of adversarial criminal justice system to protect the victims' rights. However, still the system is centralized on the suspects' rights and victim is having a weaker voice within our criminal justice system. So, this is the high time to fill the lacunas and to rethink about the progressive and realistic amendments for the traditional criminal justice system. As chief justice Lord Hewart says "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[37]

Promulgation of new laws itself is not the sole solution. Infrastructure and technology should be provided to courts in implementing the laws for the protection of victims and it is essential to establish victim centred legal system. Policy of punishment should be introduced for victim's protection. Knowledge of the legal representatives must be upgraded. Judicial officers must be able to consider much about the rights of the victims and accused in a balanced manner. The difference between the non-observance of the rights of the accused as opposed to the victim must be eliminated. Speedy trials are essential for both the accused and the victim. Dispense of Justice must be the prime concern and it is required to protect the rights of the accused and the victim without any distinction.

End Notes

* *LLB(Hons), LLM.*

1 *Justice S.Sharvananda, Fundamental Rights in Sri Lanka-A commentary, (Arnold's International Printing House Pvt. Ltd,1993), p.149*

2 *A.Wolbert, A.Robertts, C.Regehr, Victimology Theories and Application, www.http://books.google.lk,p.103-104*

3 *N. Dias and R. Gamble, "Independence Impartiality and Scrutiny: The essence of the fair trial protection", Sri Lanka Journal of International Law (2007)19(No.1), (The Faculty of Law University of Colombo), 2007, p.272*

4 *For example; Body of Principles for the protection of All persons under any Form of detention or Imprisonment, UN General Assembly resolution 43/173, December 9, 1998*

Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, December 7, 1979

Standard Minimum Rules for the Treatment of Prisoners, UN Economic and Social Council resolution 663 C(XXIV) July31, 1957 and resolution 2076 (LXII)May 13, 1977

5 *C. Fernando, "The role of the police in protecting the rights the rights of the victim", Constitutional Rights and Victim of Crime edited by H.S. Yapa and R.Sahabandu, p.77*

6 *For examples; Von Hentig's research paper titled "Remarks on the interaction of the perpetrator and the victim"- 1940, Von Hentig's book "The criminal and his victim"- 1941, Allen Berger research on "psychological relationship Between the criminal and his victim"- 1954*

7 *UN General Assembly resolution 52/86, 1997*

8 *Social and Economic council resolution 2005/20, 2005*

9 *N.Dias and R. Gamble, "International Fair Trial Protection in Criminal Trial ",Sri Lanka Journal of International Law (2008)20(No.1),(The Faculty of Law University of Colombo),2008,p.31*

10 *C. Fernando, "The role of the police in protecting the rights of the victim", Constitutional Rights and Victim of Crime edited by H.S. Yapa and R.Sahabandu, p.83*

11 *Justice S.Sharvananda, Fundamental Rights in Sri Lanka-A commentary, (Arnold's International Printing House Pvt. Ltd,1993),p.148*

12 *(1989) 1 SLR 394*

13 *(1984) 2 SLR 153*

14 *Supreme court Application No:142/87, Supreme Courts Minutes 18th Oct'1988; J. Wicramarathna, Fundamental Rights in Sri Lanka, (Navaranga publishers 1996), P.525*

15 *Supreme court Application No:142/87, Supreme Courts Minutes 18th Oct'1988; J. Wicramarathna, Fundamental Rights in Sri Lanka, (Navaranga publishers 1996), P.525 -526*

16 *(2001) 1 SLR 46*

17 *Jayasingha vs.Munasingha (1959) 62 NLR 527,Subramanium vs IP Kankasanthurai*

18 *In Jayasingha vs. Munasingha T.S. Fernando J, sait that "However, understandable this desire may have been, a trial at which the appellant was deprived of one of the most valued legal right of an accused person in spite of his expressed desire to exercise that right cannot be said to be a fair trial".*

19 *Saram vs.Neina Marikkar (04) NLR 154, G.A.Perera vs. Jaela police 61 NLR 260*

20 *king vs. Hendric Singho 07 NLR 97*

21 *48 NLR 205*

22 *(1984)2 SLR 397*

23 *32 NLR 91*

24 *M.H.Freedman, "Our Constitutionalized Adversary System", Chapman Law Review, vol I issu I 1998, p57, http;digitalcommons.chapman.edu/chapman-law-review/volI/issuI/3*

25 *(1952) 53 NLR 433, "It is very relevant to remind ourselves that our code of criminal procedure and the earlier Code which superseded, were both designed to regulate the process of bringing offenders to justice in accordance with the accusatorial system which, by the will of the succeeding legislatures, has taken firm root in this country; indeed, it has long since become part of our heritage."*

26 *P. Fernando, "Rights of the victim and Police Investigation", Constitutional Rights and Victim of Crime edited by H.S. Yapa and R.Sahabandu, p.25*

27 *The Assistance to and protection of victims of crimes and witnesses Act Section 3(g),3(l),3(m)*

28 *For an example: stolen articles are sold to an innocent party and recovered by investigating officer. Bonafide purchases suffers a lost and becomes a third party victim. See. Section 427 of the CCPA*

29 *Section 191 0f the CCPA*

30 *Section 34, Sex Offender's Act 2001*

31 *Section 443 of the CCPA*

32 *Section 443 (b) of the Code of Criminal Procedure Act*

33 *The Assistance to and protection of victims of crimes and witnesses Act, Section 3 (I)*

34 *Police officer / court officer must supervise that the evidence is given by the witness alone without any assistance/ interference/threat.*

35 *Possibility of prosecuting under chapter x and xi of the penal code and to act under Sec. 17(1), (2), (3) of the CCPA*

36 *www.judiciary.gov.bt>bjcjb, Buddhist Jurisprudence (paper presented at the Conference on Buddhist Jurisprudence in Sri Lanka on 10th and 11th May 2014 by the Chief Justice of the Bhutan, p.8*

37 *R vs Sussex Justices exp Mc Carthy, (1924) 1 K.B. 256*

APPLICABILITY OF THE PROVISIONS OF CIVIL PROCEDURE CODE (AMENDMENT) ACT NO.08 OF 2017 TO THE EXISTING LEGAL FRAMEWORK

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Under and in terms of the above amendment to the Civil Procedure Code, several **Novel Concepts** have been introduced to the existing legal frame work relating to Civil Procedure.

1. Pre-Trial Proceedings
2. Consolidation of Actions
3. Affidavit Evidence (Examination in chief)
4. Memorandum nominating legal representative. (Sections 393(1) to 398B of the Civil Procedure)
5. Obtaining Copies of the Documents maintained by any public office, Corporation and method of proving such Document.
6. Concept of "Court Expert".
7. Right of the Registered Attorney to revoke the Proxy.
8. Effectiveness of a Judgment, Order and the Directive pronounced by Appellate Courts.

A. Pre-Trial Proceedings

Under and in terms of section 79(A) of the Civil Procedure Code, **the court shall**,

(a) forthwith on the expiration of the time allowed for the filing of the answer; **or**

(b) where a replication is permitted, on the last day of the time allowed for the filing of that replication, and **whether the same is filed or not**, appoint a date not earlier than three weeks and not exceeding two months from such date

for pre-trial hearing to be commenced, either in the presence of all parties to the action or such parties as are present.(Prior to appointing a date, the court should satisfy itself that the absent parties have been duly notified of the proceedings).

The Procedure pertaining to the Pre-trial Hearing.

❖ **Proposed Admissions and Issues**

The parties shall tender their proposed admissions and issues in writing to the court registry, **fourteen days prior to the date fixed for the pre-trial hearing** with the proof of service by the submission of a copy of such admissions and issues to all other parties. (Section 142A of the Civil Procedure Code).

However, under and in terms of section 142B of the Civil Procedure Code, **subject to the provisions of section 142A,** the Judge conducting the Pre-Trial hearing may either on his own motion or on the application of any party and for sufficient cause shown, **advance or postpone** the date fixed for the pre-trial hearing.

❖ **The Period of time pertaining to the Pre-trial Hearing.**

The Judge who is conducting the Pre-Trial hearing shall conclude the hearing **within three months from the commencement of such hearing**, unless the Judge conducting the Pre-Trial hearing is prevented from acting accordingly **for reasons to be recorded by him** and no adjournment in excess of four weeks may be granted, ***unless in exceptional circumstances***.

❖ **The defaults under the Pre-Trial Hearing.**

If any party,

(a) fails to diligently prosecute his or her case; or

(b) fails to appear on the day fixed for the pre-trial hearing or on any other day to which it is adjourned, the Judge conducting the Pre-Trial hearing may, taking into consideration all appropriate circumstances,

I. proceed to dispose of the action in one of the methods specified in Chapter XII (sections 84 to 90) of this Code (In the event, the Judge conducting the Pre-Trial hearing proceeds to dispose of the action adopting any one of the methods specified in Chapter XII, the provisions of that Chapter, shall mutatis mutandisapply to and in relation to such proceedings); or

II. make such other order as he may think fit.

❖ **The Powers of the Judge who is conducting the Pre-trial Hearing.**

Under and in terms of section 142D of the Civil Procedure Code, the Judge who is conducting the Pre-Trial hearing shall have power to **question the parties or call upon them** to state their respective cases with a view to –

- ascertaining jurisdictional issues;
- elucidating the matters in dispute;
- obtaining admissions of facts and of documents;
- consolidating two or more pending cases;
- identifying the number of witnesses based on admissibility and relevancy inclusive of expert witnesses;
- appointing a court Expert;
- assisting the parties to arrive at an adjustment, settlement, compromise or other agreement, with regard to the matter in issue in such action and may, for that purpose, suggest terms of settlement which in his view is reasonable, having regard to all the circumstances of the case;
- ascertaining and recording any other matters which would be helpful in the speedy disposal of the action; and
- to take all steps and make all such orders as may appear to him to be necessary or desirable, for the expeditious and inexpensive disposal of the action.

❖ **Orders that can be made by the Judge who is conducting the Pre-trial hearing under and in terms of section 142E of the Civil Procedure Code.**

❖ **for the issuance of a commission under Chapter XXIX of the Code inclusive of an order for the appointment of an independent expert to inquire and report on any question of fact or opinion; and**

❖ **for the issuance of certified copies of any documents in the custody of any Public Officer, Public Corporation, Provincial Council or any Local Authority.**

❖ **Matters that should be recorded by the Judge who is conducting the Pre-trial hearing under and in terms of section 142F of the Civil Procedure Code.**

(a) the admissions by the parties of facts or documents or contents of documents;

(b) the agreement of the parties with regard to any matter;

(c) the agreement of parties to accept and to abide by: -

- ✓ any decision of the Judge conducting the Pre-Trial hearing arrived at in such a manner as may be agreed upon between the parties and entering of judgment in accordance with such decision (in the above circumstances the Judge should **also read out and explain the effect of such agreement to the parties** concerned and record the fact that the parties do understand the contents of such agreement and the effect thereof. When so, **the parties should be required to sign the agreement**);
- ✓ any decision of the Judge conducting the Pre-Trial hearing on any or all issues of fact or law and entering of the judgment in accordance with such decision;

(d) any agreement of the parties: -

- ✓ with regard to the mode of proof of any fact or document;
- ✓ as to the number of witnesses to be called;
- ✓ to consolidate two or more pending actions;

(e) withdrawal of actions; and

(f) adjustment, settlement or compromise of actions.

❖ **The Judge, who is conducting the Pre-trial hearing,should take into consideration the determination of the Issues of the Case.**

At the Pre-Trial hearing, issues may be determined taking into consideration proposed admissions and issues submitted in writing under section 142A, **pleadings, interrogatories and any agreement**. (when this situation where the Judge conducting the Pre-Trial hearing is of the opinion that the **issues cannot be correctly framed** without the examination of some persons not present at the pre-trial proceedings, or without the inspection of some documents not produced in the action, such Judge may adjourn framing of issues to a future day to be fixed by the court and may compel the attendance of such person or the production of such document by summons or other process).

❖ **Conclusion of the Pre-trial Hearing.**

After the issues are settled, and –

- on the parties informing the Judge conducting the Pre-Trial hearing that all the Pre-Trial steps had been taken; and

- where the Judge conducting the Pre-Trial hearing is satisfied that all such Pre-Trial steps have been taken by the parties, the Judge conducting the Pre-Trial hearing shall forthwith appoint a date **within fourteen days** of such date **for the case to be called in order to fix the date of trial** of the action in the trial court.

And, furthermore, all parties to a Civil action, should bear in mind that under and in terms of **section 80A of the Civil Procedure Code**, no Applications for pre-trial steps could be entertained after fixing the date of trial subject to the aforesaid provisions of the Civil Procedure Code.

B. Consolidation of Actions

By way of a clarification of the intention of the legislature, I would like to draw my attention to the Hansard report dated 24th May 2017, pertaining to second reading of the said amendment.

At page No. 682 of the said Hansard report dated 24th May 2017, Dr. Wijeyadasa Rajapakshe, Minister of Justice, states as follows.

> ''ඒ එක්කම, නඩු දෙකක් හෝ වැඩි ගණනක් ඒකාබද්ධ කිරීම කියන කාරණයත් මෙහි තිබෙනවා. ගරු නියෝජ්‍ය කාරක සභාපතිතුමනි, සමහර වෙලාවට එකම පාර්ශවකරුවන් අතර එක හා සමාන නඩු 10, 15, 20 වාගේ තිබෙනවා. ඒ හැම නඩුවකට ලබාදෙන හැම සාක්ෂියක්ම නැවත වතාවක් නඩු 2 ක් නම් දෙවතාවක්, නඩු 5 ක් නම් 5 වතාවක් මෙහෙයවන්න ඕනෑ. ඒ පිළිබඳව හරස් ප්‍රශ්ණ අහන්න ඕනෑ. මේ පිළිබඳව නිවැරදි ක්‍රමවේදයක් නැතිකම නිසා අද අධිකරණවල කාලය විශාල වශයෙන් නිකරුණේ නාස්ති වෙලා ගොස් තිබෙනවා. ඒ නිසා සමාන නඩු 2 ක් හෝ වැඩි ගණනක් තිබෙන කොට, ඒ නඩු ඒකාබද්ධ කර නඩු විභාගයක් පවත්වන්න, එහෙම නැත්නම් සමාන නඩු ගණනාවක් තිබෙන අවස්ථාවලදී එක නඩුවක මෙහෙයවනු ලබන සාක්ෂි අනෙකුත් නඩුවල සාක්ෂි බවට පිළිගනිමින් තීන්දු ලබාදීම සඳහා නීති ප්‍රතිපාදන සකස් කරදීම තමයි මෙමගින් සිද්ධ වෙන්නේ.

Under and in terms of the Section 149A of the Civil Procedure Code,

I. The court may order, two or more actions in which the questions of law or fact in issue are substantially the same, to be consolidated upon such terms as the court may deem fit and on the agreement of Parties.

II. The Court may order,

- several actions to be tried at the same time and on the same evidence; or
- the evidence in one action to be used as evidence in another; or
- one of several actions to be tried and other actions to be stayed to abide by the result, with the consent of the parties.

However, in the above circumstances, on the application of any party the court shall have power to try one of the other actions so stayed where the selected action fails to be a real trial of the issues involved.

C. Affidavit Evidence (Examination in Chief)

Under and in terms of section 151A of the Civil Procedure Code, notwithstanding the provisions of section 151, the court may, **on its own motion or at the request of one of the parties to the action**, order that an affidavit be substituted for an oral examination in chief of a witness and direct the party calling such witness to tender such affidavit on a date fixed by the court which date shall be **at least one month prior to the date of trial**, to enable the opposite party to prepare for the trial.

In the above circumstances, the party who is responsible for tendering the affidavit shall tender it **together with the documents referred to therein**, to the Registrar of the Court with the proof of service of a copy of the affidavit with copies of all documents of the opposite party

Furthermore, on the date of the trial, the party tendering the affidavit shall produce the affidavit **through the witness who has affirmed to or sworn to it, including all documents referred therein**. The opposite party is entitled to object to its being received, either on the inadmissibility of such evidence or a part of the evidence or on the inadmissibility or authenticity of any documents annexed to such affidavit.

In such event, the court may make aruling on such objection, prior to the witness being cross examined by the opposite party. (The court may**, in appropriate circumstances**, *permit the leading of oral evidences, in addition to the evidence contained in the affidavit*).

If an affidavit contains evidence of matters of **hearsay or any matter which is scandalous**, the court may order deletion of such matters and may proceed with the rest of the matters in the affidavit or may order the party who filed such affidavit to tender a fresh admissible affidavit and **the party filing such inadmissible affidavit shall be liable to the payment of costs**.

By way of a clarification of the intention of the legislature, I would like to draw my attention to the Hansard report dated 24th May 2017, pertaining to second reading of the said amendment.

At page No. 683 of the said Hansard report dated 24th May 2017, Dr. Wijeyadasa Rajapakshe, Minister of Justice, states as follows.

> ''ගරු නියෝජ්‍ය කාරක සභාපතිතුමනි, ඒ එක්කම, සිවිල් නඩු විධාන සංග්‍රහයේ 151 අ. වගන්තිය සංශෝධනය කරනවා. සමහර නඩුවල පාර්ශ්වකරුවෙකුගේ මූලික සාක්ෂිය

සඳහා පැයක් යනවා. සමහර නඩුවල මූලික සාක්ෂියට දවස් දෙක තුන යනවා. ඒ නිසා මූලිකසාක්ෂි දීමට ගතවන කාල සීමාව ගත්තාම එය ඉතාම දීර්ඝකාලයක් මේ සංශෝධන මගින් හඳුන්වා දෙනවා, මූලික සාක්ෂිය දිවුරුම් ප්‍රකාශයකින් ඉදිරිපත් කරන්න. එතකොට අර මූලික සාක්ෂි දීම සඳහා යන කාලය සම්පූර්ණයෙන්ම අධිකරණ වල ඉතුරු වෙනවා. ඒ වාගේම ඒ මූලික සාක්ෂි දිවුරුම් ප්‍රකාශය මගින් ඉදිරිපත් කලත්, ඒ දිවුරුම් ප්‍රකාශයේ ඇති කරුණු වලට අනවශ්‍ය පිළිගැනීමක් ලබා දෙන්නේ නැහැ. ප්‍රවාදක කරුණු, අපහාසාත්මක නැත්නම් අපකීර්තිය ගෙන දෙන කරුණු තිබෙනවා නම් ඒවා කපා හරිමින් ඒ දිවුරුම් ප්‍රකාශවල අවශ්‍ය කොටස් පමණක් නඩුවේ කටයුතු වලට අදාළ කර ගැනීම සඳහා අධිකරණයට බලය පවරා තිබෙනවා.''

D. Memorandum nominating Legal Representative. (Sections 393(1) to 398B of the Civil Procedure)

Under and in terms of section 27(2) of the Civil Procedure Code the above memorandum **should be tender with the Proxy (appointment of the Registered Attorney) of each party**.

The above provisions are similar to a great extent to the provisions of **Section 81 of the Partition Act as amended**.

Comparative Analysis of the above Provisions with Section 81 of the Partition Act as amended

1. If a party to an action fails to file, the said memorandum **when he is alive**.

In the event the memorandum is not filed at any time before the final determination of an action, **on its own motion or on the application made by any party**, require a party to the action or any person eligible to file a memorandum under the provisions of this Code, to file such memorandum on or before a date appointed for such purpose by the court. **In the event of failure to file such memorandum the court may impose an appropriate cost on the defaulting party.**

2. Upon the death of a party to an action who had filed a memorandum.

    a. The legal representative of a deceased nominator shall be entitled to take all such steps as may be necessary, as the deceased nominator party would have been entitled to take, had he been alive, **if the cause of action survive sthe death of the deceased nominator party.**

    b. A nominee shall not refuse to act as the legal representative of a deceased nominator party. He may, with the leave of the court first had and obtained, by way of petition and after giving notice to the other nominees if any, apply

for permission from court to be released from the office of legal representative of such nominator party. **Such application may be made not later than two months from the date of the death of the nominator party**.

3. Upon the death of a party to an action **who had failed to file a memorandum**. (**For the purposes of this Chapter, "legal representative" means a person who represents the estate of a deceased party**).

   a. On the death of a party to the action who had failed to file a memorandum, any party to the action may apply to the court by an exparte application by way of a petition supported by an affidavit, requesting that an executor or administrator or in the case of an estate which is below the administrable value, the next of kin who have adiated the inheritance of the deceased party be substituted in the place of such deceased party.

      Then, the Court should notice the aforesaid party and,the said partymay object that he is not the executor or administrator or in the case of an estate which is below the administrable value, the next of kin who have adiated the inheritance of the deceased party or make any defense appropriate to his character as such representative.

      Thereafter, the court may, on being satisfied that such appointment is necessary and the cause of action survives on the death of such party, shall appoint such person. (The person so appointed shall be bound by proceedings prior to his appointment).

   b. **If there be more than one plaintiff or defendant and any of them dies, and if the right to sue on the cause of action survives to the surviving plaintiff alone, or against the surviving defendant alone**, the court shall on the *ex-parte application by petition supported by affidavit*, make an order to the effect that the action be proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, as the case may be.

   c. **If there are more plaintiffs than one and any one of them dies, and if the right to sue does not survive on the surviving plaintiff or plaintiffs alone**, but survives on the legal heirs of the deceased plaintiff jointly, the court may cause the legal representative of the deceased plaintiff to be made a substituted plaintiff in the place of the deceased plaintiff, and shall thereupon cause an entry to that effect to be made on the record and proceed with the action.

   d. **In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of the deceased may, where the right to sue survives**, apply to

the court to have his name substituted on the record in place of the deceased plaintiff and the court shall thereupon cause an entry to that effect to be made on the record and proceed with the action.

e. **If no application is made to the Court by any legal representative of a deceased plaintiff within six months from the death of such plaintiff**, the court may make an order that the action shall abate, and award to the defendant the costs which he may have incurred in defending the action, to be recovered from the estate of the deceased plaintiff.

However, the court may, if it may deem appropriate, **on the application of the Defendant**, any time after the death of the plaintiff, and *upon such terms as to costs or otherwise as it thinks fit, make an order appointing the legal representative of the deceased plaintiff, in the place of the deceased plaintiff* for the purpose of proceeding with the action in order to arrive at a final determination of the matter in dispute.

f. **If there be more Defendants than one, and any one of them die before entering a decree** and the right to sue on the cause of action does not survive against the surviving defendant or defendants alone, without substitution of the legal representative of the deceased defendant and also in case of the **death of a sole defendant, or sole surviving defendant**, where the right to sue survives to the plaintiff, the plaintiff may apply to the court to substitute the legal representative of the deceased defendant in place of such deceased defendant for the purpose of the continuance of the action. **The court shall thereupon, enter the name of such legal representative on the record in the place of the deceased defendant, and shall issue notice on such legal representative to appear on a day to be therein mentioned, to defend the action**.

E. Obtaining Copies of the Documents maintained by any public office, Corporation and method of proving such Document.

Under and in terms of section440B of the Civil Procedure Code, any party may make an application by way of a motion supported by an affidavit affirming the relevancy of such certified copy to the **Judge conducting the Pre-trial hearing or to the Trial Judge**and obtain certified copies of the relevant documents **as a right**, subject to the relevant charges.

Furthermore, notwithstanding anything to the contrary in the Code or any other law, it **shall not be necessary to adduce proof of any document which is, ex facie, an original document or a certified copy** issued by a Public Officer, Public Corporation, Provincial

Council or any Local Authority, unless the authority of such document is impeached by the opposing party for reasons to be recorded and for such reasons, the court may require proof thereof.

Where the genuineness of any document is impeached by a party, such party shall state the reason for impeaching its genuineness and the court shall record the same. And in the event that the court, after evidence is lead as to the proof of the document, accepts the document, the party who impeached the document **shall be liable to pay incurred cost of proving the document, in addition to taxed costs, unless the court for good reason directs otherwise.**

By way of a clarification of the intention of the legislature, I would like to draw my attention to the Hansard report dated 24th May 2017, pertaining to second reading of the said amendment.

At page No. 683 of the said Hansard report dated 24th May 2017, Dr. Wijeyadasa Rajapakshe, Minister of Justice, states as follows.

> ''රජයේ ආයතන - රාජ්‍ය දෙපාර්තමේන්තු, පළාත් පාලන ආයතන, රාජ්‍ය සංස්ථා - ලබාදෙන සහතික පිටපත් අද තියෙන නීති තත්ත්වය අනුව සෑම දෙයක්ම ඔප්පු කරන්න ඕනෑ. ඒවා බැලූ බැල්මට පෙනෙන සාක්ෂියක් හැටියට පිළිගැනුනත් පැහැදිලි නීති ප්‍රතිපාදන නැති නිසා අධිකරණය ඒ මත කටයුතු කිරීමට තරමක් අධෛර්‍යවත් වෙලා තිබෙනවා, ඒවායේ පූර්ව නිගමනයන් සාක්ෂි ආඥා පණතේ තිබුණත්, සිවිල් නඩු විධාන සංග්‍රහයට පැහැදිලි ප්‍රතිපත්තියක් ඇතුළත් කිරීම තුළින් මෙය වඩාත් කාර්යක්ෂම ලෙස ඉටුකර ගැනීමේ හැකියාව අපට ලැබෙනවා.''

F. Concept of "Court Expert"

Under and in terms of Section 5 of the Civil Procedure Code, "Court Expert" shall mean a **Person Especially Skilled or Knowledgeable in any Subject, Field or Disciplines**.

At the Pre-trial hearing the Judge conducting the Pre-trial hearing shall have power to appoint a Court Expert. (Section 142D(f) of the Civil Procedure Code).

G. Right of the Registered Attorney to revoke the Proxy

In this amendment to the Civil Procedure Code, another novel concept has been introduced to the existing legal framework of this country. That is the right of the Registered Attorney to revoke the Proxy.

Accordingly, under and in terms of Section 27(3)(b) of the Civil Procedure Code, the aforesaid proxy can be revoked by the registered attorney on **two occasions**, namely,

(I) in writing signed by the client and filed in Court; or

(II) with leave of the court having given thirty days' notice to the client.

It is also pertinent to note that, in terms of Section 27(3)(a) of the Civil Procedure Code, the aforesaid proxy can be revoked by the client in writing with the leave of the court and after notice to the registered attorney in writing signed by the client and filed in court.

H. Effectiveness of a Judgement, Order and the Directive pronounced by Appellate Courts.

In terms of Section 774(3) of the Civil Procedure Code (as amended), "A judgment, order or directive pronounced under this section by an Appellate Court shall be deemed to be a judgment, order or directive pronounced by the original court from which the appeal was preferred".

By way of a clarification of the intention of the legislature, I would like to draw my attention to the Hansard report dated 24th May 2017, pertaining to second reading of the said amendment.

At page No. 683 of the said Hansard report dated 24th May 2017, Dr. Wijeyadasa Rajapakshe, Minister of Justice, states as follows.

> ''ගරු නියෝජ්‍ය කාරක සභාපතිතුමනි, ඒ එක්කම, සිවිල් නඩු විධාන සංග්‍රහයේ 774 වන වගන්තිය අපි සංශෝධනය කරන්නට මෙමගින් යෝජනා කරලා තිබෙනවා. ශ්‍රේෂ්ඨාධිකරණයට, අභියාචනාධිකරණයට ඉදිරිපත් වෙන්නේ මුල් අවස්ථා අධිකරණයක් විසින් දීපු නඩු තීන්දුවකට එරෙහි අභියාචනයක්. එසේ අභියාචනයක් කලාම, 1889 දී සම්මත කරලා තිබෙන සිවිල් නඩු විධාන සංග්‍රහයට අනුව අභියාචනාධිකරණය හෝ ශ්‍රේෂ්ඨාධිකරණය ඒ අභියාචනය සම්බන්ධ නඩු තීන්දුව ප්‍රකාශයට පත් කලත්, නැවත් ඒ නඩු තීන්දුව මුල් අවස්ථා අධිකරණය විසින් ප්‍රකාශයට පත්කළ යුතුයි. ඒ සඳහා නඩු වාර්තාව ගෙන්වා ගැනීම, පාර්ශ්වවලට දැන්වීම් යැවීම යනාදී කරුණු නිසා තමන් ලබාගත් නඩු තීන්දුවේ ප්‍රතිඵල බුක්ති විඳින්න පාර්ශ්වකරුවන් දීර්ඝ කාලයක් බලාගෙන ඉන්නවා.
>
> මෙහිදී බොහෝ වෙලාවට ප්‍රායෝගිකව සිදු වෙන්නෙ අභියාචනාධිකරණයේ හෝ ශ්‍රේෂ්ඨාධිකරණයේ තීන්දුව අනුව, ඒ නඩුවේ අවාසිගත පාර්ශ්වය ඔහු දෙන දැන්වීම හෝ සිතාසිය මගහැර සිටීමයි. සමහර වෙලාවට අවුරුදු ගණන් ගත වෙනවා. මේ දැන්වීම ඔහුට භාර කරන්න. එක්කෝ ඔහු මගහරිනවා, එහෙ නැත්නම් නිවසේ නැහැ කියලා පිස්කල්වරයා පාවිච්චි කරලා වෙනත් ක්‍රමයක් අනුගමනය කරනවා. අවුරුදු 10, 15, 20 නඩු කියලා තීන්දුවක් ලබා ගත්ත පාර්ශ්වයකට මේ ප්‍රමාදය නිසා එකී තීන්දුවේ ප්‍රතිඵලයක් නැහැ. ඒ ප්‍රමාදය වලක්වා ගැනීම සඳහා තමයි සිවිල් නඩු විධාන සංග්‍රහයේ 774 වන වගන්තිය අපි සංශෝධනය කරන්නේ. ඒ අනුව, ශ්‍රේෂ්ඨාධිකරණය

හෝ අභියාචනාධිකරණය හෝ අභියාචනයක නඩු තීන්දුවක් දුන්නට පසුව නැවත වතාවක් ඒ තීන්දුව මුල් අධිකරණයේ ප්‍රකාශයට පත් කිරීමේ ක්‍රියාදාමයක් අනුගමනය කරන්න වුවමනා නැහැ. එය මුල් අධිකරණය විසින් ප්‍රකාශයට පත්කලා සේ සමාන ලෙස නීතිය මගින් පූර්ව නිගමනය කළ යුතුයි. ඒ අනුව අධිකරණ වල නඩු තීන්දු දීමෙන් පසුව ඒවා ක්‍රියාත්මක කර ගැනීම සඳහා තිබෙන ප්‍රමාදවීම වලක්වා ගැනීමට අවස්ථාවක් ලැබෙනවා.''(emphasis is mine)

Therefore, without taking steps to read out the aforesaid Judgement, Order and Directive pronounced by Appellate Courts, any party can take steps in terms of said Judgement, Order and Directive pronounced by Appellate Courts.

Practical Issues pertaining to the aforesaid Civil Procedure Code (Amendment) Act No. 8 of 2017

In terms of Section 5(2) of the Interpretation Ordinance No. 21 of 1901(as Amended),"**every amending enactment shall be read as one with the principal enactment to which it relates**".

Accordingly, on **07th of June 2017** the aforesaid amendment became applicable to all Civil Litigations in our Country.

Therefore, I would like to discuss some Practical Issues pertaining to the aforesaid Civil Procedure Code (Amendment) Act No. 8 of 2017.

01. Applicability to the Pending Actions on the date of coming in to operation of the said amendment to the Civil Procedure Code.

    Under and in terms of section 17 of the Civil Procedure Code (Amendment) Act No. 8 of 2017, **All actions and matters which have been filed in the District Court but in respect of which no date has been fixed for trial shall also be subject to the provisions of as on the date of coming into operation of this Act.**

    Therefore, under and in terms of the above provisions of law, it is manifestly clear that, all Pending Cases under Civil Procedure Code are subject to the provisions of the Civil Procedure Code (Amendment) Act No. 8 of 2017.

    In terms of section 10 of the Civil Procedure Code (Amendment) Act No. 8 of 2017, **Sections 146, 147 and 148 of the principal enactment have been repealed**.

    Accordingly, when we read the said section 17 of the Civil Procedure Code (Amendment) Act No. 8 of 2017 with the section 10 of the above amendment, question arises with regard to Admissions and Issues pertaining to the Pending Actions under Civil Procedure Code on the date of coming in to operation of the said amendment.

To make it easy to solve the aforesaid question of law, I would like to separate that question in to two categories as follows.

I. The situations where parties have commenced to take steps under and in terms of Sections 146, 147 and 148, however such steps have not been completed.

Considering the above situation, I would like to draw my attention to Sections 6(3) and 6(4) of the Interpretation Ordinance No. 21 of 1901(as Amended) which reads as follows.

6(3) Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected-

(a) the past operation of or anything duly done or suffered under the repealed written law ;

(b) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law ;

(c) any action, proceeding, or thing pending or incomplete when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal.

6(4) Subsection (3) shall apply in the case of the expiration of any written law in like manner as though that written law had been repealed and had not expired.

Therefore, the court can make use of the aforesaid provisions of law, with a view to complete the settling of Admissions and Issues between the parties pertaining to such situations.

II. The situations where the parties have not commenced taking steps under and in terms of Sections 146, 147 and 148.

In considering the above situation, I would like to draw my attention to Section 04 of the principal enactment.

"**04.In every case in which no provision is made by this Ordinance, the procedure and practice hitherto in force shall be followed**, and if any matter of procedure or practice for which no provision is made by this Ordinance or by any law for the time being in force shall after this Ordinance comes into operation arise before any court, such court shall thereupon make application to the Court of Appeal for, and the Court of Appeal shall and is hereby required to give, such special orders and directions thereupon as the justice of the case shall require :

Provided always that nothing in this Ordinance contained shall be held in any way to affect or modify any special rules of procedure which, under or by virtue of the provisions of any enactment, may have from time to time been laid down or prescribed to be followed by any civil court in Sri Lanka in the conduct of any action, matter, or thing of which any such court can lawfully take cognizance, except in so far as any such provisions are by this Ordinance expressly repealed or modified."

Accordingly, under and in terms of the above provisions of the Civil Procedure Code, when there is no provision is made by the aforesaid Code,the procedure and practice hitherto in force shall have to be followed.

Therefore, the court can make use of the aforesaid practice of Court, with a view to settle the Admissions and Issues between the parties pertaining to such situations.

02. Applicability of the aforesaid amendments to the Civil Procedure Code, to the procedure pertaining to Partition Actions.

By way of a clarification of the intention of the legislature, I would like to draw my attention to the Hansard report dated 24th May 2017, pertaining to second reading of the said amendment.

At page No. 680 of the said Hansard report dated 24th May 2017, Dr. Wijeyadasa Rajapakshe, Minister of Justice, states as follows.

''අද දින ඉදිරිපත් කරන ලද පනත් කෙටුම්පතේ සඳහන් ඒ සංශෝධන, අපේ රටේ සියලුම සිවිල් අධිකරණවල තිබෙන නඩු වලට බලපානවා. ඊට අමතර ලෙස වාණිජ මහාධිකරණයේ නඩු තිබෙනවා සියයට 0.5 ක්. ඒ නඩුවලටත් අද දින ඉදිරිපත් කරන නීති සංශෝධන අදාල වෙනවා. මේ ඉදිරිපත් කරනු ලබන සංශෝධන වලින් සුවිශේෂ වූ වෙනස්කම් රාශියක් කරන්නට අප යෝජනා කර තිබෙනවා. නීතියේ යුක්තිය ඉටු කිරීම ප්‍රමාදවීම වැලැක්වීම තමයි මෙහි මූලික අරමුණ.'' (emphasis is mine)

Under and in terms of section 79 of the Partition Act, "In any matter or question of procedure not provided for in this Law, **the procedure laid down in the Civil Procedure Code in a like matter or question shall be followed by the court, if such procedure is not inconsistent with the provisions of this Law**".

Accordingly, we must draw our attention to the applicability of the aforesaid **Novel Concepts** that have been introduced to the existing legal frame work relating to Civil Procedure applicable to the Partition Actions.

- Applicability of Pre-Trial Proceedings.

Considering the aforesaid question of law, I would like to draw my attention to the Section 24(1) of the Partition Act which reads as follows.

24. (1) After the expiry of the period fixed for the filing of statements of claim, and after the return of the surveyor to the commission for preliminary survey has been received, **the court shall appoint a date for the case to be called in open court in order to fix the date of trial of the action** and shall give notice in writing of such date by registered post to all parties who have furnished a registered address and tendered the costs of such notice as provided by subsection (3) of section 19.

In terms of the above provisions of the Partition Act, **Pre-Trial Proceedings will not be applicable** to Partition Actions.

- Applicability of the repealed Sections 146, 147 and 148 of the Civil Procedure Code, pertaining to Partition Actions.

Considering the aforesaid question of law, I would like to draw my attention to the Section 25(1) of the Partition Act which reads as follows.

25. (1) On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, **the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made**.

It is to be noted that K. D. P. Wickramasinghe in his treatise "The Law of Partition in Ceylon" at page 167 states as follows.

"Irrespective of the issues framed, or the points of contest raised, in a partition Action it is the duty of the Court to investigate the title of each party to the action."

In ***Weerappa Chettiar Vs. Rambukpotha Kumarihamy*** [45 NLR 332]Wijewardena J. state as follows.

"In a Partition Action the duty is cast on the judge to satisfy himself that the properties to be partitioned do not belong to some persons who are not parties to the action. It is with regard to the decision on this question that the court would consider the evidence without regard to any issues. But apart from this question, the court has to decide on the various disputes that arise between the parties as to the devolution of title. **There is nothing improper in a court framing issues with regard to those points and I think it is a very useful practice to have**

issues regarding these matters, so that the court may be able to control the proceedings, and the parties may know precisely the points on which they have to lead evidence"

In consideration of the above, it is my view that, the aforesaid repealed Sections 146, 147 and 148 of the Civil Procedure Code has no application to Partition Actions.

- Applicability of the Affidavit Evidence (Examination in chief) pertaining to the Partition Actions.

With regard to Partition Actions, the manner in which evidence is led is governed by Sections 151, 152 and 153 of the Civil Procedure Code. (Please read Section 25(1) with Section 79 of the Partition Act).

Therefore, after the said amendment to Section 151 of the Civil Procedure Code, notwithstanding the provisions of section 151, the court may, **on its own motion or at the request of one of the parties to the Partition Action**, order that an affidavit be substituted for an oral examination in chief of a witness and direct the party calling such witness to tender such affidavit on a date fixed by the court which date shall be **at least one month prior to the date of trial**, to enable the opposite party to prepare for the trial.

- Applicability of the provisions pertaining to obtaining Copies of Documents maintained by any public office, Corporation and the method of proving such Document, in relation to Partition Actions.

With regard to Partition Actions, the aforesaid amendment to the Civil Procedure Code shall *mutatis mutandis* be applicable to Partition Actions.

Therefore, Section 440(b) and 440(c) of the Civil Procedure Code shall be applicable to Partition Actions.

03. Applicability of Section 79A (1) of the Civil Procedure Code (as amended).

In terms of the 79A (1) of the Civil Procedure Code, the court shall forthwith on the expiration of the time allowed for the filing of the answer; or where a replication is permitted, on the last day of the time allowed for the filing of that replication, and **whether the same is filed or not** appoint a date not earlier than three weeks and not exceeding two months from such date for pre-trial hearing to be commenced, either in the presence of all parties to the action or such parties as are present**.**

Considering the above provisions of law, question has arisen as to whether when a Defendant fails to file his Answer, as to whether the court has an obligation to fix a date for pre-trial hearing.

By way of answer the aforesaid question of law, I would like to draw my attention to section 80 of the principal enactment which has been repealed.

80. On the date fixed for the filing of the answer of the defendant or where replication is permitted, on the date fixed for the filing of such replication, and **whether the same is filed or not, the court shall appoint a date for the trial of the action**, and shall give notice thereof, in writing by registered post to all parties who have furnished a registered address and tendered the cost of service of such notice, as provided by subsection (2) of section 55.

Therefore, the situation that existed previously and the present situation are identical.

04. The actions, which need not follow the aforesaid Pre-Trial Procedure.

- Partition Actions.
- Debt Recovery Actions.
- Testamentary Actions.
- Adoption Applications.
- Custody Applications.
- Actions in special Nature. (Writ Pending Appeals, Claim Applications etc.)
- Actions under Summary Procedure.

Exception- Actions under Chapter LIII of the Civil Procedure Code (Summary Procedure on liquid Claims), when the court has granted leave, Pre-Trial hearing becomes applicable.

05. List of Witnesses and Documents.

Under and in terms of the aforesaid amendment to the Civil Procedure Code, Section 121(2) of the principal enactment has not been repealed.

Therefore, parties should file their respective List of Witnesses and Documents, not less than fifteen days before the date fixed for the **Trial of an action** after the notice to the opposite party.

06. Applicability of the Section 440C (3) of the Civil Procedure Code.

Under and in terms of Section 440C (3) read with section 440C (2) of the Civil Procedure Code, where the genuineness of **any document** is impeached by a party, such party shall state the reason for impeaching its genuineness and the court shall

record the same. And in the event the court, after evidence is led as to the proof of the document, accepts the document, the party who impeached the document **shall be liable to pay incurred cost of proving the document, in addition to taxed costs, unless the court for good reason directs otherwise.**

Conclusion

This article is by no means exhaustive with regard to the recent amendment to the Civil Procedure Code. I hope, I have achieved what I sought to achieve in this article, namely, to give a general outline with regard to the above amendment of the Civil Procedure Code.

Recommendations

- When a party to an action, files any Document and Evidence by way of an Affidavit, the Court should issue a receipt or affixthe seal of the court in the extra copy of the party pertaining to accepting the above.
- When the Court acts upon the Proviso of Section 393(1)of the Civil Procedure Code, in addition to the aforesaid cost, **a default term** should be imposed on the **defaulting party**.
- When the Court acts upon the Section 440C (3) of the Civil Procedure Code, in addition to the aforesaid cost, **a default term** should be imposed on the **party who impeached that document**.
- Necessity to file a memorandum with the proxy in every Civil Litigation.

In terms of the aforesaid amendment to the Civil Procedure Code, by the said Civil Procedure Code (Amendment) Act No. 8 of 2017, the procedure applicable is silent.

However, when we take cognizance of the concept of ***litis contestatio***, it is my view that, pertaining to Parties in respect of the following Actions, the obligation to file the memorandum with the proxy can be waived off.

- ✓ Divorce Actions.
- ✓ Custody Matters.
- ✓ Adoption Actions.
- ✓ Special Actions (Applications to change the Name, Applications to change the Occupation, Applications to appoint a next friend etc.)

It should be noted, when a situation arises requiring substitution, the Court has the power to do so.

Example- when a Co-Defendant dies, the Plaintiff may apply to the Court by an ex parte application by way of Petition supported by an Affidavit, requesting that an executer or administrator or in the case of an estate which is below the administrable value, the next of kin who have adiated the inheritance of the deceased party (Co-Defendant) be substituted in the place of such deceased party (Co-Defendant).

❖ List of addresses and email addresses of Registered Attorneys.

In terms of Section 29(2) of the Civil Procedure Code (as amended), "Service of any process, notice or any other document at the address given under paragraph (b) of subsection (1) of section 27 **and** sent to the electronic mail address given under paragraph (c) of subsection (1) of section 27 shall be deemed to be sufficient delivery to the party who has appointed the registered attorney, unless the court otherwise directs.

Further, in terms of Section 29(3) of the Civil Procedure Code (as amended), "Service of process, notice or any other document at the address given in the memorandum submitted under section 27(2) shall be deemed to be sufficient delivery to the nominee or nominees appointed under section 393".

However, in terms of Section 27(1) (C) of the Civil Procedure Code (as amended),"The appointment of a registered attorney to make any appearance or application, or to do any act as aforesaid, shall include an electronic mail address **if any**, to which service of any process, notice or any other relevant information may also be served on a registered attorney".

Therefore, it is my view that, it would be appropriate to have a **list of Addresses and Email addresses** of Registered Attorneys as compiled by the Registrar of each court whenever an e mail address is provided to court in terms of the requirement referred to above.

Further, it is my view that, it would be more appropriate to keep the Registered Attorneys informed of the fact that it would be better to have **an automatic confirmation** in respect of the Emails send to them by Court.

❖ Holding the Pre-trial proceedings in the chambers.

In terms of section 142(D) of the Civil Procedure Code (as amended), at the Pre-Trial hearing, the Judge conducting the Pre-Trial hearing shall have power to question the parties or call upon them to state their respective cases with a view to ascertain certain matters.

By way of a clarification of the intention of the legislature, I would like to draw my attention to the Hansard report dated 24th May 2017, pertaining to second reading of the said amendment.

At page No. 682 of the said Hansard report dated 24th May 2017, Dr. Wijeyadasa Rajapakshe, Minister of Justice, states as follows.

> ''ගරු නියෝජ්‍ය කාරක සභාපතිතුමනි, පූර්ව නඩු විභාගය තුළ වැඩි වශයෙන් අපේ මුඛ්‍ය පරමාර්ථය වෙන්නේ නඩු විභාගයට යෑමට වැඩිය, නඩු විභාගය ආරම්භ වෙන්නට කලින් විනිශ්චයකාරතුමාගේ මෙහෙයවීම තුලින් නීතිඥවරු විසින් පාර්ශ්වකරුවන් අතර සුහද ලෙස සාකච්ඡාවක් පවත්වලා සමතයක් ඇති කර ගැනීමයි.'' (emphasis is mine)

Therefore, it is my view that, it would be more appropriate to hold the Pre-trial proceedings in chambers. Because, when the Pre-trial hearing is held in chambers, the parties will be in a better environment to freely express the actual dispute between them.

Endnotes

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JUDICIAL INDEPENDENCE AND THE PRINCIPLES GOVERNING THE INDEPENDENCE OF THE JUDICIARY:

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Judicial independence is the concept that the judiciary needs to be kept away from the other branches of government. That is, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests. Judicial Independence is vital and important to the idea of separation of powers.

Different countries deal with the idea of judicial independence through different means of judicial selection, or choosing judges. One way to promote judicial independence is by granting life tenure or long tenure for judges, which ideally frees them to decide cases and make rulings according to the rule of law and judicial discretion, even if those decisions are politically unpopular or opposed by powerful interests. This concept can be traced back to 18th century England.

In some countries, the ability of the judiciary to check the legislature is enhanced by the power of judicial review. This power can be used, for example, by mandating certain action when the judiciary perceives that a branch of government is refusing to perform a constitutional duty, or by declaring laws passed by the legislature unconstitutional.

The United Kingdom, where judicial independence began over three hundred years ago, illustrates the interaction over time of national and international law and jurisprudence in the area of judicial independence. In this process, concepts and ideas have become enriched as they have been implemented in successive judicial and political systems, as each system has enhanced and deepened the concepts and ideas it actualized. In addition to the UK, similar developments of conceptual cross-fertilization can be seen internationally, for example in European Union law, in civil law countries such as Austria, and in other jurisdictions including Canada.

International standards

The International Association of Judicial Independence and World Peace produced the Mt. Scopus International Standards of Judicial Independence between 2007 and 2012. These built on the same associations New Delhi Minimum Standards on Judicial independence adopted in 1982 and their Montréal Universal Declaration on the Independence of Justice in 1983. Other influences they cite for the standards include the UN Basic Principles of Judicial Independence from 1985, the Burgh House Principles of Judicial Independence in International Law (for the international judiciary), Tokyo Law Asia Principles, Council of Europe Statements on judicial independence (particularly the Recommendation of the Committee of Ministers to Member States on the independence, efficiency and role of judges), the Bangalore Principles of Judicial Conduct 2002, and the American Bar Association's revision of its ethical standards for judges.

Canada has a level of judicial independence entrenched in its Constitution, awarding superior court justices various guarantees to independence under sections 96 to 100 of the Constitution Act, 1867. These include rights to tenure (although the Constitution has since been amended to introduce mandatory retirement at age 75) and the right to a salary determined by the Parliament of Canada (as opposed to the executive). In 1982 a measure of judicial independence was extended to inferior courts specializing in criminal law (but not civil law) by section 11 of the Canadian Charter of Rights and Freedoms, although in the 1986 case ***Valente Vs. The Queen*** it was found these rights are limited.

During the middle ages, under the Norman monarchy of the Kingdom of England, the king and his Curia Regis held judicial power. Judicial independence began to emerge during the early modern period; more courts were created and a judicial profession grew. By the fifteenth century, the king's role in this feature of government became small. Nevertheless, kings could still influence courts and dismiss judges. The Stuart dynasty used this power frequently in order to overpower the Parliament of England. After the Stuarts were removed in the Glorious Revolution of 1688, some advocated guarding against royal manipulation of the judiciary. King William III approved the Act of Settlement 1701, which established tenure for judges unless Parliament removed them.

It is vitally important in a democracy that individual judges and the judiciary as a whole are impartial and independent of all external pressures and of each other so that those who appear before them and the wider public can have confidence that their cases will be decided fairly and in accordance with the law. When carrying out their judicial function they must be free of any improper influence. Such influence could come from any number of sources. It could arise from improper pressure by the executive or the legislature, by individual litigants, particular pressure groups, the media, self-interest or other judges, in particular more senior judges.

Why is independence important?

It is vital that each judge is able to decide cases solely on the evidence presented in court by the parties and in accordance with the law. Only relevant facts and law should form the basis of a judge's decision. Only in this way can judges discharge their constitutional responsibility to provide fair and impartial justice; to do justice as Lord Brougham, a 19th Century Lord Chancellor, put it 'between man and man' or as Lord Clarke, former Master of the Rolls put it more recently in 2005, 'between citizen and citizen or between citizen and the state'.

The responsibilities of judges in disputes between the citizen and the state have increased together with the growth in governmental functions over the last century. The responsibility of the judiciary to protect citizens against unlawful acts of government has thus increased, and with it the need for the judiciary to be independent of government.

Judicial independence is important whether the judge is dealing with a civil or a criminal case. Individuals involved in any kind of case before the courts need to be sure that the judge dealing with their case cannot be influenced by an outside party or by the judge's own personal interests, such as a fear of being sued for defamation by litigants about whom the judge is required in the course of proceedings or judgment to make adverse comment. This requirement that judges be free from any improper influence also underpins the duty placed on them to declare personal interests in any case before it starts, to ensure that there is neither any bias or partiality, or any appearance of such.

The protection of judicial independence has been the focus of international resolutions, the most prominent of which are:

1. **The 'United Nations Basic Principles on the Independence of the Judiciary and the role of lawyers'.** These were endorsed by the UN General Assembly in 1985 and 1990

2. The **'Bangalore Principles of Judicial Conduct'.** They were endorsed in 2003 and set out a code of judicial conduct. They are intended to complement the UN's Basic Principles on the Independence of the Judiciary and the role of lawyers. The first of its principles states that "Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects

Other bodies have endorsed judicial independence. For instance, in 1995, the group of Asian – Pacific Chief Justices adopted a common set of standards for the promotion and protection of their judicial institutions, which included judicial independence. These are

known as the 'Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region'

In 1998, a similar statement of principle ("the Latimer House Principles") was also agreed by representatives from over 20 Commonwealth countries at a conference held at Latimer House, Buckinghamshire, UK.

The essence of the commitment to judicial independence can be found in the oath that all judges in England and Wales have to swear when they take up their office.

The Principles Governing the Independence of the Judiciary: General Principles.

We shall now try to summarise the basic principles and the crucial requirements for the exercise of a truly independent justice system:

1. The judiciary is an autonomous body. It is not subject to either of the other state authorities.
2. Judges are subject only to the law.
3. Judges should be appointed for such period as is consistent with guaranteeing their independence. No change introduced in regard to the compulsory retirement age should have a retroactive effect.
4. The selection and appointment of judges should be carried out according to objective and transparent criteria and on the basis of the professional qualifications of the persons concerned.
5. There should be no interference by the legislative or executive authorities in the selection of judges.
6. A Higher Judicial Council should be established with responsibility for appointments, assignments, transfers, promotions and disciplinary procedures in relation to judges. This body should be composed of judges, or at the very least should include a majority of judges.
7. Judges should only be transferred, suspended or removed from office in circumstances prescribed by law and then only as the result of a disciplinary finding reached by the competent body through the appropriate procedure.
8. Disciplinary proceedings should be brought before an independent council which includes a substantial representation of judges. Disciplinary proceedings against judges should only be brought under the provisions of a pre-existing law and in accordance with pre-established rules of procedure.

9. Judges and public prosecutors are entitled to an effective system of initial and in-service training. The training of judges should be carried out by an independent establishment (such as a school established specifically for the initial and/or in-service training of judges), or by an independent body which would include a substantial representation of judges.

10. Judges should have appropriate working conditions.

11. The salaries of judges should be established by law (and not by administrative decision).

12. Judges should have full freedom of association. Service within such an association should be officially recognised as having the same status as the ordinary work of judges.

We must admit that none of the instruments or declarations cited above includes all of the rules that I have just proposed, but it is nevertheless clear that those international documents must be read and interpreted today as forming part of a patchwork structure, constituting a veritable "international and trans-national *corpus juris* on the status of judges". This system has already been applied to some extent at national level in Europe. One example I might quote is that of the Italian constitution: this text–although it was drawn up over half a century ago, at the end of a period of dictatorship, conflict and civil war–has nevertheless managed to protect the independence of the judiciary over the past 50 years.

AN OVERVIEW OF THE PROCEDURE RELATING TO SEQUESTRATION BEFORE JUDGMENT IN CIVIL PROCEDURE CODE

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Introduction

The "Provisional Remedies"[1] provided by the Civil Procedure Code are consist of 'arrest before judgment', `sequestration before judgment', `injunctions', interim orders' and the `appointment of receivers'. Chapter 47 in Part V of the Civil Procedure Code makes provisions with regard to the "Provisional Remedies" of `arrest before judgment' and `sequestration before judgment'. These "Provisional Remedies" provided by the Civil Procedure Code are referred to as "Interim Orders" and sometimes "Interlocutory Orders" in the English Law. These Orders may be issued by a Court during the pendency of an action where the Court is satisfied that the interests of justice require the issue of an Order granting one or more of these "Provisional Remedies" before the Court makes a final determination of the action.

The purpose of these provisional remedies defined in Halsbury's Laws of England as follows:-

> *"Interlocutory applications are almost invariably necessary in order to deal with the rights of the parties in the interval between the commencement of the proceedings and their final determination. Their function is to enable the court to grant such interim relief or remedy as may be just or convenient. Such relief or remedy may be designed to achieve one or more of several objectives, for example to maintain the status quo ante, to prevent hardship or prejudice to one or other of the parties, to preclude one party from overreaching or outwitting the opposite party, to preserve a fair balance between the parties and to give them due protection while awaiting the final outcome of the proceedings, and to prevent any abuse of process during this period.".*[2]

Sequestration of property before judgment[3] is a provisional remedy which provides provisions to protect the interests of a plaintiff faced with the prospect of a defendant who is about to fraudulently dispose of his property, during the pendency of the action, in order to escape paying the monies which he will have to pay to the plaintiff, if a decree is entered against him. Thus, a sequestration order is issued to prevent a decree which may be entered in favour of the plaintiff being rendered nullity, by the fraudulent disposal of property by the defendant. According to the situations where a sequestration order is issued it may be described as an extraordinary remedy issued on a just and equitable basis.

Definition of Sequestration before Judgment

Section 653 of the Civil Procedure Code defines the Sequestration before Judgment a follows:-

> *If a plaintiff in any action, either at the commencement thereof or at any subsequent period before judgment, shall, by way of motion on petition supported by his own affidavit and viva voce examination (if the Judge should consider such examination necessary) satisfy the Judge that he has a sufficient cause of action against the defendant, either in respect of a money claim of or exceeding one thousand five hundred rupees or because he has sustained damage to that amount, and that he has no adequate security to meet the same, and that he does verily believe that the defendant is fraudulently alienating his property to avoid payment of the said debt or damage; and if he shall at the same time further establish to the satisfaction of the Judge by affidavit or (if the Judge should so require) by viva voce testimony such facts that the Judge infers from them that the defendant is fraudulently alienating his property with intent to avoid payment of the said debt or damage, or that he has with such intent quitted Sri Lanka leaving therein property belonging to him, such Judge may order a mandate (form No. 104, First Schedule) to issue to directing him to seize and sequester the houses, lands, goods, money, securities for money and debts, where so ever or in whose custody so ever the same may be within his district, to such value as the court shall think reasonable and adequate and shall specify in the mandate, and to detain or secure the same to abide the further orders of the court.*

Sequestration of immovable property has the effect of sequestering all rents and profits which proceed there out, pending the sequestration.[4]

In a recent judgment by the Supreme Court it was held that a plaintiff, who wishes to obtain an Order for the sequestration of a defendant's property before judgment, must satisfy the Court that he has established all the following five requisites:[5]

I. That, the plaintiff has a "sufficient cause of action" against the defendant;

II. That, the cause of action is for the recovery of money or compensation for damages, in a sum of Rs.1500/- or more;

III. That, the plaintiff does not hold adequate "security" for the satisfaction of his claim against the defendant in the event decree is entered in his favour against the defendant;

IV. That, the plaintiff "does verily believe" that, "the defendant is fraudulently alienating his property to avoid payment" of the monies claimed by the plaintiff in the action;

V. That, the plaintiff has established by affidavit [or by viva voce testimony if the Court requires] "facts" from which the Court can "infer" that the defendant is "fraudulently alienating his property with intent to avoid payment" of the monies claimed by the plaintiff in the action or that, the defendant has "with such intent quitted Sri Lanka leaving therein property belonging to him".

In ***David & Co. Vs. Albert Silva***[6] it was held that an Application for a mandate of sequestration under Section 653 of the Civil Procedure Code must be supported by an affidavit giving a statement of facts and grounds to belief such facts.

In an application for a mandate of sequestration before judgment, the facts which the petitioner is required to allege need not be such as he is able to testify to of his own knowledge and observation. They may be merely statements of his belief provided he gives reasonable grounds for such relief. An allegation that the defendant is preparing to do something is sufficient allegation of fact within the meaning of sections 181[7] and 653 of the Civil Procedure Code.[8]

It was decided in ***Singhaputra Finance Limited Vs. Appuhamy***[9] that the court can vacate the sequestration order on the basis that the affidavit is solely based on belief and reasonable grounds for such belief have not been stated.

Section 653 enables a plaintiff who satisfies the Court that the requisites of section 653 have been established, to obtain an order for the sequestration of the defendant's property and, thereby, secure rights which the plaintiff may obtain if decree is eventually entered in his favour at the conclusion of the pending action. Therefore, when a Court is called upon to decide whether to issue a sequestration order, it must keep in mind the fact that, it has not yet had an opportunity to make a final determination with regard to the rights and liabilities of the parties and that, a sequestration order is issued, on a just and equitable basis, to protect the potential rights of a plaintiff who has satisfied the Court that, he has established the requisites of section 653 of the Civil Procedure Code.[10]

After a sequestration order is issued it will affect the defendant's proprietary right, in law, to enter into bona fide transactions with his own property during the pendency

of an action instituted against him and also the issue of a sequestration order and the consequent seizure of property can damage the reputation of a defendant. Therefore when a court is considering the fact of whether to issue a sequestration order or not, the Court must consider both the interests of a plaintiff who wishes to secure his rights on a decree which he might obtain at the conclusion of the pending action and also the consequences which might the defendant have to face, if the sequestration order is issued.

The Supreme Court held in SC CHC Appeal 26/2010 that the essential requisites of section 653 must be clearly averred on the face of the petition and supporting affidavit. A Court cannot be expected to scour these documents searching for clues to check whether the plaintiff has satisfied the requirements of section 653. It would be appropriate to keep in mind that, it is incumbent on the pleader to exercise care and due diligence in the drafting of an application, especially where *ex parte* relief is sought.[11]

Further in the aforesaid case[12] it was held that according to the specific requirements mentioned in section 653, the plaintiff should have specifically stated, in its petition and supporting affidavit, that, the plaintiff believes the defendant is fraudulently alienating his property to avoid payment of the monies claimed by the plaintiff in the action or, at the least, state that fact by using other words to that clear effect.

For these reasons, Orders for sequestration before judgment should be issued only where the Court, after exercising due care and consideration, is satisfied that, the plaintiff has duly established all the requisites of section 653. The Court should be of the view that, unless the sequestration order is issued, there is likelihood that the defendant will fraudulently alienate his property and, thereby, render nugatory any decree which the plaintiff may obtain and that, therefore, the interests of justice require the issue of the sequestration order. Where the Court is so satisfied, a Court should not hesitate to issue a sequestration order and, thereby, secure the plaintiff's claim. But, in a situation where the plaintiff fails to establish all the requisites of section 653 to the satisfaction of Court, the extraordinary remedy of a sequestration order should not issue.[13]

Whether the Plaintiff has to give Security before Sequestration is issued?

It is settled law that before making an order for mandate of sequestration the plaintiff shall give security for the costs and damages that may be awarded to defendant or any other person for the wrongful sequestration of defendant's property.

Section 654 of the Civil Procedure Code states that "Before making the order for a warrant of arrest or mandate of sequestration, the Judge shall require the plaintiff to enter into a bond (form No. 105, First Schedule), with or without sureties, in the discretion of the Judge, to the effect that the plaintiff will pay all costs that may be awarded and

all damages which may be sustained by reason of such arrest or sequestration, by the defendant or by any other person in whose possession such property shall have been so sequestered; and it shall be competent to the court to award such damages and costs of suit either to the defendant or to those in whose possession."

Manner of Investigating any claim to Property Sequestrated

Any claim to the property sequestrated before judgment shall be investigated in the manner provided for the investigation of claims to property seized in execution of a decree for money.[14]

The court should not exercise its discretion in favour of allowing an application for sequestration before judgment, unless the applicant has strictly complied with the requirements of Section 653.[15]

Therefore it is a settled law that the Court has the duty to investigate the title of the property sized and not mere possession thereof. A claim to property sequestrated can be entertained and inquired into by the District Court and Sections 658 and 659 of the Civil Procedure Code applies to such claims.

It was held in ***Government Agent, Southern Province Vs. Kalupahana***[16] that the District Judge was right in holding that he was entitled to try the question whether the deed was void or not in the claim proceedings.

Where the property is sequestrated before judgment and a claim is made and an investigation is held under sections 658 and 659 of the Civil Procedure Code, the question of possession is not decisive. The court has to be satisfied before releasing the property from seizure, that the property was not the property of the defendant.[17]

It was held that a writ of sequestration should not issue in an action against the heirs as such of a deceased person on the ground that they are alienating his estate.[18]

Costs and Damages for Wrongful Sequestration

If upon any such investigation the court is satisfied that the property sequestered was not the property of the defendant, it shall pass an order releasing such property from seizure, and shall decree the plaintiff to pay such costs and damages by reason of such sequestration, as the court shall deem meet. If otherwise, the claim shall be disallowed, and make such order as to costs as it shall deem meet.[19]

Section 659 of the Civil Procedure Code is not a bar to a regular action for damages for wrongful sequestration before judgment.[20] This position further upheld in ***Muttaiaha Chettiyar Vs. Emmanuel***[21] where it states that Section 659 of the Civil Procedure Code

does not debar a person whose property has been wrongfully seized under a mandate of sequestration before judgment, from maintaining a separate action to recover damages.

In ***Widyasekera Vs. Dias***[22] it was held that the defendant was not liable to pay damages for wrongful sequestration as his proxy given to the proctor was limited to obtain an injunction.

Whether a defendant against whom an *ex parte* sequestration order has been issued, is entitled to make an application to have that sequestration order vacated?

In section 653 and the subsequent sections in Chapter 47 of the Civil Procedure Code make no specific provision for a defendant against whom a sequestration order has issued, to make an application to have that Order vacated.

It was held in ***Muttiah Vs. Mutuswamy*** [23] that, a defendant against whom an *ex parte* sequestration order has been issued by a Court is entitled to make an application to the same Court, with notice to the plaintiff, to have that sequestration order vacated. In the aforesaid case it was stated that *"On the ground suggested that a District Court, having once ex parte allowed a sequestration to issue, cannot recall it, on good grounds shown by the defendant, all I can say is that I do not assent to so novel and, I think, so dangerous and unjust a rule. There is as a rule no appeal against an ex parte order. The proper course is to apply to the Court made the order to vacate it with notice to the party who holds the order, and on showing good grounds that the order had been made on insufficient materials, or was otherwise wrong."*[24]

The said legal position, that a defendant against whom an *ex parte* sequestration order had been issued in the District Court, succeeded in an application made by him to the same Court to have that sequestration order vacated also accepted in ***Samarakoon Vs. Ponniah***[25], ***Hadjiar Vs. Adam Lebbe***[26] and ***Singhaputra Finance Ltd Vs. Appuhamy***[27]

In the recent judgment delivered by the Supreme Court held that it is an established law that, a defendant against whom an *ex parte* sequestration order has been issued by a Court is entitled to make an application to the same Court, with notice to the plaintiff, to have that sequestration order vacated.[28]

Effect of Sequestration on Prior Rights

Sequestration before judgment shall not affect the rights, existing prior to the said sequestration, of persons not parties to the action, nor bar any person holding a decree against the defendant from applying for the sale of the property under sequestration in execution of such decree.[29]

It was held in ***Letchimanen Chetty Vs. Abdul Rahiman***[30] that where goods belonging to a debtor are sequestrated under a sequestration issued under section 653 of the Civil Procedure Code any other judgment creditor of the debtor, who has obtained judgment before or after such sequestration, is entitled to have the said goods sold in execution of his decree.

In ***Mohamadu Vs. Marikar***[31] the question arose that whether the decree holder whose writ was issued to the fiscal was entitled to have his decree satisfied out of the proceeds of sale where the said property was under a sequestration. In this case where a property sequestrated before judgment was sold by the Fiscal who had at the time of sale received a writ issued in execution of a decree obtained against the same defendant in another action.

The Court held that the decree holder whose writ was in the hands of the Fiscal at the time of sale, was entitled to have his decree satisfied out of the proceeds of such sale, and further held that the proctor of the party who obtained the order for sequestration had no lien on the proceeds of sale until his client's claim had been reduced to a decree.

Unnecessary to obtain a subsequent seizure of property under decree

Where a property is under sequestration by virtue of the provisions of Chapter XLVII of the Civil Procedure Code, and a decree is given in favor of the plaintiff, it shall not be necessary to again size the property as preliminary to sale of delivery in execution of such decree.[32]

Conclusion

It is clear that provisions relating to sequestration before judgment is an extraordinary remedy issued on a just and equitable basis. Therefore such an order should be issued with due care and consideration. Further, a Court has to be vigilant to ensure that the plaintiff is seeking the sequestration order with good faith and for good reason, apprehends that the defendant is attempting to fraudulently dispose of his property and not merely for the reason that the plaintiff is attempting to force the defendant into settling the case or to humiliate or harass the defendant maliciously.

Endnotes

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1 *Post Attorney Diploma in Corporate Law-ALSU Sri Lanka Law College, Post Graduate Diploma in Human*

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Part V of the Civil Procedure Code

2 *Halsbury's Laws of England [4th ed]*

3 *Section 653 of the Civil Procedure Code*

4 *Explanation-Sec 653 of the Civil Procedure Code*

5 *SC CHC Appeal No. 26/2010 decided on 06/04/2017*

6 *31 NLR 316*

7 *What statements may affidavit contain*

8 *Karunadasa Vs Yoosuf 51 NLR 326*

9 *Page 7 in SC CHC Appeal No. 26/2010*

10 *2005 [1] SLR 55*

11 *Page 13 in SC CHC Appeal No. 26/2010*

12 *SC CHC Appeal No. 26/2010*

13 *Page 8 in SC CHC Appeal No. 26/2010*

14 *Sec 658 of the Civil Procedure Code*

15 *Careem Vs Appuhamy 25 NLR 190*

16 *25 NLR 13*

17 *Careem Vs Appuhamy 25 NLR 190*

18 *Hingppuhamy Vs Donchhamy 1 Browns 376*

19 *Sec 659 of the Civil Procedure Code*

20 *The bank fo Bengal Vs the Jaffna Trading Company 16 NLR 417*

21 *32 NLR 47*

22 *16 NLR 460*

23 *1 NLR 25*

24 *Per LAWRIE ACJ in 1 NLR 25 page 28*

25 *32 NLR 257*

26 *43 NLR 145*

27 *[2005] 1 SLR 55*

28 *Page 10 in SC CHC Appeal No. 26/2010*

29 *Section 660 of the Civil Procedure Code*

30 *11 NLR 123*

31 *31 NLR 289*

32 *Section 661 of the Civil Procedure Code*

RIGHT BASED APPROACH TO DETERMINE THE PLEAS OF AUTREFOIS ACQUIT AND AUTREFOIS CONVICT

Lilan Warusavithana.[1]
Magistrate, Galgamuwa

Introduction

It is a universally accepted principle that a person cannot be convicted twice for the same offence. However, this principle has been applied by the Courts in a broader sense than its literal meaning. For the purpose of this article a more focused attention would be given to the application of the aforesaid principle in criminal law both in foreign jurisdictions and our country.

The peremptory pleas of autrefois convict and autrefois acquit are based on the famous criminal principle of Double Jeopardy which is a procedural defence that forbids a Defendant/Accused from being tried again on the same, or similar charges following a legitimate acquittal or conviction as said in terms of "*ne bis in idem*" which means "not twice for the same". The defence is also based on the principle that any person should not be subject to punishment upon punishment which would thereby amount to a cruel and inhuman punishment.

The recognition in the International Law for the pleas of autrefois acquit and autrefois convict

The fundamental principle that a man must not be put twice in peril for the same offence is also enshrined in many International Conventions;

Article 14(7) of the International Convention on Civil and Political Rights-

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

European Convention on Human Rights, Article 4 of the optional seventh protocol to the convention-

No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state or an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state.

This fundamental principle is also constitutionally guaranteed in several jurisdictions;

Article 20(2) of the Indian Constitution

No person shall be prosecuted and punished for the same offence more than once

and in the Fifth Amendment to the Constitution of U.S.A;

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Therefore, it is well established law that the peremptory pleas of autre fois acquit and autre fois convict are universally accepted defenses for the accused who has been put into peril twice for the same offence and the same has been identified as a right of the accused.

Pleas of autre fois acquit and autre fois convict in Sri Lanka

The Act of Criminal Procedure Code No. 15 of 1979 provides specific provisions for the said pleas in section 314 and this section embodies the whole law in so far it expressly provides where a second trial barred and where it is permissible.

Section 314 of the Code of Criminal Procedure Act

(1) A person who has once been tried by a court of competent Jurisdiction for an offence and convicted or acquitted of such offence shall while such conviction or acquittal remain in force not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 176 or for which he might have been convicted under section 177.

(2) A person acquitted or-convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under subsection (1) of section 175.

(3) A person convicted of any offence constituted by any act causing consequences which together with such act constituted a different offence from that of which he was convicted may be afterwards tried for such last- mentioned offence, if the consequences had not happened or were not known to the court to have happened at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may notwithstanding - such acquittal or conviction be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed, if the court by which he was first tried was not competent to try the offence with which he is subsequently charged.

According to Section 314(1) an accused once convicted is not liable to be tried again

1) either for **the same offence** or

2) **on the same facts for any other offence** for which **a different charge** from the one made against him might have been made (under Section 176 or for which he might have been convicted under Section 177)

How to determine "the same offence"

The same offence means an offence whose ingredients are the same. The crucial requirement therefore for applying section 314(1) is that the offences are the same or identical. Even if the allegations of facts in two indictments are substantially similar, the benefit of the pleas cannot be invoked when the offences in two indictments are distinct.

Illustration (a) of Section 314 is an example where a person charged for the offence of theft as a servant and acquitted cannot thereafter the tried either for theft as a servant or upon the same facts with theft simply or with criminal breach of trust.

In ***State of Bombay Vs. Apte***[1], the accused was convicted under section 409 of the Indian Penal Code for criminal breach of trust and subsequently prosecuted on the same facts under section 105 of the Insurance Act. Considering the application of Article 20(2) of the Constitution, Indian Supreme Court held that the second prosecution was not barred as the ingredients of the offences are different.

In order to determine whether the offences are the same, the principles laid down in the Halsbury test and the Connelly case can be used and the same will be discussed hereinafter in detail.

- The Halsbury Test

The question for the Court in trying the plea of *autre fois convict* is whether the Accused

has previously been in jeopardy in respect of the charge upon which he is now indicted. According to the Halsbury rules[2], one test is whether the evidence which is necessary to support the second indictment could have founded a lawful conviction upon the first indictment, either for the offence charged, or for an offence of which the defendant could on that indictment have been found guilty.

The Halsbury rules further state that a necessary incident of the test is that the offence charged in the second indictment had been allegedly committed at the time of the first charge and this principal is also well established in section 314(3) of the Code of Criminal Procedure in Sri Lanka.

- Principles laid down in Connelly VDPP

The pleas of autrefois convict and autrefois acquit were fully analyzed in ***Connelly Vs. Director of Public Prosecutor***[3] by Lord Morris where his Lordship identified the following nine governing principals regarding the pleas of autrefois convict and autrefois acquit.[4]

I. that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted;

II. that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted;

III. that the same rule applies if the crime in respect of which he is being charged is in effect the same or is substantially the same as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted;

IV. that one test whether the rule applies is whether **the evidence which is necessary to support the second indictment**, or whether **the facts which constitute the second offence**, would have been sufficient to procure a legal conviction on the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty;

V. that this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge;

VI. that on the plea of autre fois convict or autre fois acquit a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the Court, but that **he may prove by evidence** all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence **which is either the same** or is **substantially the same** as one in respect of which he has been acquitted or convicted or as the one in respect of which he could have been convicted;

VII. that what has to be considered is whether the crime or offence charged in the later indictment **is the same or is in effect or substantially the same** as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings;

VIII. that apart from circumstances under which there may be a plea of autre fois acquit a man may be able to show that a matter has been decided by a court competent to decide it so that the principle of res judicata applies

IX. that apart from cases where indictments are preferred and where pleas in bar may therefore be entered the fundamental principal applies that a man is not to be prosecuted twice for the same crime.

Therefore, it is evident from the aforesaid principles that more than comparing indictments, the accused is entitled to prove by evidence that the offences contained in two indictments are similar. Therefore, the question whether the second indictment is barred by a previous conviction or acquittal, is a question to be determined on the facts and circumstances of every case with the intention of promotion of justice and rights.

Same facts for any other offence for which a different charge

According to section 314(1) of the Code of Criminal Procedure, a person shall not be to be tried again on the same facts for any other offence which might have been made under section 176 or for which he might have been convicted under section 177.[5]

According to section 176, where it is doubtful on which offence has been committed, the court is permitted to indict the accused with all or any one or more of such offences without specifying which offence was committed. However, if a person was not indicted for a particular offence which could have been charged under section 176, he is entitled for the benefit of the plea when he is subsequently indicted for the said offence. The rationale behind this is that, since section 177 permits the Court to convict the accused for offences which could have been charged under section 176 without charging for the said offences, the said discretion could have been exercised by the Court at the conclusion of the first trial.

In ***R Vs. Barron***[6] Lord Reading C.J expressed very clearly the accepted principles on which the plea of autre fois acquit or convict is based,

> *"that the law does not permit a man to be twice in peril of being convicted for the same offence. If, therefore, he has been acquitted, i.e., found to be not guilty of the offence, by a court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offence actually*

> *charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment"*

In ***R Vs. Hogan***[7] it was held that a person who has been convicted of an offence cannot subsequently be charged with the same offence in an aggravated form in relation to the same fact is confined to courts of competent jurisdiction. This principle also accepted in our jurisdiction in many cases. In ***Canagasingham Vs. Meyadin Bawa***[8] the accused was charged with theft and in the alternative with receiving stolen property, and the Magistrate acquitted him of the charges, reserving to the prosecutor the right to charge the accused for criminal misappropriation on the same facts. Then he was tried again with the criminal misappropriation where he raised the plea of autre fois acquit, Akbar J held that;

> *"As I have stated, it my opinion this acquittal of the accused on both charges of theft and retention of stolen property is a bar to a subsequent prosecution on the charge of criminal misappropriation on the same facts. The Magistrate could not take away the effect of this bar by reserving to the complainant his right to so proceed"*[9]

In ***Dyson Vs. Khan***[10] it was held that where a person is charged under section 210 of the Penal Code with accepting a gratification for screening an offender from punishment and acquitted, he cannot be charged again on the same facts under section 138, with accepting a gratification as a motive or reward for rendering a service with a public servant.

> *This principle was well established in* ***United States Government Vs. Atkinson***[11] *by Lord Parker C.J where his Lordship held that;*
>
> *"Indeed as it seem to me the pleas of autre fois acquit and autre fois convict being pleas in bar which are decided before the evidence in the later case is known, the validity of the pleas depends on the legal characteristics of the two offences in question, namely whether the facts necessary to support a conviction in each case are the same, and do not depend on whether the actual facts thereafter given in evidence are the same"*[12]

- exceptions to the plea

The statutory provisions of section 314 of the Criminal Procedure Code itself provide legal exceptions for the aforesaid pleas.

The 1st exception to Section 314(1) is found in Section 314(2) which states that a person so convicted may afterwards be tried for a distinct offence for which a separate charge might have been made against him on the former trial under subsection (1) of Section 175

The Illustration (b) of section 314 exemplifies the situation where offences of murder and robbery (which are distinct offences) occur in the course of the same transaction and the accused is acquitted of murder and can thereafter yet be charged and tried for robbery.

According to section 314(3), when the consequent results of the act of convicted offence caused to constitute a different offence, the same can be tried separately if the consequences had not happened or were not known to the Court to have happened at the time when he was convicted. This can be considered as the 2nd exception for the pleas provided under section 314(1).

In ***R Vs. Thomas***[13] it was held that where a person has been convicted of wounding with intent to murder and the person wounded subsequently dies of the wounds inflicted, a plea of autrefois convict is not a good answer to a subsequent indictment.

The 3rd exception is found in section 314(4) where it provides that if the Court by which the accused was first tried was not competent to try the first offence, subsequent prosecution is permitted. Therefore, it is important to discuss the term of competent court in order to understand the scope of this exception.

Competent Court

In ***Regina Vs. Hogan*** and ***Regina Vs. Tompkins***[14] two prisoners serving sentence of preventive detention planned with another man to escape from prison and three men got out through the skylight and escaped. The two prisoners having been recaptured by the prison authority, were tried before the visiting committee and the said committee made a number of awards forfeiting privileges against the men. Both men were later tried and convicted on an indictment for the same incident. In the appeal they took the defence of autrefois convict which was rejected on the ground that visiting committee was not a competent court.

In ***Lewis Vs. Mogan***[15] a seaman who was convicted by the master of the ship subsequently charged before the court. Rejecting his plea of autrefois convict Justice Stable held that;

> *"On the question whether the respondent was entitled to plead autre fois convict, in my judgment, the short answer is that he was not, because the charge against him had never previously been dealt with by a competent jurisdiction"*[16]

In SC Reference 01/2010 His Lordship the Chief Justice and three other judges of the Supreme Court have extensively analyzed the legal provisions and come to the conclusion that the Court Martial is a Court established by the provisions of the Constitution. Therefore, after the aforesaid decision, the Court Martial which is established under the Army Act should be considered as a competent court and a person cannot be tried under

the general criminal offences if he was tried by the Court Martial for the same or similar offences.

The main requirement for applying the pleas is that the offences are the same. It is therefore necessary to analyze and compare not the allegations in the two complaints but the ingredients of the two offences. Therefore when a person is alleged that he has committed an act of grievous hurt, there would be no bar to try him in a criminal litigation under the offences of Penal Code and in a civil litigation for damages.

In ***Suba Singh Vs. Davinder Kaur***[17] the accused was convicted and sentenced under the Indian Penal Code. The dependants of the deceased claimed damages for causing the death of the deceased by the wrongful act of the accused. When the accused pleaded for autrefois convict, it was held by the Supreme Court that it is elementary that an action for civil damages is not prosecution and decree of damages is not punishment so that the rule of double jeopardy has no application.

Forms of technical and statutory acquittals specified in the Code of Criminal Procedure.

Apart from the acquittal arrived through a final judgment or an order made under section 186, several modes of acquittals are provided in the Code of Criminal Procedure which can be considered in successful plea of double jeopardy.

According to section 188(1), the accused may be acquitted in the absence of the complainant and the same is considered as a valid acquittal under section 314. Under the provisions of section 189, the complainant may be permitted to withdraw his compliant with the permission of the Court and the final order of acquittal made thereafter operates as bar to a subsequent trial.

The provisions of section 266 of the code permit the parties to compound certain offences and since compounding amounts to a technical acquittal, subsequent trial is therefore barred.

Burden of Poof and the Procedure

The burden of proof for the plea of autrefois convicts lies on the defendant and he must prove what he asserts on the balance of probability[18]. It was held in ***R Vs. Thomson Holidays Ltd***[19] that:

> *"The defendant is not restricted to a comparison between the later indictment and some previous indictment, or to the records of the court, but may prove by evidence all such questions as to the identity of persons, dates and facts as are*

> *necessary to enable him to show that he is being charged with an offence which either the same or substantially the same as one in respect of which he could have been convicted on an earlier effective trial.*"

The provisions contained in section 315 of the Code specify the procedure to plead the plea of previous acquittal or conviction. Accordingly, the party who wish to plead the same is permitted to make that application either orally or in writing in the form specified in section 315. However, when the plea is pleaded, the Court should determine the same in the 1st instant and the Court is not permitted to determine at the conclusion of the trial with other issues.

Other Statutory Provisions relating to the Pleas

The legislature has accepted the principle of double jeopardy in two statutes other than the Criminal Procedure Code. In the present circumstances it is necessary to consider Section 9 of the Interpretation Ordinance.

Section 9

> *Where any act or omission constitutes an offence under two or more laws, whether either or any of such laws came into force before or after the commencement of this Ordinance, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those laws, but shall not be liable to be punished twice for the same offence.*

In ***Samarasinghe Vs. Dalpadadu***[20] it was held that the second conviction on the same facts is obnoxious to section 9 of the Interpretation Ordinance. It is to be noted that the section 33 of the Interpretation Act (1889) in England was similar to the section 9 of the Interpretation Ordinance and both these sections established the very first principle of the criminal law that a man should not be placed twice in jeopardy upon the same facts.

In ***Wemyss Vs. Hopkins***[21] there had been an assault which constituted an offence under each of two statues. A complaint was preferred under one statute and there was a conviction and fine. Some six weeks later a complaint was preferred under the other statute and on conviction there was a further fine. The question that arose was whether the first conviction was bar to the second and it was held that it was. As this case had been in a court of summary jurisdiction, the plea of autre fois convict could not be presented but the Blackburn J. pointed out that the offence of the appellant was one for which he might be punished under either of two statutes and referred to the **"fundamental principle**" that no person shall be prosecuted twice for the same offence.

The provisions contained in the International Covenant on Civil and Political Rights Act No. 56 of 2007 also recognized the principle of double jeopardy as a right of the accused.

4(3) No person shall be tried or punished for any criminal offence for which such person has already been convicted or acquitted according to law.

Thus Section 4(3) of the ICPR Act goes even beyond Section 314(1) of the Criminal Procedure. Section 4(3) is not confined to the courts of civil judicature but apply to all convictions under the law. Therefore, when there is a conflict between the interpretation of the provisions of the ICCPR Act and the previous legislations to the same, the ICPR Act being a subsequent Act will prevail over the other legislations which enacted prior to the ICCPR Act. It is submitted that where there is a conflict between two provisions of law, it is the primary duty of Court to give expression to the **current will of Parliament.** In other words, the provisions of the latter Act enacted by Parliament will prevail over the conflicting provisions of a previous law, even though the earlier provisions have not been expressly repealed which is found in the "doctrine of implied repeal" which gives expression to the latest expression of the will of Parliament.

Conclusion

Therefore, the principle of double jeopardy has been applied broadly by Court to ensure the fundamental principle that no one shall be punished or put in jeopardy for the same offence more than once. By enacting ICCPR Act No. 56 of 2007 the legislature has recognized the said principle as a right of an accused which invites the Courts to determine the same in more right based approach. Therefore, the Court is duty bound to peruse relevant evidence, court records and other materials and determine the issue without merely comparing the two offences in question.

Endnotes

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1 *AIR 1961 SC 1*

2 *Halsbury's Laws of England, 4th edition, vol 11 - Criminal Law, Evidence and Procedure, Crown Proceedings and Crown Practice, page 147.*

3 *1964 2 All.ER 401*

4 *Ibid p.412*

5 *although it is stated as section 166 and 167 in the Sinhala text, it is clear that the intention of the drafter is to refer section 176 and 177 of the Criminal Procedure Code.*

6 *1914 (2) KB 570*

7 *1960 (2) QB 513*

8 *1931 (33) NLR 356*

9 *Ibid p.357*

10 *1932 (31) NLR 136*

11 *1969 (2) All E.R 1151*

12 *Ibid P.1157*

13 *1949 (2) All E.R 662*

14 *1960 (2) Q.B 513*

15 *1943 (1) K.B 376*

16 *Ibid P. 380*

17 *AIR 2011 SC 3163*

18 *Archibold's pleading and evidence in criminal cases, page 394*

19 *1974 (1) All.ER 823*

20 *41 NLR 564*

21 *1875 L.R 10 QB 378s*

Printed by Sanghinda Printers & Publishers