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MESSAGE OF HIS LORDSHIP THE CHIEF JUSTICE

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19th November 2019

It is with immense pleasure that I forward this message to be published in the JSA Law Journal Volume - VII.

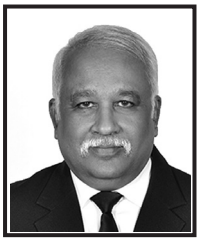
At a time when increasing attention is paid to the role and significance o the Judiciary, the question of professional development of members of the judiciary is of particular importance. As judges we are duty-bound to perform our judicial work professionally and diligently, which implies that Judges should have great professional ability, acquired, maintained and enhanced through continuous training and development. The purpose of encouraging the judicial officers to write Articles is to bring out the writing skill o the judicial officers to the fore, besides making the judicial officers to undertake research on various topics while contributing Articles. It is noted that the publication of JSA Law Journal Over the last few years has evolved itself into a platform through which members of our judicial fraternity could share their knowledge, experience and issues that concern them during the adjudication process and help each other to effectively discharge their duties. The Publication of a Law Journal is a positive step in this direction.

I take this opportunity to convey my best wishes to the members of the Judicial Service Association and the Editorial Board for their sincere endeavours.

Jayantha Jayasuriya, P.C.

Chief Justice

MESSAGE OF THE HONOURABLE DIRECTOR OF SRI LANKA JUDGES' INSTITUTE



It is with much pleasure I pen this message to the "JSA Law Journal-Volume VII".This Journal is being published by the JSA since the year 2013 and has become an annual event.

It seems this Journal is very significant in many ways. Firstly, it creates a safe platform to share the experiences of Judicial Officers with other legal professionals. Secondly, it is a great opportunity and encouragement for the members of the JSA to sharpen their capabilities. Thirdly, it adds an academic perspective to the Judicial work. All of these would undoubtedly subsidize to the advancement of the legal system of the country.

This year Volume contains vast array of timely important articles, worthy to read by any legal professional. It is pleased to observe that the Journal is mostly encompassed with the writings of the Judicial Officers who severe in various parts of the country. Further it has been augmented by the contributory articles of the Apex Court Justices, High Court Judges, Members of the Bar and Academics.

I congratulate all Judicial Officers who have contributed their writings to this Volume and hope more contributions in the future. Let me take this opportunity to appreciate JSA and the Editor of this Volume for their hard work and commitment to make this endeavor a success. I wish this opportunity would be available for the members of the JSA in future as well.

Justice L.T.B. Dehideniya
Judge of the Supreme Court
Director

Sri Lanka Judges' Institute.

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

Dear Colleagues,

It is with great pride I write this message to you, as the President of the Judicial Service Association 2019. Year 2019 is almost over and we are looking forward to welcome year 2020. The year 2019, in retrospect, was filled with so many achievements, and also some setbacks. As in the past, the JSA stood for preserving the independence and hallowed traditions of the judiciary. The JSA sent a letter to the JSC, requesting to impose minimum eligibility criteria in selecting Law Officers to High Court vacancies. As far as we know, the JSC, in its wisdom, has considered our request in favorable manner.

We, in collaboration with the Judges' Institute, organized a workshop with visiting Indian Academic. As the JSA, we tried our best to revive Weekend Seminars, and hopefully, we would see the results soon. We were able to organize a successful Annual Trip of JSA, which was a long felt need. We hope this event will continue in the coming years. I accept that we have not been able to achieve everything I wished for, however, I assure you me, together with Ex-Co, have done everything to the best of our ability.

The JSA endeavored to have money allocated to build a National Judicial Academy for Sri Lanka. We have drafted a comprehensive proposal to this effect and forwarded it to relevant authorities. Though it is still not materialized yet, hopefully, necessary funds will be allocated by the Budget 2020 and work would start in the near future.

The Ex-Co of the Association, always rendered me their fullest possible support at all times. Participation in Ex-Co meetings was admirable throughout the year. Last but not least, I commend you for the unwavering support and trust all of you have shown to me, during my tenure as President.

I wish you a happy and prosperous new year 2020!

Hasitha Ponnamperuma,
District Judge, Matale .
President,
Judicial service Association

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Part - II

EDITOR'S NOTE

It is an utmost pleasure and a privilege to present the Seventh Volume of the Law Journal of the Judicial Service Association of Sri Lanka. Since the first edition in 2013 the perseverance and commitment of JSA regarding to the journal is manifested by this successive seventh volume. Hon Justices of our Apex Courts, Hon Judges of High Courts, members of the Judicial Service Association, legal luminaries and scholars who excelled in spears of law in Sri Lanka have shared their expertise through the articles published herein.

It is my singular honor to express my sincere gratitude to His Lordship the Chief Justice, Honourable Jayantha Jayasuriya PC, for obliging us with a message of encouragement and inspiration to make this endeavour a success.

I thank His Lordship Honourable L.T.B. Dehideniya, Judge of the Supreme Court and the Director of the Sri Lanka Judges Institute and Mr. Anushka Senevirathne, the Academic Coordinator of the Sri Lanka Judges Institute for their valuable guidance and support given to the Editorial Committee.

The Editorial Committee of the JSA wins my unreserved appreciation for the remarkable work done. Mr. Trinity Rajapakshe, Assistant Editor, Mr. Isuru Neththikumara, Mr. Lilan Warusawithana and Mr. Rasika Mallawarachchi who devoted their valuable time to get this publication see the light of the day deserve a big THANK YOU.

Further I extend my sincere gratitude to Mr. Hasitha Ponnamperuma, President of the JSA and Mr. Prasanna Alwis, the Secretary to the JSA for their valuable guidance and efforts to make this journal a success. Mr Ranga Dissanayake, former president of the JSA, Mr. Jayaruwan Dissanayake former editor of the JSA and Mr. Chinthaka Gunasekara are greatly appreciated for leading the way and mentoring. I owe a special appreciation to Mr. Uddala Suwandurugoda, Mr. Pradeep Mahamuthugala, Ms. Anandi Kanagarathnam and Mrs. Chamila Rathnayake for their roles in this achievement.

I take this opportunity to express my sincere gratitude to all the authors who had found time to pen their valuable articles despite their very busy schedules.

My sincere appreciation goes to Sanhinda Pulishers who undertook and gave fullest cooperation in the publication of the Journal and I must appreciate the cooperation of Ms. Amila Sandamali Kanangara and Mr. Lalith Seneverathne, who designed the journal and the cover page.

Finally, I wish to thank all the members of the Judicial Service Association and I wish all the members a happy, prosperous and successful new year 2020.

Part - I

ADMISSIBILITY OF SOCIAL MEDIA EVIDENCE IN COURT PROCEEDINGS: EVIDENTIARY PRINCIPLES AND LIMITATIONS.

Justice Dr. Ruwan Fernando[1]
Judge of the Court of Appeal

Abstract

Social media posts, text messages, conversations, photographs, images and videos are increasingly used in court proceedings both in criminal and civil trials. The admissibility of such social media evidence is sometimes denied on several objections, including irrelevance, difficulty of authentication and hearsay rule. The failure to apply the legal principles and best practices may deny any proponent to rely on social media evidence to resolve disputes in our courts.It is only after a proponent can successfully meet this threshold requirement; the Courts will berequired to go into the issues of credibility and weight of the admitted evidence.

The difficulties frequently arise in establishing the relevance and authorship of social media evidence as often more than one person uses social media accounts and social media accounts are accessed without permission. The Courts of many jurisdictions, in particular, the United States have emphasised the need to authenticate the identity of the author without merely relying on secondary evidence unless social media evidence is admitted or not in dispute and demanded additional circumstantial evidence to be presented to authenticate the identity of the author.It is high time, that the Sri Lankan Courts also seriously look at the approaches taken by the US courts in admitting social media evidence on the basis of the well-settled evidentiary principles subject however, to the existing statutory provisions in Sri Lanka.

1 PhD in Law (Biotechnology Patent Law), Colombo LL.M. (Commercial Law), Cardiff, U.K., Post Attorney Diploma in Intellectual Property Law (S.L.)

Introduction

The term 'social media' commonly refers to the use of electronic devices to create, share or exchange information, ideas, pictures and videos with others via virtual communities and network.[2] Social media has been, however, defined as "forms of electronic communications (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages and other content (as videos).[3]"

The significance of social media evidence, its limitations and legal implications are lucidly explained by the American Bar Association in 'The Florida Bar Journal' as follows:

> "Social media is everywhere. Nearly everyone uses it. Litigants who understand social media–and its benefits and limitations–can immeasurably help their clients resolve disputes…it is inevitable that the social media accounts of at least one person involved in a dispute will have potentially relevant and discoverable information." However, "If not properly researched, preserved, and authenticated, the best social media evidence is worthless."[4]

Extent of Social media Platforms

Amongst the numerous social media platforms that exist today online, the popular social media platforms are Facebook, Twitter, WhatsApp, Instagram, YouTube and LinkedIn. Today, as of June 2019, Facebook, alone, has an estimated more than 2.4 billion monthly active users, 1.6 billion daily active users and 88% of Facebook's user activity are from a mobile device and the average amount of time a user spends on Facebook every day is 58 minutes.[5] There are over 300 million photos uploaded to Facebook every day, on average, 5 Facebook accounts are created every second and approximately, 8 billion video views per day.[6]

In case of Twitter, as of June 2019, it has more than 330 million monthly active users, 134 million daily active users and twitter users are posting 140 million tweets daily and each twitter user has on average 208 followers.[7]On the other hand,

2 Social Media-Guidelines on prosecuting cases involving communications sent via social media, p.2 https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications- sent-social-media

3 Paul W. Grimm et al., Authentication of Social Media Evidence, 36 American Journal of Trial Advocacy, Vol. 36.4333 (2013), at 434. (2013) (quoting Definition of Social Media, Merriam–Webster. http://www.merriam-webstercom/dictionary/social%20media)

4 Social Media Evidence: What You Can't Use Won't Help You(2014) Florida Law Journal, Volume 88, No. 1.

5 Dustin Stout, Social Media Statistics 2019: Top Networks by the Numbers, www.dustinstout.com

6 Ibid

7 Ibid

WhatsApp which is an instant messaging application platform for smartphones is estimated to have approximately 1.5 billion monthly active users.[8] There are now over 1 billion daily active users on WhatsApp, on average, 1 million people register on WhatsApp daily and approximately, 60 billion texts daily are sent to WhatsApp platform.[9]

Instagram which is mainly used to share pictures and videos has over 1 billion monthly active users and more than 600 million daily active users.[10] It has so far shared more than 40 billion photos and on average, 95 million photos are uploaded daily.[11] Currently, YouTube has more than 1.9 billion logged-in-visits every month, 149 million people login to YouTube daily and on average and 300 hours of videos are uploaded every minute on You Tube and there are over 5 billion video views each day.[12] The average duration of a You Tube visit is 40 minutes.[13]

LinkedIn, which is a professional networking service has over 560 million registered users and approximately, 303 million monthly active users.[14]

The vital factor is that through these sites, users can create a personal profile, which usually includes the user's name, location, and often a picture of the user text messages, images, pictures or videos.[15] These posts and messages are used by the authors of such sites to deliver content such as videos and pictures etc, to their subscribers. Naturally, these posts and content will include relevant evidence for a trial, including party admissions, inculpatory or exculpatory photos, or online communication between users.[16]

These social networking sites and blogs are sophisticated tools of communication where the user voluntarily provides information that the user wants to share with others and therefore, the users can choose what information to provide free to the users.[17] These social media networking sites are used by the online users to post concerns, ideas, opinions, images or texts, photos, videos, etc.[18] Thus, they provide valuable evidence relevant for criminal and civil litigation.

However, social media evidence that is found in social media posts, including texts, photos, images and videos could be fake or forged or manipulated by those

8 Ibid
9 Ibid
10 Ibid
11 Ibid
12 Ibid
13 Ibid
14 Ibid
15 Danah M. Boyd & Nicole B. Ellison, Social Network Sites: Definition, History, and Scholarship, 13 J. Computer–Mediated Comm. 210, 213 (2007).
16 Griffin v. State, 419 Md. 343, 19 A.3d 415, 423 (Md.2011)
17 Independent Newspapers, Inc. v. Brodie, 407 Md. 415, 424 n. 3, 966 A.2d 432 (2009): Id. at 424,
18 Ibid

who share or steal passwords that may result in the unreliability of some social media evidence in litigation. Very often, e-mail addresses and social media accounts are shared and accessed by more than one person without permission.

The practice of allowing users to share and post messages and photos would also lead to the identity of the said users or participants leading to difficulties in ascertaining the identity of a person who posted a message or photo or video on social media networks.It has however, become a common practice by those who do not follow best evidential practices to merely rely on social media printouts/screenshots of third party websites which are not properly authenticated by the testimony of a person who visited the websites but had no knowledge of the accuracy of the printouts/screenshotsleading to number of objections to the admissibility of social media evidence contained in printouts/screenshots on the grounds of irrelevance, lack of authenticity and hearsay before going into the probative value and weight of such evidence.

This will invariably compel the proponent or prosecution to offerby other means of evidence, including witness testimony, corroborative circumstances, distinctive characteristics or descriptions and explanations of the technical process or system that generated the evidence, sufficient to support a finding that the matter in question is what the prosecution or the proponent claims(e.g. to authenticate a social media post) unlessit can be shown that it is admitted or the conditions relating to admissibility are not in dispute.

In this context, the investigators, lawyers, prosecutors are expected to improve professional competence and investigate thoroughly, the social media networking sites and follow best practices as such social networking sites "may record people's thought processes and impressions in unguarded moments, exactly the sort of evidence that can be invaluable during litigation.[19]

Purpose of the Article

The articles examine the hurdles that confront the reception of social media evidence and evidentiary principles in establishing for the admission of social media postings and messages under the Sri Lanka law by establishing (i) relevance; (ii) authenticity and (iii) exceptions to hearsay and applying best practices as the use of the evidence on the social media platforms increases in litigation. The article will not however, cover procedural requirements for the admissibility of social media evidence and it will be dealt with in the modified version of the article in due course.

19 Kathrine Minotti, Evidence: The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession, 60 S.C. L. REV. 1057, 1059-61, 1066-68, 1071-73 (2009).

Electronic Evidence and its Admissibility

In determining whether the social media evidence is admissible in court proceedings, the starting point is to look at the admissibility of other types of electronic communications viz. any statement, declaration, demand, notice or request made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar devices such as electronically or computerised instant messages and text messages and mobile phone test messages.

Section 3 of the Evidence Ordinance describes two types of evidence. According to section 3 of the Ordinance, 'evidence' means and includes (a) all documents which the court permits or requires to be made before it by witnesses in relation to matters of fact, under inquiry (oral evidence); (ii) all documents produced for the inspection of the matters (documentary evidence). Second proviso to section 60 of the Evidence Ordinance however recognises the real evidenceand provides that if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection (real evidence).

Photographs and other forms of contemporaneous recordings have been admissible in evidence in Sri Lanka despite the limitations of section 3 of the Evidence Ordinance which confined its definition of 'evidence' to oral and documentary evidence.[20] Our Courts have utilised other provisions of the Ordinance, such as the second proviso to section 60, which empowered the court to require any material thing that is referred to in oral testimony to be produced in court for its inspection and section 165 empowered the court to order the production in court of anything, to admit in evidence.[21] For examples, contemporaneous recordings of public speeches (*Abu Bakar v The Queen*[22], *Kularatne and Another v. Rajapakse*[23]), telephone conversations presented through wire or a tape recording (*In re S.A. Wickremasinghe*[24] *and K.H.M.H. Karunaratne v. Queen*[25]) and photographs (*Shahul Hameed and Another v. Ranasinghe and Others*[26] *and Peiris and Another v. Perera and Another*[27]).

On the other hand, section 4 of the Evidence (Special Provisions) Act No. 14 of 1995 refers to two types of evidence (i) contemporaneous recording or reproduction

20 *Upali Dharmasiri Welaratne v. Wesley Jayaraj Moses*, S.C. Appeal No. 65/2003 decided on 27.05.2009). Pp. 5-6

21 Ibid

22 *Abu Bakar v The Queen*54 NLR 566

23 *Kularatne and Another v. Rajapakse*1985) 1 Sri LR 24

24 *In re S.A. Wickremasinghe*, 55 NLR 511

25 *K.H.M.H. Karunaratne v. Queen* 69 NLR 10

26 *Shahul Hameed and Another v. Ranasinghe and Others* (1990) 1 Sri LR 104

27 *Peiris and Another v. Perera and Another* (2002) 1 Sri LR 128).

of evidence by the use of electronic or mechanical means which is real evidence as opposed to oral or documentary evidence. This section read with the proviso to section 60 clarifies that the electronic evidence stands at par with the conventional form of real evidence.

Admissibility of Social Media Evidence recorded or reproduced and contained in social media electronic networking devices

Social media evidence in the form of contemporaneous recording or reproductions thereof, such as data, conversations, photos, images and videosand is contained in an electronic device or devices is admissible in evidence subject to the limitations set out in the Evidence (Special Provisions) Act No.14 of 1995. Section 4 (1) of the Evidence (Special Provisions) Act provides that in any proceeding, where direct oral evidence of a fact would be admissible, any contemporaneous recording or reproduction thereof, tending to establish that fact shall be admissible as evidence of that fact in any proceeding.

Section 4(1)(a) specifically refers to the manner in which the recording or reproduction has to be made for the admissibility of such recording or reproduction and provides that the recording or reproduction has to be made by the use of electronic or mechanical means.Thus, any information that is contained in a contemporaneous recording or reproduction thereof that was made electronically by the social media networking devices would be admissible in evidence in any proceeding where direct oral evidence of a fact in issue would be admissible in evidence to establish that fact subject to other conditions set out in section 4 of the Act.

Thus, any contemporaneous recording or reproduction thereof made by means of electronic or mechanical means, whether it was made by a single machine or device or by several machines or devices, or by different machines or devices or combination thereof with or without the aid of any equipment or human intervention falls within section 4 of the Evidence (Special Provisions) Act No. 14 of 1995. Example include, CCTV recording, mobile and camera phone recordings, tape recording, recording of ECG machines, whether by electronic or mechanical means and made by a single machine or device or by several machines or devices or by different devices and such recording or reproductions thereof would be admissible as electronic evidence.

Social media' evidence which is made by the use of online electronic communications through devices to create, send, generate, receive or store, share or exchange information, ideas, pictures and videos electronically, with others via online communities and network would fall within section 4 of the Evidence (Special Provisions) Act No. 14 of 1995.

Statutory Limitations for Admissibility

Section 4 however, provides provisions in detail for the admissibility of contemporaneous electronic recordings or reproductions thereof, if the following 4 conditions are satisfied

1. The recording or reproduction was made by the use of electronic or mechanical means (whether it was made by a single machine or device or by several machines or devices, or by different machines or devices, in any combination, with or without the aid of any appropriate equipment or human intervention-see-section 4(4);
2. Recording or reproduction is capable of being played, replayed, displayed or reproduced in a manner so as to make it capable of being perceived by the senses;
3. Throughout the material part of the period of recording or reproduction, the machine or device used in making the recording or reproduction was operating properly. In case, the machine or device was not properly operating or out of operation, it must be shown that this did not affect the accuracy of the recording or reproduction (accuracy of the contents);
4. (a) The recording or reproduction was not altered or tampered with in any manner whatsoever during or after the making of such recording or reproduction or (b) that it was kept in safe custody at all material times during or after the making of such recording or reproduction and that sufficient precautions were taken to prevent the possibility of such recording or reproduction being altered or tampered with during the period in which it was in such custody; (chain of custody);

Admissibility of transcripts or translations

Section 4 (3) deals with a situation where any recording or reproduction cannot be played, replaced or reproduced in a manner so as to make it capable of being perceived by the senses or is capable of being so perceived, but is unintelligible to a person, not conversant in a specific science or is of such nature that it is not convenient to perceive and receive in evidence in its original form. In such case, this section gives a discretion to the court to admit in evidence a transcript, translation, conversion or transformation of such recording or reproduction which is intelligible and is capable of being perceived by the senses.

Admissibility of 'duplicates' as evidence

Section 4 (5) provides that when evidence is admissible under section 4, a duplication of such evidence shall be admissible in the same manner and to the same extent as the source from which the duplication is made subject however, to other

limitations set out in the Act. 'Duplicate' is defined as any counterpart produced by the same impression as the original or from the same matrix or by means of photography (including enlargements, reductions and miniatures) or by electronic mechanical or chemical reproduction or re-recording or by other equivalent techniques which accurately reproduces the original.

Thus, it is possible to produce a duplicate of social media evidence contained in a text message, conversation, videos or photographs without further proof or production of the original as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible. Secondary evidence of these electronic recordings or reproductions thereof may be admitted in evidence through printed reproductions including printed, text message, photos, images or chats or transcripts or translations or transformation or conversion which is intelligible and is capable of being perceived by the senses. A duplicate of a contemporaneous recording or reproduction (e.g. Printouts or recorded CCTV footage or video) is admissible under section 4 (5), the admissibility however, depends on the fulfilment of the requirements set out in section 4 ((1) –(4) and hence, it is unlikely that the mere production of a duplicate of a recording or reproduction of a duplication in any court proceeding will be admitted without presenting evidence of its accuracy and authentication.

The contemporaneous recordings and reproductions of information, conversations (chats), data, images, photos and videos are however, more susceptible to tampering, alteration, transposition, excision, falsification etc. The Evidence (Special Provisions) Act has recognised this situation and made it mandatory for a proponent to satisfy that the recording or reproduction was not altered or tampered with in any manner whatsoever, during or after the making of such recording or reproduced and that it was kept in safe custody at all material times and that sufficient precautions were taken to prevent such acts during the material period see- section 4(d).

Although the Evidence (Special Provisions) Act permits the Court to admit in evidence a transcript, translation or transformation or conversion of a recording or reproductions, in situations set out in section 4(3),[28] it is unlikely that a mere transcribed or transformed or translated text message or transformed video or photos or images would be lightly admitted in evidence without presenting evidence of authentication that such transcribed or transformed or translated work is genuine and not fabricated and that it came from the proper custody with the Transcribed Cell phone text messages. This rule may not sometimes be applicable when the social media evidence is admitted or conditions relating to admissibility are not in dispute (see- section 8 (1)-(2).

28 See, section 4(3)

The question that arises, whether the mere production of secondary evidence of these electronic recordings or reproductions in the form of printouts or screenshots, copies of photos, text messages, images and videos would be admissible without fulfilling the well-established evidentiary rules, namely, relevance, authenticity and exception to hearsay rule unless such evidence is admitted by the opposing party or the conditions relating to admissibility are not in dispute..

Evidentiary Principles

The law thus, requires a proponent to meet and satisfy the following three conditions in order to admit social media evidence in court proceedings and without such safeguards, the whole trial based on proof of contemporaneous electronic recording or reproductions thereof contained in social media networking maysometimes lead to a miscarriage of justice.

1. Social media evidence is relevant to the court proceedings at hand (relevance)
2. Social media evidence is authentic (authentication);
3. Social media evidence is not hearsay evidence (excluded from hearsay rule).

Relevance - It must be related to a factual or legal issue to be decided by the Courts

Social media evidence may be relevant to nearly every type of legal dispute as the millions of peoples,including litigants use social media websites such as Facebook, LinkedIn, WhatsApp, Twitter, Instagram Google and Myspace etc.[29] The litigants in the modern world have social media profiles and they naturally use them, communicating with others via such social media and taking pictures of themselves and publishing them all online that 'will have a tendency to make the existence of' material facts 'more or less probable.'[30]

The first principle or the first hurdle is that to be admissible, the social media evidence must be relevant and connected with the facts in issue and therefore, the facts in issue in a case can only be proved by adducing evidence which is relevant. Whatever the form of the evidence, whether testimonial, documentary, real, direct or circumstantial.[31] The Evidence Ordinance of Sri Lanka defines in section 3 the term 'relevant' as follows:

> "One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Ordinance relating to the relevancy of facts."

29 Lawrence Morales & David A. Canales, "Discoverability and Admissibility of Electronic Evidence", 79 The Advoc. (Texas) 116 2017, Westlaw, p.6

30 Ibid

31 Martin Hannibal, The Law of Criminal and Civil Evidence, 2002, p. 11.

The Evidence Ordinance defines in section 3 'facts in issue' that includes-

> "Any facts from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted denied in any suit or proceeding, necessarily follows."

Section 4 of the Evidence (Special Provisions) Act also refers to admissibility of contemporaneous recording or reproduction thereof, whether direct oral evidence of such fact would be admissible tending to establish that fact in any court proceeding. Thus, the social media evidence must be proved to be relevant for the admissibility of any such evidence in any court proceeding. The classic definition of relevance is provided by Lord Simon in *DPP v. Kilbourne* [32] as follows:

> "Evidence is relevant if it is logically probative of some matter which requires proof. I do not pause to analyze what is involved in 'logical proactiveness' except to note that the term does not of itself express the element of experience which is so significant of its operation in law, and possibly elsewhere. It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e. logically probative or disapprobative) evidence is evidence which makes the matter which requires more or less probative."

The evidence that is relevant is evidence that is necessary for the proof of the facts in issue in the case, which depends on the determination of the truth or falsity of any fact in question having assessed the probability of the existence of a fact in issue. Thus, the preliminary question to be decided by a trial court relating to the admissibility of evidence is whether such evidence is relevant to the facts in question in any court proceeding. All suchrelevant evidence is admissible, except otherwise provided and any evidence and which is not relevant is inadmissible. However, where the relevancy of evidence depends on the fulfilment of any other condition of fact, the Court may admit it upon the fulfilment of such condition. When the evidence is admitted as relevant, the proponent may also present further evidence to prove that it is authentic and support its weight or credibility or that it is not against hearsay rule.

Texas Evidence Rules

It is important to refer to Texas Rules of Evidence on the criteria to be applied in deciding the relevancy or irrelevancy of social media evidence in court proceedings. The evidence is relevant if (i) it has any tendency to make a fact more or less probable that it would be without the evidence; and (ii) the fact is of consequence in determining the action.[33] Relevant evidence is evidence that has any tendency to make the existence of any consequential fact, more or less probable that it would be without the evidence as set out in Rule 401.

32 *DPP v. Kilbourne* 1973) AC 729

33 Texas Rules of Evidence 401

The test of relevancy in the context of social media evidence was considered by the Court of Appeal in the case of Texas in *Alfredo Hernandez v. The State of Texas*[34], where it was emphasized that if the evidence is not relevant, it is not admissible and in deciding whether evidence is relevant, a trial could should ask whether a reasonable person, with some experience in the real world, would believe the evidence is helpful in determining the truth or falsity of any fact that is of consequence to the lawsuit.[35]

In the case of *Alfredo Hernandez v. The State of Texas,* the appellant argued in appeal *inter alia, that* the trial court erred in refusing to admit into evidence the complainant's Myspace page. The Myspace page, created by the complainant showed a picture of the compliant and her boyfriend at school taken sometime after the alleged criminal solicitation of a minor.[36] The appellant argued that (i) the picture and caption imply that, prior to her encounter with the appellant, she had knowledge of the sexual terms she accused him of using in the solicitation and therefore, the evidence is relevant because it tends to show the complainant actually participated in certain sexual activities; and (ii) she did not learn the words refereeing to those activities for the first time from anything appellant said to her.[37] He further argued that the Myspace page supports his position that the complainant fabricated the accusation against him.[38]

The Texas Court held that (i) the image on the Myspace page depicts the complainant smiling while her boyfriend has his arm around her and although the caption to the picture is vague, it offers no contextual support and is potentially misleading; (ii) even if the caption implies what appellant asserted it implies, that the complainant was sexually active prior to the solicitation, the picture was taken after the solicitation and the caption was posted after the solicitation; (iii) therefore, the caption has no specific relevance to the complainant's knowledge of sexual terms before her encounter with the appellant.[39] For those reasons, the Court held that the social evidence (Myspace) is irrelevant and the trial court was correct in refusing to admit it.

Justice Marion held that in deciding whether evidence is relevant, a trial court should ask whether a reasonable person, with some experience in the real world, would believe the evidence is helpful in determining the truth or falsity of any fact that is of consequence to the lawsuit.[40] Thus, in determining whether the evidence is relevant, the courts should examine the 'purpose' for which the social media evidence

34 *Texas in Alfredo Hernandez v The State of Texas,* 327 S.W.3d 200 (2010)
35 Lawrence Morales & David A. Canales, Note 1, p.6
36 Ibid
37 Ibid
38 Ibid
39 Ibid
40 Ibid

is being introduced. The Court should consider the material facts to be proved and whether there is a direct or logical connection between the actual social media evidence and the proposition sought to be proved by a party who relied on such evidence (See further- *Moreno v State and Layton v State*.[41])

The question of relevancy of social media evidence in personal injury cases arose in the of *Romano v. Steelcase,*[42] where the plaintiff sued the defendant seeking damages for personal injuries and the defendant sought access to the plaintiff's current and historical Facebook and Myspace pages and accounts, including all deleted pages and related information upon the grounds that the plaintiff has placed certain information on these social networking sites which is believed to be inconsistent with her claims in this action concerning the extent and nature of her injuries, especially her claims for loss of enjoyment of life.[43] The plaintiff objected on the basis of the personal nature (private). The trial court held that (i) the information sought by the defendant regarding the plaintiff's Facebook and Myspace accounts is both material and necessary to the defence of this action and/or could lead to admissible evidence. The Trail Court held that although the video is not a surveillance tape, as contemplated by CPLR 3101 they were not relevant to the claim of permanency of the injuries.

Onappeal, the Court rejected the plaintiff's privacy argument and observed that:

> "Both Facebook and Myspace are social networking sites where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking. Indeed, Facebook policy stated that "it helps you share information with your friends and people around you." And that "Facebook is about sharing information with others. Likewise, Myspace is a "social networking service that allows Members to create unique personal profiled online in order to find and communicate with old and new friends and as a global lifestyle portal that reaches millions of people around the world. Both sites allow the user to set privacy levels to control with whom they share their information."[44]

Having made such observations, the Court held that:

(i) the public profile page on Facebook showed her smiling happily in a photograph outside the confines of her home despite her claim that she has sustained permanent injuries and is largely confined to her house and bed;

41 *Moreno v State* 858 S.W. 2d 353 (Tex. Crim. App. 1993 and *Layton v State* 280 S.W.3d. 235 (Tex. Crim. App. 2009)

42 *Romano v. Steelcase*, Inc., 907 N.Y.S. 2d 650

43 Ibid

44 Ibid, paragraph 8

(ii) in the light of the fact that the public portions of the plaintiff's social networking sites contain material that is contrary to her claims and deposition testimony, there is a reasonable likelihood that the private portions of her sites may contain further evidence. Those may include information with regard to her activities and enjoyment of life, all of which are relevant to the defence of this action and/or could lead to admissible evidence;

(iii) the information sought by the defendant on the plaintiff's Facebook and Myspace, profile pages/accounts is both material and necessary to the defence of this action and/or could lead to admissible evidence; and

(iv) any order to prevent the defendant from accessing the plaintiff's private postings on Facebook and Myspace would be in direct contravention of the liberal disclosure policy in New York.Thus, the defendant's application to access to plaintiff's current and historical Facebook and Myspace pages and accounts, including any records precisely deleted or archived by the said operators was allowed.[45]

Is Social media evidence, privileged or an invasion of privacy or broad in scope?

The question whether the social media evidence is privileged or discovery of such evidence is an invasion of privacy of a person was considered in the case of *Davenport v State Farm Mutual Automobile Insurance Co.*[46]. The defendant in this personal injury case sought an order compelling the plaintiff to produce all photographs posted, uploaded or otherwise added to any social networking site or blogs since the date of the accident either by the plaintiff or others in which the plaintiff had been tagged or otherwise identified therein.

The plaintiff objected to the application on the ground that it was not reasonably calculated to lead to the discovery of admissible evidence when the request is overly broad and improbably invades the plaintiff's privacy. The plaintiff further argued that the defendant is on a 'fishing expedition' in regard to the plaintiff's Facebook page, seeking everything in her personal life.

Toomey J.denying the defendant's application on the basis that defendant has not made a sufficient predicate showing that the material it soughtwas reasonably calculated to lead to the discovery of admissible evidence held that:

(i) generally, social networking service (SNS) content is neither privileged nor protected by any right of privacy referring to *Tompkins v. Detroit Metropolitan Airport;*[47];

45 Ibid, paragraph 9

46 *Davenport v State Farm Mutual Automobile Insurance Co.*, No. 3:11-cv-632-J-JBT decided on 21.02.2012

47 *Tompkins v. Detroit Metropolitan Airport,* 2012 WL 179320

(ii) On the scope of the discovery request, however, 'must still be tailored', so that it appears reasonably calculated to lead to the discovery of admissible evidence, otherwise, the defendant would be allowed to engage in the proverbial 'fishing expedition', in the hope that there might be something of relevance in the plaintiff's social network service account;

(iii) the request for photographs sought production of 'every photograph' added to every SNS since the date of the accidentis overly broad on its face and not reasonably calculated to lead to the discovery of admissible evidence.

(iv) Nevertheless, the potential relevancy of such photographs outweighs any burden of production or privacy interest therein, and thus, the plaintiff was directed in part, to produce all photographs depicted her, taken, since the date of the accident and posted to an SNS, regardless of who posted them and added to any social networking site (SNS) since the date of the subject accident that depict the plaintiff, regardless of who posted them.[48]

On the same question of the relevancy and privilege of social media evidence US District Court of Michigan held in *Tompkins v. Detroit Metropolitan Airport*[49], that (i) although the material posted on a private Facebook page is not accessible to a selected group of recipient and not available for viewing by the general public, it is generally not privileged and is not protected by common law or civil law notions of privacy(ii) nevertheless, the defendant does not have a generalized right to rummage at will through information that the plaintiff has limited from public view unless it is shown that the requested information is reasonably calculated to lead to the discovery of admissible evidence; (iii) otherwise,, the defendant would be allowed to engage in the proverbial 'fishing expedition', in the hope that there might be something of relevance in the plaintiff's Facebook account.[50]

The District Court in *Tompkins v. Detroit Metropolitan Airport* further held that the request for the entire account, which may contain voluminous personal material having nothing to do with the case is overly broad and thus, the court has a discretion to limit a plaintiff to go 'fishing' and a trial court retains discretion to determine that a discovery request is too broad and oppressive.[51]

The irrelevance of social media evidence on the ground of its broad scope was again considered by the Florida Court of Appeal in *Root v. Balfour Beatty Construction LLC DRMP*,[52] which considered in a personal injury case the proprietary of an order compelling the production of Facebook pages. The Trial

48 *Davenport v State Farm Mutual Automobile Insurance Co.,* paragraphs 5-8
49 *Tompkins v. Detroit Metropolitan Airport,* Note 46
50 Ibid
51 Ibid
52 *Root v. Balfour Beatty Construction LLC DRMP*, 132 So. 3d. 867 (Fla. 2d DCA 2014),

Court ordered Root to produce *inter alia*, copies of postings on her Facebook account relating to electronically stored information relating to Root's mental health, stress complaints, alcohol use and relationship with other friends and family members.

The Court of Appeal held that as the plaintiff's claim was based on loss of consortium, the relevance of the requested information should have been limited to that related to the impact of the son's injury upon Root and other information is relevant to the should be confined to evidence related to the impact of the child's injury upon his mother and the defendant was entitled to discovery of the plaintiff's Facebook pages limited to the specific material that is relevant to the plaintiff's case and other information is irrelevant.[53] While quashing the discovery order, it held that if further developments in the litigation suggests that the requested information may be discoverable, the trial court may have to review the material in camera and fashion appropriate limits and protections regarding the discovery.[54]

In Nucci v Target Corporation,[55] the Trial Court in a personal injury case made order compelling the discovery of photographs from the plaintiff's Facebook account. The defendant sought discovery of the photographs on the ground that they are relevant as the plaintiff' placed her physical and mental condition at issue. The plaintiff objected on the ground that their disclosure of photographs would constitute an invasion of privacy and thus, prevented the general public from having access to her account and amounted to a fishing expedition.[56] The Trial Court ordered the plaintiff to provide copies or screenshots of all the photographs associated with her social networking site content. The Federal Court of Appeal of Florida rejected the privacy claim and held that the photographs posted on a social networking site are neither privileged nor protected by any right of privacy and the discovery order is narrower in scope and is calculated to lead to evidence that is admissible in court.[57]

The case law demonstrates that (i) social medial posting is neither privileged nor protected by any right of privacy and (ii) when the information contained in a social media site is reasonably calculated to lead to relevant and admissible evidence and (iii) that if the scope of the order is narrowly tailored, the discovery request should be allowed.

Authentication or identifying of Social Media Evidence (authorship)-genuineness of evidence

After the relevance is established, the second hurdle raised by social media is the question of authentication of evidence with respect to authorship, that is the

53 Ibid
54 Ibid
55 *Nucci v Target Corporation* 162 SO 3d 146 (Fla. 4th DCA 2015),
56 Ibid
57 Ibid

evidence that is sufficient to support a finding that the version of the claimant is genuine and credible and not fabricated. Thus, to prove authorship, it is necessary to present evidence beyond simply identifying the name appearing on a social media account. [58]

The US Federal Rule of Evidence 901 (a) provides that (a) in general, the requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that a matter in question is what its proponent claims. Thus, the proponent must satisfy the requirement of authenticating and identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Authentication of social media evidence can include: (1) testimony from a witness who states that the evidence is what it is claimed to be; (2) distinctive characteristics of the evidence itself, such as "appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances," that can authenticate the documentary evidence; or (3) evidence that shows that the documentary evidence is accurately produced through a process or system.[59] However, these are not the exclusive ways to authenticate social media posts.[60]

The authenticity of social media evidence is significant for a number of reasons. The social media account can be falsified or a legitimate account may be accessed by an imposer.[61] On the other hand, the nature of social evidence is such that traditional tools are not entirely helpful when attempting to authenticate evidence found on social media websites.[62] For example, the appearance and contents of an individual's Facebook or Twitter or WhatsApp profile may look completely different from they did the day or even an hour before, simply because the user and his contacts have the ability to revise, delete and add content.[63]

Moreover, it is also possible that statements that were ostensibly authored by the profile owner were in fact written by someone else as the user as any person who know the other person's social media password.[64] The authentication requirement is intended to address three related concerns, namely, (i) preventing a fraud on the court; (ii) preventing innocent mistakes and (iii) guarding against 'jury credulity.[65] Accordingly, unless the evidence is admitted orthe testimony of a witness is

58 *Rhenals v State 18 FLW Supp.* 973 (8th Cir. 2011)
59 *Parker v State* No. 38,2013 decided on 05.02.2014)
60 Ibid
61 *United States v Browne* 834 F 3d. 403 (3d. Cir. 2016).
62 Lawrence Morales, Note p. 28
63 Ibid
64 Ibid
65 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence 9:2 at 325-26 (3d ed. 2007)

uncontroverted and the cooperative witness testimony is available, the claimant must produce other evidence sufficient to support the claimant's case.[66]

The Evidence (Special provisions) Act has recognised 4 conditions before electronic evidence is admitted and one such condition related to authentication is section 4(d) which requires proof that the recording or reproduction was not altered or tempered with in any manner whatsoever during or after the making of such recording or reproduction or that it was kept in safe custody at all at all material times and that sufficient precautions were taken to prevent the possibility of such recording or reproduction being altered or tempered with during the period in which it was in such custody (chain of custody).

Admissions of social media evidence

It is important to note that section 8 of the Evidence (Special provisions) Act relates to admissions and provides that:

(a) in any proceeding, it shall not be necessary for any party to tender any evidence of any fact which is admitted by the opposite party;

(b) It shall not be necessary for the party tendering evidence in respect of contemporaneous recording or reproduction to show the conditions set out in section 4 relating to the admissibility of such evidence if the conditions relating to admissibility are not in dispute;

Thus, when the social media evidence is admitted by the opposing party or the conditions relating to admissibility are not in dispute, it shall not be necessary for the party tendering such evidence to show the conditions set out in section 4 of the Act. Unless, the social media evidence is admitted or conditions relating to admissibility are not in dispute, the mere producing screenshotor printouts of social media information may not be sufficient to admit such evidence and the proponent is required to offer other circumstantial evidence and establish that the defendant really posted or sent the said posting or message and it has not been tempered with during the relevant period in which it was in custody. The question that now arises is as to who and the manner in which social media evidence could be authenticated in litigation.

First-hand & Circumstantial social media evidence to prove authenticity

Unless the social media evidence is admitted to be guanine evidence created by the author and the conditions relating to admissibility are not in dispute, the mere presentation of evidence by way of a printout or screenshot that the social media posts

66 White Paper, Overcoming legal Challenges to the Authentication of Social Media Evidence, p.2 x/ com/wp-content/upload/1019/08/XDiscovery_whitepaper_social_Media.pdf

and messages came from a social media account bearing the defendant's name by a person who has no direct knowledge of the creation of such social media evidence is not enough to allow the evidence to be admitted.[67] Then, the authentication of electronic evidence requires more than mere confirmation that the number or address belonged to a particular person.[68]

First-hand knowledge

The authentication of social media evidence is two-fold. First-hand knowledge and extrinsic evidence. The first method of authentication of social media evidence is timeless and elementary where the proponent produces a witness with first-hand knowledge of the creation of a social media post.[69] The proponent may elicit testimony from the author of the post that he or she created the post or another witness who saw the author create the post, thus possesses direct knowledge of authorship.[70]

In State of New Jersey v. Terri Hannash,[71] New Jersey Courts have held that the social media evidence in the form of tweets had been properly authenticated where (i) the tweet suggested the author was a person with 'intimate knowledge' of the incident (ii) the tweet was sent in reply to a previous communication and (iii) testimony was presented that the tweet displayed the poster's picture and the witness was familiar with poster's Tweeter handle.[72]

However, in *U.S. v. Barnes*,[73] the appellants were chargedwith and found guilty inter alia of conspiracy to possess with intent to distribute 500 or more grams of methamphetamine less than 50 kilograms of marijuana and some amount of cocaine and possession go firearms. The Fifth Circuit Court of Appeals considered the question whether the State sufficiently authenticated certain text and Facebook messages through a witness with first-hand knowledge during a drug trafficking trial. The defendant Hall argued that certain Facebook and text messages attributed to him at trial were introduced into evidence with insufficient authentication. The text messages and Facebook related to drug transactions between Hall and the witness. The State sought to introduce Facebook posts and text messages attributed to the defendant by calling a witness who testified that she had seen Hall use Facebook and she recognised his Facebook account and the Factbook messages matched Hall's manner of communicating. She further testified that Hall could send text messages

67 White Paper, Note 41, p. 3
68 Ibid
69 Bronwyn Miller and Brian Barakat, A Prolific Landscape: The Admissibility of Social media Postings' 92- APR Fla. B.J.8 Florida Bar Journal, p. 3
70 Ibid
71 *State of New Jersey v. Terri Hannash* 448 N.J.Super 78 (App. Viv. 2016).,
72 Ibid
73 *U.S. v. Barnes*, 803 F 3d. (5th Cir. 2015),

from his cell phone and that she has spoken to Hall on the phone number that was the source of the texts and the content of the text messages indicated that they were from Hall.[74]

Under such circumstances, the Court of Appeal held that(i) although the witness was not certain that Hall authored the messages, conclusive proof of authenticity is not required for the admission of disputed evidence; (ii) the testimony of witnesses was corroborated by a similar number of witnesses and thus, Facebook and text messages were properly admitted in evidence.[75] The case demonstrates the fact that the prosecution in a social media case need not present a witness who saw the digital evidence penned and Instead, the witness may discuss having seen prior postings by the author of the account at issue and stylistic and content cues indicating authorship.[76]

Extrinsic Evidence

When social media evidence, however, cannot be authenticated by a knowledgeable person, it may be authenticated by other evidence including circumstantial evidence.[77] For example, Maryland Rule[78] provides that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Moreover, Md. Rule 5-901 (b) (4) further provides, by way of illustration, that "circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics," may be sufficient to establish "that the offered evidence is what it is claimed to be."

Federal Rules on authenticating or identifying evidence

US Federal Rule 901 provides that to satisfy the requirement of authenticating or identifying an item of evidence the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is and provides examples that satisfy the requirement of authentication:

(1) Testimony of a Witness with Knowledge**.** Testimony that an item is what it is claimed to be.

(2) Nonexpert Opinion About Handwriting**.** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it, that was not acquired for the current litigation.

74 Ibid
75 Ibid
76 Bronwyn Miller and Brian Barakat, Note 40
77 Federal Rules, subsection (b)(4). 901(b) (4)
78 Maryland Rule 5-901(a)

(3) Comparison by an Expert Witness or the Trier of Fact**.** A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) Distinctive Characteristics and the Like**.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion, identifying a person's voice-whether heard first-hand or through mechanical or electronic transmission or recording based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. In a telephone conversation, evidence that a call was made to the number assigned at the time too:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records**.** Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) Evidence About Ancient Documents or Data Compilations**.** For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System**.** *Evidence* describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Statute or Rule**.** Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Mere production of a printed copy of social media website, screenshots is insufficient-

It is important now to consider the issue of authenticating of social media posts to establish authorship in the context of instructive and detailed cases that have laid down rules in regard to the properly and improperly collecting social media evidence for court and its admissibility. The courts in the United States have held that the mere

production of a printed copy of a social media website is insufficient to authenticate social media evidence.

Facebook screenshots and LinkedIn profile pages

In the case of *Linscheid v Natus Medical Inc.*,[79] It was held that that when printout of LinkedIn profile page is not authenticated by declaration of individual who printed the page from the Internet is not sufficient to be admitted into evidence. In *Moroccanoil v. Marc Anthony Cosmetics Inc.*,[80] the federal district court ruled Facebook screenshots are inadmissible when the defendant in a trademark in Cosmetics, offered the screenshots without supporting circumstantial information. The court referred to Internet Specialties W., *Inc. v. ISPWest*,[81] in which the court ruled: "Defendant's argument, that web pages could be 'authenticated' by the person who went to the website and printed out the home page, is unavailing."[82]

Transcribed cell phone text messages

In Commonwealth v. Koch[83], the Superior Court of Pennsylvania examined the question whether cell phone messages had been appropriately authenticated prior to their admission into evidence, In the said case, the appellant was convicted of possession with intent to deliver (PWID) (marijuana) and possession of a controlled substance (marijuana) as an accomplice. The Commonwealth sought the admission of text message retrieved from a cell phone taken during the execution of a search warrant on the defendant's residence. During the search, the Police found two cell phones, marijuana, scales, a bong, pipes for smoking marijuana and other drugs. The defendant admitted to owning one of the cell phones. 13 text messages retrieved from the defendant's cell phone, the content of which also indicated drug scale activity.

The appellant raised two issues. (i) there was no sufficient evidence to prove the requisite elements of possession with intent to deliver a controlled substance; and (ii) the trial court erred in admitting text messages and transcripts of text messages where the text messages were not authenticated as the author of the text messages could not be ascertained and were not offered for the truth of the matter asserted.[84]

At the trial the detective who was involved in the search testified that he transcribed the text messages and identifying information from the cellular phone belonging to the defendant. He said that the text messages were drug-related from

79 *Linscheid v Natus Medical Inc.* 2015 WL 1470122 at 5-6 (N.D. Ga. Mar. 30,2015)
80 *Moroccanoil v. Marc Anthony Cosmetics Inc*, 57 F Supp. 3d 1203
81 Internet Specialties W., *Inc. v. ISP West* 2006 WL 4568796
82 Ibid
83 *Commonwealth v Koch* 39, A 3d 996, 1005 (Pa. Super. 2011)
84 Ibid

those that were just general communication and that the text messages together with pipes and bongs, also indicated possession. The Court held that there was sufficient evidence to sustain the conviction and affirmed the conviction on PWID and possession.

The remaining challenge to the admissibility of the text message evidence was examined by the Superior Court. The detective, however, admitted that he could not confirm that the defendant was the author of the text messages and that they were not clearly written by the defendant. Koch Court, which ruled that:

(i) 'an authentication of electronic communication, like documents requires more than confirmation that the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required;

(ii) the testimony of the detective was insufficient to authenticate the text messages in question and there was no testimony from any person who had sent or received the text messages, nor any contextual clues in the drug-related text messages that tended to reveal the identity of the sender and therefore, the admission of the text message was an abuse of the Court's discretion;

(iii) Often, more than one person uses an e-mail address and accounts can be accessed without permission and the mere fact that an e-mail bears a particular e-mail address is inadequate to authenticate the identity of the author and thus, the courts demand additional evidence.[85]

Photographs, Images, screenshots and chat messages

In *Commonwealth v. Mangel*,[86] the State charged the defendant with aggravated assault and harassment and sought, in a pre-trial hearing, to introduce evidence of an image of bloody hands (photographs) posted to Facebook and screenshots of certain pages of a Facebook accounts consisting of Mangel's undated online and mobile device 'chat message allegedly authored by the defendant.The prosecution also sought to introduce a Facebook screenshot wherein a photograph of bloody hands.The Facebook account at issue bore the defendant's name, hometown and high school, which the prosecution argued was sufficient to authenticate the proffered evidence.

The issues on appeal were whether the Commonwealth provided adequate extrinsic evidence to support the authenticity of Facebook records and whether the Commonwealth provided adequate extrinsic evidence to support the authenticity of the Facebook records. The third question was what proof is necessary to authenticate social media evidence. The appellate court held that (i) Commonwealth presented no evidence, direct or circumstantial, tending to substantiate that Mangel created the

85 Ibid

86 *Commonwealth v. Mangel* 181 A.3d 1154 (2018)

Facebook account in question, authored the char messages or posted the photograph of bloody hands (ii) relying on the Koch decision, the mere fact that the Facebook account in question bore Mangel's name, hometown and high school was insufficient to authenticate the online and mobile device chat messages as having been authored by Mangel; (iii) Moreover, there were no contextual clues in the chat messages that identified Mangel as the sender of the messages.[87]

The Superior Court of Pennsylvania addressed the standard for admissibility of social media posts and disallowed into evidence a social media post presented by the prosecution as a simple screenshot as follows:

"Mangel did not himself state at any time that the Facebook account in question was his own personal Facebook account and/or that he authored the posts and messages on the Facebook account, and the Commonwealth did not introduce subsequent testimony from any other knowledgeable party to substantiate that the Facebook page (and, by association, the posts and messages contained therein) belonged to Mangel. Moreover, the Commonwealth did not obtain the username or password for the Facebook account to confirm its authenticity. Although the Commonwealth did produce evidence allegedly linking Mangel to the Facebook page in question, including a name, hometown, school district and certain pictures, this information has been held to be insufficient to connect a defendant to posts and messages authored on a Facebook page. In fact, following a search on Facebook for the name of Tyler Mangel by defense counsel, five (5) Tyler Mangel Facebook accounts appeared in response to the search, one of which has the same hometown of Meadeville, Pennsylvania, which contradicts Detective Styn's testimony that only one (1) Tyler Mangel Facebook account appeared during her search….

A thorough review of the Facebook posts and messages themselves raises specific issues. First, the evidence presented by the Commonwealth does not indicate the exact time the posts and messages were made. The incident which brought about the instant criminal charges occurred allegedly on June 26th, 2016, according to the Criminal Information. The lack of a date and timestamps raises a significant question regarding the connection of the posts and messages to the alleged incident on June 26th, 2016. Furthermore, the Tyler Mangel who allegedly authored the Facebook posts and messages does not specifically reference himself in the incident on June 26th, 2016; rather, other individuals, many of them who are not directly involved in the instant criminal case, reference a Tyler Mangel in response to a post made and in subsequent conversations about an alleged assault. Moreover, the Facebook posts and messages are very ambiguous, containing slang and other nonsensical words with Like replies, and do not specifically and directly relate to the alleged incident on June 26th, 2016. Finally, the Commonwealth did not produce evidence as to the distinct

87 Ibid

characteristics of the posts and messages which would indicate [that] Mangel was the author."[88]

The court considered the proper standard in determining whether the Commonwealth had presented sufficient direct or circumstantial evidence that Mangel had authored the Facebook messages in question and held that (i) the Commonwealth presented no evidence, direct or circumstantial, tending to substantiate that Mangel created the Facebook account in question, authored the chat messages, or posted the photograph of bloody hands; (ii) the mere fact that the Facebook account in question bore Mangel's name, hometown and high school was insufficient to authenticate the online and mobile device chat messages as having been authored by Mangel. Moreover, there were no contextual clues in the chat messages that identified Mangel as the sender of the messages.[89]

The important thing that was emphasised was that that circumstantial evidence, which tends to corroborate the identity of the sender, is required"[90] and that the mere Facebook exhibit offered by the Commonwealth was not relevant regarding the authentication of the Facebook posts and messages. The case law clearly demonstrates that merely presenting evidence that the posts and messages came from a social media account bearing the Defendant's name was not enough to authenticate and allow social media evidence in courts and the "authentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person who sent or received such messages.

Best circumstantial evidence to establish authenticity & factors Metadata as best circumstantial evidence

The courts have recognised, however, that circumstantial evidence, which tends to corroborate the identity of the sender, is required. Is Metadata[91] which is a key form of circumstantial evidence. For example, the Mangel court noted the conspicuous omission of two key metadata items: the date the post was created, and account ID and thus, circumstantial evidence, which tends to corroborate the identity of the sender, is required."[92]

88 Ibid, paragraph 20-21

89 Ibid, paragraph 22

90 White Paper, Overcoming Legal Challenges to the Authentication of Social Media Evidence P. 3

91 The metadata is basic information about other data such as author, date created and data modified and file size which makes it easier to locate a specific document files and images, videos, spreadsheets and webpages.
Metadata for webpages contain descriptions of the page's contents as well as keywords linked to the content (Margaret Rouse Whatis.com

92 White Paper, Overcoming Legal Challenges to the Authentication of Social Media Evidence Note -41, P. 3

The successful application and admission of circumstantial evidence in the form of metadata, including date stamps and user account names was emphasised in the case *Tienda v. State of Texas*,[93] During the trial of a criminal court case, prosecutors introduced pictures and comments obtained from an account attributed to Tienda. The defendant objected to the admission of these materials on the basis that their authenticity and his authorship had not been established.

The prosecution argued that authenticity was shown by the distinctive characteristics of the materials to support a finding that the Myspace pages belonged to the appellant and that he created and maintained them. The trial court agreed with the prosecution. The Court of Criminal Appeals was of the view that there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be - Myspace pages, the contents of which the appellant was responsible for.[94] Thus, the Court of Appeal ruled that although many scenarios existed where a great conspiracy took place to create a page under the defendant's name, all the circumstantial facts taken together were so compelling as to make them admissible. Thus, the Myspace evidence was admitted.[95]

Two US Approaches for the authentication of social media evidence

In the application of authentication evidence, there are two approaches adopted by two different Courts in the United States-the Maryland Approach and the Texas approach on the authentication of social media evidence

Maryland Approach

The Maryland approach seems to be a higher standard for social media authentication, which is best exemplified by the Maryland Court of Appeals' decision in *Griffin v. State*.[96] It was a case of murder and assault. The prosecution relied on a printout of portions of a Myspace profile purporting to be that of Griffin's girlfriend. Although the girlfriend testified at the trial, the state did not attempt to authenticate the Myspace profile as genuinely hers through her testimony. Instead, the lead investigator testified that the Myspace profile identified itself as being that of 'Sistasouljah' having the same date of birth as the girlfriend.

Also posted on the profile was a photographic image of the defendant with his girlfriend. The State argued that the date of the birth and the photograph provided sufficient indicia of authentication to justify admission of other postings on the Myspace profile that amounted to threats against the State's principal witness against

93 *Tienda v. State of Texas,* No. PD–0312–11 (2012)
94 Ibid
95 Ibid
96 *Griffin v. State* 419 Md. 343, 19 A 3d. 415 (2011),

the defendant. The Court said that 'anyone can create a Myspace profile at no cost and that anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's uses name and password recognised that social media postings may be readily be authenticated, explicitly identifying three non-exclusive methods.[97]

The Maryland Court of Appeal in *Griffin v State* held that (i) the pages allegedly printed from Griffin's girlfriend's Myspace profile were not properly authenticated as the State failed to properly authenticate Barber's post and thus did not adequately link both the profile and the "snitches get stitches" posting to Barber; (ii) the trial court "failed to acknowledge the possibility or likelihood that another user could have created the profile in issue or authored the 'snitches get stitches' posting."[98]

The Maryland Court of Appeals recognised that such posting may readily be authenticated, explicitly identifying the following three non-exclusive methods and to properly authenticate social media posts, the Court held that the admitting party should follow the following tests:

First, the proponent could present the testimony of a witness with knowledge, or in other words, '**ask the purported creator if she indeed created the profile and also if she added the posting in question**(if the state offers the evidence to be authenticated and the purported author is the defendant, this question will not arise);

Second, the proponent could offer the results of an examination of the internet history or hard drive of the person who is claimed to have created the profile in question to determine whether the person's personal computer was used to originate the evidence at issue;

Third, the proponent could produce information that would link the profile of the alleged person from the appropriate employee of the social networking website corporation.

The appellate court noted that rule 901 states that circumstantial evidence "birth date and location, were not sufficient "distinctive characteristics" on a Myspace profile to authenticate its printout, given the prospect that someone other than the alleged author could have created the site and accessed and post the messages in question…..[99]

The Maryland approach involves courts setting "an unnecessarily high bar for the admissibility of social media evidence, whereas Texas approach utilizes a different method, "determining the admissibility of social media evidence based on whether there was sufficient evidence of authenticity for a reasonable jury to conclude that the evidence was authentic."[100] It seems that in Maryland Approach, the courts are

97 Ibid
98 Ibid
99 Ibid paragraph 34
100 Honorable Paul W. Grimm's 2013 article, Authentication of Social Media Evidence, supra Note 2

required to satisfy that the defendant sceptical of social media evidence, finding the odds too great that someone other than the alleged author of the evidence was the actual creator and the proponent must therefore affirmatively disprove the existence of a different creator in order for the evidence to be admissible.[101]

The Texas Approach

On the other hand, the Texas approach seems to be a moderate standard for social media authentication, which is best exemplified by the Court of Criminal Appeals of Texas case, *Tienda v. State*[102] In Tienda, the state introduced various circumstantial evidence, namely key metadata fields from the defendant's Myspace page such his names and account information associated with the profiles, photos posted on the profiles, comments and instant messages linked to the accounts, and two music links posted to the profile pages. The defendant objected to the admission of these evidence on the basis that their authenticity had not been established.

The State presented evidence to establish that the username was consistent with the appellant's nickname and the account holder purported to live in Dallas and the email address registered to the account created related to the appellant's nickname. The state introduced multiple photos "tagged" to these accounts because the person who appeared in the pictures at least resembled the appellant. The person is shown displaying gang-affiliated tattoos and making gang-related gestures with his hands. On appeal, the Court of Criminal Appeal of Texas said that

> "Like our own courts of appeals here in Texas,jurisdictions across the country have recognized that electronic evidence may be authenticated in a number of different ways consistent with Federal Rule 901 and its various state analogy. Printouts of emails, internet chat room dialogues, and cellular phone text messages have all been admitted into evidence when found to be sufficiently linked to the purported author so as to justify submission to the jury for its ultimate determination of authenticity. Such prima facie authentication has taken various forms. In some cases, the purported sender actually admitted to authorship, either in whole or in part,or was seen composing it.In others, the business records of an internet service provider or a cell phone company have shown that the message originated with the purported sender's personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have had access to the computer or cell phone…"[103]

101 Wendy Angus-Anderson Authenticity And Admissibility Of Social Media Website Printoutsp. Duke Law journal, Vol. 14,37

102 *Tienda v. State* 358 S.W. 3d. 633 (Tx. App 2012)

103 Ibid, paragraph 17

The Court held that although the defendant argued that the state did not properly authenticate the Myspace profile or the individual posts to attribute them to the defendant, the state had sufficiently authenticated the defendant's Myspace posts and pictures by presenting sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be-Myspace pages the contents of which the appellant was responsible.[104]

The evidence of circumstantial evidence in the context of the two approaches was further emphasised in the case of *Parker v State*[105] which distinguished the two Maryland and Texas approaches and held having rejected the Maryland approach that the Texas approach is the most practical approach to be adopted on the question of authentication of social media evidence.

In *Tiffany Parker v State of Delaware*, Parker was convicted of Assault Second Degree. Parker claims that the Superior Court erred in admitting statements posted on her Facebook profile. The trial Court adopted the Texas approach and found that Parker's social media post was sufficiently authenticated by circumstantial evidence and by testimony explaining how the post was obtained. On appeal, Parker claimed that social media evidence requires greater scrutiny than other evidence and should not be admitted unless the trial judge is convinced that the evidence has not been falsified.

The Supreme Court of Delaware disagreed and held that the Texas approach better conforms to the requirements of Rule 104 and Rule 901 of the Delaware Rules of Evidence, under which the jury ultimately must decide the authenticity of the social media evidence. A trial judge may admit a relevant social media post where the proponent provides evidence sufficient to support a finding by a reasonable juror that the proffered evidence is what the proponent claims it to be. It observed:

> "Although we are mindful of the concern that social media evidence could be falsified, the existing Rules of Evidence provide an appropriate framework for determining admissibility. Where a proponent seeks to introduce social media evidence, he or she may use any form of verification available under Rule 901-including witness testimony, corroborative circumstances, distinctive characteristics or descriptions and explanations of the technical process or system that generated the evidence in question-to authenticate a social media post. Thus, the trial judge as the gatekeeper of evidence may admit the social media post when there is evidence 'sufficient to support a finding' by a reasonable juror that the proffered evidence is what its proponent claims it to be.[106]

104 Ibid
105 *Tiffany Parker v State of Delaware*,No. 38, 2013. Decided: February 05, 2014,
106 Ibid, Texas approach, paragraph 16

Accordingly, the Court while endorsing the Texas approach in *Parker v State* held that the trial court has correctly exercised discretion in admitting the social media evidence in accordance with the Delaware Rules of Evidence. Thus, where a proponent seeks to introduce social media evidence, he or she is entitled to use any form of relevant and admissible circumstantialevidence including witness testimony, documentary evidence, distinctive characteristics or descriptions and explanations of the technical process or system that generated the evidence in question and combinations thereof to authenticate a social media posts, text messages, images, videos or photos etc.[107]

It is, however, for the judge to evaluate such circumstantial evidence and determine as a gatekeeper of evidence to be satisfied himself the requirements in section 4-5 of the Evidence (Special Provisions) Act and admit the social media evidence to support the requirement of authentication.

Examples of first hand and circumstantial evidence that can be presented to establish a connection between the author and the social media evidence in a court proceeding include[108]:

1. Testimony from the purported creator of the social media network profile and related postings;
2. Testimony from persons who saw the purported creator establish or post to the page;
3. Testimony of a witness that he/she often communicates with the alleged creator of the page through that account;
4. Expert testimony concerning the results of a search of the social media accounts holder's computer hard drive
5. Testimony about the contextual clues and distinctive aspects in the messages that tend to reveal the identity of the purported author;
6. Testimony regarding the account holder's exclusive access to the originating computer and social media account;
7. Information from the social media network that links the page or post to the purported author;
8. Testimony directly from the social networking websites that connects the establishment of the person who initiated it;
9. Expert testimony regarding how social media network accounts are assessed and what methods are used to prevent unauthorised access;

107 Ibid, paragraph 16

108 Hon. Paul W. Grimm, et al, Best Practices for Authenticating Digital Evidence, West Academic Publishing 2016 (Drinker Biddle &Reath, Authenticating Social Media Evidence at Trail www.lexology.com

10. Production pursuant to a document request;
11. Whether the purported author knows the password to the account and how many others know it as well;
12. That the page or post contains some of the factors previously discussed as circumstantial evidence of authenticity of texts, emails, etc. including:
    (a) non-public details of the purported author's life;
    (b) other items known uniquely to the purported author or a small group including him or her;
    (c) references or links to, or contact information about, loved ones, relatives, co-workers, and other close to the purported author;
    (d) photos and videos likely to be accessed by the purported author;
    (e) biographical information, nicknames etc. not generally accessible;
    (f) the structure or style of comments that are in the style of the purported author.

Hearsay Exception

The final requirement to admissibility of social media evidence is that the social media evidence should fall within hearsay exceptions.Exceptions to hearsay are found mainly in sections 17-23, 24 to 31, 32(1), 32(2)-34, 32(3), 32(4), 32(5), 32(6), 32(7), 32(8), 33 of the Evidence Ordinance of Sri Lanka. Hearsay evidence is defined as 'evidence of a statement made to a witness by a person who is not himself called as a witness and such evidence may not be hearsay evidence and may be admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. (*Subramaniam v DPP*.[109])

It seems, however, certain social media real evidence such as photographs, and silent video (e.g. CCTV camera footage) from social media account cannot be regarded as statements made by a human person and thus, they may not constitute hearsay evidence.[110] However, when such photographs and silent video contains statements made by a human person, the hearsay rule may be applicable.[111] For example, *Smith v. State*[112] was a murder case involving the death of a 17-month-old child named Ally. On appeal, the defendant argued that the trial court erred in admitting copies of Facebook communications between the defendant and the victim's mother, Jenny Waldrop.

109 *Subramaniam v DPP* (1956 1 WLR 965 at 970)
110 Bronwyn Miller & Brian Barakat, Note 40, p. 5
111 Ibid
112 *Smith v. State* Miss. Ct. of Appeals No. 2012-KA-00218-COA, June 4, 2013)

During Waldrop's testimony, the State offered evidence of Facebook messages between Smith and Waldrop. (1) copies of two Facebook messages between Waldrop and Smith and (2) a copy of an email automatically generated and sent the email contained the text of a Facebook message from Smith to Waldrop. The defendant also objected that the two messages were hearsay. The defendant claimed that the documents were not authenticated and were hearsay. The defendant further objected that the email was "double hearsay" and the email notification and the message therein were also hearsay.The court considered the question whether the content of the messages would be considered to be hearsay and, thus, inadmissible under Rule 802.[113]

The Court held that two of the three messages were sent by Smith and these messages were Smith's own statements, and both statements are therefore not hearsay under Mississippi Rule of Evidence 801 (d) (2) (A), because they are admissions by a party-opponent. The content of the messages sent by Smith are not hearsay, as defined by the rule, and were admissible in evidence.[114]

Conclusion

As discussed in this article, the admissibility of social media postings, text messages, chats and content (videos) as evidence depends on the fulfilment of traditional evidentiary principles such as relevance, authentication and hearsay exception. Some evidentiary principles have been incorporated in the Evidence (Special provisions) Act in particular, section 4 which relates to contemporaneous recording or reproductions. Unless, social media evidence is admitted or conditions relating to admissibility are not in dispute to the satisfaction of the court, such evidence may not be admitted in evidence unless proponent satisfies the three hurdles to admissibility either by first-hand evidence or circumstantial corroborative evidence.

Although the admissibility of social media evidence is not specifically referred to in the Evidence (Special Provisions) Act, the rules set out in section 4 together with the traditional principles of evidentiary rules are sufficient to address issues regarding the admissibility of social media evidence in Sri Lanka. It remains to be seen how Sri Lankan Courts are able to address complex issues such as authentication of social media evidence in particular, by following the principles, best practices and norms followed by the US Courts.

113 Ibid
114 Ibid

SUBJECT TO PROOF

Wickum A. Kaluarachchi
Judge of the High Court*

The establishment of a fact by the use of evidence call "Proof". Judges make decisions on proved facts. Most difficult task of a Judge who writs a Judgment is to identify proved facts and unproved facts and to ascertain whether it has been proved beyond reasonable doubt or balance of probabilities. Thousands of disputes are forwarded to Judges to determine so many issues in this way.

Introduction

In adducing evidence in courts, there are some items of evidence that need proof. Documentary cases especially in Civil actions, the three words, "Subject to Proof" are often heard. When a document is about to mark, the counsel for the opposing party objects to whatever document and request to accept the document subject to proof. This is the normal practice in our courts.

However, the situation in some other countries are not so. Countries like India, has now changed these traditional systems of law. According to the reforms of the Civil Procedure in India, mere denial in not enough. Denial should be specific. For an example, if the defendant says that a signature in a document is not his signature, he has to submit his signature to court. In our country, ground for objecting to most of the documents is that they are unaware of the document. In India, when you object to a document you have to be specific whether you object for the signature, author or whether the contents are wrong or whether it is a forged document. In addition, the party objects, has to submit his counter version. After taking these steps by the opposing party, only the objected element has to be proved. Also, if it is found at the end that the objection was baseless, very heavy costs would be ordered.

Unfortunately, our laws have not developed according to the needs of the time. Therefore, we have to act within the present existing legal framework. However, by

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the amendment to the Civil Procedure Code, No. 8 of 2017 the law has developed to a certain extent. Similar provision to India has been brought to our Civil Procedure Code by the said amendment. Section 440C(2) states that "Where the genuineness of any document is impeached by a party, such party shall state the reason for impeaching its genuineness andthe court shall record the same."

In addition, similar provision to India in respect of costs has also been introduced. Section 440C(3) reads as follows: "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".

These amendments are vital to prevent unnecessary delay and to expedite hearing of civil cases.

Role of the Judge in controlling legal proceedings

It is to be seen that even within the existing laws, some Judges do not take much interest in controlling legal proceedings. It is to be noted that it is not expected from a trial Judge just to sit on the bench until lawyers proceed with the case and write the judgement at the conclusion of the case. When you take the pen to write the judgment especially in civil cases, then only you realise that the proceedings are filled with documents submitted subject to proof. Then the Judge has to go on voyage of discovery to ascertain which document had been proved, which document had not been proved, which document has to be proved and which document need not be proved. To avoid this unnecessary hazard, the judge has to control proceedings from the beginning.

When we discuss about controlling proceedings, I intend to focus your attention especially on documents tendered in civil actions subject to proof because in criminal actions this would not be a serious problem.Firstly, the trial judge should be able to decide then and there which document has to be proved and which document need not be proved. It is pertinent to bear in mind that as far as possible documents should be accepted without subject to proof. At the same time judges should take into account that this control has to be done within the provisions of the law.

Recent amendment to the Civil Procedure Code to accept certain document without further proof

Recent amendment No. 08 of 2017 to the civil procedure code provides room to accept certain documents without further proof.

Section 440B reads as follows:

440B. (1) Where a party to any proceedings in a civil court requires for the purposes of such proceedings a certified copy of any document, or of any register either deposited or maintained or kept in the custody, (or a certified copy of any register or book) maintained in the ordinary course of business, at any Public Office, Public Corporation, Provincial Council or Local Authority in the ordinary course of business, the Judge conducting the Pre-Trial hearing or the court, as the case may be may upon application made in that behalf by a party by motion supported by an affidavit affirming the relevancy of such certified copy in the proceedings direct the officer in charge of such office, Public Corporation, Provincial Council or Local Authority, as the case may be to issue such certified copy. Upon production of the order of court or Judge conducting the Pre-Trial hearing and upon payment of the relevant charges, such party shall be entitled to obtain a certified copy of the document concerned.

440B(2) A certified copy obtained by a party under subsection (1) from any Public Office, Public Corporation, Provincial Council or Local Authority, relevant to any proceeding by such party may, without an officer from the Public Office, Public Corporation, Provincial Council or Local Authority concerned being called as a witness, be produced in such proceeding in proof of the fact that such document was made or such document is in the custody of such Public Office, Public Corporation, Provincial Council or Local Government Authority concerned and **be prima facie proof** of the contents therein:

So, the certified copies of the documents mentioned above could be accepted without further proof. However, if the court feels that the genuineness of the document has to be proved, the proviso to the section provides room as follows:

Provided, however that the court may of its own motion or upon application made by any party to such proceedings require the production of the original document and permit any such party to examine it or require that the officer who is in charge of keeping or maintaining such document be summoned as a witness.

Nevertheless, the trial judge should be vigilant in acting under the proviso. Granting permission to examine the original or summoning a witness is a discretion of the Judge. If there is no real necessity, it is not necessary to act on the proviso, otherwise the applications to bring originals and summoning witnesses to testify will flow continuously. Then there would be no purpose of this amendment.

Further assistance to shorten the proceedings have been given by the section 440C(1) of the amendment. It says. "Notwithstanding anything to the contrary in this 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 Office, 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".

If the opposing party impeaches a document sub sections (2) and (3) of the section 440C is applicable and if the document is impeached without a valid reason, costs has to be paid. This is indeed a very effective method of controlling proceedings. The trial Judge should make use of these important provisions of law.

Dealing with the application "Subject to Proof"

In addition, when a counsel objects and make an application to accept document subject proof, Judge could always ask the reason for objection. Most of the occasions you will find that there is no acceptable reason. Although it is found that the objection is baseless, the judge would find difficult just to reject the application because it could be requested to accept the document subject to proof on the ground that the party objects does not know about the document. Then what normally does is accepting the document subject to proof (ඔප්පු කිරීමට යටත්ව භාර ගතිමි.) However, at the end of the trial, you would find that there is no necessity of proving the document because it is not relevant to determine the issues of the case. Then, what would be the solution?

As we all know, in the caseof *Sri Lanka Ports Authority and another V. Jugolinja Boat-East* (1981 1 Sri L.R. 18) and in the case of *Balapitiya Gunananda Thero V. Talalle Methananda Thero* (1997 2 Sri L.R. 10) it was held "where a document is admitted subject to proof but when tendered and read in evidence at the close of the case is accepted without objection, it becomes evidence for all purposes of the case". However, one can pose the question that who accepted the document subject to proof. The court accepted. So, even though the opposing party did not raise the objection at the closure of the case, it is an issue whether the court can rely upon the document without proving when the court itself accepted the document subject to proof.

Recently, the Supreme Court focused the attention to this issue. In *Dadallage Anil Shantha Samarasinghe V. Dadallage Mervin Silva and another* – SC Appeal 45/2010 (Decided on 11.06.2019), it was observed that if the principle enunciated in the case of Jugolinja Boal-East (supra) is accepted in respect of deeds, even a fraudulent deed marked subject to proof can be used as evidence, if it is not objected by the opposing party at the close of the case of the party which produced it. In the said Supreme Court case, it was held that when a document which is required to be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance is produced in evidence subject to proof but not objected to at the close of the case of the party which produced it, such a document cannot be used as evidence by courts, if it is not proved.

The said judgement is perfectly correct, otherwise there is no purpose in section 68 of the Evidence Ordinance which stated that *"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of court and capable of giving evidence."*

In *Samarakoon v. Gunasekera and Another* (2011 1 Sri L.R.149), it was held that the High Court in total disregard of the specific and stringent provisions of Section 68 of the Evidence Ordinance had relied on an obiter dictum made in a case where due execution was challenged, to reverse the decision of the District Judge. Further, it was held that in terms of Section 2 of the Prevention of Frauds Ordinance, a sale or transfer of land has to be in writing signed by two or more witnesses before a notary, duly attested by the notary and the witnesses. If this is not done, the document and its contents cannot be used in evidence.

In this Judgement at page 154, it has been held further that "A deed for the sale or transfer of land, being a document which is required by law to be attested, has to be proved in the manner set out in section 68 of the Evidence Ordinance by proof that the maker (the vendor) of that document signed it in the presence of witnesses and the notary. If this is not done, the document and its contents cannot be used in evidence."

Now, vital matter to be considered is that by the aforesaid SC Appeal 45/2010 case, Jugolinja Boal decision has not been over ruled. What the Hon. Justice Sisira de Abrew states is "I do not think that the principle enunciated in the case of Jugolinja Boal (supra) extends to such a situation". The reason is obvious. The documents produced in the Jugolinja Boal case were pertaining to carrying cargo because the case filed for loss of cargo during transhipment in the port of Colombo. There is no specific requirement in law to prove such documents unless there is an objection. However, when it comes to prove a deed, there is a specific requirement in law, that is section 68 of the Evidence Ordinance to prove a deed. In such occasions, it has to be proved in the manner set out by law even thoughthere was no objection by the opposing party at the close of the case.

Similar legal position was enunciated in the case of *Mohamed Naleem Mohomed Ismail V. Samsulebbe Hamithu* (SC Appeal 04/2016 – Decided on 02.04.2018). This is a case filed seeking an order of declaration of title. The plaintiff relied in his title on the deed produced marked P7. When the plaintiff closed its case without calling any witness to prove P7 before the District Court, the defendant did not raise any specific objection for the failure by the plaintiff. The Supreme Court held that the decision of the District Court to dismiss the action was correct as the plaintiff had failed to

establish his title as required by law. Considering the section 68 of the Evidence Ordinance and the section 31 of the Notaries Ordinance together with the settled law in respect of *Rei Vindicatio* action, that the burden is clearly on the plaintiff to establish his title.The Supreme Court held that the plaintiff's title has to be proved as required by law even though no objection wastaken by the defendant.

In the above case also the decision of *Sri Lanka Ports Authority and another V. Jugolinja Boat-East* and in the case of *Balapitiya Gunananda Thero V. Talalle Methananda Thero* were considered and held that none of these cases referred to a document which required by law to be attested.

So, it is apparent that when the law requires a deed or some other document to be proved in a certain manner, it has to be proved although an objection is not taken by the opposing party. However, the Jugolinja Boal decision still applies for the documents where no specific provision in law stipulating how the document has to be proved. However, if the opposing party objects in accepting the document which had gone subject to proof and not proved, the judge has to allow to call witnesses to prove the document, if party produced the document makes the application to prove it.Even if the judge thinks that the said document need not be proved, the application has to be allowed. This is an unnecessary burden for the trial Judge.

There is a way to overcome this problem. When a party objects for a document (this is only for the documents that proof is not required by law) and make an application to accept the same subject to proof, the judge could accept the document stating that "the counsel for the defendant moves to accept the document subject to proof" ("ඔප්පු කිරීමට යටත්ව භාර ගන්නා ලෙස විත්තියේ නීතිඥ මහතා ඉල්ලා සිටී."). Then if the counsel for the defendant does not make an application at the close of the plaintiff's case to prove the document, following the Jugolinja Boal decision,the Judge can accept the document without proving. Further, if the document is not proved and even if the defendant's counsel objects at the close of the case, the judge could decide whether it is necessary to prove the document to be accepted as evidence because it was not recorded that court had accepted the document subject to proof. It was only recorded that the defendant's counsel moved to accept the document subject to proof. Also, when writing the judgment, the judge would not face the difficulty of sorting out documents one by one to see whether they have been properly proved.

The irrelevant documents in determining the issues of the case need not be proved. Similarly, although some documents are relevant and not proved, the judge could express his opinion with reasons those documents need not be proved as those documents could be accepted as genuine when considering the entirety of the evidence adduced before the court.

Further, although the opposing party does not object, the judge could accept certain document subject to proof, if it the opinion of the judgethat those documents are vital in adjudicating the case. Then you can record "the document is accepted subject to proof". That means the court has accepted the document subject to proof. In that manner when accepting documents subject to proof, the Judge can categorise them as "the counsel for the defendant moves to accept the document subject to proof" and "the document is accepted subject to proof".

Evidence that need not further proof under Partition Law

Certain laws exempted further proof of some documents that generally need proof.

According to the Section 18(2) of the Partition Act, the plan pertaining to the preliminary survey, the report, surveyor's affidavit and the field notes could be used as evidence in a Partition Action without further proof. However, the proviso to the section provides room to call surveyor to be summoned and examined orally, if there is any omission or any clarification is needed.

In a Partition action, evidence regarding the pedigree could be taken under section 32(5) of the Evidence Ordinance without further proof, although such evidence is hearsay.

In terms of section 32(5,) when the statement relates to the existence of any relationship by bloods, marriage, or adoption between persons as to whose relationship by blood, marriage, adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised, such evidence is permitted to be led although the person made the statement was not called in evidence. Normally, when such items of evidence are led, it is permitted to lead evidence subject to proof by calling the person made the statement. But this is an exception.

In addition, Section 68 of Partition Law permits to produce deeds in a Partition Action without a formal proof.

The said section states; It shall not be necessary in any proceedings under this Law to adduce formal proof of the execution of any deed which, on the face of it, purports to have been duly executed, unless the genuineness of that deed is impeached by a party claiming adversely to the party producing that deed, or unless the court requires such proof.

Facts which need not be proved

Chapter 111 of the Evidence Ordinance deals with facts need no further proof. Section 56 states that "No fact of which the Court will take judicial notice need not be proved".

According to section 57of the E.O., The Court shall take judicial notice of the following facts:

(1) all laws, or rules having the force of law, now or heretofore in force or hereafter to be in force in any part of Sri Lanka;

(2) all public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed;

(3) articles of war for her Majesty's Navy, Army or Air Force;

(4) the course of proceedings of the Legislature of Sri Lanka;

(5) The Public Seal of the Republic of the Sri Lanka;

(6) the seals of all the courts of Sri Lanka and of notaries public; and all seals which any person is authorized to use by any enactment for the time being in force of the Legislature of Sri Lanka or of the Legislature of any foreign country;

(7) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any part of Ceylon, If the fact of their appointment to such office is notified in the Gazette;

(8) The existence, title and national flag of every State or Sovereign recognized by the republic of Sri Lanka

(9) The ordinary course of nature, natural and artificial divisions of time, the geographical divisions of the world, the meaning of English words, and public festivals, facts, and holidays notified in the Gazette;

(10) the territorial limits of the Democratic Socialist Republic of Sri Lanka and ofits divisions;

(11) the commencement, continuance, and termination of hostilities between theRepublic of Sri Lanka and any foreign state or body of persons;

(12) The names of the members and officers of the court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, proctors, and other persons authorized by law to appear or act before it;

(13) The rule of the road on land or at sea;

(14) All other matters which it is directed by any enactment to notice.

In addition, the facts admitted by parties need not be proved. Section 58 of the Evidence Ordinance specifically states so.

The section reads as follows:

"No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit

by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

Hence, it is vital to record admissions as far as possible before commencing the trial, so, it is not necessary to waste further time to establish undisputed facts and documents. However, documents that do not need further proof and documents that should go subject to proof have to be identified carefully.

In the case of *Rex V. Baba* (6 NLR 35), an opinion expressed in a text book by the title "Medical Jurisprudence" was tried to use in terms of section 57(14) of the Evidence Ordinance. It was held that the context of a text book would not be taken judicial notice under section 57 of the Evidence Ordinance.

In Menon V. Lantine (43 NLR 34), the prosecution failed to lead evidence to demonstrate that the "Galle Road" was a Highway. It was held that the court was entitled to take judicial notice of the fact.

In *Jayakody V. Paul Silva* (44 NLR 379), it was held that the court was entitled to take judicial notice of the date on which an Ordinance have been brought in to operation.

In *Kandasamay V. Bandaranayake* (48 NLR 449), it was held that Indian Law is "foreign law" and cannot be judicially noticed by a Sri Lankan (then "Ceylon") Court.

The Following Documents could be accepted without further proof

- Genuineness of Gazettes of Sri Lanka is presumed. (Section 81 – E.O.)
- The court shall presume that maps, plans, or surveys purporting to be signed by the Surveyor-General or officer acting on his behalf were duly made by his authority and are accurate; but maps, plans, or surveys not so signed must be proved to be accurate. (Section 83 – E.O.)

It was held in *The Surveyor General V. Zylva* (12 NLR 53) that "The presumption created by section 83 of the Evidence Ordinance (No. 14 of 1895) in favour of plans and surveys purporting to be signed by or on behalf of the Surveyor-General, extends to everything necessary to be done in order to make the survey or plan a faithful drawing and measurement of the lands surveyed.

The above decision has been incorporated in the recent judgment of *Dehiwela-Mt.Lavinia Municipal Council V. Fernando and others* (2007 1 Sri LR 293).

- The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country,

and to contain any of the laws of that country, and of every book purporting to contain reports of decisions of the Courts of such country. (Section 84 – E.O.)

- Due execution and authentication of a Power of Attorney executed before and authenticated by a notary public or duly authorized person by law, is presumed. (Section 85 – E.O.)

Criminal Cases

When contradictions are marked in a Criminal Case or Omissions are drawn to the attention of the court, they must be proved. Just marking contradictions and omissions in cross examination is not sufficient. Contradiction signifies that the witness made a different statement at a different time. So, it must be proved by calling the officer who recorded the statement of the witness that the witness had made such a statement.

Admissibility of the Reports and other documents prepared by the Public Officers in Criminal Cases.

Section 414(1) of the Criminal Procedure Code permits to produce the reports of certain government officers as evidence without calling them to give evidence. The said Section states that "Any document purporting to be a report under the land of the Government Analyst, the Government Examiner of Questioned Documents, the Registrar of Finger Prints, Examiner of Motor Vehicles or Government Medical Officer upon any person, matter or thing duly submitted to him for examination or analysis and report, or the report of a Government Medical Officer based upon any skiagraph purporting to have been made by a Government Radiologist or such skiagraph itself and any document purporting to be a report under the band of such Radiologist upon such skiagraph, may be used as evidence in any inquiry, trial or other proceeding under this Code although such officer is not called as a witness".

The section 414(5A) [Amendment Act No.11 of 1988] states; 'The written statement of a public officer other than a public officer referred to in subsection (1) verified by affidavit, relating to any act done by such public officer in the performance or discharge, of any duty or function of his office may be given in evidence in any inquiry, trial or other proceeding under this Code, although such officer is not called as a witness.".

The section 444(2) provides room to produce a certified copy of any information or statement of every proceeding under the Criminal Procedure Code without calling the inquirer or police officer by whom it was recorded, notwithstanding the provisions of any other law. Such a certified copy shall be prima facie evidence of the fact that such information was given or that such statement was made. It shall

not be necessary to call such inquirer or officer as a witness solely for the purpose of producing such certified copy.

Video Recording in Child Abuse Cases.

Video Recordings in child abuse cases could be used as direct evidence.

By the Evidence (Special Provisions) Act No 32 of 1999, new section to the evidence ordinance was introduced to adduce video recording as direct evidence in proceedings foroffences relating to child abuse.

The said new section 163A states that; In any proceedings for an offence relating to child abuse a video recording of a preliminary interview which-

(a) is conducted between an adult and a child who is not the accused in such proceeding (here inafter referred to in this section as "a child witness"); and

(b) relates to any matter in issue in those proceedings, may notwithstanding the provisions of any other law with the leave of the court, be given in evidence in so far as it is not excluded by court under subsection (2).

Where a video recording is tendered in evidence in any proceedings referred to in subsection 163A(1) the court shall give leave under that subsection subject to the conditions stipulated in 163A(2).

Such video recording is considered as direct oral testimony of the child according to the section 163A (4) of the said Evidence (special provisions) act. This subsection reads as follows: Where a video recording is given in evidence under this section any statement made by the child witness which is disclosed by the video recording shall be treated as if given by that child witness in direct oral testimony and accordingly, any such statement shall be admissible evidence of any fact of which direct oral testimony from him would be admissible.

Therefore, although Video Recordings are used as evidence in other occasions subject to proof, in child abuse cases, without further proof, video recordings could be used as evidence.

Documents, subject to proof

The application of “Subject to Proof” always raises when a document is produced in a Civil or Criminal trial. The section 61 of the Evidence Ordinance states that “The contents of documents may be proved either by Primary or by Secondary Evidence.” Although the section 61 of the evidence ordinance states that the contents of documents may be proved either by primary or by secondary evidence, section 64 requires primary evidence in the first instance for the proof of documents. The said section excludes secondary evidence of documents, if the originals are available.

Hence, the rule is the contents of documents are generally proved by primary evidence, unless secondary evidence is permitted.

Secondary Evidence

The section 63 of the Evidence Ordinance explains what the secondary evidence is and Section 65 refers to the occasions where secondary evidence could be given. Subsection (1) states;

When the original is shown or appears to be in the possession or power-

(i) of the person against whom the document is sought to be proved, or

(ii) of any person out of reach of, or not subject to, the process of the court, or

(iii) of any person legally bound to produce it; must give notice to the party in whose possession or power the document is or to his proctor, to produce the document in terms of section 66. If the original is not produced on the said notice, secondary evidence may be given of the existence, condition, or contents of the document.

It is often seeking to produce secondary evidence when the original is destroyed or lost. Section 65(3) provides room for that, with the restrictions stated therein. When a copy of the original is produced, section 162 of the Civil Procedure Code describes how such copy could be produced as secondary evidence. The said section reads as follows:

When the document, the admission of which is objected to, is put forward as the copy of an absent original, it is not proved until both such evidence as is sufficient to prove the correctness of the copy, and also such evidence as would be sufficient to prove the original, had it been tendered instead of the copy, has been given.

Note. - The question whether a copy document is admissible in evidence between the parties in the place of the original is quite distinct from the question whether the document (original or copy) is admissible as evidence relevant to the issue under trial.

The Attorney General V. A. James (68 NLR 228), A carbon copy of a handwritten document is, for the purpose of the Evidence Ordinance, a duplicate original and is primary evidence of its contents.

Proof of Documents

There is no general standard of proving every kind of document. There are various modes in proving different kind of documents.

However, it is to be noted that it was held in *Robins V. Grogan (*43 NLR 269), A document cannot be used in evidence, unless its genuineness has been either

admitted or established by proof, which should be given before the document is accepted by Court.

Section 66 of the Evidence Ordinance states; Secondary evidence of the contents of the documents referred to in section 65(1), shall not be given unless that party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his proctor, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the court considers reasonable under the circumstances of the case.

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the court thinks fit to dispense with it:

(1) When the document to be proved is itself a notice

(2) When from the nature of the case, the adverse party must know that he will be required to produce it.

(3) When it appears or is proved that the adverse party has obtained possession of the original by fraud or by force

(4) When the adverse party or his agent has the original in court

(5) When the adverse party or his agent has admitted the loss of the document

(6) When the person in possession of the document is out of reach of, or not subject to, the process in the court.

However, the general rule is that the party possessing the original has to be noticed to produce the original before giving secondary evidence of that document.

In a rent and ejectment case, where receipts of notice to quit is denied, it was decided that secondary evidence is permissible without calling upon the defendant to produce the original under S. 66 of the Evidence Ordinance. – *Joonoos V. Chandraratne* (1990 2 Sri LR 337), Court of appeal.

In the same case, *Joonoos V. Chandraratne* (1993 1 Sri LR 86), it was the decision of the Supreme Court that "the requirement of the notice to produce a document is not dispensed with only in the six cases enumerated in section 66 but also, as the proviso states, in any other case in which the court thinks fit to dispense with it.

Proving a Deed

Section 68 of the Evidence Ordinance States as follows:

> "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence."

At the same time the Section 70 states that "The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."

So, when a deed or a document required by law to be attested is produced in evidence, it must be accepted subject to proof by calling at least one attesting witness.

Sangarakkita Thero v. Buddarakkila Thero (53 NLR 457), A deed which on its face appears to be in order is presumed to have been duly executed. The mere framing of an issue as to the due execution of the deed followed in due course by a perfunctory question or two on the general matter of execution, without specifying in detail the omissions or illegalities which are relied upon, is insufficient to rebut that presumption.

It was held in *Tilakeratne V. Samsudeen* (4 NLR 65), that where a deed is on the face of it regular, it will be presumed that all the formalities required by law were complied with in its execution.

It was held in *Wijeyaratne and Another V. Somawathie* (2002 1 Sri LR 93), that a deed where a thumb impression was placed without a mark by the executant was valid and the absence of a mark by the executant at most would be non-observance by the Notary of the Rules specified in section 31.

Hilda Jayasinghe V. Francis Samarawickrema (1982 1 Sri LR 349), Defendant Appellants alleged that through the machinations of the Attorney at Law and Notary Public both Deeds Nos. 4879 and 4880 of 24.3.76 were fraudulently executed by obtaining the signatures of the Defendant Appellants by misrepresentation of facts and by obtaining their signatures and thumb impression on blank sheets of paper. They also alleged that no consideration passed and that the two attesting witnesses were not present at the time they placed their signature and thumb impression.Mr. Kahatapitige the Notary gave evidence but no attesting witness was called.

Held: that the circumstances of this case required that one of the two attesting witnesses be called to prove execution of the deed.

*Joseph Fernando V. Pearlin Fernando (*61 NLR 177), When an attesting witness, who is called for the purpose of proving the execution of a document required by law to be attested, denies the execution of the document. It was held that proof of his signature is not sufficient to establish due execution. Under section 69, read with section 71, of the Evidence Ordinance there must be, in addition, proof of the executant's signature.

It is also held that whether, in the absence of other evidence and without the benefit of the opinion of an expert, it is open to a Court, on a mere comparison of two documents containing respectively an admitted signature and a signature which is repudiated, to express the opinion whether the two signatures are of one and the same person.

Applicability of the section 68 of the Evidence Ordinance to a Criminal Case

The decision of *The Solicitor General V. Ahamadulebbe Ava Umma and Others* (71 NLR 512) is that when the attesting witnesses are also accused in the case, section 68 has no application. The relevant portion of the decision is as follows:

> "Section 68 of the Evidence Ordinance had no application to a criminal case where the prosecution had made the attesting witnesses also accused in the case and, far from seeking to use the deed as evidence, was impugning it as a forgery committed as a result of the abetment of the said offence on the part of the witnesses and the vendee. In such a case, the elements of the charges which have to be established by the prosecution may be established in any of the ways permitted by law".

Hearsay Evidence

It is an objection often raise, when hearsay evidence is led, that evidence to be accepted subject to proof by calling the person who made the statement. In deciding whether to accept the hearsay evidence or not, the nature of the hearsay evidence adduced is important. The trail Judge should be able to separate what item of evidence needs the proof by calling the person made the statement and what item of evidence, the proof is not needed.

In the case of *Subramaniam V. Public Prosecutor* (1956 1 W.L.R. 965), it was held by the Privy Council that; Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made.

It is to be noted although there is no specific provision in the Evidence Ordinance regarding the hearsay evidence, hearsay rule comes from section 60 of the Evidence Ordinance where it says that oral evidence must, in all cases whatever, be direct. So, when a witness says that I heard X say something, such evidence is admissible and becomes direct evidence under section 60(2) of the Evidence Ordinance as to the fact that the statement was made. Section 60(2) states that, if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact. But if the court is called upon to assume the truth of what X said, the statement is inadmissible as hearsay.

For example, if X said "He is dead", the witness who heard that can give evidence about what he heard. If it is not allowed the witness to speak what he heard, he should not be allowed to speak what he saw that person was doing. Witness can

give evidence about what he saw and heard. But the witness cannot give evidence why the X made that statement or what did X mean by making that statement because that would be known only to the X.

So, every occasion when a witness say that he heard something told by another person, that person need not be called in evidence to prove the fact. In other words, every occasion, hearsay evidence need not be accepted subject to proof. Properly identifying the need of proof, prevents dragging of court proceedings.

Useful Decisions regarding Proof

In deciding whether any item of evidence has to be accepted subject to proof, the decisions of following judicial authorities would be useful.

Cinemas Limited V. Sounderarajan (1998 2 Sri LR 16)

In a civil case, when a document is tendered, the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the document unless the document is forbidden by law to be received and no objection can be taken in appeal - Section154 CPC (explanation).

Where one party to a litigation leads prima facie evidence and the adversary fails to lead contradicting evidence by cross-examination and also fails to lead evidence in rebuttal, it is a "matter" falling within the definition of the word " proof" in the Evidence Ordinance and failure to take cognizance of this feature and matter is a non-direction amounting, to a misdirection.

Wickremasuriya V. Dedoleena and Others (1996 2 Sri LR 95), The expression prima facie proof in S.45 has to be construed and interpreted. "Prima facie proof is Nothing more than sufficient proof which should be accepted only, if there is nothing established to the contrary."

Sivaratnam and others V. Dissanayake and others (2004 1 Sri LR 144), Admissions are not conclusive proof of the mattersadmitted, but they may operate as estoppels.

Conclusion

I wish to conclude this article with the following thought. Not only the evidence place before the court is "subject to proof". The ability and competence of all Honourable Judges are "subject to proof". It is the prime duty of all Judges to prove their abilities by hearing patiently and deciding impartially, correctly and firmly the cases come before them because the faith, confidence and respect of the public towards the Judiciary and the Judicial system of this country entirely depend on the conduct of the Judges and the manner of decision making by Judges.

LAW AND PROCEDURE RELATING TO TESTAMENTARY ACTIONS

K.M.S.DISSANAYAKE,
Judge of High Court[*]

Introduction

Where a person dies leaving in Sri Lanka property to be administered, the procedure that has to be followed is found in the Chapter XXXVIII, LIV and, LV of the Civil Procedure Code as amended. While, Chapter XXXVIII of the Civil Procedure Code as amended deals with the law and procedure relating to both the testacy as well as intestacy, Chapter LIV and LV deal with the procedure relating to the aiding and controlling of executors and administrators, and the judicial settlement of their accounts as well as the procedure relating to accounting and settlement of the estate. A person is said to have died testate, when, he dies leaving a last Will whereas, a person who dies without leaving a last Will or where, the last Will cannot be found, is said to have diedintestate. Hence, the Civil Procedure Code as amended lays down different procedure to be followed in the testamentary action inrelation to testacy and intestacy.While, sections 516, 517, 518, 520, and 524 of the Civil Procedure Code as amended deal with the procedure to be followed where aperson dies testate leaving in Sri Lanka property to be administered, sections 525, 526, 527 and 528 of the Civil Procedure Code as amended deal with the procedure to be followed where a person dies intestate leaving in Sri Lanka property to be administered.Sections 523 and 529 to 539 of the Civil Procedure Code as amended deal with the procedure to be followed commonly both in testacy and intestacy. Thus, it is proposed to deal with separately the different procedure to be followed in the testamentary actions in relation to testacy and intestacy.

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(A) PROCEDURE TO BE FOLLOWED IN THE TESTAMENTARY ACTIONS WHERE A PERSON DIES TESTATE LEAVING IN SRI LANKA PROPERTY TO BE ADMINISTERED.

Sections 516, 517, 518, 520, and 524 of the Civil Procedure Code as amended deal with the procedure to be followed where a person dies testate leaving in Sri Lanka property to be administered.

Deposit of the will of the deceased

Section 516 of the Civil Procedure Code as amended enacts that **"**when any person shall die leaving a Will in Sri Lanka, the person in whose keeping or custody it shall have been deposited, or who shall find such Will after the testator's death, shall produce the same to the District Court of the District in which such depository or finder resides, or to the District Court of the District in which the testator shall have died, within three months after the finding of the Will, and he shall also make oath or affirmation, or produce an affidavit in form No.81 in the first schedule verifying the time and place of death, and stating (if such is the fact) that the testator has left property within the jurisdiction of that or anyother, and in that event what Court, and the nature and value of such property; or, if such is the fact, that such testator has left no property in Sir Lanka.

The will so produced shall be numbered and initialed by the Probate Officer and deposited and kept in the record room of the District Court**"**.

Hence, section 516 of the Civil Procedure Code as amended imposesa duty on the custodian of a will or the finder thereof, to produce it in Court. It sets out **a)**. by whom it should be produced, **b).** to which Court, it should be produced, **c)**. the period within which it should be produced and **d).**the procedure that should be adopted in producing the same to Court. It also casts upon the Probate Officer a burden that the will so produced shall be numbered and initialed by him anddeposited and kept in the record room of the District Court.

It is in this context, I would think it expedient at this juncture, to deal with **the rebuttable presumption of Law arising from the circumstances that after the execution of the Will, it was in the possession of the testator but was not forthcoming that such testator had destroyed it with the intention of revoking it**.

It was held in ***Manchihamy vs. Abeyasekera*** (15 NLR 479) *that "where, a Will is traced to the custody of a testator and cannot be found at his death, the presumption is that he destroyed it himself, but this presumption may be rebutted by evidence leading to a contrary conclusion, as by a declaration of good Will towards the parties benefited by the Will or of an adherence to the Will".*

It was held in ***Athapattu vs. Jayawardena*** **(**22 NLR 497) that *"if a Will is made by a testator and is shown to have been in his possession and is not forthcoming at his death, it is presumed to have been destroyed animorevocandi".*

It was held in ***Rosaline Nona vs. Mango Nona*** (66 NLR 33) that *"Will is found destroyed or mutilated in a place in which the testator would have naturally put it, the presumption is that the testator destroyed it, and that the destruction was done animorevocandi".*

It was held in ***Goonewardena vs. Beddewela*** **(**73 NLR 463) that "*a will cannot be said to have been revoked by destruction merely because certain strokes in ink and other notes were made on it by the testator after the will was executed indicating an intention to revoke. Revocation of a will by destruction must be proved not only by evidence of an intention to revoke but also by an actual destruction in an appropriate manner".*

It was held in ***Weerasinghe vs. Nugagahawatta*** (1984 (1)SLR 411) that *"it is a necessary condition to the coming into effect of the presumption that a testator has destroyed his last will animorevocandi where the will is shown to have been in his possession but is not forthcoming at his death that the Court should be satisfied that the will was not in existent at the time of the death.*

Where circumstances giving rise to the presumption are absent and the Will has been irretrievably lost or destroyed, its contents may be proved by secondary evidence.

The protocol is a copy of the original Will and the Court was competent to issue probate thereof".

It was held in ***Raliya Umma vs. Mohamed*** (55 NLR 385) that *"if a Will is shown to have been in the testator's possession, and is not forthcoming at his death, it is presumed to have been destroyed by him animo revocandi. The presumption is applicable even where the missing document is a joint Will".*

Application for probate or administration

Section 517(1) of the Civil Procedure Code as amended provides for the application for probate or administration within the time limit and in the manner specified in Section 524 thereof. Section contemplates two types of persons as persons who may apply to the District Court to have the will proved and to obtain grant to himself of administration of the estate with copy of the will annexed, namely; either **a)**. theperson appointed executor by the will or **b)**. any person interested either by virtue or will or otherwise in having the property of the testator administered. It also sets out the appropriate Court to which such an application may be made in that an application for probate or administration may be made **a)**. to the District Court of the District within which he resides, or **b).** within which the testator resided

at the time of his death, or **c)**.within which any land belonging to the testator's estate is situate.

In ***Re- A. Hendricks and S. Hendricks*** (4 NLR 24) it was held that "*where an executor, who produces in court the last will of a testator who had died many years since its production, should be called on to explain his delay, and…….. . If a third of a century has not elapsed since the death of the testator the will may be admitted to probate*."

It was held *in* ***Pannananda Thero vs. U. Piyaratna Thero*** *54 NLR 563* that *"where an application for probate of a will was made eight years after the death of the testator, merely lapse of time not satisfactorily explained should not bar the admission to probate of a will where such lapse of time has not affected the rights of any person".*

In the light of the principle laid down in the decision in ***Pannananda Thero vs. U. Piyaratna Thero*** [supra], the test that should be applied in determining as to whether the lapse of time not satisfactorily explained would bar the admission to probate of a Will, would be whether or not, such lapse of time has affected the rights of any person. Hence, if the lapse of time has not affected the right of any person, last will should be admitted to probate notwithstanding, the lapse of time that has not even,been satisfactorily explained.

Section 517(2) provides for the grant of letters of administration with or without the will annexed, as the case may require, to the duly constituted attorney of such person in case any person who would be entitled to administration is absent from Sri Lanka.

It was held in ***Vyraven Chettiar vs. Segappai Achy*** *(41 NLR 398) that "the attorney of a widow who is resident in India, should not be appointed to administer the estate of the deceased person, where the attorney resides for the most part in India or where his interest conflicts with his duty".*

In the light of sections 516 and the 517 of the Civil Procedure Code as amended, when any person dies leaving a Will in Sri Lanka, the person in whose custody it shall have been, should deposit the same in the District Court of the district in which such depositor resides or in the District Court of the district in which the testator shall have died and that when a will is deposited in Court as set out above, any person appointed by the said Will may apply to the District Court of the district within which he resides, or within which the testator resided at the time of his death, or within which any land belonging to the testator's estate is situated to obtain the probate or the issue of letters of administration with the will annexed, in the manner specified in Section 524 of the Civil Procedure Code.

A careful scrutiny of sections 516 and 517 of the Civil Procedure Code as amended, thus, makes it manifest that;

a). the deposit of the Will,

b). the application to prove the same, and

c). to have the Probate issued, are different situations and are considered as separate acts that should be performed separately.

This view is fortified in the manner in which Section 517 (1) of the Civil Procedure Code as amended had been drafted. It provides that any person interested either by virtue of the Will or otherwise too, can apply to prove the Will and to obtain grant of Letters of Administration of the estate of a deceased person with the Will annexed. This view is further strengthened by the decision in ***Ratnasingham vs. Dasanayake*** (1998 (1) SLR 08) wherein it was held that *"it is a fallacy to argue that merely because section 516 imposes a duty on the custodian of a will to produce it in Court, such custodian has a right to probate, section 516 confers no such right. It is section 518 which deals with the right to probate, and there legislature expressly confined that right to wills affecting property in Sri Lanka"*.

On the other hand, sections 518 of the Civil Procedure Code as amended makesthe grant of Probate or issue of letters of administration compulsory, when, there is a Will.

Section 518 of the Civil Procedure Code as amended contemplates a situation **where a will is deposited in Court after the coming into operation of this chapter, and no application has been made by any person to have the will proved and probate granted in respect thereof**. In such a situation, this section makes it obligatory that **the Court shall in accordance with the procedure set out in respect of the grant of probate or letters of administration on application made thereto, proceed to grant the probate of the will, to the executor or executors named in such will, or letters of administration with or without the will annexed, as the case may require, to some person who by the provisions of the last preceding section is competent to apply for the same, or to some other person who in the opinion of the Court, by reason of consanguinity, amount of interest, the safety of the estate, and probability that it will be properly administered, is a proper person to be appointed administrator** and in every such case letters of administration may be limited or not in manner hereinafter provided, as the Court thinks fit.

In ***Sellambram vs. Kadiraie*** (20 NLR 161), the Court laid down the principle that *"If a person is domiciled in Ceylon, the grant of administration to his estate is governed by the law of this colony"*.

It was held in ***Peiris vs. De Silva*** (45 NLR 144) that *"the estate of a deceased person for purposes of section 519 of the Civil Procedure code (section 518 of the new Civil procedure Code) means the net value of an estate after deducting debts and encumbrances"*.

Security- when and under what circumstances should it be ordered?

Section 520 of the Civil Procedure Code as amended, stipulates the instances where security must be ordered for the due administration of the estate of the deceased wherein, it provides that in every case in which it is found necessary, whether **a).**by reason of such executor as aforesaid not applying for probate, or **b)**.by reason of there being no executor resident in Sri Lanka competent and willing to act, or **c)**. by reason of no person who is competent under section 517 to apply for letters of administration, so applying, that any such person as is mentioned in section 518, should be appointed administrator, the Court shall take from such person security for the due administration of the estate, and shall for this purpose require such person to enter into a bond with two good and sufficient sureties in form No.90 in the first schedule, for the due administration of the deceased person's property, and it shall not in any case be competent for the Court to dispense with such security. The significance here is that the Courthas power to order security only in such circumstances outlined aboveas **a), b)** and **c)** as referred to in section 520, and that, in such circumstances, it is not competent to Court to dispense with such security.

To whom grant should be made

Section 523 of the Civil Procedure Code as amended lays down the rule that, in the case of a conflict of claims tohave the will proved and probate or grant of administration granted, the claim of anexecutor or his attorney shall be preferred to that of all others, and the claim of acreditor shall be postponed to the claim of aresiduary legatee or devisee under the will. And in the like case of a conflict of claims for grant of administration where there isintestacy, the claim of the widow or widower shall be preferred to all others, and the claim of an heir to that of a creditor:

Provided, however, that the court may forgood cause supersede the claim of the widow or widower.

It was laid down in ***Violet Perera vs. Rupa Hewawasam*** (1985 (1) SLR 229) that "*the widow has a preferential rights to be granted letters of administration*".

It was held in ***Mariam Beebi vs. Reqqiah Umma*** (53 NLR 15) that other considerations being equal, a Court should in granting letters of administration with the will annexed, exercise its discretion with regard to the claims and wishes of those legatees or devisees who have the greatest interest in the estate to be administered. The provisions of section 523 of the Civil Procedure Code which confer upon the spouse of a deceased person a preferential right to the grant of letters of administration are applicable only in cases of intestacy.

It was held in ***Kanagasundarem vs. Sinniah*** (32 NLR 43) that "*where the widow of the deceased person was a lunatic, her preferential right to administration should be recognized by granting the letters to the manager of her estate*".

In ***Moosagee vs Carimgee*** (29 NLR 387), it was held that *"the preferential right to a grant of letters of administration given under section 523 of the Civil Procedure Code may be claimed by the attorney of a widow who is absent from the Island"*.

It was held in ***Appuhamy vs. Menika*** **(**19 NLR 149) that *"Abinna husbandis, on his wife's death, entitled to the preference in a case of a conflict of claims, for grant of administration to wife's estate"*.

It was held in ***Jamila Umma vs. Jailabdeen*** (44 NLR 187) *that "in a contest for letters of administration, the preference given by law to the widow's claim cannot be displaced merely because her interest in the estate is small"*.

It was held in ***Ranasinghe vs. Ranasinghe*** (38 NLR 302) that *"in an application for letters of administration to the estate of a deceased person, the Court should grant the order in favour of that person amongst those of the same degree of kindred for whom the majority of the parties interested have expressed reference."*

However, it has to be borne in mind that the Court may for good cause, supersede the claim of the widow or widower as provided by the proviso to section 523 of the Civil Procedure Code.

Mode of application for probate and proof of will

Section 524(1) of theCivil Procedure Code as amended provides for the mode of application for probate and proof of will wherein, it lays down that every application to the District Court to have the will of a deceased person proved, shall be made within a period of three months from the date of finding of the will, and shall be made by way of petition and affidavit and such petition shall set out in numbered paragraphs;

a). the fact of the making of the will;

b). the details and the situation of the deceased's property;

bb). the heirs of the deceased to the best of the petitioner's knowledge;

c). the grounds upon which the petitioner is entitled to have the will proved; and

d). the character in which the petitioner claims (whether as creditor, executor, administrator, residuary legatee, legatee, heir, or devisee)

Section 524(2) of the Civil Procedure Code as amended, provides that if the will is not already deposited in the District Court in which the application is made, it must either be appended to the petition, or must be brought into court and identified by affidavit, with the will as an exhibit thereto, or by parole testimony at the time the application is made.

Section 524(3) of the Civil Procedure Code as amended provides that every person making or intending to make an application to a District Court under this

section to have the will of a deceased person proved, which will is deposited in another District Court, is entitled to procure the latter court to transmit the said will to the court to whichapplication is to be made, for the purpose of such application and such application must be supported by sufficient evidence either by way of affidavits of facts, with the will as an exhibit thereto, or the oral testimony, proving that the will was duly executed according to law and establishing thecharacter of the petitioner according to his claim.

Section 524(4) of the Civil Procedure Code as amended provides that the petitioner shall tender with the petition proof of payment of charges to cover the cost of publication of the notice under section 529.

I would think it appropriate at this juncture to examine in depth, the law relating to proof of last will in Court.

Law Relating to Proof of Last Will

Presumption of due execution of the last will and presumption of sanity.

The leading case on this point is ***Gunesekere vs. Gunesekere*** (41 NLR 351) wherein, it was laid down that *"propounder of a last will proves the due execution of the document, a presumption would arise that the testator knew and approved of its contents, unless suspicion a priori attaches to the document by its very nature"*.

It was further laid down that *"If, after proof of due execution, there is nothing intrinsically unnatural in the document, the burden is shifted to the objector to show that there was undue influence or fraud or that the deceased was not of a sound disposing mind when he made the will"*.

It was also laid down that *"where the testator is able, while instructions are given to the will, to address himself to the matter and indicate his mind, it would not be fatal to the will that he may not have been able to follow all its provisions when it was read out to him before signature"*.

In the case of ***Gamini Ranasegalla vs. Corea*** (1998 (2) SLR 200), it was emphasized that in addition to the other requirements, a will should be duly, executed according to law.

From the above, it becomes evident that one of the essential ingredients to constitute a valid last will is "due execution".

Section 04 of the Prevention of Frauds Ordinance, makes provisions for the due execution of a last will wherein, it stipulates that *"No will, testament, or codicil containing any devise of land or other immovable property, or any bequest of movable property, or for any other purpose whatsoever, shall be valid unless it shall be in writing and executed in manner hereinafter mentioned ; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the*

presence of a licensed notary public and two or more witnesses, who shall be present at the same time and duly attest such execution, or if no notary shall be present, then such signature shall be made or acknowledged by the testator in presence of five or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary".

In the light of the section 04 of the Prevention of Fraud Ordinance, a last will could be executed either before five witnesses or in the alternative, before two witnesses and a Notary. It is needless to lay emphasis that in the latter case, the document has to be duly attested by the Notary and witnesses. The requirements relating to a duly attested document are found in the Notaries Ordinance.

The form of the attestation is set out in the schedule under item 'E' to the Notaries Ordinance.

I would think it expedient at this juncture, to re-produce some of the relevant passages quoted by Court in ***Wijewardena and another vs Ellawala*** (1991 (2) SLR 14) with regard to the consequences in relation to proof of due execution of a will which reads thus;

"If a rational will is produced, and shown to have been duly executed, the jury ought to be told to find infavour of the testator's competence. The legal burden rests on the party who propounds the Will, but the rule that he does not have to adduce evidence of capacity in the first instance, is sometimes said to raise presumption of sanity in testamentary cases"

Cross on Evidence, 2nd Edition at page 104,

"If a will is rational on the face of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid."

As regards the presumption of due execution and presumption of sanity, it was held in ***C.A. (Rv) Application No.999/2002 and 1000/2002 – decided on 28.10.2008*** that,

"a) It is trite law that where a Will is in proper form and is duly executed, it gives rise to a presumption that the requirements to constitute a valid 'W I L L' have been fulfilled. This presumption in law is termed as *Omnia praesumuntur rite esseacta*.

b) A propounder of a last Will must satisfy court that the instrument relied on by him is the last Will of a willing and competent testator and that it had been duly executed.

c) Should there be any suspicions with regard to any of the circumstances enumerated under item numbers (1) to (3) above, then it is the duty of the propounder to remove all such doubts and prove affirmatively the required elements.

d) (1) It is the duty of the person who produces a will to prove that the will is the act and declaration of a free and capable testator (2) that, the testator was not only aware of it but also approved the contents thereof (3) that, the testator intended the document to be his last Will and the last Will had been duly executed according to law.

A judgment pronounced in the recent past touching upon the heavy burden cast upon the propounder of a last will deserves to be quoted at this juncture. That is ***De Silva vs. Seneviratne*** (1981 (2) SLR 07) where, it was *inter- alia* held that;

"(2) The propounder of a Last Will must prove that the document in question is the act and deed of a free and capable testator; that the testator was not only aware of it but also approved of the contents of the said document; that the testator intended the document to be his Last Will; that the said document had been duly executed according to law.

(3) If there exists facts and circumstances which arouse the suspicion of the Court in regard to any matter which has to be proved by the propounder then it is the duty of the propounder to remove all such doubts and prove affirmatively the various elements which must be proved by him and the Court should then scrutinize the evidence led by the propounder with jealousy and should pronounce the alleged Last Will to be valid only if its conscience is satisfied in regard to the said matters. As to whether the evidence so placed before the Court is such as to satisfy the conscience of the Court is ultimately a question of fact for the trial judge."

I would think it appropriate at this juncture to examine furtherthe law relating to proof of last will with reference to the presumption of due execution and presumption of sanity as enunciated by the Superior Court in its judgments, in a more extensive and elaborative manner for the better understanding of the same.

It was held ***in Re W.F. Morriss*** (6 NLR 371) that "*a claimant under a will, who produces a will to Court is not bound to prove that it has been cancelled by a subsequent will or that it is otherwise valid*" .

In ***Silva vs. Zoysa*** (7 NLR 360) where an application was made for probate on a will executed by a deceased after 30 years by the widow of the testator, it was held that *"Court should presume that custody has a legitimate origin and its genuineness"*.

In ***Peiris Vs Peiris*** (8 NLR 179),it was held that *"where, it has been once proved that a will has been duly executed by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under an undue influence is on the party who alleges it"*.

In ***the Alim Will Case*** *(20 NLR 481)*, in a contest arising out of an application for probate, a single issue was framed, viz., "Was the will duly executed by the

deceased? " The party seeking probate contented himself with proof of the execution. The respondent called evidence to prove that the signature was obtained by fraud.

It was held that *"a respondent who wishes to support a petitioner for probate should call his evidence at the conclusion of the petitioner's case. He is not entitled to wait until the opposing respondents disclose their whole case, and then to start a fresh case for the purpose of upholding the will in reply to the evidence of the opposing respondents.*

Where a suspicion attaches to a will, the Court must be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

It was held in ***Croos vs. Croos*** (21 NLR 208) that "*To impeach a will on the ground of undue influence, it must be proved that the influence exercised amounted to coercion, i.e., compelled the testator to do something he did not want to do*".

In ***Andrado vs. Silva*** (22 NLR 4), it was held that Whenever, a will is prepared and executed under circumstances which arouse the suspicion of the Court, it ought not to pronounce in favour of it, unless the party propounding it adduces evidence which would remove such suspicion and satisfies the Court that the testator knew and approved of the contents of the instrument.

The burden of proof of undue influence is on those who allege it. It cannot be presumed. The burden of proving mental competency on the other hand, lies on the propounders. They are not bound to show affirmatively that the testator's mind is free from any influence which the law considers ' undue '.

I do not mean to say that the principle that it is the duty of the propounders to remove suspicions does not apply to undue influence. I think it does so apply in exactly the same manner as it applies to fraud.

If the circumstances are such that a suspicion arises that the apparent approval by the testator is not a real approval, that his act was not the expression of his own free will but of a will coerced or dominated by another, then it is for the propounders to remove the suspicion, and if they fail to do so their whole case fails, even though the suspicious circumstances do not constitute a prima facie case of undue influence, and even though on a review of the evidence on both sides, it cannot be said that undue influence was positively established.

To amount to undue influence, the influence exercised must be something in the nature of coercion.

It is for the medical witness to describe the mental condition of the testator; it is for the Court to determine whether that condition was such as to impair his testamentary competency."

It was held in ***Sinnapodian vs. Muttan*** (38 NLR 410) that " *Where the validity of a last will is contested on the ground of the minority of the testator, the burden of proving that the testator was of full age is on the person propounding the will*"

The Court lays down in ***Arulampikai vs. Thambu*** (45 NLR 457) *that* "*Where a strong suspicion arises in consequence of the will being wholly in the handwriting of the beneficiary who is the father of the testatrix, a young woman living under his roof in a state of estrangement from her husband, it is incumbent on the propounder to dissipate the suspicion by leading evidence of the confirmation of the will.*"

In ***Fernando vs. Peiris*** (47 NLR 169) where a testator, when he was seriously ill, executed a will devising and bequeathing to his wife all his property and the validity of the will was challenged on the ground of undue influence the only evidence in support of the plea being that at the time of the execution of the will the wife was present and was weeping.

It was held that "the Court was not entitled to presume that the wife exercised undue influence on the testator".

It was held in ***Ananthathurai vs Kanagaratnam*** (50 NLR 361) that "*Where a person who writes or prepares a last will takes some benefit under it, this fact gives rise to a suspicion that the last will does not express the mind of the testator. A Court ought, in such circumstances, to be vigilant in examining the evidence in support of the instrument and should not pronounce in its favour unless the suspicion is removed*"

In ***Sellammah vs. Sellamuttu*** (59 NLR 376) where certain obvious alterations were noticeable in a will in regard to the name of one of the devisees. The alterations were not attested or authenticated by the signatures of the notary or the testator and the witnesses in terms of either section 30 (21) of the Notaries Ordinance or section 7 of the Prevention of Frauds Ordinance. When, application for probate of the will was made, there was much difficulty in obtaining on affidavit from the attesting notary and witnesses.

It was held, *that "the will should not be admitted to probate in view of the failure of the propounders in the first, instance to remove the suspicions created by the alterations, the knowledge of which must necessarily be imputed to them*".

In ***D. M. Abeysekara vs. Vernon D Livera*** (71 NLR 465) *"where, before order nisi is made absolute in an application for probate of a Will, the genuineness of the Will is challenged on the ground that the testator had no testamentary capacity in that he did not have a sound and disposing mind at the time of execution of the alleged Will, the burden of proving testamentary capacity is on the propounder of the Will. It would be the task of the objector to rebut this fact by leading satisfactory evidence that it was otherwise.*

But, if the authenticity of the Will is challenged on the ground that the deceased was induced to sign the Will by the exercise of undue influence by a legatee, the objector must furnish sufficient particulars concerning the nature of the acts of undue influence, so as to enable the other side to meet the case even after fresh issues are framed by the Court in terms of section 146 of the Civil Procedure Code. The objections should not be "loose and vague" and must be "clear and specific and calculated to raise a reasonable doubt as to the genuineness or validity of the alleged Will."

In ***Sithtamparanthan vs. Mathura Nayagam*** (73 NLR 53) it was held that *"where, in an application for probate of a Will, the testamentary capacity or disposing mind of the testator at the time of the execution of the Will is called in question, the onus lies on those propounding the Will to prove positively the testamentary capacity, even in the absence of a plea of undue influence or fraud. Whether or not the evidence is such as to satisfy the conscience of the Court that the Will was the act and deed of the deceased, in the sense that he was competent to make the Will, is a pure question of fact…….. If a party writes or prepares a will under which he takes a benefit, or wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicions is removed.The Judge, when he considers the mental condition of the testator at the time when he signed the Will, must put himself thequestion whether the mental faculties of the testator retained sufficient strength fully to comprehend the testamentary act about to be done. The evidence of the Proctor who prepared the Will is not conclusive to the mental capacity of the testator."*

It was held in ***Gunewardene Vs. Cabral*** (1980 (2) SLR 220) that,

(1). The onus of proving the will lie on the party propounding the will;

(2). He must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator in that he must show that the testator knew or approved of the instrument an intended to be such;

(3). The onus imposed on the party propounding the will is in general, discharged by proof of capacity and the fact of execution from which a knowledge of an assent to the contents of the instrument are assumed;

(4). The circumstances attending the execution of the document may be such as to show that there is suspicion attaching to the will, in which case it is the duty of the person propounding the will to remove that suspicion and that is done by showing that the testator knew the effect of the document he was singing;

(5). The burden of proving that the will was executing under undue influence rests on the party who alleges it (not considering any suspicion on undue influence, if any, that may arise on evidence);

It was held in ***Ratnayake vs Chandrathilake*** **(1987 (2) SLR 299)** that "where probate is being sought of a last will, **two rules are applicable**:

1. The *onus probandi* lies in every case upon the part propounding the will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable Testator.
2. If a party writes or prepares a Will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which, it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does represent the true will of the deceased.

This rule extends to all circumstances exciting suspicion whenever such circumstances exist and whatever their nature may be, it is for those who propound the will to remove such suspicions and prove affirmatively that the testator knew and approved of the contents of the will.

It is only when this is done that the burden falls on those who oppose the will to prove fraud and undue influence or whatever they rely on to displace the case made out for proving the Will.

Hence although fraud, undue influence or coercion was not proved the failure of the propounder to discharge the burden that lay upon him to remove the suspicious circumstances when there was material to trouble the conscience of the Court, entitles the Judge to hold that the will has not been proved.

The fact that one evening the deceased left the hospital where he was under treatment for alcoholism without informing the hospital authorities and had gone the same evening to meet the petitioner's lawyer and on the following day executed six deeds five of them transfers (for a total consideration of Rs. 31,000 previously received) in addition to the impugned will, the fact that there is a contradiction between the evidence of the Notary and that of the petitioner as to where the deeds and the Will were executed, the fact that an available witness to the Will was not called and the fact that the petitioner himself or his children are grantees on the deeds, and in the Last Will the petitioner himself is a beneficiary along with his children **were suspicious circumstances"**.

The decision in ***Gamini Ranasegalla Corea vs. Ernestina Corea*** [supra] lays down the following rules as being the rules for granting of probate, namely;

"(1) The party propounding the Will must satisfy the conscience of the Court that the instrument propounded is the Last Will of a true and capable testator;

(2) if a suspicion attaches to the Will, the Court should not pronounce in favour of it until the suspicion is removed. If a party writes or prepares last Will under-

which he takes a benefit that is a circumstance that ought generally to incite the suspicion of the Court. The Court must then be vigilant-and jealous in examining the evidence in support of the Will though this does not mean that a special measure of proof or a particular species of proof is required. The principle is that whenever a Will is prepared under circumstances, which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed by the propounder.

(3) In addition the Will must be executed according to law. Under Section 4 of the Prevention of Frauds Ordinance (Cap. 70), no Will attested by five witnesses is valid unless it shall be in writing and executed in manner hereinafter mentioned: that is to say it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of five or more witnesses present at the same time and such witnesses shall subscribe the Will in the presence of the testator but no form of attestation shall be necessary.

The only question was whether all the witnesses signed the Will at the same time in the presence of the testator and when he signed. In the last paragraph of the Will Shirley Corea himself had declared he signed in the presence of the five witnesses thus contradicting Bandara. The propounder Harold Herat an attorney-at-law who was present at the execution testified that all the witnesses and the testator signedat the same occasion in the presence of one another. Hilary Fernando an attorney-at-law did not give evidence. The evidence of Bandara stood uncorroborated. The presumption of due execution expressed in the maxim ***omniaprasumuntur rite esseacta*** applicable where the Will is in regular form was not displaced. The Will sought to be propounded was the act and deed of a free and capable testator: there were no suspicious circumstances; there was satisfactory evidence that the Will had been duly executed and as it was in regular form the maxim ***omniapraesumuntur rite esseacta*** will hold".

It lays down in the case of ***Wijewardena Vs. Ellawala*** (Court of Appeal Judgment [supra]that "No will, testament or codicil containing any devise of land or other immovable property or any bequest of movable property or for any other purpose whatsoever will be valid unless, it is in writing and executed as follows:

It must be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses who shall be present at the same time and duly attest such execution.

Where one partner of a firm of Attorneys-at-law practising in partnership take the instructions of the deceased testator and later signs as a witness, the validity of the last will will remain unaffected. There is no impropriety when partners of a partnership of Attorneys-at-law attest the Will as witnesses and a 3rd partner attests the execution of the Will itself.

Where a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it until that suspicion is removed.

Where a will is shown to be rational and duly executed there is a presumption that the testator had testamentary capacity. The failure of the notary to seek medical opinion in regard to the competence of the testator at the time of the taking of instructions for the preparation of the Will or at the stage of execution, will not affect the validity of the will, especially where the testamentary capacity of the testator was never in issue. Non-medical evidence to prove that the testator had a sound disposing mind can be relied on. The *onus probandi* lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. Where undue influence is alleged it must be proved by the party alleging it".

In ***Ellawala Vs Wijewardena*** (1991 (2) SLR 45), in an application to the Supreme Court for Special Leave, it was held by the Supreme Court that,

1. The finding of the Court of Appeal did not call for review. The last will is a rational or natural will. The evidence does not warrant the suspicion that the testator Lacked testamentary capacity; and the failure of the attesting notary to consult the testator's medical advisers as to his mental condition before executing the last will was not, in the circumstances, a suspicious circumstance.
2. According to applicable principles of law, undue influence, if it is to vitiate the will, must be something in the nature of coercion or fraud existing at the time of the making of the will.
3. The fact that the son-in-law and the daughter of the attesting notary public who are his partners and assistants were witnesses to the signing of the last will, is, neither in law nor as a matter of ethics, a matter affecting due execution. In the absence of any suspicion or impropriety touching the attesting notary, it is of no relevance on the question of testamentary capacity.

(B) <u>PROCEDURE TO BE FOLLOWED IN THE TESTAMENTARY ACTIONS WHERE A PERSON DIES INTESTATE LEAVING IN SRI LANKA PROPERTY TO BE ADMINISTERED.</u>

Sections 525 to 529 of the Civil Procedure Code as amended deal with the procedure to be followed where a person dies intestate leaving in Sri Lanka property to be administered.

Duty to report where person dies leaving property exceeding Four Million Rupees in value.

Section 525 of theCivil Procedure Code as amended imposes a statutory duty on the widow, widower, or next of kin of a person who dies intestate without leaving a will in Sri Lanka wherein, it provides that when any person shall die in Sri Lanka without leaving a will, it shall be the duty of the widow, widower, or next of kin of such person, if such person shall have left property in Sri Lanka amounting to or exceeding in value four million rupees, within one month of the date of his death to report such death to the District Court of the District in which he shall have so died, and at the same time to make oath or affirmation or produce an affidavit verifying the time and place of such death, and stating if such is the fact, that the intestate has left property within the jurisdiction of that or any other, and in that event what court, and the nature and value of such property.

Who may apply for letters of administration

Section 526 of theCivil Procedure Code as amended deals with a kind of persons by whom an application for letters of administration may be made and to which Court such an application should be made. It enacts that when any person shall die without leaving a will or where the will cannot be found, and such person shall have left property in Sri Lanka.

(a) any person interested in having the estate of the deceased administered may apply for the grant to himself of letters of administration; or

(b) any heir of the deceased may apply for the issue of certificates of heir–ship to each of the heirs entitled to succeed to the estate of the deceased.

Such application shall be made in accordance with section 528 to the District Court of the District within which the applicant resides, or within which the deceased resided at the time of his death, or within which any land belonging to the deceased estate is situate.

It was held ***in Re- A. Hendricks and S. Hendricks***[supra]that *"in the case of a stale application for letters of administration, the court will not grant them except necessity for administration be shown".*

It was held in ***Corenelis Appuhamy vs. Appuhamy*** *(28 NLR 286)* that *"a husband is entitled to have issued to him letters of administration to his deceased wife's estate, even though they had been living apart in terms of a deed of separation entered into between them".*

Administration is compulsory where estate is over four million rupees in value.

Section 527 of the Civil Procedure Code as amended enacts a provision similar to that of section 518 of the Civil Procedure Code as amended wherein, it provides that in case no person shall apply for the grant of letters of administration or for the issue of certificates of heir –ship, as the case may be and it appears to the Court necessary or convenient to appoint some person to administer the estate or any part thereof, it shall be lawful for the Court in its discretion, and in every such case where the estate amounts to, or exceeds in value, four million rupees, the Court shall in accordance with the procedure set out in this chapter appoint some person, whether he would under ordinary circumstances be entitled to take out administration or otherwise, to administer the estate, and the provisions of sections 518 to 521, both inclusive, shall apply, so far as the same can be made applicable, to any such appointment.

It was held in ***Peiris vs. De Silva*** [supra] that *"the estate of a deceased person for purposes of section 519 of the Civil Procedure code (Section 518 of the new Civil Procedure Code) means the net value of an estate after deducting debts and encumbrances"*.

Mode of application for letters of administration or certificates of heir-ship

Section 528 of the Civil Procedure Code as amended provides for the mode of application for letters of administration or certificates of heir-ship wherein, it enacts that "Every application to the District Court for grant of administration or for the issue of certificates of heir-ship shall be made within three months from the date of death, and shall be made by way of petition and affidavit, and such petition shall set out in numbered paragraphs-

(a) The fact of the absence of the will;

(b) The death of the deceased;

(c) The heirs of the deceased to the best of the petitioner's knowledge;

(d) The details and the situation of the deceased's property;

(e) The particulars of the liabilities of the estate;

(f) The particulars of the creditors of the estate;

(g) The character in which the petitioner claims and the facts which justify his doing so;

(h) The share of the estate which each heir is entitled to receive, if agreed to by the heirs.

(2) The application shall be supported by sufficient evidence to afford prima facie proof of the material averments in the petition, and shall name the next of kin of the deceased as respondents. If the petitioner has no reason to suppose that

his application will be opposed by any person, he shall file with his petition an affidavit to that effect.

(3) The petitioner shall tender with the petition

(a) proof of payment of charges to cover the cost of publication of the notice under section 529;

(b) the consent in writing of such respondents as consent to his application;

(c) notices on the respondents who have not consented to the application, requiring them to file objections if any, to the application on or before the date specified in the notice under section 529, such notice shall be sent by the Probate Officer by registered post.

(C) PUBLICATION OF NOTICE RELATING TO APPLICATION UNDER SECTION 524 AND 528

Provision made by section 529 of the Civil Procedure Code as amendedin relation to publication of notice relating to application under section 524 and 528,is common to both testacy and intestacy. It provides that;

(1) Every application to a District Court under Section 524 or 528 shall be received by the Probate Officer of the District Court, and shall be registered in a separate register to be maintained for that purpose by the Probate Officer who shall thereafter cause the required publications to be made in terms of subsection (2).

(2) The Probate Officer of a District Court shall, on any day of the week commencing on the third Sunday of every month cause a Notice in Form No.84 in the first schedule to be published in a prescribed local news-paper in Sinhala , Tamil and English relating to;

i. Every application under section 524 or 528 received by that District Court in the preceding one month; and

ii. Every application under section 524 or 528 received by that District Court and incorporated for the first time in the notice published in respect of such District Court in the previous month,

So however that the information in respect of every application under section 524 or 528 received by every District Court is published on two separate occasions in two consecutive months.

(3) The notice published under subsection (2), shall call upon persons having objections to the making of an order declaring any will proved or the grant of probate or of letters of administration with or without the will annexed, or the issue of certificates of heir-ship to any person specified in the application made under section 524 or 528, to submit their written objections, if any, supported

by affidavit, before such date as is specified in the notice, being a date not earlier than sixty days and not later than sixty seven days from the date of the first publication referred to in subsection (2).

(4) Copies of such objections if any, shall be forwarded by the person making the same to the person making the application under section 524 or 528 as the case may be, and shall also be served on the other parties named in such objections.

It was held in ***Kathiramanthamby vs. D. Lebbethamby Hadjiar*** (75 NLR 228), that "(i) In an application for probate of a Last Will, the failure of the District Judge to select a news paper which would satisfy the object mentioned in section 632 of the Civil Procedure Code, viz., that " notice of the order *nisi* should reach all persons interested in the administration of the deceased's property", is a non-compliance with a mandatory provision of law. In such a case the order absolute for probate is liable to be set aside by the Supreme Court upon an application in revision made by interested parties to intervene in the testamentary proceedings".

The significance of the principle enunciated in ***Kathiramanthamby vs. D. Lebbethamby Hadjiar*** [supra] is that it imposes a duty which is of mandatory nature, on the District Judge to select a news-paperwhich would satisfy the object mentioned in section 529 of the Civil Procedure Code as amended, namely; the publication contemplated thereby, should reach all persons interested in the administration of the deceased property, a non-compliance of which would make the grant of probate liable to be set aside by the Appellate Court upon an application in revision made by interested parties to intervene in the testamentary proceedings.

Order on application made under section 524 and 528

Section 531(1) of the Civil Procedure Code as amended provides for the orders that may be made by Court where no objections are received in relation to any application received under section 524 or 528 in response to a notice published under section 529 on or before the date specified in such notice in respect of such application.

Section 531(2) of the Civil Procedure Code as amended provides for the legal effect attached to a certificate of heir-ship in that it stipulates that the certificate of heir-ship issued under subsection (1) (b) (ii) above, shall be sufficient proof of the true heirs of the deceased referred to therein, and may be produced for the purpose of claiming any share in respect of any right, title or interest, accruing upon intestacy.

Section 532 A of the Civil Procedure Code as amended provides for the effect of acting in pursuance of a certificate of heir-ship in that it lays down that where upon the production of a certificate of heir-ship issued by a District Court, under section 531 (1) (b) (ii) , any money, movable property, or certificate is handed over

or transferred in pursuance of such certificate by any bank or institution to any heir entitled to the same, such handing over or transfer shall be deemed to be in discharge of an obligation to the deceased in respect of whose estate the certificate of heir-ship is so issued.

Section 531(3) of the Civil Procedure Code as amended imposes a statutory duty on the Probate Officer by making it incumbent upon him to submit all papers relevant to the application in question to the District Judge in Chambers on the day following the day specified in the notice published under section 529 in respect of such application. It further enacts that upon compliance of the statutory duty so imposed upon the Probate Officer, the Court shall forthwith make an appropriate order.

Procedure where there are objections to application under section 524 or 528 in response to a notice published under section 529, on or before the date specified in such notice in respect of such application

Section 532(1) of the Civil Procedure Code as amended lays down that in such a case, the Court shall proceed to hear, try and determine such application in accordance with the procedure therein provided and may for such purpose name a day for final hearing, and disposal of such application and may, in addition, make such order as it may consider necessary under section 451 of the Civil Procedure Code as amended.

Section 532(2) of the Civil Procedure Code as amended makes a similar provision to that of 531(3) of the Civil Procedure Code as amended in that it imposes a statutory duty on the Probate Officer by making it incumbent upon him to submit all papers relevant to the application in question to the District Judge in Chambers on the day following the day specified in the notice published under section 529 for the purpose of making an order under section 532(1) of the Civil Procedure Code as amended.

Section 539(2) of the Civil Procedure Code as amended make it obligatory on the Court that it shall forthwith issue such certificate to such person upon the making of an order under section 531(1) (b) (ii) of the Civil Procedure Code as amended declaring any person entitled to have issued to him a certificate of heir-ship.

At the final hearing Court to frame issues

Section 533 of the Civil Procedure Code as amended makes provisions that if on the day appointed under section 532(1) for final hearing, or on the day to which it may have been duly adjourned, the personsfiling objections satisfies the Court that there are grounds for objecting to the application, such as ought to be tried on *viva*

voce evidence, then the court shall frame the issues which appear to arise between the parties, and shall direct them to be tried on a day to be then appointed for the purpose under section 386.

Hence, the procedure to be followed at the final hearing is the summary procedure as provided for by chapter XXIV of the Civil Procedure Code as amended.

Orders that may be made on the final hearing

Section 534(1)(a)(b)(c) and (d) of the Civil Procedure Code as amended specifies theorders that may be made on the final hearing.

With regard to the legal effect of an order made by Court on the final hearing dismissing the petition by virtue of the powers vested in it under section 534(1) (b) of the Civil Procedure Code as amended, 534(2) thereof stipulates that the dismissal of any petition shall not be a bar to renewal of the application by the petitioner as long as grant either probate of the deceased's will, or of administration of his property, shall not have been made, either on the occasion on this application or subsequently thereto, to some other person other than the petitioner.

Question that would arise here, is,whether, it is competent for a District Court in the course of the testamentary proceedings to compel a bank to deposit in Court money lying to the credit of the deceased customer, whose estate is been administered.

The answer thereto, can be found from the decision in ***The Imperial Bank of India Ltd. Vs. Perera*** (30 NLR 59). The Court relying on a passage from the book titled "Law of Banking- Grant, 7th Edition" –at page 2on the relation of a bank to its customer,held that *"it is not competent for a District Court in the course of the testamentary proceedings to compel a bank to deposit in Court money lying to the credit of the deceased customer, whose estate is been administered".*

The next question is as to the right of a claimant to intervene in a testamentary proceedings and claim property in the same action.

Answer thereto can be found from the decision in ***Kalaikumar vs. Saraswathey and Others*** (2005 (3) SLR 301) which is exactly in point.

The facts of the case read thus;

"The petitioner respondent S. instituted testamentary proceedings in respect of the estate of LA who died on 28.02.1973. Letters were granted to S. The claimant petitioner sought to intervene and claim a certain land, which was included in the inventory. The claimant petitioner's position was that the deceased had transferred the said land to one L in 1971 who had subsequently transferred to the claimant petitioner in 1982 . The trial Judge dismissed the application of the petitioner. The claimant petitioner moved in Revision.

Held:

Per Wimalachandra, J.

"The learned District Judge has failed to appreciate that the estate of a deceased person should consist of properties the deceased owned at the time of his death.

Any dispute with regard to immovable property included in the inventory where a contest arises between the administrator/ executor and any of the other parties to the testamentary case shall be determined in the same special proceedings and in the same manner as any issue arising in a civil suit".

Per Wimalachandra, J.

"It is seen that section 736(2) is silent - when a party other than a party to the testamentary action claims a property, in such a situation when the Code is silent and no express provision has been made in that behalf can the court use its inherent power to adopt such procedure as may do substantial justice - in my view, the District Court must hold an inquiry as to the genuineness of the claim of the petitioner. When it is apparent that a particular land has been disposed of by the deceased can the administrator include it in the inventory?"

Quarere;

"When the Code is silent and no express provision is made in that behalf, can the Court use its inherent power to adopt such procedure as may do substantial justice"

(D) <u>WHO MAY FILE CAVEAT</u>

Section 536 of the Civil Procedure Code as amended provides the manner in which an intervention may be made by a person though not a person specified in the petition who is interested in the will or in the deceased person's property or estate. Hence, it is competent for such a person to intervene in the testamentary action by filing in the same Court a *caveat* as set out in Form 93 in the first schedule to the Civil Procedure Code at any time after the notice published under section 529 and before the final hearing of the petition against the allowing the petitioner's claim or a notice of opposition thereto. In such case, the Court may permit such person to file objections, if any, and may adjourn the final hearing of the petition.

(D-1) Power to recall, revoke, or cancel probate, administration or certificate of heir-ship

Section 537 of the Civil Procedure Code as amended lays down the procedure as to when, and under what circumstances, thepower of Court to recall, revoke, or cancel probate, administration or certificate of heir-ship ought to be exercised by the District Judge. It provides that in any case where, a certificate of heir-ship has issued, or probate of a deceased person's will or administration of a deceased person's

property has been granted, it shall be competent to the District Court to cancel the said certificate, or recall the said probate or grant of administration, and to revoke the grant thereof, upon being satisfied that the certificate should not have been issued or that the will ought not to have been held proved , or that the grant of probate or of administration ought not to have been made; and it shall also be competent to the District Court to recall the probate or grant of administration, at any time upon been satisfied that events have occurred which render the administration hereunder in practicable or useless.

(D-2) Transitional for recall

Section 538 of the Civil Procedure Code as amended provides for the procedure and the status and or the *locus standi* of the person who may make an application for cancellation, recall, or revocation of certificates of heir-ship, probate or grant of administration in that it stipulates that all applications for cancellation, recall, or revocation of certificates of heir-ship, probate or grant of administration shall be made by petition, in pursuance of the rules of summary procedure, and no such applications shall be entertained unless the petitioner shows in his petition that he has an interest in the estate of the deceased person as entitles him in the opinion of the Court to make such application.

The question here,is, when and under what circumstances can the District Judge exercise the power conferred upon him under and by virtue of section 537 of the Civil Procedure Code as amended,to recall, revoke, or cancel probate, administration or certificate of heir-ship?

In ***Shanthi Goonethilake vs. Mangalika and others*** (2006 (3) SLR 331) at pages 331 and 332– decided on 20th of May 2005,the facts are as follows; the respondent widow filed testamentary action naming the four children of the deceased as respondents. The Court entered order *nisi* in the first instance, and directed that the order *nisi* be published in the papers, in terms of section 529. As no objections were received in response to the publication, the Court under section 531(2) made order granting letters. Thereafter the petitioner moved Court seeking to recall the letters on the footing that the deceased has left a last will and the petitioner has already filed a testamentary case seeking that she be declared the executrix and the probate be granted to her. The District Court refused the application. On leave being sought, it was held that ;

"(1) The petitioner has not filed any objections to the order made by Court to grant letters to the respondent as prescribed in section 529(2). Objections to granting of letters could be entertained in terms of section 529 (3) only if such objections are submitted not earlier than 60 days and not later than 67 days from the date of the first publication.

When a period of time is specified by law before the expiration of which any act has to be done by a Party in a Court of Law, Court has no jurisdiction to permit that act to be done after the expiration of that time within which it had to be done.

When the petitioner has not made an application to recall the letters within the period prescribed in section 529(3), the petitioner's application cannot be maintained.

(2). When a Court directs an order *nisi* to be published and where there is no person in the prayer to serve the order *nisi* the power of Court to recall or revoke letters/probate is limited to cases when an order absolute is entered in the first instance

(3) Section 536 and section 537 of the Code must be read together. When the issue of probate is followed upon by an order *nisi* the provisions of section 537 do not apply, and all parties are concluded with the issue of probate".

Per Wimalachandra .J.;

"*Section 537 provides for the recall of letters/probate only when an order absolute had been issued in the first instance and in the instant case only an order nisi had been entered in the first instance. Therefore, sections 537 which deals with the power to recall or revoke probate/letters do not apply.*"

It was held ***in K.A.S.Alwisvs. K.A.K. Alwis and others*** (C.A.L.A.No.84/2004- decided on 12/01/2007) that *"in terms of section 516 of the Civil Procedure Code, after the testator's death, the will must be produced within three months after the finding of the will. Where the letters of administration with the will annexed has followed upon an order nisi, the provisions of section 537 do not apply. The appellant in this petition only says that in the effect the will produce is a forgery. This allegation which amounts to 'untested' information is of no evidentiary value. The Court at this stage cannot act upon such allegations, when and issue of letters of administration with the will annexed has followed an order nisi. Where there is fraud in connection with the obtaining of letters of administration with the will annexed even after an order nisi an independent action might be brought to set aside the letters of administration*".

It was held in ***K.K.S.D.Gunathilake vs. M.A.S.Mangalika & 4 others*** (CA.L.A.No.321/2004 - decided on 6th of June 2006*)* reported in BASL Newsletter, January/February 2007 that the petitioner did not file objections to the order made by Court when granting letters of administration to the respondent as prescribed in section 529(2) of the CPC. When a period of time specified by law before the expiration of which any act has to be done by a party in a Court of law that Court has no jurisdiction to permit that act to be done after the expiration of time within which it has to be done. **Section 537 of the CPC provides the recall of a probate or letters of ministration only where an order absolute is issued in the first instance and in the instant case only order *nisi* has been issued in the first instance. Therefore,**

Section 537 which deals with the power to revoke or recall or cancel a probate or grant letters of administration does not apply. Application dismissed.

I would think it appropriate at this juncture to re-produce a passage which has a relevancy on the matter under consideration, quoted by Court in ***Adoris vs. Perera*** **(17 NLR 212)**which reads thus;

"When an issue of probate has followed upon an order nisi (and not upon an order absolute in the first instance), the summary procedure for the recall of probate provided in section 537 does not apply, and all parties are concluded by the issue of probate. But, where, there is fraud in connection with the obtaining of probate even upon an order nisi, an independent action might be brought to set- aside the probate".

It was *inter-alia* , held in ***Pieris vs. Wijeratne and others*** (2000 (2) SLR 145 -decided on 6th of October 2000)that "*although according to S.536 Civil Procedure Code an application to recall Probate could be made only when an order absolute in the first instance has been made, in an appropriate case, depending on the circumstances, a Court has jurisdiction to act under S.839 Civil Procedure Code and make an order as may be necessary for the ends of justice or to prevent abuse of the process of Court.*"

(E) INVENTORY AND VALUATION

Section 539(1) of the Civil Procedure Code as amended provides that in every case where an order has been made, by a District Court declaring any person entitled to have probate of a deceased person's will, or administration of a deceased person's property granted to him it shall be the duty of the said person, executor or administrator, in whose favour such order is made, to take within fifteen days of the making of such order, the oath of an executor or administrator as set out in form No.92 in the first schedule, and thereafter to file in Court within a period of one month from the date of taking of the oath, an inventory of the deceased person's property and effects, with a valuation of a same as set out in form No.92 in the first schedule and the Court shall forthwith grant probate or letters of administration, as the case may be.

The question that would arise at this juncturefor consideration is that Can the non-inclusion of a land in a testamentary proceeding for the administration of an estate of a deceased, in any manner, defeat the title of the deceased and his heirs?

Answer to this question can be found from the decision in ***Ratnayake and others v. Kumarihamy and others*** (2002 (1) SLR 65) wherein, it was *inter- alia* held that *"The non-inclusion of a land in a testamentary proceeding for the administration of an estate of a deceased, cannot in any manner, defeat the title of the deceased and his heirs".*

Rational behind the rule enunciated by Court in ***Ratnayake and others v. Kumarihamy and others*** [supra] can be found from the decision in ***Silva Vs. Silva*** (10 NLR 234) wherein it was held that *"Title to immovable property belonging to the estate of a deceased person does not vest in the administrator of the estate of such person; and a conveyance by the heir of the deceased without the concurrence or assent of the administrator is valid, subject to the right of the administrator to deal with the property for purposes of administration.*

HUTCHINSON C.J.—The personal representative retains the power to sell the property for the purposes of administration; but his non-concurrence in the conveyance by the heirs does not otherwise affect its validity.

GEENIEB A.J.—On the death of a person, his estate, in the absence of a will, passes at once by operation of law to his heirs, and the dominium vests in them. Once it so vests, they cannot be divested of it, except by the several well-known modes recognized by law".

(F) FILING OF ACCOUNTS AND CLOSURE OF PROCEEDINGS

Section 551 of the Civil Procedure Code as amended provides that "Every executor and administrator shall file in the District Court , on or before the expiration of twelve months from the date upon which probate or grant of administration issued to him, or within such further time as the Court may allow, a true and final account of his executorship or administration, as the case may be, verified on oath or affirmation, with all receipts and vouchers attached, and may at the same time pay into Court any money which may have come to his hands in the cause of his administration to which any minor or minors may be entitled;

Provided that where the parties consent, the filing of such account and payment shall be dispensed with on payment of the stamp duty that would have been otherwise payable on the filing of such account, and the proceeding shall then be closed".

Question here is, Does the Court have power to re-open proceedings in order to entertain a claim to share of the estate on the ground that the claimant is an heir, where, a final account has been filed in administration proceedings and the estate declared closed?

Answer to this question can be found from the decision in ***Nonahamy vs. Punchihamy*** (31 NLR 220) where, it was held that *"where, a final account has been filed in administration proceedings and the estate declared closed, the Court has no power to re-open proceedings in order to entertain a claim to share of the estate on the ground that the claimant is an heir".*

The next question is, Are there any provisions in the Civil Procedure Code for the Court to order the Secretary to report on the account or to issue notice to, or hear objections from, the heirs in regard to the account filed?

Answer to this question can be found from the decision in ***Tharmalingam vs. Chandrasegaram*** (68 NLR 04) where, it was held that *"where the administrator of a deceased person's estate files an account in terms of section 553 of the Civil Procedure Code (which is similar to the new section 551 of the Civil Procedure Code as amended), there is no provision in the Code for the Court to order the Secretary (now the Registrar of the Court) to report on the account or to issue notice to, or hear objections from, the heirs in regard to the account filed. Where the Court hears objections from the heirs, it has no power to make an order that can only be made in appropriate proceeding under chapter LV of the Code. Even under that chapter the administrator cannot be made to account for property that has not come into his hands qua administrator.*

Where a husband appropriates and spends his wife's money with or without her consent, the husband qua administrator cannot be called upon to account for such property unless it is proved that, the property came into his hands qua administrator after his wife's death".

(F-1) Executor or administrator failing to administer within one year liable for interest.

Section 552 of the Civil Procedure Code as amended provides that If any executor or administrator shall fail to pay over to the creditors, heirs, legatees, or other persons the sums of money to which they are respectively entitled within one year after probate or administration is granted, such executor or administrator shall be liable to pay interest out of his own funds for all sums which he shall retain in his own hands after that period, unless he can show good and sufficient cause for such detention.

(F-2) Compensation of an executors and administrator.

Section 549 and 550 of the Civil Procedure Code as amended make provisions in this regard.

(F-3) Offences.

Section 553(1) and (2) (a), (b), (c) and (d) of the Civil Procedure Code as amended deal with the offencesthat may be committed in an application made under section 524 or 528 of the Civil Procedure Code as amended and the punishmentthat may be inflicted therefor.

(G) <u>SPECIAL PROVISIONS RELATING TO TESTAMENTARY ACTIONS</u>

(G-1) When Public Trustee may be appointed

Section 519 of the Civil Procedure Code as amended provides for the appointment of the Public Trustee as administrator of the estate of the deceased for the administration of the same. This section lays down two instances where, Public Trustee may be so appointed the administrator. namely; **a)** where, there is no fit and proper person in the opinion of the Court to be appointed administrator in the

manner provided in the last proceeding section or **b)** where, no such person is willing to be so appointed **and not in any other case, the Court shall appoint the Public Trustee as administrator**.

In the light of the section 519 of the Civil Procedure Code as amended, the power of the Court to appoint the Public Trustee as the administrator, is limited only to the instances **a)** where, there is no fit and proper person in the opinion of the Court to be appointed administrator in the manner provided in the last proceeding section or **b)** where, no such person is willing to be so appointed **and not in any other case, the Court shall appoint the Public Trustee as administrator**.

This view has been fortified by the decision in ***Ramanathan Chettiar vs. Barfi Lall*** (29 NLR 126) wherein, it was held that *"an official administrator should be appointed only when there is no fit and proper person to be appointed administrator. Where proceedings are pending for the appointment of an administrator, it is open to the Court to appoint an administrator pendente lite."*

Application for administration by the Public Trustee

Section 521(1) of the Civil Procedure Code as amended provides for the ingredients that an application for administration by the Public Trustee should contain.

Section 521(2) of the Civil Procedure Code as amended requires that the Public Trustee shall not be required to file accounts of the property of the deceased unless, the Court otherwise directs.

Duties of Public Trustee in administering estates

Section 522 of theCivil Procedure Code as amended provides that whenever the Public Trustee has obtained probate in respect of a will or grant of letters of administration in respect of the estate of a deceased person, he shall as far as practicable, comply with the provisions of this Chapter relating to the administration of estates subject however to the followings, namely; that the Public Trustee shall not be required—

(a) to take oath as executor or administrator;

(b) to furnish any bond or security, but shall be subject to the same liability and dues as if he had given such bond or security;

(c) to affix stamps on any document at or about the time of the making of such document; but shall eventually make such payment as required by the Stamp Duty Act, 43 of 1982;

(d) unless the court otherwise directs, to tender final accounts.

(G-2) Appointment of Guardian or Manager.

Section 530 of the Civil Procedure Code as amended provides that, If any of the heirs, legatees or beneficiaries named in such notice is a minor without a natural guardian, or person of unsound mind, without a guardian, steps shall be taken for the appointment of a guardian or manager, upon the making of an application to the District Judge, which application shall be heard in Chambers.

(G-3) Procedure where Corporation is appointed administrator or executor.

Section 535(1), (2) and (3) of the Civil Procedure Code as amended provides for the procedure where, Corporation is appointed administrator or executor.

(G-4) Limited probate or administration.

Section 540 of the Civil Procedure Code as amended provides for the grant or issue of limited probate or administration as the case may be, limited either in respect of its duration, or in respect of the property to be administered thereunder, or to the power of dealing with that property which is conveyed by the grant in the cases referred to in section 540 (a), (b), (c), (d), (e), (f), and (g) thereof.

(G-5) Administration pendente lite

Section 541 of the Civil Procedure Code as amended stipulates that where any legal proceeding touching the validity of the will of a deceased person or for obtaining, recalling or revoking grant of probate or letters of administration or for obtaining certificate of heir-ship is pending, the Court may either on the ground of undue delay or for any sufficient causegrant or issue probate or letters of administration as the case may be, in the manner provided for by subsections (i) and (ii) of (1) of 541 thereof.

However, in such a case, the respondent named in the original petition for probate or letters of administration or certificate of heir-ship must be given notice of the same and they or any other person interested in the estate shall be heard in opposition unless, they or any of them shall have signified their assent to such sale as, provided for by section 541 (2) thereof.

(G-6) Powers of administration when, not limited.

In the light of section 542 of the Civil Procedure Code as amended, if no limitation is expressed in the order making the grant, then the powers of administration extend to every potion of the deceased person's property, movable and immovable, within Sri Lanka , other than such property as is deemed under section 554 (A) not to be the property of the deceased, or so much thereof as is not administered, and enures for the life of the executor or administrator or until the whole of the said property is administered, according as a death of the executor or administrator, or the completion of the administration, first occurs.

It was held in ***Appuhamy vs. Silva*** (18 NLR 496) that "An administrator is entitled to sell landed property of an intestate when, letters of administration contain no limitation of his power as to such sales".

It was held in ***Bahar vs. Bura*** (55 NLR 1) that *"An administrator who enters in that capacity upon any property belonging to the estate of a deceased person cannot commence acquiring prescriptive title to that property for himself against the intestate heirs until, he has divested himself of his representative character by " completing the administration " within the meaning of section 540 of the Civil Procedure Code. An administrator in possession of property belonging to the estate owes an equal duty by virtue of his office to all the intestate heirs without discrimination, and, so long as that fiduciary relationship subsists, the law will not permit him to say, for purposes of prescription, that he held the property for the benefit only of those to whom he was bound by special ties of kinship or affection".*

It was held in ***Malliya vs. Ariyaratne*** (65 NLR 145) that *"An executor is not entitled to sell, for the payment of the testator's debts, any fideicommissary property in which minors are interested, unless sanction of the Court has been obtained. Nor can he sell, without the authority of the Court, property specially devised to minors. In such cases, a sale by the executor without the authority of the Court is invalid as against the minor, who can, therefore, while he is still a minor, institute a partition action if the property sold was his undivided share of a land owned in common*".

It was held in ***Somasunderam vs. Wijeratne*** (66 NLR 193) that "*Where a testator dies owing no debts and leaving sufficient money for the payment of estate duty, the executor has no power to sell any of the immovable property that is left subject to the condition that the executor shall have the right only to take and enjoy all the rents and profits and shall not have the power to sell or mortgage or alienate the same and that, after his death, the property shall devolve on and vest in certain specified legatees.*

Where, after his power of administration has come to an end, an executor sells immovable property which the Will does not authorise him to sell, the sale conveys no title to the purchaser as against a person who subsequently buys the same property from the heirs of the deceased and institutes a vindicatory action against the former purchaser. Even, if his power of administration has not come to an end, the executor has power to sell only for the purposes of due administration".

(G-7) Issue of Letters *adColligenda*.

Section 543 of the Civil Procedure Code as amended providesfor the circumstances, the District Court may issue of letters *adColligenda* in that it stipulates that if any person shall die leaving property in Sri Lanka, the Judge of the Court of any District in which such property shall be situate shall, on the facts been verified to its satisfaction and, it been made to appear that there is not some next of kin or other person in Sri Lanka, entitled to administration of the estate of the person , so

dying, issue letters *ad Colligenda*in the Form 91in the first schedule to one or more responsible persons to take charge of such property until the same shall be claimed by some executor or administrator lawfully entitled to administer the same, or by any heir to whom a certificate of heir-ship shall have been issued.

(G-8) Nomination

Section 544 of the Civil Procedure Code as amended provides that any person over 16 years of age (referred to as the nominator) who has monies,share or any other movable property lying to the credit of , or in the name of the nominator as itemized in section 544 (1) (a), (b), (c),(d) and (e) thereof, may nominate a person (referred to as the nominee) to whom such monies, share or other moveable property lying to the credit of, or in the name of the nominator or monies payable under such insurance policy shall be paid or transferred upon his death. 544(2), (3), (4) and (5) of the Civil Procedure Code as amended deal with the legal effect of such nomination.

(G-9) No transfer to be effected in certain cases

Section 545 of the Civil Procedure Code as amended provides that no person shall effect any transfer of any property movable or immovable, in Sri Lanka, belonging to or included in, the estate or effects of any person dying testate or intestate in or out of Sri Lanka within five years prior to the effecting of a transfer, unless grant of probate has been issued in the cases of a person dying testate, or letters of administration or certificates of heir-ship have been issued in the case of a person dying intestate and leaving an estate amounting to, or exceeding four million rupees in value.

In the light of section 545 of Civil Procedure Code as amended, the prohibition contained therein appear to be inapplicable to a transfer of any property movable or immovable, in Sri Lanka, belonging to or included in, the estate or effects of any person dying testate or intestate in or out of Sri Lanka after five years prior to the effecting of such transfer.

(G-10) Fresh grant, when allowed

Section 547 of the Civil Procedure Code as amended provides that when a sole executor or a sole surviving executor to whom probate has been granted, or a sole administrator or a sole surviving administrator to whom a grant of administration has been made, die leaving a part of the deceased's property unadministered, then a fresh grant of administration may be made in respect of the property left unadministered according to the rules herein before prescribed for a first grant.

It was *inter-alia* held in ***Sadhana Dharmabandu vs. Mallika Homes Ltd and Others*** (2009 (1) SLR 151)at page 158 that *"when those publication are made in the news-papers once, it amounts to sufficient publicity for persons to come forward and to participate in Court proceedings initiated in respect of a deceased person. Therefore, the formalities that have already taken place in this connection need not be taken again as in a fresh application since the purpose of those formalities are now been achieved".*

(H) INSOLVENT TESTAMENTARY ESTATES

Chapter XXXVIII A of the Civil Procedure Code deals with the procedure relating to Insolvent testamentary estates.

(I) FOREIGN PROBATES

Chapter XXXVIII B of the Civil Procedure Code deals with the procedure relating to foreign probates.

(J) OF THE AIDING AND CONTROLLING OF EXECUTORS AND ADMINISTRATORS, AND THE JUDICIAL SETTLEMENT OF THEIR ACCOUNTS.

Chapter LIV deals with the procedure relating to the aiding and controlling of executors and administrators, and the judicial settlement of their accounts.

It was held in ***De Silva vs. Gomes*** (30 NLR)that *"An administrator, who is not prepared to admit the claim of a creditor, is not entitled to place upon the Court the responsibility of a decision on the matter. In such a case, it is left to the creditor to establish his claim by regular proceedings against the estate".*

Wickremaratne vs. Wickremaratne (1991 (1) SLR 203) is a decision made under sections 712, 714 and 716 of the Civil Procedure Code as amended. Facts of the case read thus;

"A testator had devised a multi-storied building to three of his sons, one of whom having obtained probate was appointed administrator with the Will annexed and he moved for a citation under section 712 of the Civil Procedure Code against one brother (a co-heir) on the ground that he had been appropriating all the rental from this building for some time after the death of the testator. In the citation, he called upon his brother to account for and deposit to the credit of the testamentary case the rental income received. The estate duty had been paid".

Court held that "in the absence of proof or averment that this rental income is required for the purpose of due administration of the estate, he was not entitled to such a citation".

(K) OF THE ACCOUNTING AND SETTLEMENT OF THE ESTATE.

Chapter LV deals with the procedure relating to accounting and settlement of the estate.

Conclusion

As it is manifest from the above, the testamentary law still occupies a significant place in the sphere of our Civil Law.

SUSTAINABLE FISHERIES MANAGEMENT IN THE INDIAN OCEAN

Vikum de Abrew
Senior Deputy Solicitor General[1]

The Legal Initiatives by Sri Lanka for Combating Illegal, Unreported and Unregulated Fishing

Sri Lanka is an island State in the Indian Ocean located south-east of the Indian sub-continent between latitudes 6-10° N and longitudes 80-82° with an approximately 1340 km long coastline, facing the sea routes linking countries on either side of the Indian Ocean. The fisheries sector in Sri Lanka plays an important role in the country as one of the principal sources of nutrients while providing over 85000 direct job opportunities to the people in the coastal areas. According to the Ministry of Fisheries and Aquatic Resources Development, Sri Lanka has exported a sum of Rs40, 318 million worth of fish and fishery products during the first nine months in the year 2019.[2]

Illegal fishing is rampant in the Sri Lanka Waters. It is estimated that around 60,000 illegal fishing trips are carried out by foreign fishermena year, in Sri Lanka Waters [3] incurring annual direct and indirect losses amounting to US$ 61.5 million or LKR 7, 939.5 million.[4]

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2 Value of Exported Fish and Fishery Products at https://www.fisheries.gov.lk/web/index.php?option=com_content&view=article&id=43&Itemid=152&lang=en

3 Creech Steve "IUU fishing by Tamilnadu Fishermen:" Sunday Times (Sri Lanka) 22.10.2017.

4 MuttukrishnaSarvananthan "Cost of fishing dispute between Sri Lanka and India" Daily News (Sri Lanka) 18.01.2019

What is IUU Fishing?

According to the Food and Agriculture Organization of the United Nations (FAO), the acronym IUU stands for "Illegal, Unreported and Unregulated fishing", a term first coined by the CCAMLR[5] during discussion sessions in 1997[6].

IUU fishing may take place in areas within the national jurisdiction of a country or in the high seas. Therefore, the definition on IUU fishing in international instruments is wide enough to cover violations in both national and international sea areas.

In general terms **Illegal fishing means**, fishing activities conducted by nationals or foreign vessels in territorial waters[7] or the exclusive economic zone[8], without permission or in violation of the laws of the coastal State. It is also considered as *illegal fishing* if the vessels of the member States of the relevant regional fisheries management organization like IOTC operate in contravention of the conservation and management measures adopted by a regional organization.

Unreported fishing refers to fishing activities which have not been reported or have been misreported, in contravention of national laws or fishing in the area of competence of a relevant regional fisheries management organization without reporting or misreporting in contravention of the reporting procedures of that organization.

Unregulated fishing refers to fishing activities in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to the regional fisheries organization.[9]

International Instruments on Fisheries

The international fisheries law which is a subfield of law of the sea is an immerging area of public international law. International instruments on fisheries could be categorized into two namely, binding legal instruments such as conventions and non-binding instruments such as policy guidelines. Some of the important legal instruments which are applicable to the Indian oceanare briefly discussed below.

5 Commission for the Conservation of Antarctic Marine Living Resources.

6 Doulman, DJ. (2000) Illegal, Unreported and Unregulated Fishing: Mandate for an International Plan of Action. Document AUS:IUU/2000/4. FAO. Rome, Italy. 16p. ISBN: 92-5-104732-4

7 12 Nautical Miles from the base line of the coastal State.

8 200 Nautical Miles from the base line of the coastal State.

9 Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)- www.itlos.org

The United Nations Convention on the Law of the Sea (UNCLOS)

The UNCLOS divides ocean space into three broad maritime zones: zones under sovereignty[10]; zones under sovereign rights[11]; and high seas[12]. Under the Convention, the State has sovereigntyin the territorial waters[13]. Vessels of other States have the right to traverse within the territorial waters. The passage has to be continuous, expeditious and also innocent[14]. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. It is a violation of the right of innocent passage if a foreign vessel engages in any fishing activities whilst traversing through the territorial sea of the coastal State[15].

In the exclusive economic zone (EEZ) the coastal State has the sovereign rights over living and non-living resources. The coastal State is also obliged to conserve and manage resources in the EEZ[16]. States are required to cooperatewith regard to straddling fish stocks and highly migratory species[17]. On the other hand, coastal State has also a legal continental shelf of 200 n.m. The rights of the coastal State has sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. The two regimes are overlapping. The main difference of the two regimes is that the EEZ has to be declared by the coastal State[18], whereas the continental shelf of the coastal State exists *ipso facto* and *ab initio*, by virtue of its sovereignty over the land[19].

The UNCLOS grants to all States the freedom of fishing subject to certain conditions[20]. This freedom is balanced by a duty to co-operate in managing the fisheries resources and a duty to adopt measures to control the fishing activities of nationals on the high seas.

FAO Agreement on Port States Measures (PSMA)[21]

The Agreement is the first binding international agreement which specifically dealt with IUU fishing. Its objective is to prevent, deter and eliminate IUU fishing by preventing vessels engaged in IUU fishing from entering ports and landing its catch.

10 Part II of the Convention.
11 Parts V and Vi of the Convention.
12 Part VII of the Convention.
13 Article 2 of the Convention.
14 Article 17 and 19 of the Convention.
15 Article 19of the Convention.
16 Article 56 of the Convention.
17 Articles 63 and 64of the Convention.
18 Article 57 of the Convention.
19 North Sea Continental Shelf Cases 1969 ICJ Reports p.3.
20 Articles 116-120 of the Convention.
21 United Nations Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009).

The provisions of the PSMA apply to fishing vessels seeking entry into a designated port of a State which is different to their flag State[22]. The Agreement effectively prohibits fishery products derived from IUU fishing from reaching national and international markets. The effective implementation of the PSMA would contribute to long-term conservation and sustainable use of living marine resources and marine ecosystems.

FAO Compliance Agreement

The primary purpose of the agreementis to ensure that the State strengthens its control over its vessels to ensure compliance with international conservation and management measures.

Under the Agreement, flag States are required to ensure that none of their vessels are fishing on the high seas unless authorized. Flag States shall also ensure that their vessels comply with international measures.

The maintenance of records of fishing vessels, international cooperation, and the area of enforcement are covered extensively by the provisions of the Agreement.

UN Fish Stock Agreement 1995

The Agreement elaborates on the fundamental principle, that States should cooperate to ensure conservation and promote the objective of the optimum utilization of fisheries resources both within and beyond the exclusive economic zone.

The Agreement attempts to achieve this objective by providing a framework for cooperation in the conservation and management of the resources. The Agreement intends to achieve effective management and conservation of high seas resources by establishing, minimum international standards for the conservation and management of straddling fish stocks and highly migratory fish stocks.

Indian Ocean Tuna Commission

The Indian Ocean Tuna Commission (IOTC) is an intergovernmental organization mandated to manage tuna and tuna-like species in the Indian Ocean and adjacent seas. The objective of the Commission is to promote the conservation and optimal utilization of tuna and tuna-like stocks covered by the IOTC Agreement, and to encourage sustainable development of fisheries**.**

Sri Lanka's obligation to respect the International Law

Sri Lanka being a dualist country needs to enact legislation to give effect to domestic application of international obligations undertaken by Sri Lanka. The

22 The State where the vessel is registed.

legal position in Sri Lanka in respect of implementation of international treaties has been lucidly explained by the Supreme Court of Sri Lanka in the case of ***Singarasa v Attorney General*** (2013 1 SLR 245) wherein Court held:

"On the other hand, where the President enters into a treaty or accede to a covenants the content of which is inconsistent such act would not bind the republic qua state. …….The accession and declaration does not bind the Republic qua State and has no legal effect within the Republic."

The Constitution of Sri Lanka recognizes Sri Lanka's commitment to respect for international law and treaty obligations in Article 27 of the Constitution.

In the case of ***Wijebanda v Conservator of Forests***[23]*, Shirani Tilakawardene J held:*

"*Although the Directive Principles of State policy in Article 27(4) of the Constitution, are not specifically enforceable against the State, they provide important guidance and direction to the various organs of State in the enactment of laws and in carrying out the functions of good governance."*

The Supreme Court in the case of ***Sunila Abeysekara v Ariya Rupasinghe*** held that the *national courts have regard to international obligations which a Country undertakes whether or not they are incorporated into domestic law*[24].

Thus, the provisions of the Constitution and judgments of the superior Courts have unequivocally affirmed the obligation of the State to respect not only the treaty obligations but also the customary international law principles.

Obligation of Sri Lanka to eliminate Illegal, Unreported and Unregulated Fishingunder International Law

Illegal, Unreported and Unregulated fishing is a major threat to global marine resources. It is estimated that between 11 and 26 million tonnes of fish are caught illegally each year with an annual global value of up to 10 billion euros[25].

Sri Lanka being a signatory to the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS) is obliged to protect the marine environment under Article 192 of the UNCLOS. Article 192 applies to all maritime spaces irrespective of the geographical location. In the *Southern Bluefin Tuna cases*[26], the International Tribunal for the Law of the Sea or ITLOS, observed that the conservation of marine environment is also an element of Article 192 of UNCLOS.

In the ITLOS Advisory Opinion, ITLOS found that the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing in the

23 2009 1 SLR 337.
24 2000 1 SLR 314.
25 http://eeas.europa.eu/archives/delegations/sri_lanka/documents/press_corner/20160617.pdf.
26 New Zealand v Japan; Australia v Japan ITLOS 1999.

EEZ rest with the coastal State. It is the coastal state's responsibility to adopt necessary laws and regulations, including enforcement procedures, consistent with UNCLOS, to conserve and manage the living resources in the EEZ. The Tribunal further opined that, Coastal States' obligations did not relieve flag states of their obligations to combat IUU fishing. ITLOS was further of the view that, the liability of a flag state arises only if it failed to meet its due diligence obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the EEZs.

Maritime Zones of Sri Lanka

Sri Lanka exercised maritime jurisdiction over ancient ports and adjacent areas long before the territorial sea concept came into existence. During the period of Dutch colonial era, Sri Lanka maintained a three nautical mile territorial sea. Sri Lanka also declared its maritime zones before the Law of the Sea Convention was adopted in 1982. However, the Sri Lankan law on maritime zones are substantially in compliant with the provisions in the Convention. **The Maritime Zones Law of No 22 of 1976** provides for the declaration of maritime zones of Sri Lanka and the manner of measuring the said zones. Pursuant to the said law and also based on bilateral agreements between Sri Lanka and India , by Proclamation of 15th January 1977, Sri Lanka declared a territorial sea of 12 n.m, a contiguous zone of 24 n.m , and an exclusive economic zone & maritime pollution zone of 200 n.m. The maritime boundaries in the Palk Bay , Gulf of Mannar and Bay of Bengalhave been delimited according to bi-lateral agreements. The salient provisions of the agreements are discussed below.

Indo-Sri Lanka Agreements in 1974 and 1976

The maritime zones between Sri Lanka and India have been demarcated consequent to the three agreements entered into in 1974 and 1976 following a series of bilateral discussions.

The first boundary agreement was entered into between Sri Lanka and India on 26th June 1974, delimiting the international maritime boundary in the area of Palk Strait to Adam's Bridge. Article 4 of this Agreement stipulates that *each country shall have sovereignty and exclusive jurisdiction and control over the waters, islands, continental shelf and subsoil thereof falling on its own side of the aforesaid boundary*.

Article 6 of the said Agreement further stipulates, *[t]he vessels of Sri Lanka and India will enjoy in each other's water's such rights as they have* ***traditionally enjoyed therein***. .

The reason to include the said Article was explained by Mr. *W. T. Jayasinghe*, who was the Foreign Secretary at the time of the negotiations, in his book titled "*Kachchativu: And the Maritime Boundary of Sri Lanka*". Referring to the bilateral discussions between two countries prior to entering into the said Agreement, he has commented that Article 6 was included to preserve only the **traditional right of navigation** enjoyed hitherto and **not to confer any fishing rights** in the areas falling within each other's jurisdiction[27].

The above proposition is further fortified by Article 5 of the Agreement, wherein the Indian fishermen and pilgrims, are permitted to visit Kachchativu without obtaining travel documents for religious purposes. Thus, this Article does not permit Indian fishermen to engage in fishing in the new areas within the jurisdiction of Sri Lanka.

Another Agreement was signed on 23rd March 1976 on the demarcation of maritime boundary in the Gulf of Mannar and the Bay of Bengal. Article V(2) of the said Agreement grants sovereign rights and exclusive jurisdiction over the resources (whether living or non-living) falling on its side of the aforesaid boundary.

This position was further confirmed by letters that were exchanged between the two Secretaries to the Foreign Ministries of the respective countries. In the letter dated 23rd March 1976 written by Mr. Kewal Singh, Secretary to the Foreign Ministry of India to his counter-part in Sri Lanka, he has stated as follows:

"Our two governments have also exchanged views on the substance of our proposed maritime legislation. India and Sri Lanka will exercise sovereign rights over the living and non-living resources of their respective zone. The fishing vessels and fishermen of India shall not engage in fishing in the historic waters, the territorial sea and the exclusive economic zone of Sri Lanka nor shall the fishing vessels and fishermen of Sri Lanka engage in fishing in historic waters of the exclusive economic zone of India, without the express permission of Sri Lanka or India, as the case may be." [28]

27 Jayasinghe. W.T; *Kachchativu: And the Maritime Boundary of Sri Lanka, Stanford Publications.,Pannipitiya, Sri Lanka.,2003, p.102.*

28 Jayasinghe. W.T; *op. cit.*, p.147.

Mr. Jayasinghe in his reply affirmed the position of India in the following statement:

"I have the honour to confirm that the above correctly sets out the understanding reached between our two Governments. Your letter and my reply thereto shall constitute an Agreement between the Government of Sri Lanka and the Government of India…"[29]

Pursuant to the agreements, Sri Lanka promulgated the Maritime Zones Law No.22 of 1976 incorporating the aforesaid negotiated position.

It important to highlight that, as a result of the final outcome of the negotiations, the Kachchativu Island fell within the Sri Lankan side of IMBL[30], and at the same time 45 square miles of Sri Lankan fishing area fell within the Indian side of the IMBL[31].

It is clear from the bilateral agreements and exchange of letters leading to the aforesaid agreements that both India and Sri Lanka did not want to permit fishers fishing in the waters of the other country.

Both countries have respected the IMBL between Sri Lanka and India agreed upon in terms of the above agreements since then. Courts of the jurisdiction of both countries have reiterated the obligation to respect the international maritime boundary line (IMBL) between the two countries[32]. During the recent Joint Working Group (JWG) discussions between India and Sri Lanka, both countries have stressed the importance of preventing illegal fishing by fishers in the jurisdiction of the other State. The law enforcement officers of both countries are working very closely to achieve this objective.

Historical Background in Fisheries in Sri Lanka

The management of natural resources such as fisheries and aquatic resources management in Sri Lanka dates back to the Pre – Independence Era where several legislations and laws had been passed in order to protect and manage natural resources.

The Chank Fisheries Ordinance No. 8 of 1853 was enacted to regulate persons and boats taking *chanks* without a permit. Similarly the ***Pearl Fisheries Ordinance No. 2 of 1890*** was enacted as a separate Ordinance with regard to the *window – pane oyster fishery*. Several years later, the ***Whaling Ordinance No. 32 of 1928*** *was enacted to* regulate the fishing of whales, dolphins, porpoises and all marine mammals. Under the provisions of this Ordinance no person was allowed to kill or hunt or attempt to kill any of these animals, in territorial (Ceylon) waters, without a license.

29 Jayasinghe. W.T; op. cit., p.148
30 International Maritime Boundry Line.
31 Jayasinghe. W.T; op. cit., p. 94.
32 https://timesofindia.indiatimes.com/india/Katchatheevu-is-a-settled-issue-Indians-cant-fish-near-islet-Centre/articleshow/29268736.cms

***The Fisheries Ordinance No. 24 of* 1940** was enacted consolidating the laws relating to fisheries except the above mentioned *Chank Ordinance, Pearl Fisheries Ordinance* and the *Whaling* Ordinance and also provided for the registration of local fishing boats.

*Later, the Fisheries Ordinance, t*he *Chank Fisheries Ordinance, t*he *Pearl Fisheries Ordinance and the Whaling Ordinance were repealed and replaced by the* Fisheries and Aquatic Resources Act of No 2 of 1996.

The legislations related to fisheries in Sri Lanka

The fisheries legislative framework to a large extent has been regulated by the Fisheries and Aquatic Resources Act of No 2 of 1996 and Fisheries (Regulation of Foreign Fishing Boats) Act No 59 of 1979. These two Acts have been further amended several times during the last few years by incorporating the international obligations undertaken by Sri Lanka. Besides the said laws, there are other legislations which regulate various aspects of fisheries in Sri Lanka[33]. It is pertinent to note that some of the provisions of the Acts are overlapping with the Fisheries and Aquatic Resources Act and the Fisheries (Regulation of Foreign Fishing Boats) Act. Therefore, coordination between various State agencies becomes difficult when it comes to the implementation of these laws.

Prevention of Illegal Fishing by Sri Lankan Fishers in the High Seas

Part IIA of the Fisheries and Aquatic Resources Act No 2 of 1996, which was introduced in 2013, regulates fishing in the high seas by Sri Lankan fishermen. It is prohibited to engage in any prescribed fishing operations in the High Seas, except under a license granted by the Director-General[34]. The licensee shall carry out the fishing operation in accordance with the conservation and management measures adopted-

(a) under the United Nations Convention on the Law of the Sea of December 10, 1982;

(b) by the Indian Ocean Tuna Commission (IOTC);

(c) under the Fish Stocks Agreement of 1995; and

(d) under the Food and Agriculture Organization (FAO) of the United Nations Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009).

33 The State Lands Ordinance, Central Environmental Authority Act No 47 of 1980, Coasts Conservation Act No 57 of 1981, Fauna and Flora Protection Ordinance No 2 of 1937, Forest Ordinance No 16 of 1907, Marine Pollution Prevention Act No 35 of 2008, National Aquatic Resources and Development Agency Act No 54 of 1981.

34 Section 14A of the Act.

The same Chapter contains provisions to prevent fishing in the national jurisdiction of another State unless authorized to do so by the said State[35].

Several regulations have been made under the aforesaid Act in keeping with Sri Lanka's obligations under international law for the conservation and management of resources in the High Seas. The following are some of the salient measures adopted to maintain the minimum standards stipulated in the aforesaid international instruments:

(1) Every person who uses mechanized fishing boats registered under the Registration of Fishing Boats Regulations 1980 published in the Gazette Extraordinary No 109 of October 1980 for fishing in Sri Lanka waters or the High Seas shall carry on board a log book issued by the Department of Fisheries and shall record the catch in the log book in relation to each fishing trip[36].

(2) It is prohibited to be engaged in a prescribed fishing operation[37] in the High Seas except under the authority of a valid license granted by the Director-General. The holder of the licence granted for fishing operations in the High Seas shall comply with the conditions stipulated therein, in keeping with the relevant provisions of UNCLOS, IOTC, Fish stocks Agreement (1995) and the FAO Agreement on Port States Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009)[38].

(3) All fishing boats, supply or cargo vessels which have an overall length of 10.3 m or more shall be fitted with a Vessel Monitoring System Device (VMS) approved by the DFAR. It is the duty of the skipper to ensure that the information is transmitted irrespective of the geographical location[39].

It is prohibited to be engaged in trans-shipment, landing and or selling certain shark species after being engaged in fishing operations in the High Seas. If a shark of a prohibited species is accidentally caught, the shark shall be released and a record of such incident shall be documented[40].

Sri Lanka has made regulations under the UN Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009) to ensure that boats entering or doing any activity with the catch

35 Section 14 F of the Act.

36 Fish Catch Data Collection Regulations 2014 Gazette Extraordinary No 1878/11; dated 01/09/2014

37 Under the regulation the prescribed fishing operations for High Seas are Purse Seine, Long Lone, Gillnet cum Long Line, Gillnet, Pole and Line, Hand Line, and Trolling fishing operations.

38 High Seas Fishing Regulations No 1 of 2014 Gazette Extraordinary No 1878/12 dated 01/09/2014 amended by Gazette Extraordinary Nos 1892/41 dated 12.12.2014 and 1945/6; 14.12.2015;

39 Implementation of Satellite based Vessel Monitoring Systems (VMS) For Fishing Boats Operation in High Seas Regulation 2015 Gazette Extraordinary No 1907/47 dated 26/03/2015

40 Shark Fisheries Management (High Seas) Regulations 2015 Gazette Extraordinary No 1768/36 dated 26/10/2015

harvested in violation of the domestic and international law. According to the said regulation, no person shall, except under authority of a licence issued by the Director General of DFAR, land, trans-ship, pack or process fish taken outside Sri Lanka waters by a foreign fishing boat or obtain services such as resupplying, maintenance and dry docking for such boats. These services shall be carried out only in ports designated and declared in the IOTC or in ports authorized by the Director General. If the Director General has sufficient evidence to believe that the boat seeking entry has engaged in or is connected with IUU fishing, such boat shall be denied entry to the port, and such decision shall be communicated to the flag State which authorized fishing and IOTC[41].

The violation of any regulations on conservation and management measures under UNCLOS, IOTC, Fish stocks Agreement and the FAO Agreement on Port States Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing will attract a maximum sentence of 2 years imprisonment and a monetary fine as per the schedule according to the size of the boat[42].

Prevention of Illegal Fishing by Sri Lankan Fishers in the Sri Lanka Waters

It is prohibited to engage in prescribed fishing operations in Sri Lanka waters[43] without a licence from the Director of Fisheries. These licenses are non-transferable, without the approval of the Director or the licensing Officer[44]. This part has no application for the licensing of foreign fishing boats used for fishing in Sri Lanka waters under the provisions of the Fisheries (Regulation of Foreign Fishing Boats) Act, No. 59 of 1979[45].

Protection of Fish and Other Aquatic Resources

Part IV of the Act deals with the protection of fish and aquatic resources. Under the Act, using or having in possession poisonous, explosive or stupefying substances (including dynamic) or other noxious or harmful matter or substance in Sri Lanka waters for the purpose of poisoning, killing, stunning or disabling any fish or other aquatic resource is prohibited[46].

Furthermore, the use or possession, of any prohibited fishing gear or engaging in any prohibited fishing method in any area of Sri Lanka waters or the High Seas

41 Implementation of Port State Measures to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing Regulations 2015; 1907/47 dated 26/03/2015 amended by Gazette Extraordinary No 2027/32dated 13/07/2017

42 Section 49 of the Act.

43 Sri Lanka Waters means territorial waters, contiguous zone, exclusive economic zone, historic waters and internal waters.

44 Part II of the Act.

45 Section 14 of the Act.

46 Part IV.of the Act.

is prohibited[47]. With the introduction of the amendment to Section 28 of the Act in 2017, engaging in fishing operations utilizing bottom trawl nets towed by motorized fishing boats is strictly prohibited.

Offences

It is important to note that no bail shall be allowed by a Magistrate to any person who is accused of an offence related to the use of any poisonous, explosive or stupefying substance (including dynamite).

Though the punishment for the use of prohibited fishing gear is only a fine, fishing utilizing bottom trawling nets carries 2 years imprisonment and a fine of Rs. 50,000.

Fishing by Foreign Fishing Boats in Sri Lanka Waters

The Fisheries (Regulation of Foreign Fishing Boats) Act No 59 of 1979 was promulgated to regulate fishing in Sri Lanka waters by foreign fishing boats. It was observed that the main Act had several drawbacks such as fines being inadequate to discourage foreign fishing boats fishing in Sri Lanka waters; the same punishment being imposed for violations in different maritime zones; the jurisdiction to hear the cases being vested with the High Court; and the Act not being in compliance with recent developments in international law.

In this backdrop, a cabinet memorandum was forwarded by the Ministry of Fisheries and Aquatic Resources Development to the Cabinet of Ministers and accordingly, by the cabinet decision dated 12-11-2015, the Secretary to the Ministry of Fisheries and Aquatic Resources Development, was directed to formulate a concept paper with regard to the amendments required to be made to the Fisheries (Regulation of Foreign Fishing Boats) Act No 59 of 1979, based on the recommendations of a Committee appointed for this purpose.

Based on the recommendations of this committee, the said Act was amended by Act No 1 of 2018. The salient features of the Act are as follows.

Fishing in Sri Lanka Waters

A foreign fishing boat is prevented from carrying out fishing or related activities in Sri Lanka waters except under the authority of a permit issued under the Act[48]. The fishing gear of a foreign fishing boat, while traversing through the Sri Lanka Waters, shall be stowed in the prescribed manner at all times[49].The Director-General is empowered under the Act to grant permission authorizing any foreign fishing boat

47 Section 28 of the Act
48 Section 4 of the Act.
49 Section 5 of the Act.

to be used for research operations, experimental fishing or scientific investigations relating to fisheries resources in Sri Lanka waters[50].

Notification of Arrest

In terms of Article 73 read with Article 292 of the Law of the Sea Convention (UNCLOS), it is required to notify the flag State of the arrest made in connection with the offences in the Exclusive Economic Zone (EEZ)[51]. Under the new amendment, it is required to inform the consular officer of the country to which the fishing boat belongs through the Minister of Foreign Affairs[52].

Offences

Based on the recommendation of the committee, different punishments are specified for violations committed in different zones.

In the event that any foreign fishing boat is used in the **territorial waters**, for fishing without a permit; the master, owner and charterer or any person on board or any person suspected to have been on board of such boat are liable on conviction to an imprisonment for a term not exceeding two years or to a fine not less than the amounts specified in the Schedule based on the length of the fishing boat.

However, if the offence is committed for the first time, such offender is liable for an imprisonment for a term not exceeding one year or to a fine not exceeding the amounts specified in the first Schedule[53]. Similarly, If the fishing gear is not stowed in the prescribed manner, the offender is liable for a different punishment[54].The offencesmentioned above are non- bailable[55].

If any foreign fishing boat is used in the **Exclusive Economic Zone** of Sri Lanka without a permit or without stowing the fishing gear in the prescribed manner; the master, owner and charterer or any person on board or any person suspected to have been on board of such boat shall be guilty of an offence under this Act and shall be liable on conviction by a Magistrate to a fine not less than the amounts specified in the respective Schedules based on the length of the fishing boat[56]. The arrested vessels and crew shall be promptly released upon security[57]. The bond or security has to be of a financial nature[58]. The value of the bond should be determined taking into

50 Section 12 of the Act.
51 *Arctic Sunrise (Kindom of Netherlands v Rusian Federation) ,Saiga II(St. Vincent and Grdenies v Guinea) and Verginia G (Panama v Guinea-Bissau)*
52 Section 13 A of the Act.
53 Section 15 of the Act.
54 Section 15A of the Act
55 Section 15F of the Act.
56 Section 15B and 15 C of the Act.
57 The"Tominmaru" (Japan v Russian Republic).
58 The " Volga" (Russian Republic v Australia)

consideration the gravity of the offence, penalty imposable and the value of the vessel. Offences committed for the first time can be compounded and the procedure for the same is stipulated in section 20 of the Act.

The salient feature of the Act is that the master, or any person shall not be deemed to be guilty of an offence under this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of that offence[59].

Jurisdiction of Court

The *jurisdiction* to try offences committed under the Act had been conferred on the High Court in keeping with the provision of section 9 of the Judicature Act. This provision caused practical difficulties to prosecute offenders under the Act. The amended provision has given jurisdiction to the Magistrate's Court to hear cases[60]. It is incumbent on the Learned Magistrate to conclude proceedings within a period of one month from the date of institution of such proceedings in the Magistrate's Court[61].

The procedure for the forfeiture of boats [62] is identical to the provisions in the Fisheries and Aquatic Resources Act.

Presumptions under the Act

The following presumptions were incorporated, taking into consideration the difficulties in proving cases involving multinational offenders.

- If the place in which an event is alleged to have taken place is in issue, the place stated in a certified copy of the relevant entry in the log-book or other official record of the enforcement vessel shall be presumed as the place of offence, until the contrary is proved.
- If the fishing gear of a foreign fishing boat is not stowed in the prescribed manner or fish is found have been on board such boat, it may be presumed that the said boat was used for fishing within the said zone, until the contrary is proved.
- Where any abandoned foreign fishing boat is found, it may be presumed to have been used for the commission of any offence under this Act, until the contrary is proved.

59 Section 15H of the Act.
60 Section 24 of the Act.
61 Section 15 E of the Act.
62 Section 18 of the Act.

Abandoned Foreign Fishing Boats

It was brought to the attention of the Committee that offenders at time abandon the boats. Therefore, the Committee proposed to include a provision to the effect that if any abandoned foreign fishing boat, along with fishing gear, fish, etc. is seized on suspicion of being involved in the commission of an offence under this Act, such boat shall vest absolutely in the State unless a claim is made regarding the said boat within the prescribed period[63].

Where a claim is made to such articles the Magistrate upon being satisfied pursuant to an inquiry that such boat was not used for the commission of any offence under this Act, shall make an order to release such boat or such items on board, or proceeds thereof[64]. However, the claimant shall pay all expenses incurred by the State in relation to the abandoned foreign fishing boat and all such items thereon[65].

Post Amendments to the Fisheries (Regulation of Foreign Fishing Boats) Act

83 foreign fishermen and 13 boats were arrested in the year 2018 for engaging in illegal fishing in the Northern areas of Sri Lanka. It is reported that 190 foreign fishermen and 38 boats have been arrested so far in 2019 for the same offencein the Northern areas of Sri Lanka.Consequent to the pleading guilty for illegal fishing, most of the fishermen were sentenced and thereafter repatriated. These judgements have been delivered on the basis that they had committed the offence for the first time. So far, the owners of the said boats have not made any application before the said courts.

Conclusion

The Fisheries and Aquatic Resources Act No 2 of 1996 was amended several times since 2013. The main reason for such amendments was the EU Ban on fisheries exports from Sri Lanka from January 2015. The Ban was announced in October 2014 on the basis that Sri Lanka has not sufficiently addressed the shortcomings in its fisheries control system identified in 2012. The main weaknesses identified by the EU include shortcomings in the implementation of control measures, a lack of deterrent sanctions for the high seas fleet, as well as lacking compliance with international and regional fisheries rules[66]. It was lifted completely in July 2016, once the EU was satisfied with the commitment of Sri Lanka to respect international obligations.

63 Section 19A of the Act.
64 Section 19B of the Act.
65 Section 19C of the Act.
66 http://europa.eu/rapid/press-release_IP-14-1132_en.htm.

The ban on utilizing bottom trawling nets used by mechanized boats was introduced in 2017 to end commercial trolling. With the recent amendments to the above Act and the regulations made thereunder, the Fisheries and Aquatic Resources Act No 2 of 1996 is now in compliance with all major international obligations Sri Lanka has undertaken.

The Fisheries (Regulation of Foreign Fishing Boats) Act No 59 of 1979 was also amended to deter illegal fishing in Sri Lanka waters. The Act was drafted taking into consideration the unique issues Sri Lanka faces in the region. This Law also contains provisions regarding the notification of arrest of fishermen to the consular office of the flag State, and also regarding the arrest / release of fishermen in respect of the EEZ offences as per the provisions in the Law of the Sea Convention.

Therefore, Sri Lanka is one of the very few countries in the Asian Region where the laws are on par with all major international and regional instruments dealing with combatting IUU fishing.

CHALLENGES TO HUMAN RIGHTS IN THE FACE OF TERRORISM: DOMESTIC AND INTERNATIONAL LEGAL RESPONSES WITH SPECIAL REFERENCE TO SRI LANKA

Professor Wasantha Seneviratne*

Effective counter-terrorism measures and the protection of human rights are not conflicting goals but complementary and mutually reinforcing ones. The defence of human rights is essential to the fulfilment of all aspects of an effective counter-terrorism strategy. Only by honouring and strengthening the human rights of all the international community can succeed in its efforts to fight this scourge.'

Kofi Annan, 'Uniting Against Terrorism'

1. Introduction

Being subjected to the terror of repeated cycles of terrorism over several decades, Sri Lanka provides an example of a countryabout the adverse effects of terrorism on a country's physical and human security. The bombs explosions occurred on 2019 Easter Sunday morning at the heart of Colombo reminded us the need to protect the security of State but without undermining the rights of people. This scholarly article attempts to provide a glimpse of an overview based on the current debates and discourses on the difficulties pertaining to strike a balance between protecting and promoting human rights on one hand and maintainingphysical security of a countryon the other hand in countering terrorism.

Protection and promotion of human rights being an integral aspect of a civilized society,the duty in this regard remains anundeniable responsibility of the Government of a sovereign State. Also, it is well understood that peace is an unnegotiable aspect ofany society. If peace and human rights are in conflict with each other a question would arise as to what should be given the prominence over the other, if the given circumstances require a choice to be made. Some scholars have academically addressed this perplexity by prioritising either human rights over the

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security of a country or peace and security over the rights of people. The scholars who prefer to protect rights over State security draw examples from the Preamble and some of the key provisions of the United Nations Charter in order to support their argument. However, the scholars who wish to prioritise peace over human rights have made used of the context in which the UN Charter was adopted because in the aftermath of the deadliest Second World War, peace was the utmost priority in order to prevent or mitigate the occurrence of future wars.

Once again, the world had to walk in to the new millennium through the havoc of 2001 September 11 terrorist attacks taken place in the USA, which too could shock the peace-loving nations. Along with this tragedy, other series of terrorist activities,occurred in several parts of the world in the recent past,could add a weight to strengthen this opinion, which led the international community to take several measures to curb terrorism by paying less attention on human rights. Although the international community is thus motivated to find long lasting solutions to eradicate the menace of terrorism from the world, some of the counter-terrorism measures paved the way to undermine human rights of innocent people who have no connection to acts of terrorism. In this backdrop, opposite scholarly views that argue for safeguarding human rights while engage in counter-terrorism activities, also emerged strongly.

Sri Lanka was emerging from the ravages of the three decade long armed conflict when the Easter Sunday bomb explosions occurred on 21st April 2019. With the ugly head of terrorism reappeared in Sri Lanka consequent to these blasts, the need to counter terrorist activities also has resurfaced as one of the key priorities. The old debates on the conflict of interests between the need to maintain national and international security and to protect people's freedom, rights and social harmony also emerged with a new vigour. The main objectives of this research paperset out in this context, are to examine and analyse the relevant international and domestic counter terrorism laws and responses and their impact on protection of human rights categorically subject to counter terrorism measures in any society, with a special focus on the contemporary Sri Lankan debates on this issue. The author wishes to recommend on how to make a balance between the counter terrorism measures and the protection of human rights at the end of the article.

Some States employ illegal, cruel and discriminatory counter terrorism measures while arresting, interrogating and convicting the suspects and engage in torture and other inhumane and degrading treatment and punishment on them. These actions violate established international and domestic human rights standards and safeguards. Such activities may undermine the independence of the judiciary and the rule of law too. Establishment of special courts and tribunals and the adoption

of draconian legislations as measures for countering terrorism would lead to give sentences based on malice and non-legal objectives.Governments may use the State powers to suppress the voices of human rights defenders, journalists, vulnerable groups and the civil society.

The contemporary Sri Lankan society also faceswith the dilemma of fighting against terrorism while protecting human rights. Therefore, this paper explains that eradicating terrorism would have a far-reaching effect on the overall respect for human rights unless the counter-terrorism measures are carefully chosen and implemented with either no harm or unavoidable minimum harm on people who have no connection with the terrorist activities. Human rights have to be seen as the basis of counterterrorist legislation and are never to be regarded as a hindrance of the struggle against terrorism. The paper argues that the threat of terrorism requires specific measures, but these measures should not lead to violate human rights and fundamental freedoms by creating animosity and mistrust among the people against each other. In the given context, the paper examines the counterterrorist measures at international, regional and national levels, and also explores the nexus between terrorism and the protection of human rights. The post Easter bomb explosion occurred in Sri Lanka will be the main focus of this and the methodology employed was a desk review of relevant documents that included the relevant literature, domestic and international legal standards and case law jurisprudence.

2. Fight against Terrorism and the Need for Counter-Terrorism Measures

Terrorism is not a new phenomenon.Terrorism manifests differently based on the context in which the terrorists operate and also based on their targets and tactics. Every form of terrorism poses a threat to all States and to all peoples and in particular results in mass destructions. Human rights violations may give birth to terrorist activities and the terrorist activities require deploying counter terrorist strategies in which case human rights of people may be under threat. This may produce new terrorists suppressed unduly by such unjustifiable counter terrorist measures. This rotation would become a vicious cycle in societies and a heavy blow on the peace, rule of law, good governance and human rights.

Terrorists have no particular place or time to do their heinous violations, but target to terrify their opponents and the subjects whom are affected by their rivalries in order to earn publicity and to achieve their motives. Nevertheless, terrorism is defined by various scholars from different perspectives based on the context and the discipline that the term is used. Thus, we find various types and uses of terrorism such as political terrorism, state-terrorism or state-sponsored terrorism.[1]

1 Elisabeth Kardos Kaponyi, Upholding Human Rights in the Fight Against Terrorism, 29 Society and Economy (2007) 1, pp. 1–41

In most of the times, terrorists are belonged to resistant movements, which operate clandestinely and going under covered. They are considered non-State actors (NSAs). They generally perpetrate terrorist activities with the aim of creating fear in order to achieve political, economic, religious, or ideological goals.[2] In Sri Lanka, evidence were received that the blasts in churches and hotels in Colombo and Batticaloa were done by an extremist radicalised Islamic group named National Thowheed Jamaat (NTJ)[3] influenced by an infamous international terrorist organisation called ISIS (Islamic State of Iraq and Syria).

The term 'terrorism' is said to have come from French *terrorisme*, from Latin: *terror*, 'great fear', 'dread', related to the Latin verb *terrere*, 'to frighten'.[4] However, at present there is no universal agreement on the legal definition of terrorism. Also, there is no comprehensive and agreed treaty definition of terrorism in any treaty under international law. It is noticed a reluctance by the international community on formulating a common legally binding definition due to various reasons.[5]However, the international community has developed a number of international and regional legal instruments to prevent terrorist acts since 1963.[6]

2.1 Snapshot of selected definitions of term "terrorism"

The first definition was formulated by the League of Nations Convention of 1937, which stated: 'All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public'.

Several years later, UN General Resolution Res. 51/210, 1999 on Measures to eliminate international terrorism language strongly condemned all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed'. This Resolution reiterated that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.[7]

2 ibid

3 Police believe that Zahran Hashim, the alleged mastermind of the Easter Sunday attacks, led the group or a splinter faction to mount the attacks in Colombo as well as on a church in Batticaloa in the east.

4 Definition, History, and Types of Terrorism, <https://ekuonline.eku.edu/homeland-security/definition-history-and-types-terrorismhttps://www.salto-youth.net/downloads/toolbox_tool_download-file-2029/ROE_module_1.pdf> accessed on 14 September 2019

5 US Annual country reports on terrorism". LII / Legal Information Institute. Retrieved March 10, 2019<.https://www.law.cornell.edu/uscode/text/22/2656f> accessed on 14 September 2019

6 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism, A/HRC/37/52, submitted to UN HRC, 26 February–23 March 2018

7 UN General Resolution Res. 51/210, 1999

Bassiouni recognises the difficulty of defining 'terrorism' in anall-inclusive and unambiguous manner. Thus he notes that providing such an internationally accepted definition on terrorism as a largely impossible undertaking and also a futile and unnecessary effort.[8] However, the infamous September 11 attacks (also referred to as 9/11 attacks) committed in the United States allegedly by the Islamic terrorist group named al-Qaeda killed a great many number of people while making another massive number of innocent people injured. It further caused countless damages to the property and the infrastructure of the area. More than these physical damages, the psychological trauma experienced by people could be one of the worst things in this disaster.[9]

2.1.1 European Council's 'Common Position'on the application of specific measures to combat terrorism

Having influenced by this attack, on 27 December 2001 the European Council issued a 'Common Position' on the application of specific measures to combat terrorism. It gave a definition of "terrorist act", which referred to a list of *intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aims of: seriously intimidating a population, or unduly compelling a government or an international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.*

2.1.2 UN Security Council Resolution 1566 (2004)

In 2004, The UN Security Council unanimously adopted a Resolution based on a proposal initiated by Russian Federation that was able to provide a comprehensive definition of terrorism.[10] This Resolution requires the countries, which aid and abet terrorists to prosecute terrorists. This definition of terrorism seems to provide anall inclusive ban on all forms of violence that intentionally targets civilians, regardless of the motive.[11] Paragraph 3 of this Resolution states:

'*criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a*

8 M. Cherif Bassiouni, "A Policy-oriented Inquiry of 'International Terrorism'" in: M. Cherif Bassiouni, ed., *Legal Responses to International Terrorism: U.S. Procedural Aspects*, (Dordrecht, Boston and London: Martinus Nijh off Publishers, 1988) pp.xv – xvi

9 Several years aftermath of the September 11 attack, it is reported that additional people who have died of 9/11-related cancer and respiratory diseases in the months and years following the attacks. *Matthew J. Morgan, How much did the September 11 terrorist attack cost America?". Institute for the Analysis of Global Security. (August 4, 2009). The Impact of 9/11 on Politics and War: The Day that Changed Everything?. Palgrave Macmillan. p. 222. ISBN 978-0-230-60763-7*

10 UN SC Resolution 1566 (2004)

11 ibid

population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

2.1.3 The Council of Europe Convention on the Prevention of Terrorism of 2005

The Council of Europe adopted the first ever international treaty on the Prevention of Terrorism, which has entered into force on 1 June 2007 that outlawed several activities as criminal offences, which may lead to acts of terrorism, such as incitement, recruitment and training.[12] It also reinforces international co-operation for the prevention of terrorism by modifying existing arrangements for extradition and mutual assistance. The Convention, draws up a list of terrorist acts defined by reference to international treaties listed in its Appendix.[13] This Convention has introduced three new offences which it defines: Public Provocation to Commit a "Terrorist Offence"; Solicitation of Persons to Commit "Terrorist Offences"; and Provision of Training For "Terrorist Offences". State parties are required to incorporate these offences in their national legal systems.

2.2 Appointing a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

A significant step was taken at the international sphere in order to strike a balance between counter-terrorism strategies and protection of human rights by appointing a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The Commission on Human Rights, by adopting the Resolution 2005/80, created the mandate of this Special Rapporteur who should be appointed by the UN Human Rights Council. The appointee should be an independent expert and required to gather, request, receive and exchange information on alleged violations of human rights and fundamental freedoms while

12 This regional multilateral treaty negotiated under the auspices of the Council of Europe was concluded in Warsaw on 16 May 2005.

13 Many relevant treaties that have provisions to curb terrorism are included in the Appendix. For an example, (1) Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970 (2) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971 (3) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted in New York on 14 December 1973 (4) International Convention Against the Taking of Hostages, adopted in New York on 17 December 1979 (5) Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980 (6) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on 24 February 1988 (7) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on 10 March 1988 (8) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done in Rome on 10 March 1988 (9) International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997

countering terrorism. The Rapporteur should report regularly to the Human Rights Council and General Assembly about *inter alia* on identified good policies and practices; existing and emerging challenges; and present recommendations on ways and means to overcome them.[14] The mandate of this Rapporteur was established by the UN Human Rights Council Resolution 15/15. Among the many actions and responsibilities entrusted on this position, what is particularly important is the power vested on the Rapporteur to make concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism, including, at the request of States, for the provision of advisory services or technical assistance on such matters; to integrate a gender perspective throughout the work of his/her mandate; to develop a regular dialogue and discuss possible areas of cooperation with Governments and all relevant actors, including relevant United Nations bodies including the Counter-Terrorism Committee of the Security Council, the Office of the United Nations High Commissioner for Human Rights, the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime and treaty bodies and other relevant bodies. The Rapporteur should report regularly to the Council and to the General Assembly.

3. Responsibility to Protect Human Rights

More than ever, the need to protect and promote human rights has become a priority both at national and international spheres. In the aftermath of the Second World War, the attention of the international community was highly paid in this regard. The result has been the birth of the United Nations Commission on Human Rights. One of the major endevoursof the Commission was to adopt an international legal instrument on human rights. The Universal Declaration on Human Rights (UDHR) of 1948 was the fruition of this effort, which embraced varieties of human rights included in this very first international instrument on human rights. However, it was originated as a soft law instrument but eventually derived a very high level of authority with the gradual transformation of its provisions as customary international law. However, many governments and judicial bodies have recognised the utmost importance of guaranteeing the civil, political, economic,social and cultural rights of people stipulated in the UDHR. In fact, the United Nations Charter included a number of references highlighting the need to protect and promote human rights in the Preamble itself ('to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small') and many other Articles of the text of the Charter, such as in Articles 1, 55 and 56.Article 1(3) emphasises the need to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental

14 The Special Rapporteur is mandated by HRC Resolution 15/15

freedoms for all without distinction as to race, sex, language, or religion as one of its primary purposes. Article 55 (c) of the Charter strongly requires the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.Article 56 of the same requested all Members of the UN to pledge that they will take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

Whether protection and promotion of human rights is a matter of international concern has been a debated issue by some Sovereign States over the period of time. However, in light of the above provisions and the developments emerged in the treaty law and international human rights case law developed by international and regional human rights courts and tribunals, it could be said that this concern has now become baseless. The number of human rights protecting mechanisms established under the UN Charter regime and the core human rights Conventions adopted subsequent to the adoption of the UDHR support the wide acceptance that the primary responsibility for protecting and promoting human rights should lie with domestic authorities. If the national authorities fail to do so the international community will take over its residual responsibility to forester due care and protection of the rights of people universally.

3.1 Internationally regulated human rights subject to derogations

Many international and regional human rights treaties explicitly recognise the situations, which require derogating human rights in specified circumstances. Derogationsenable the sovereign States to restrict certain individual rights only in the exceptional circumstances, such as public emergency situations, riots or war. Different international instruments have used different terms to describe these exceptional circumstances that authorise the national authorities to limit the rights of people to establish peace and order in their territories.

The direct provisions with regard to derogations to be made in times of public emergency and other acceptable volatile situations was included to an international treaty in 1966 when the International Covenanton Civil and Political Rights (ICCPR) was adopted by the UN General Assembly. This Convention includes a higher binding authority being an international treaty with a high membership of States.[15]Due to application of the well-established corner stone principle of customary international law named *pactasunt*servanda all the member States to a treaty should implement

15 *Article 4(1) stipulates that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin*

their treaty obligations in good faith without fail. Later this customary international law principle was inserted to the Vienna Convention on Law of Treaties of 1969. Article 4 of the ICCPR recognises certain rights as non-derogable.[16] These rights are absolute in nature and cannot be subject to any limitation even in times of an emergency or an armed conflict or similar othersituation specifically mentioned in the ICCPR. However, other ICCPR rights may be derogated as stipulated in the same Article subject to a close scrutiny and if the imperative reasons so demand only.

3.1.1 European Convention on Human Rights of 1951

The European Convention on Human Rights includes the phrase 'time of war or other public emergency threatening the life of the nation' to explain the exceptional circumstances that would allow derogations.

3.1.2 American Convention on Human Rights of 1969

The American Convention too describes exceptional circumstances and includes 'time of war, public danger, or other emergency that threatens the independence or security of a State Party'.

The striking feature of these international and regional human rights instruments with regard to the exceptional situations is that such circumstances are strictly limited to exceptional security threats, to which a State has to face with and as a result how that State's fundamental capacity to function effectively has been affected. Unless a State has a genuine reason to limit the individual rights of people, mainly because of the need to ensure common good of the community at large, it should not use special laws and mechanisms to restrict the rights of people already guaranteed for them.

3.2 Domestically regulated human rights subject to derogations

Sri Lanka became a State party to the ICCPR by acceding to the treaty in 1979. However, before being a member State to this important international human rights instrument, Sri Lanka had already taken steps to legalise some of the internationally accepted human rights in her domestic law. The county has particularly introduced such human rights through the Constitution, the highest legal source of the country. The first Constitution of the independent Sri Lanka was the Soulbury Constitution.

3.2.1 Human Rights protection under the Soulbury Constitution

This Constitution included a very important provision to protect the rights of minority people that in effect prevented the future Parliaments in amending or repealing the said Article.[17]

16 *Article 4(2) No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision*

17 Article 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.*

As Ivor Jennings wrote, this legislative power vested on Parliament was considered as absolute due to the above words. It was claimed in the case named *Liyanage v. The Queen*, that the Parliament of Ceylon has the authority even to pass retrospective legislations, legislations against the UDHR, principles of natural justice and Fundamental Rights finally decided by the Privy Council of the United Kingdom.[18] However, this argument was not accepted by the Court. The power vested on Parliament was limited by Article 29(2), (4) and 39.

Article 29(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.*

Jennings and Marshall (British Experts on Constitutional law) were of the view that Article 29(2) imposed only procedural limitations. Nevertheless, there were extremists' opinions that it provided an absolute limitation so that no Act could be adopted in contravening of this Article. However, the above mentioned Privy Council Decision on *Liyanage v. The Queen* held that the legislative power is not unlimited.

3.2.2 Human Rights protection under the 1972 Constitution

The first Republican Constitution was adopted in 1972 after Sri Lanka achieved full sovereignty. However, this Constitution was adopted by the invocation of a legal theory known as Pure theory of law. This legal theory was expounded by a well renowned jurist named Hans Kelson, who argued for a mandate to be received from the public to change established legal documents even from a non-Constitutional manner if the direct mandate is garnered from the Public. Hence, the legality of repealing Article 29 was not subject to query by any Court of Law but accepted the constitutionality and legality of the 1972 Republic Constitution. It included a very significant provision to protect the rights of people of Sri Lanka.

In the 1972 Constitution, all fundamental rights and permissible restrictions were contained in Section 18 of 1972 Constitution.

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 the right to freedom of thought, conscience and religion. This right

18 Liyanage v. The Queen, [1967] 1 AC 259

shall include the freedom to have or to adopt a religion or belief of his choice, and the freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching; (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; Provided that in the interests of such services, specified posts or classes of posts may be reserved for members of either sex: (i) every citizen shall have the right to freedom of movement and of choosing his residence within Sri Lanka.

Section 18(2) delineates the situations in which the above guaranteed rights can be derogated. [19]

3.2.3 Human Rights protection under the 1978 Constitution

The strongest protection for fundamental rights of peoplein Sri Lanka is enshrined in the second Republic Constitution of Sri Lanka of 1978, which is subjected to 19 amendments up to now. First time in the constitutional history of the country, a fully dedicated chapter on fundamental rights has been introduced to this Constitution. Articles 10 to 14 of this chapter delineate the rights which are legally guaranteed and are subject to the protection by the Court when violated by executive and administrative action. Article 126 of the same Constitution provides for fundamental rights jurisdiction of Sri Lanka to the Supreme Court, which is the highest court of the country. Hence, when these rights are infringed or about to be infringed, people of the country can resort to obtain an appropriate legal remedy as stipulated in this Constitutional provision. However, Article 15 restricts certain rights in specified situations.[20] The exercise and operation of all the

19 S.18(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 interests 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 Principles 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.*

20 According to Article 15 (1), rights under 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. The fundamental right recognised by Article 14(1) shall be subject to restrictions based on the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence. The rights stipulated in Article 14(1) (b) shall be subject to restrictions based on the interests of racial and religious harmony. The rights stipulated in 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, Article 14 (1) (g) shall be subject to restrictions based on the interests of national economy or in relation to the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise'

fundamental rights declared and recognised by Articles 12, 13(1) 13(2) and 14 shall be subject to such restrictions as may be prescribed by law (Article 15) 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. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.[21]

These limitations partly mirror the derogations to be found in Article 4 of the ICCPR. Hence, the Sri Lanka's legal landscape too supports the derogations of human rights in certain periods of time asstipulated by the Constitution itself.

The above discussion reveals that legally permissible grounds to restrict the enjoyment of human rights are recognized by the Constitution/s itself. Therefore, in situations of terrorism where the public security of the country is in danger, there could be a need to employee counter-terrorism activities which may require to derogate generally recognized rights of people but subject to the caveats mentioned in the Constitution itself.

3.3 Easter Sunday attacks and the need to counter terrorism

Sri Lanka has to face with repeated cycles of terrorism since the last century. The country was badly affected by the non-international armed conflict ravaged for nearly three decades between the State armed forces and the non-state actor named the Liberation Tigers of Tamil Elam (LTTE). During this protracted war period, the country was subject to emergency regulations, which in effect affect the full enjoyment of the fundamental rights of people in Sri Lanka guaranteed under the Constitution. Particularly, Articles which are subject to Article 15 of the 1978 Constitution are curtailed in numerous occasions. People challenge the infringement of their rights throughout this period either before the Supreme Court of Sri Lanka or other domestic human rights protecting mechanisms in place, such as, the National Human Rights commission of Sri Lanka.Well recorded case law jurisprudence on these cases are available, in which the Supreme Court of Sri Lanka has held that the rights included inArticles 10 and 11 being non-derogablethose cannot be subject to any limitation or infringement despite how serious the security threatsare. In contrast, with regard to the alleged violations of Articles 12, 13 and 14 the Constitution, the Court has accepted in principle that such rights can be derogated if the circumstances used to restrict such rights of the aggrieved parties are justifiable under the rationale laid down in Article 15. The armed conflict happened in Sri Lanka saw an end in 2009

and the licensing and disciplinary control of the person entitled to such fundamental right, and Article 14 (1) (h) shall be subject to such restrictions as may be prescribed by law the interests of national economy

21 Article 15(7) of 1978 Constitution

and people in the country could have had a breath of relief. However, this relief was deprived all of a sudden due to the unfortunate and unexpected Easter Sunday bomb explosion.

To reassure the security of Sri Lanka, the Government had to take a number of counter-terrorism measures. For a short period of time, state of emergency was declared. In certain occasions, people compliant about the deprivations of their rights due to the search of terrorist suspects, arrests and detainments.

3.3.1 The Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (PTA)

The Prevention of Terrorism Act (PTA) was first enacted as a temporary piece of legislation in 1979 but was retained up to now in Sri Lanka. PTA allowed for extended periods of detention even without a charge. The legislation is well known for its draconian provisions. Many of its provisions attest that if such provisions are used maliciously it would lead to deprive the personal liberties, freedom and fundamental rights of people. For example, suspects can be held without charge for up to 18 months, Minister of Defence has the power to restrict freedom of expression and association, with no right of appeal in courts, special rules of evidence can be used that will allow for confessions to be admissible in courts and the onus is placed on a suspect to prove to a court that a statement was made under duress.[22]

This Act could be used to arrest and/or to detain persons suspected of terrorism-related activities associated with Easter Sunday attacks. Therefore, many allegations were levelled against the misuse of its provisions against people who had no connection to such terrorist activities but just because of the religion or ethnicity of such people. In contrast, the 'Ground Views' criticises about the non-application of Section 27 of the PTA that could easily have been used to proscribe the National Thowheed Jamaat (NTJ) or any other such organisation.[23] Section 27 gives the Minister the power to make regulations for the purpose of carrying out or giving effect to the principles and provisions of the PTA. A proscription order or regulation under Section 27 must be published in the Gazette and comes into operation on a date prescribed by the relevant Minister. However, such regulations must be brought before the Parliament for approval, and they are deemed rescinded if parliamentary approval has not been given. The LTTE was first proscribed when the most respected 'Temple of the Tooth Relic' (*DalandaMaligwa*) was bombed in 1998 by invoking emergency regulations.[24] In 2001, the President used Section 27 of

22 SRI LANKA: COUNTERING TERRORISM AT THE EXPENSE OF HUMAN RIGHTS, Amnesty International Organization, <https://www.amnesty.org/download/Documents/ASA3797702019ENGLISH.PDF> accessed on 28.11.2019

23 See, Ground Views, <https://groundviews.org/2019/04/28/was-the-sri-lankan-law-adequate-for-dealing-with-the-easter-bombers-before-they-attacked/>accessed on 28.11.2019

24 ibid

the PTA to reintroduce the ban against the LTTE. As 'Ground Views' points out even after the state of emergency was terminated after the war in 2011, PTA regulations were made to continue to the proscription of the LTTE and the Tamil Rehabilitation Organisation (TRO), which are still in force. So even without a state of emergency, the PTA provides a wide proscribing power to the Government in relation to organisations associated with terrorism.[25] This discussion reveals that the existing laws are sufficient enough to detain, investigate, and convict, and even to proscribe, the individuals and groups currently being identified with the Easter Sunday attacks. However, the application of the relevant provisions in countering terrorism should be done with utmost care to prevent the rights violations of people.

3.3.2. Draft Counter Terrorism Act of 2018 (CTA)

The Counter terrorism Bill or the draft Act is said to attempt to replace the Prevention of Terrorism Act (PTA) with much improved proposals to safeguard the rights of people.[26] The bill has endeavoured to narrow the definitions of terrorism acts and to strengthens protections against custodial torture and coerced confessions. It reduces pre-charge and pre-trial detention periods and increases access by suspects to legal counsel and family members.[27]The proposed expansion of powers of Magistrates and the Human Rights Commission of Sri Lanka may serve as very significant move to reduce the abusive conduct by law enforcement officials as alleged against them when engaged in arrests and detentions under the PTA.[28]

Some segments of the society claim that this PTA being a draconian legislation should be replaced by the proposed Counter Terrorism Bill (CTA). The Counter Terrorism Bill was considered by a parliamentary oversight committee with the view to modernise the Sri Lanka's anti-terrorism powers framework in the context of global terrorism. However, a further careful study should be done before replacing the PTA with the CTA despite that some of the provisions of the PTA either need an entire abrogation or a drastic amendment without much delay in order to protect the rights of peace-loving people in Sri Lanka.

The draft CTA considerably narrows the list of acts considered to be terrorist offenses. The draft law does not criminalise "words either spoken or intended to be read that threaten the unity of Sri Lanka," which was included at the outset to the draft. The criticism on the original phrase was that it would violate freedom of expression

25 ibid

26 Proposed Counter Terrorism Act of 2018 (CTA), Bill No. 268, *Gazette of the Democratic Socialist Republic of Sri Lanka,* September 17, 2018

27 Sri Lanka Draft Counter Terrorism Act of 2018, Human Rights Watch Submission to Parliament, <https://www.hrw.org/news/2018/10/21/sri-lanka-draft-counter-terrorism-act-2018> accessed on 28.11.2019

28 Human Rights Watch, *Locked Up Without Evidence: Abuses under Sri Lanka's Prevention of Terrorism Act,* January 2018, https://www.hrw.org/report/2018/01/29/locked-without-evidence/abuses-und..., pp. 21-40

under article 19 of the International Covenant on Civil and Political Rights (ICCPR). Nevertheless, the phrase included in the Bill "intimidating a population" (sections 3(a) and 6) is still subject to criticism. Since intimidation does not per se rise to the level of an act that would reasonably be considered terrorism, Human Rights Watch recommends that this phrase be removed.[29] The CTA also criminalises the act of "wrongfully or unlawfully compelling the government of Sri Lanka, or any other government, or an international organization, to do or to abstain from doing any act" as terrorism (section 3(b)). The word "wrongfully" is vague and could capture legitimate protests against government policies. The draft CTA contains certain exemptions for "good faith" acts, which is commendable.

Part II of the draft CTA improves protections during arrests and police custody. The police must present a detained suspect to a Magistrate within 48 hours (section 21), reduced from 72 hours under the PTA. The CTA requires the police to take "every possible measure" to ensure that the arrest of a female suspect is carried out by or in the presence of a female arresting officer, and requires any searches of women and girls to be carried out by a female arresting officer (sections 22-23). A family member must be notified within 24 hours of a suspect's arrest (section 25), as well as where the suspect is being detained and the name of the arresting officer. Also, the CTA limits Detention Orders by reducing the period that suspects can be held in police custody to eight weeks total: four periods of 14 days, with extensions beyond the first 14-day period requiring a Magistrate's approval (section 31). A Magistrate may reject any requested extensions and instead send a suspect to judicial custody after the initial 14-day period. That provision would significantly reduce the excessive police detention periods under the PTA, which authorized three months of detention, renewable five times for a total of 18 months.[30] To reduce the possibility of ill-treatment in detention, the draft CTA also requires a Magistrate to interview a suspect in private, without the arresting police present, during police detention (section 28). The Magistrate also has unrestricted access to the suspect, without providing advance notice, during the police detention period (section 32).[31] However, the initial 14-day police detention period cannot be overturned by a Magistrate.

Part III of the draft CTA significantly shortens pre-charge judicial custody to six months with a second, six-month extension upon an application by the Attorney General approved by a High Court judge (section 30). Magistrates must grant bail after six months or, in the case of an extension, 12 months, if no indictments are filed by that time, unless they believe that defense counsel is unduly prolonging the

29 Sri Lanka Draft Counter Terrorism Act of 2018, Human Rights Watch Submission to Parliament, <https://www.hrw.org/news/2018/10/21/sri-lanka-draft-counter-terrorism-act-2018> accessed on 28.11.2019

30 ibid

31 ibid

proceedings. This is a commendable improvement as opposed to the corresponding draconian provisions of the PTA under which suspects can be held for several years without charge or trial.

Commendable reforms are introduced to the draft Act to protect the suspects from torture in custody. If Magistrates suspect torture, they may order a forensic examination and medical treatment and may bar the police officer overseeing custody from further access to the suspect (section 28). A Magistrate is required to order an investigation if the medical examination concludes torture was probable. The draft Act further requires Magistrates to make unannounced visits to places of detention to check on and interview suspects. Magistrates who see evidence of torture must order a forensic examination. Should those examinations show torture, they must also order criminal proceedings against the alleged torturers (section 32). To be admissible as evidence, confessions must be made to a Magistrate. This is a significant improvement from the PTA, which allowed the use of police confessions despite widespread evidence that they were obtained through torture and other ill-treatment. Furthermore, immediately prior or after making a confession, the suspect must be examined by a forensic expert and a forensic report produced. Under the CTA, the burden of proving the confession was voluntary lies with the prosecuting authority (section 80).[32]

Sections II and III of the draft CTA substantially strengthen the powers of the Human Rights Commission of Sri Lanka to protect terrorism suspects from human rights violations. Among other measures, the commission must be notified within 24 hours of a suspect's detention and be granted "prompt" access to the detainee (section 25). The authorities must also maintain a database for terrorism-related cases, including details on ill-treatment, and provide the commission with access to the data (section 26).

Human Rights Commission is given wide powers to intervene to alleged violations of suspects in detention. Representatives of the Commission may interview detainees and inspect their case files with no advance notice (section 34). The Commission must be notified of detainees' transfers and release (sections 42-43). The Commission, as well as the Magistrate, have authority to register a complaint about conditions of police or prison detention (section 48), and the Inspector General of Police or Superintendent of Prisons is required to take all feasible steps to ensure humane treatment. Chapter IV of the draft CTA significantly expands judicial control over police investigative powers. It requires the police to obtain a judicial order to access information in a suspect's bank accounts and other financial institutions

32 Most of the information on the writings on draft CTA are based on Sri Lanka Draft Counter Terrorism Act of 2018, Human Rights Watch Submission to Parliament, <https://www.hrw.org/news/2018/10/21/sri-lanka-draft-counter-terrorism-act-2018> accessed on 28.11.2019

(section 63), to obtain data from service providers (section 64), to freeze a suspect's assets or bar them from travel (section 66), or to monitor, record or intercept phone, mail and electronic communications (section 67).

International community has urged the Government of Sri Lanka to repeal the PTA and to replace the PTA with the CTA. With regard to the provisions of the draft CTA, the Human Rights Watch has required the Parliament to include a Sunset Clause to make CTA automatically lapse after two years. Renewal of time would be based on an independent review of the law's impact on human rights.The emergency regulations imposed immediately in the aftermath of the attacks arealso susceptible to abuse and has the danger of seriously affecting the fundamental rights of people in the country. The above comparison between the PTA and the draft CTA demonstrates the need to strike a careful balance between counter-terrorism laws and the need to safeguard human rights. Therefore, combating terrorism should be done with in compliance with applicable Constitutional guarantees and the international law obligations of the country.

3.3.3 International Covenant on Civil and Political Rights Act of 2007 (ICCPR Act)

This Act was passed to give effect to certain articles in the International Covenant on Civil and Political Rights (ICCPR) of 1966. The ICCPR Act includes provisions to make it a criminal offence to incite religious hatred and to propagate war. This Act also makes it a criminal offence to attempt, aid, abet, or threaten to commit acts of inciting religious hatred or propagating war.

However, the Act was heavily criticised for being misused to harass political opponents and suppress the freedom of expression of even that of journalists and other authors. Recent arrest of Shakthika Sathkumara under the ICCPR Act for writing a short story distorting Lord Buddha's life story, which was published in social media is pointed out as an example to this.

3.4 Judicial Activism in Sri Lanka

The judiciary has been pragmatic in striking a balance between the security and rights. The landmark judgement given by the Supreme Court of Sri Lanka in *Ishara Anjalie v Waruni Bogahawata and Others*[33] for violating the fundamental rights of a minor by the police illegally detaining and intimidating her based on an alleged charge of being rape by a politician is evident to the proactive attitude of the judiciary in protecting rights of the people in police custody. A three-judge bench comprising Justices Buwaneka Aluwihare, Priyantha Jayawardena and Vijith K. Malalgoda unanimously ordered the State to pay Rs. 50,000 and the OIC of the Matara district, Children and Women Bureau CI WaruniBogahawatta to pay Rs. 100,000

33 IsharaAnjalie v WaruniBogahawata and others, SC (FR) Application, 677/2012

as compensation to the 15-year-old minor. The bench held that Bogahawatta had abused her authority and violated the girl's fundamental rights and also intimidated her family. Bogahawatta was accused of violating the teenager's fundamental rights through the unlawful arrest, deprivation of liberty, unjustified detention without being produced her before a Magistrate and being subject to degrading treatment. The court noted that the girl had been treated as a perpetrator rather than a potential victim of a crime. In addition to this breakthrough judgement, the Court seriously noted the increasing number of incidents of abuse of power by law enforcement authorities. Accordingly, the Court directed the Inspector General of Police to lay down guidelines to be followed by law enforcement authorities if such guidelines are not in place already. The judgesorderd that "Guidelines that are thus formulated must reflect the legal safeguards in our law, international instruments and global best practices".

3.5 Directives issued by the National Human Rights Commission of Sri Lanka on arrest and detention under the prevention of terrorism (temporary provisions) act no 48 of 1979

The National Human Rights Commission of Sri Lanka has issued Directives on arrest and detention under the prevention of terrorism (temporary provisions) act no 48 of 1979 to be followed by designated officials arresting persons under the Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979 (PTA) to ensure the fundamental rights of persons arrested or detained are respected and protected, and such persons are treated humanely. The Directives are based on the Directives on Arrest and Detention issued by previous heads of state and binding international human rights law standards. The Chair Person of the Commission stated that the PTA should be construed narrowly and used in very specific circumstances, and should not be used to arrest persons for ordinary crimes.[34]

In addition, in the aftermath of the Easter attacks too, the Chair Person of the Commission wrote to the Inspector General of Police requesting him to issue proper instructions to officers under his command to follow human rights friendly guidelines in arresting and detaining the suspects of the attacks.

4. Counterterrorism Measures at UN Level

As it has already been noted, terrorism is not a new phenomenon. Hence the need to take counterterrorism measures is well accepted. The UN, being the principal international organization with much powers and international cooperation, has taken many proactive steps to address this need in a pragmatic manner. Particularly, the UN General Assembly and the Security Council have shown a key interest on

34 Directives issued by the Human Rights Commission of Sri Lanka on Arrest and Detention under the Prevention of Terrorism (temporary provisions) act no 48 of 1979, issued on 18.05.2016

anti-terrorist measures in the recent decades. The counterterrorist resolutions and conventions adopted under the aegis of the United Nations have focused on international and domestic security issues, human rights issues, the need to develop international law in these areas to strike a balance between human rights protection and counter-terrorism measures and the fight against the ugly head of terrorism conclusively. In the last decades about 13 International Conventions and Protocols were adopted related to states' responsibilities for combating terrorism.

As it has been noted before, since the 9/11 attacks, anti-terrorism has been at the top of the agenda of the international and regional organisations, and the international community has taken further steps to enhance co-operation to prevent and combat terrorism. A large number of international, regional and national initiatives have been adopted in the last decade against terrorism. These documents have highlighted that any acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed and they are to be unequivocally condemned. However, at the outset, counter-terrorism initiatives, measures and actions did not pay much attention to the protection of human rights while engage in /dealing with terrorism and re-establishing security.

4.1 Steps taken by the UN Security Council

UN Security Council declared that phenomenon of international terrorism as a threat to international peace and security and imposed an extensive and mandatory counter-terrorism agenda upon States under Chapter VII of the UN Charter by adopting several Resolutions in the dawn of the 21st century. On 28 September 2001, the United Nations Security Council used its powers under Chapter VII of the UN Charter, and adopted Resolution 1373 (2001) laying out wide-ranging strategies to combat terrorism and in particular the fight against the financing of terrorism. This Resolution was adopted in the aftermath of the 2001 September 11 attack occurred in the US. The global condemnation of terrorist activities that destabilase international and domestic peace and harmony induced the adoption of this Resolution. This Resolution has mandated the UN Member States to adopt specific measures to combat terrorism. These measures include in particular the prevention of the financing of terrorism, e.g. through freezing of the financial assets or economic resources of persons and organisations, who commit, or attempt to commit, terrorist acts or who participate or facilitate the commission of terrorist acts and to identify the holders and true beneficiaries of bank accounts, irrespective of their place of residence. Secondly, the Resolution declares the establishment of terrorist acts as serious criminal offences in domestic laws and regulations, with commensurably serious punishment; and thirdly it purports taking appropriate measures before granting refugee status to ensure that the asylum seeker has not planned, facilitated, or participated in any commission of terrorist acts.

By the Resolution 1373 (2001) new entity called the Counter Terrorism

Committee (CTC) of the Security Council was created. It is entrusted to oversee the implementation of Resolution 1373. The CTC can blacklist countries that are late in submitting their reports. However, this Committee (CTC) created to monitor States' compliance was subjected to heavy criticism by many human rights actors as the CTC did not want to listen to them. Especially when some States invoked Article 103 of the UN Charter as an explanation why their counter-terrorism obligations would trump their HR commitments.[35]

Again in 2003 the Council adopted Resolution 1456 (2003) to contribute to peaceful resolution of disputes and to create a climate of mutual tolerance and respect in order to deter the terrorists and their supporters who exploit instability and intolerance to justify their criminal acts. The Security Council stated that terrorism can only be defeated, in accordance with the Charter of the United Nations and international law, by a sustained comprehensive approach involving the active participation and collaboration of all States, international and regional organisations, and by redoubled efforts at the national level. Resolution 1456 (2003) reaffirmed that in an increasingly globalised world there is a serious and growing danger of terrorist access to and use of nuclear, chemical, biological and other potentially deadly materials, and therefore expressed the need to strengthen control on these materials. The Council emphasised strongly that terrorists must be prevented from making use of other criminal activities such as transnational organised crimes, illicit drugs and drug trafficking, money-laundering and illicit arms trafficking while adopting this Resolution.

4.2 Steps taken by the UN Human Rights Committee

UN Human Rights Committee , which is the treaty body established under the International Covenant of Civil and Political Rights (ICCPR), developed a systematic practice of addressing and assessing States for their counter-terrorism measures.

4.3 United Nations Global Counter-Terrorism Strategy

In 2006, the General Assembly adopted the United Nations Global Counter-Terrorism Strategy, which assured that effective counter-terrorism measures and the protection of human rights are not conflicting goals but complementary and mutually reinforcing ones.[36] The strategy committed to ensure the respect for

35 Article 103 of the UN Charter, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

36 In the 2005 UN World Summit Outcome (http://www.un.org/summit2005), the UN General Assembly received a mandate to develop a counterterrorism strategy to promote comprehensive and co-ordinated responses to one of human kind's major threats. In April 2006, the UN Secretary-General issued recommendations for a global counterterrorism strategy (60/825), which on 8 September 2006, led to the unanimous adoption of the United Nations Global Counter-Terrorism Strategy (60/288) by the General Assembly. The global counterterrorism strategy (60/852) declared

human rights for all and the rule of law to be protected with the utmost priority when countering terrorism. It identifies that conditions lead to undermining the rule of law and violations of human rights in any society would amount to conditions conducive to the spread of terrorism. The strategy introduced four pillars of actions and measures to ensure respect for human rights for all and the rule of law form one of the four Pillars of this Strategy, and at the same time a components in all other pillars. The title of the fourth pillar identifies this principles as the fundamental basis of the fight against terrorism.The Strategy also recognizes that it is necessary to address the long-term structural conditions conducive to the spread of terrorism.It includes, inter alia, lack of rule of law, and violations human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance. The Strategy represents a clear affirmation by member States that effective counter-terrorism measures and the protection of human rights are not conflicting but complementary and mutually reinforcing goals. Thus human rights and the rule of law are recognized as the fundamental basis of their counter-terrorism strategies.

The Global Counterterrorism Strategy (60/288) marks the first time that countries around the world agree on a common strategic approach to fight terrorism. The Strategy contains a plan of action: to address the conditions conducive to the spread of terrorism; to prevent and combat terrorism; to take measures to build state capacity to fight terrorism; to strengthen the role of the United Nations in combating terrorism; and to ensure the respect of human rights while countering terrorism.[37] It has been also established the Counterterrorism Implementation Task Force (CTITF) to monitor coordination efforts under his guidance. The CTITF focuses primarily on formulating more detailed proposals and recommendations from the Secretary-General to the General Assembly and the Security Council, aimed at streamlining capacity building. This issue is closely related to the International Criminal Court (ICC), which is the first ever permanent international institution with jurisdiction to prosecute individuals responsible for the most serious crimes of international concern: genocide, crimes against humanity and war crimes.

4.4 UN Secretary General's Report Titled 'Uniting Against Terrorism'

The above report too identified the defence of human rights as essential to the fulfilment of all aspects of an effective counter-terrorism strategy.

that "The United Nations should project a clear, principled and immutable message that terrorism is unacceptable. Terrorists must never be allowed to create a pretext for their actions. Whatever the causes they claim to be advancing, whatever grievances they claim to be responding to, terrorism cannot be justified.

37 The Global Counterterrorism Strategy (60/288)

5. Obligations of a Sovereign State

States possess an obligation, which emanates from customary international law and international treaties, to protect those within their jurisdiction from acts of terrorism. Although some Governments pledged to support the implementation of the UN Counter-Terrorism Strategy they have not proved a genuine commitment to uphold human rights in reality. The insensitivity to human rights protection in counter-terrorism activities would lead to undermine the rule of law and good governance in societies urge for democracy. However, the increasing recognition that effective counter-terrorism measures and the protection of human rights as complementary to each other and mutually reinforcing could be notice through the above discussed international and domestic responses with regard to a balance between the two.

States should fulfil their international law obligations and when adopting counter-terrorism legislation and employing other mechanisms. They should apply different tests to check the feasibility and legitimacy of such actions whether those are in compliance with the Connotational guarantees and international minimum standards. Periodic reviews of counter-terrorism legislation should be undertaken to assess their impact on human rights. Judicial oversight was necessary in all stages of emergency power practice. The effects of counter-terrorism measures on vulnerable minority groups of people should be constantly checked with a required care and sensitiveness. Terrorists may try to destroy the universal respect on human rights in order to achieve their objectives. However, it is the utmost responsibility of the Governments to uphold respect for human rights, fundamental freedoms and the rule of law essential in the effort to combat terrorism.

6. Conclusion

This article emphasized the need to comply with human rights while countering terrorism and argued that both objectives can be achieved by respecting the rule of law, paying due care and refraining from using arbitrary power. Hence, counter terrorism measures should not be a justification to derogate from human rights protection. Protecting the non derogable rights guaranteed by the Constitution without limitations and upholding the other fundamental rights with minimum limitations as required by the exigencies of the situation is paramount. The need for a strong State, which has the capacity to encapsulate both interests together, is emphasized. Failure of the State to take necessary precautions to avoid the 'Easter Sunday blasts' may provide evidence that Sri Lanka is a fragile State which could not guarantee the security of people.The lack of respect for human rights could be a reason for unhealthy factions and extremist opinions among the people. People's

demand for protection of human rights is a demand to guarantee their right to live in a free and safe society. All the organs of the government should play their respective roles promptly and efficiently. The current discourse based on the comparison of the Prevention of Terrorism Act (PTA) and the Counter Terrorism Bill is very relevant to this discussion.

In essence; States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.Sri Lanka, in the aftermath of the blasts, should issue stringent guidelines to the law enforcement officials to follow when arresting, interrogating and detaining the suspects of terrorist activities to minimize the chances where personal liberties would be infringed. Reforms are a must but it should not weaken the security in the country but should pay great due care and attention to the protection of human rights of the people.

UNALLOTTED SHARES: NEVER ENDING STORY?

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INTRODUCTION

Title derived from a partition decree has been considered as a best title and also considered as a good land right against the whole world (*in rem*). But the painful truth is in most cases, it is a lengthy process to obtain a decree even though there is a specific legislation to end co-ownership of a land. When there is a lacuna in the statute or unusual delay of enacting a proper legislation, rights of people should be preserved. In anexample, where a title of a party of partition action is not properly proved, but said allotment/s can be remained as unallotted. Regrettably, no provision/ procedure in the partition law in relation to a later claim for such a share resulting the whole purpose of the partition law is not achieved and gives the impression that "Never Ending Story". This paper is a revisit of prevailing remedial measures which can be followed by the courts.

BACKGROUND

When considering the devolution of partition law from the past (in a *nutshell*) since the Roman Dutch law is the Common law in Sri Lanka, those legal principles applied for partition actions before enacting the first partition ordinance. In the case of *Abeysekara vs Silva*[2] it was held that

> *it is the opinion of the Supreme Court that, by the established law of this colony every holder of property in common is entitled to insist upon a fair partition and where the property cannot be conveniently divided to call for sale.*[3]

It reflects that even on those days lands in common have become a big problem

1 L.LB (University of Colombo). LL.M (University of Colombo)
2 1841 Morgan's 319
3 Wickremasinghe K.D.P, The law of partition Of Ceylon, p8

in Sri Lanka. Then necessity has arisen of a strong statute with regard to partition the land in common and as a result of it, Ordinances of 21 of 1844,10 of 1863 were enacted.

The latter one which (10 of 1863), although declares the common law right of partition among co - owners, it is not an attempt to codify the existing Roman Dutch law. The Ordinance made specific provisions for a method for institution of proceedings, a procedure for service of summons a right of appeal,stamp duty and taxation of costs.[4]Although that partition Ordinance remained in force quite a long period it was never considered as a satisfactory enactment. After considering the shortcomings and defects of the Ordinance even by several appointed commissions[5] the Partition Act No 16 of 1951 enacted. Even though there is a special legislation for land in common, the case load and the duration of concluding a case were much high. Main purpose of this legislation too to provide a law for the partition and sale of land held in common. Then after 25 years, present Partition law of 21 of 1977 was enacted by the parliament to expedite the partition cases with more specific provisions and a procedure to gain the above purpose and also for the incidental and connected matters with land in common. This Partition law applies presently with four amendments thus,5 of 1981, 6 of 1987, 32 of 1987, 17 of 1997.

APPLICATION OF EXISTING PARTITION LAW NO 21 OF 1977

Through the long line cases have elaborated the sacred duty of District Judge to investigate the title of each party under the section 25 of Partition Law. After conclusion the trial, court bound to pronounce the Judgement and as soon as after the judgment is pronounced, the court should enter an interlocutory decree in accordance with the findings in the judgment.The interlocutory decree may include one or more of the following orders, so however that the orders are not inconsistent with one another[6]: –

(a) order for a partition of the land;

(b) order for a sale of the land in whole or in lots;

(c) order for a sale of a share or portion of the land and a partition of the remainder;

(d) order that any portion of the land representing the share of any particular party only shall be demarcated and separated from the remainder of the land;

(e) order that any specified portion of the land shall continue to belong in common to specified parties or to a group of parties;

4 P14

5 Commission appointed in 1918, Land Commission of 1927, Judicial Commission 1935.

6 Section 26 (2)

(f) order that any share remain unallotted.

Out of several higher court decisions, in a recent case of *Polwatte Lekamlage Podi Appuhamy (Deceased) Polwatte Lekamalage Premasiri (Substituted Plaintiff Appellant). Vs. Mudannaka Arachchilage Gunasekera* [7] *(Defendant Respondent),* it has been discussed the nature of sections 25 and 26 (2)(f) above thus,

> *According to section 25 of the Partition Act, at the trial the district judge is duty bound to examine the title of each party and he 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, in the land to which the action relates. According to section 26 among other orders district judge can demarcate and separate a portion of the land which represent the share of any particular party and also order that any share remain unallotted. This shows even if one party to the action proves his share it can be partitioned and the other portions can be left unallotted*[8].

Then the problem arises where there is an order to remain any share unallotted and when various applicationslodge claiming unallotted shares. When there is such an order, the purpose of partition law of dividing of that share is not fulfilled yet. According to the privy council, **the conception underlying judicial proceedings for partition or sale that of dissolving the bond of common ownership by alienation of the co-owner's shares.**[9] In another words purpose to end co-ownership is yet to be performed.

Partition Law 21 of 1977 is still silent on what should do with unallotted shares. Though there are four amendments to the main law no procedure and no provision available with those amendments though it is a highly felt need. Next question arises at the same time that, since the finality of the interlocutory decree and final decree has recognized under section 48[10] how an application of claim for the unallotted share will affect the same? Anyhow finally court has to replied within the frame work of law by making suitable, proper and timely needed orders.

JUDGE MADE LAW

Under English law principles judicial precedent is a source of law even in Sri Lanka. *Stare decisis* of superior courts' Judgments could be applied by lower courts and lower courts are bound to follow them when the same points arise again in litigation. A solution with regard to a claim on unallotted share has been available in

7 Case No. CA 111O/2000(F) -Decided on 15.01.2018
8 Page 4, By hon. Justice E.A.G.R Amarasekara (emphasis added)
9 Ceylon Theatres, Ltd vs Cinemas, Ltd. (Emphasis added)
10 Subjected to sub sections 4 and 5

the case of *David Danthanarayana and L.A. Nonahamy*[11] which was decided by the Supreme Court. It could be considered as a landmark Judgment with regard of creating provisions to claim unallotted shares. Appeal Judgement has been pronounced on 13.02.1978, just after the present Partition law was enacted. The facts of that partition case were that, after the learned District Judge entered the interlocutory decree, one Nonahamy intervened and filed a statement moving that she be added as a defendant and claiming a 1/60 share of the corpus. The succeeded learned Judge made Nonahamy as 14th defendant and amended the interlocutory decree by allotting the unallotted 1/60 share to her. Then the petitioner David Dantanarayana had filed a motion stating that Nonahamy had transferred her 1/60 share to him upon deed No. 10615 dated 5.11.1947. He has moved that he be added as a defendant and that he be allotted that share. This matter had fixed for inquiry. Learned District Judge by his order dated 24.11.1976 had refused the petitioner's application. The appeal was from that order. It has been argued on behalf of the appellant that the District Judge had no jurisdiction to amend the interlocutory decree entered on 28.10.75 and that the amendment allotting the un allotted share to Nonahamy is of no validity in law. The contention of learned Counsel for the respondent was that there could be no objection to this amendment as the learned Judge who recorded the evidence at the trial had come to a finding that Nonahamy had title to that share, and the amendment of the interlocutory decree was only done with a view to bringing the decree in conformity with the judgment. Hon. Justice Wimalaratne has mentioned that,

> *When interlocutory decree was entered, as well as when it was subsequently amended, the law in force was the Administration of Justice (Amendment) Law, No. 25 of 1975. Section 644 (2) of that law required the Court, at the conclusion of the trial, to pronounce the judgment, and thereafter to enter an interlocutory decree in accordance with the findings in the judgment. There was no special provision to amend an interlocutory decree entered. Therefore, only such general provisions regarding amendment of decrees would apply. The general provisions were contained in section 463 (6), which empowered a court to correct any clerical or arithmetical mistake in any judgment, or any error arising therein from any accidental slip or omission and in section 464 (4) which empowered a court to amend the decree to bring it in conformity with the judgment.*
>
> *Nor was there provision to add parties after interlocutory decree had been entered. Section 643(1) empowered the courtto add a person who, in the opinion of the court should be orshould have been made a party, or who applied to be added as aparty to the action only at any time before interlocutory decree was entered. Indeed, section 69 of the new Partition Law, No. 21of 1977, is more stringent in that parties can be added only at any time before judgment is*

11 1979 (2) NLR 241.

delivered. The District Judge who recorded the evidence of the plaintiff had not added Nonahamy as a party defendant. He could have done so under section 643(1), but he did not do so very probably because of the averment in plaint, and in at least one statement of claim, that Nonahamy had transferred her interests on deed No. 10615 dated 6.11.1947. He had ordered that 1/60 share to remain unallotted, and there was no finding in his judgment, that Nonahamy was entitled to it. The learned Judge who inquired into Nonahamy's application had, therefore, no jurisdiction either to add Nonahamy as a defendant or to allot the unallotted share to her. But a practice has evolved in our courts of allotting unallotted shares on proof of title even after interlocutory decree has beenentered. The reason is to avoid unnecessary delay and expensein compelling a person entitled to such share to institute aseparate action for declaration of title to that share[12]*. Before that is done there should be clear proof of title, and the mere consent of parties would not be sufficient, because in a partition action there is a duty imposed on the court to examine the title of each party and to hear and receive evidence in support thereof. The party claiming title to such unallotted share should generally be called upon to lead evidence in proof of his title.*[13]

It seems that this case is a turning point with regard to the unallotted shares but it is to be noted that without clear proof of the title shares must not unallotted by the name to a person. Such duty of the judge has been also discussed in that case thus,

In absence of positive finding in the judgement entered after the trial that Nonahamy was entitled to a 1/60 share, the learned District Judge ought not to have allotted that share to her.

By saying that, the order of learned District Judge has been set aside enabling the appellant to make their claims to that lot in a separate action. Then it is clear that even for allotting unallotted share, mere claiming is not sufficient and also title must prove and also to be cautious to give reasons as to why making an order to unallot such share?

This has been focused even in a recent case of *Sarath Godagampala (1A defendant- petitioner Appellant) and others vs. W.K. Peter Fernando and others*[14] by the Supreme Court. It is an appeal from the court of Appeal.

Despite the evidence referred to above, learned District Judge made order having kept only 36/342 (1/12) shares un-allotted from the corpus. He has not given any reason either, to show why he kept only 1/12 shares un-allotted despite the fact that there was un-contradictory evidence of the plaintiff to state that he cannot explain as to the devolution of title for a share amounting to 5/12 fraction.

12 Emphasis added by me

13 Pages 242 and 243

14 SC Appeal No: 98/2007, SC (SPL) L.A. 202/2007, decided on 10.06.2016

> *Therefore, it is clear that the learned District Judge has not properly addressed his mind to the evidence when he made order to keep only 1/12 share un-allotted. The decision referred to above of the learned District Judge clearly show that he has not performed his duty cast upon him under Section 25(1) of the partition law.*[15]

In another unreported case of *Thambavitage Don Albert vs Thambavitage Don Tepalis*[16] The court of Appeal took the view that even an intervenient is permitted to prove his title to unallotted share, with a reference to the *David Danthanarayana* case. In this case the learned District Judge has on a preliminary objection taken by the plaintiff -Respondent refused to permit the petitioner to lead evidence on the ground that that the petitioner has failed come within the prescribed period under section 48 (4) of the partition Law. Petitioner made that application to prove his title to the unallotted share in the final decree in case No.2333/P and for an order allotting the interests of T. D. Pieris to the Defendant-petitioner.Court decided that,

> *section 48(4) is not applicable of this nature and although there is no provision in the partition law under which an application of this nature can be made but a practise has developed in our courts where by even an intervenient is permitted to prove his title to un allotted share.*[17]

Then it is clear that it is highly expected to investigate the title of each party in a partition case. Based on the decisions of *Danthanarayana vs Nonahamy and Sapin Signgno vs Luwis signgno,* it is a legal principal created by the Judiciary on court practise which ability of making application on unallotted shares. Even in another recent case of Court of Appeal, *E. Kalyanawathie and others (Defendant-Appellants) Vs Pesharatne Patakara Gedara Wijesiri and Another (Plaintiff-Respondents)*[18] same legal principle has been applied. This is a case where after the trial learned District judge entered the Judgement granting undivided 1/3 share to the plaintiffs but left the balance 2/3 share unallotted. Defendants had preferred an appeal. It was held that,

> *The learned District Judge has refused to grant undivided 2/3 share to the defendants (despite the plaintiffs stating so in the plaint itself) as there was no proof before the learned Judge that the defendants are the children of Devaya. This being a partition action, it is on that basis, the 2/3 share has been left unallotted, which, in my view, is flawless. That does not mean that the defendants are disentitled to 2/3 share. They can, if so advised, make a proper application before the District Court claiming the unallotted shares*[19].

15 As per Hon. Justice Chithrasiri at page 10
16 CA Application No352/92- Decided on 19.06.1997 by Hon. Edussuriya J
17 Emphasis added.
18 CA/891/2000 (F), Decided on 21.01.2019
19 By hon.Justice Samayawardhane

It is clear that even in the present scenario higher courts have permitted to claim unallotted share by way an application as a remedial measure. Superior Courts (Supreme court and Court of Appeal) had slightly improved the above legal principal according to the timely needs. In the above mentioned *Danthanarayana vs Nonahamy* case, it was held that an intervenient could be claimed unallotted shares and amend the interlocutory decree accordingly. This position has been further developed in the case of *K. A. Chandrawathi Perera and others Vs Bulathsinghege Abraham Cooray*[20] which was decided by the Court of Appeallater.

Plaintiff is one Bulathsinhalage Abraham Cooray and dispute has been arisen between several defendants. 3rd, 4th and 5th defendant petitioners have made an application to the Court of Appeal claiming lot 4 which was an unallotted share. Hon. Justice Palakidner[21] allowed the application. He made the order to amend the interlocutory decree and to be allotted un allotted Lot 4 to the 3, 4, and 5th defendants and also to amend the final decree accordingly. It has been followed the *Danthanarayana case*.

It is to be noted that court *practise* has been considered as a legal principle for the purpose of removal of uncertainty of procedure. Through the line of several cases from the past and to date two legal principles have been introduced. Those have been clearly held by the Court of Appeal in *Sapin Singho vs Luwis Singho and others*[22] as follows,

1. A practice has developed where by even an intervenient is permitted to prove his title to an unallotted share after the interlocutory decree is entered.
2. The right of a party to prove his title to a share left unallotted in the final decree is recognised.

In this case Court has referred above mentioned *T.D. Tepalis Vs.T.D. Albert, Danthanarayana V. Nonahamy, K.A. Chandrawathi Perera and others Vs Bulathsinghege Abraham Cooray* cases as well. This is very significant case as it is lightly discussed about the procedure of claiming to un allotted share.

PROCEDURE AND STANDARD OF PROOF ON A CLAIM

According to the *Sapin Signgno case* petition and affidavit is sufficient to that effect and Court of Appeal has directed the learned District judge to hold an inquiry in respect of the said application made by the 2nd and 4th defendants appellants by way of petition and affidavit. Then there will not be any further trial but only an inquiry. In a partition case title must be strictly prove. Even for the claim on unallotted share

20 Court of Appeal minutes-14.10.1993- DC Mount Lavinia 13732 P
21 With the agreement of Hon. Justice Ananda Grero
22 2002 (3) Sri LR 271, By Hon. Justice N.E. Dissanayaka

District Judge has to act upon the duty empowered under section 25. It is very clear that with the following statement of *Danthanarayana* case thus,

> *there should be clear proof of title and the mere consent of parties would not be sufficient, because in a partition action there is a duty imposed on the court to examine the title of each party and receive evidence in support thereof. The party claiming title to such unallotted share should generally be called upon to lead evidence in proof of his title*[23]

Then it seems that it is not a just simple inquiry, but to investigate the title of the claimant properly.

PROBLEMS

When an intervenient makes an application claiming un allotted share and where he proves the title, he should be considered as a defendant/party. Further, either an intervenient or may be a party, other parties must be aware about the application whether they object or not, with regard to the 'cost pro rata' and 'owelty" affected by that unallotted share. In a very old case *Kattanhamy vs Wickramasinghe*[24] it was held that

> *It was not clear how the partition was to be effect when there was only one co-owner to whom a share had been allotted nor how the costs could be paid pro-rata when other shares were not ascertained.*

Then there should be procedure to issuing notices, to obtaining a witnesses list, to record evidence, to pronouncement of the additional order and also after amending the decree registration the same. With regard to such applications presiding Judge have to control the inquiry with discretion and wisdom on his own. Then there will be no uniformity among the courts. That situation applies even a defendant makes an application on unallotted share of a final decree. Where there are many claims for an unallotted share situation will be worse more. Sometimes Decree may be severally amended which should not be. As the result of non-unavailability of comprehensive provisions, such an inquiry has to be held under the principles of natural justice departed from the main procedure. Another problem is having without a specific time period, such applications could be lodged even after several years of conclusion of the case. This situation has become a victimization to some litigants with the impression of "Never Ending Storey".

RECOMMENDATIONS/CONCLUSION

The main solution is to codify a legislation immediately but after careful analysis. It is to be noted that anybody can get private medical treatment in his illness

23 Per Wimalaratna, J, Dantanarayana vs Nonahamy, p 243
24 (1916) 3 CWR 296

if he desires so from anybody whom he likes. But Judicial system is not such, whether like or not litigants have no option but to go through the process. By understanding that, Courts have created remedial measures to prevent unnecessary delay and expenses of the litigants until a proper codification. Until such a legislation which is able to meet the present challenges District Courts can follow the above authorities practically and the close the story quickly with a good end. (Dec.2019)

JUDICIAL LEGISLATION, AN INSTRUMENTALITY OF JUDICIAL IMPERIALISM VIA JUDICIAL ACTIVISM BUT AS AN ANTIPATHY OF JUDICIAL OLIGARCHY

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Abstract

The Montesquieuan doctrine of separation of governmental powers has gained the prime importance to the theory of the organization of government for the purpose of preserving of the life and liberty of the individual and for avoiding tyrannical and arbitral control by the governmental organs. All Constitutions of the democratic world, recognize the fact that government is an organic instrument. Therefore the separation of legislative, executive and judicial powers for the maintenance of good governance has to be reconciled with the need for their co-operation with, and dependence on, each other. It is recognized that some union of powers promotes harmony in government and some separation makes for liberty, while both are essential for efficiency. The question arises as to what extent separation is desirable and practicable. In all modern Constitutions, no single instance could be traced to indicate a complete separation instead some union and relationship of the Legislature to the Executive, the Legislature to the Judiciary, the Executive to the Legislature, the Executive to the Judiciary, the Judiciary to the Legislature and the Judiciary to the Executive, thus allows only for partial union and partial separation.

It is on this basis, this article examines the partial union of the Judiciary to the Legislature which in turn establishes the doctrine of **Judicial Legislation** through the medium of **Interpretation of Statutes**, which creates Judicial Activism and leads to exalt the concept of **Judicial Imperialism**, a remote and distinctive character of **Judicial Oligarchy** which assumes **Judicial Supremacy** as against its inherent essentiality of independece.

***LL.B., LL.M. President Labour Tribunal, Borella**

(1) Introduction

Blackstone an English jurist gave an expression in regard to the doctrine of separation of powers and concluded thus**"***in all tyrannical governments the supreme magistracy, or the right both of marking and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and where ever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed in quality of dispenser of justice with all the power which he as legislator thinks proper to give himself… Were it (the judicial power) joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative***"***[1] ***(italics supplied)*** Therefore it had been an accepted theory that the accumulation of all powers *i.e*, legislative, executive and judicial in the same heads, whether of one, a few or many and whether hereditary, self- appointed or elective may justly be pronounced the very definition of tyranny[2].

Today, depending on the above rationale, the idea of a separation of the governmental powers and functions has found its way into the Constitutions of almost all democratic countries. However, although the idea has so found its way, varying degrees in its application based on the interpretation attached to it and in turn depends on the particular constitutional structures, priorities and political ideologies of different countries. As a result, the doctrine of separation of powers has become the bedrock of a democratic government based on the Rule of Law. The legislative power,the first limb of the governmental power, of the people's sovereignty which led to the concept of supremacy of parliament, means that parliament can pass any law, on any topic, affecting any person and that there are no fundamental laws which parliament cannot amend or repeal, in the same way as ordinary legislation.

It is on this basis the doctrine of separation of powers confers the legislative or law making power to the parliament or to the Legislature which led to the emergence of the concept of 'parliamentary supremacy'atranscendent and absolute power to make laws on any contemporaneous events with prospective or retrospective effect. Therefore**"***duty of making or altering the law is thefunction of parliament and is not as*

1 Blackstone – Commentaries on the Laws of England vol. l pp 146 & 269

2 *A.Appadorai – The Substance of Politics - Eleventh Edition p.516

**JathikaSewakaSangamaya v. Sri Lanka Hadabima Authority SC Appeal No.15/2013 Decided on 16.12.2015*

**In Re the Nineteenth Amendment to the Constitution (2002) 3SLLR 85*

many mistaken persons seem to imagine, the privilege of the judicial tribunals"[3] ***(italics supplied)***. Hence the conventional view is summarized thus,"*law is complete body of rules existing from time immemorial and unchangeable except to the limited extent that legislatures have changed the rules by enacted statutes. Legislatures are expressly empowered thus to change the law. But the judges are not to make or change the law but to apply it. The law, ready-made, pre-exists the judicial decisions….Judges are simply living oracles of law. They are merely 'thespeaking law',theirfunction is purely passive. They are'but the mouth which pronounces the law'….Judicial opinions are evidence of what the law is: the best evidence,but no more than that……..If a judge actually attempted to contrive a new rule, he would beguilty of usurpation of power, for the legislature alone has the authority to change the law. The judges, writes* ***Blackstone****, are 'not delegated to pronounce a new law, but to maintain and expound the old law'; even when a former decision is abandoned because 'most evidently contrary to reason', the 'subsequent judges do not pretend to make new law, but to vindicate the old one from misrepresentation'. The prior judge's eyesight had been defective and he made a mistake in finding the law, which mistake is now being rectified by his successors*"[4] ***(italics supplied)***

This shows the conventional notion of the Legislative Supremacy of law making evolved by the '***strict constructionists'*** who go by the letter of the legislation. There is also a contrary view led by ***'intention seekers'*** who go by the purpose or intention of the makers of the statute, which any dispassionate observer may accept as obviously the correct view. A brief survey of the controversy will illuminatethe rest of this article.

(2). Interpretation of Statutes –Is It a Phonographic Theory of the Judicial Function

(2.1) Traditional View and Dogmatic Fashion

In the period of the 19th century, which was dominated by the '**strict constructionists'**, wereof the view that the courts should adhere as rigidly as possible to the express words that are found and to give those words their natural and ordinary meaning, the rule still has, many adherents even today[5]. In the 20th century the '**intention seekers**' have gained ground by reinforcing 'schematic' method of interpretation, which looks to the scheme or design and then fill in the gaps[6]. On this basisthe fact to be noted is that the law relevant to interpretation of statutes has thus gained its development and supremacy on the above rival methods based on words

3 ***Northman v Barnet Council****(1978) WLR 22*
4 Jerome Frank – Law and the Modern Mind pp 32& 33
5 ***Grey v Pearson (1857) 6H (a).61***
6 Lord Denning – Master of the Rolls – The Discipline of Law p.4

of a text drafted by a legal draftsman. Therefore, *"there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used. If language is clear and explicit, the court must give effect to it, for in that case the words of the statute speak the intention of the Legislature. And in so doing it must bear in mind that its function is* ***jus dicere****, (to declare the law) not* ***jus dare****,(to make the law) the words of a statute must not be overruled by the judges, but reform of the law must be left in the hands of Parliament"*[7]**. *(italics supplied)***

It is to be borne in mind that the reason as to why words are so important is because words are considered to be the vehicle of thoughts; of which a draftsman has to achieve the principal objects of **certainty** and **clarity** but **not obscurity** and sometimes even **absurdity**. However it is to be noted that the literal approach of the 'strict constructionist' has confined the function of the court. **"***The general proposition that it is the duty of the court to find out the intention of Parliament – and not only Parliament, but of Ministers also – cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used; these words may be ambiguous but, even if they are, the power of the court to travel outside them on a voyage of discovery are strictly limited"*[8]**. *(italics supplied).*** The above view of **Lord Symonds** was consistent with the traditions evolved and practiced for over a century as was held in ***Guynne v Burnell***[9]. The duty of a judge is to interpret the legal history he finds and not to invent a better history. The interpretation of a statute is not to be collected from any notions which may be entertained by the courts as to what is just and expedient. In ***Kimmins***[10], **Lord Diplock** distinguished 'literal approach' from 'purposive approach' to statutory construction and adopted the latter. Whatever might be the terminology the **Law Lords** had used, the net effect and purpose of the so-called 'purposive approach' is nothing but a disguised usurpation of legislative functions by the judiciary[11].

On this basis 'Judicial Disposition' can be defined as a 'collective' of the approaches adopted by a judge *qua* judge to cases that come up for decision, and includes judicial discipline, sense of detachment, power of reasoning, and a concern for consistency. The extent of the soundness of his disposition, or the lack of it, can be inferred from the degree of objectivity displayed by him throughout the judicial process beginning with the hearing of parties, ascertainment of facts, analysis of the case, application of law, and finally, from the quality of the verdict.

7 P.S.T.J.Langan – Maxwell on The Interpretation of Statutes - Twelfth Edition pp.1&2.

8 ***Magor&St.Mellons RDCv. New port corpn*** [1951] 2 All E.R 839

9 ***GuynnevBurnell*** (1840) 7 CL & F 672, referred in Maxwell on Interpretation of statutes Twelfth Edition at.p 29

10 ***Kimminsv Zenith Investment Ltd*** [1971] AC 850 at p.881

11 E.M Rao – Industrial Jurisprudence – A Critical Commentary p. 835

An uncompromising adherence to judicial decorum is not merely a desideratum, but an imperative in a modern democracy wedded to the doctrine of '*separation of powers*' which predicates the existence of a judiciary that is absolutely independent of the other two wings of the modern state. The concept of independence of judiciary can be looked at as both a power conferred, and a liability imposed, on the judges. It is a 'power' naturally vested in the judges in the sense that they are free to decide cases without being influenced or coaxed either by the executive or by the legislature. It is a 'liability' imposed on them in so far as they are required to exercise the freedom so conferred dispassionately and judiciously, and function within certain well-recognized limits. Their demeanour and decisions are as much open to public scrutiny as of the other two wings of the state. It is, therefore, of paramount importance to ensure that judicial license does not degenerate into licentiousness making inroads into the political institutions of the country.[12]

Therefore it had been the ideology of the 'strict constructionists' that the radical view of judges to justify their *rock-the-boat approach* punctuated by an illegitimate trespass into the pastures reserved for the legislature to the detriment of the Montesquieuan doctrine of separation of powers.[13] It is on this basis, judge's power to make law even by breathing life into the dead letter of a statute has been identified as a misconceived notion to be rejected *inlimine* as a mechanism which gives an unfretted freedom to individual judges, bordering on free-wheeling legislative activity thereby enabling them to interpret provisions according the their private notions and idiosyncrasies.[14] Hence any liberal construction is not to justify extension of the scope of a statute beyond the contemplation of the legislature, even on purely remedial, beneficial or desirable construction would clearly create a basic violation of the tripartite theory of governmental powers and permit the court to exercise legislative powers of law making.[15]

However it is to be noted that the duty of court to interpret words which the legislature has used, a kind of a text bound interpretation, has been identified as a '**traditional view based on a dogmatic fashion**'[16]**.** And also it had been treated as '***a voice of the past***', the voice of the strict constructionists who go by letters. It is the voice of those who adopt the strict literal and grammatical construction of the words heedless of the consequences faced with glaring injustice the judges are, it is said, impotent, incapable and sterile. The literal method is now completely out of date.[17] it has now become an accepted norm that judges take part in a creative function of

12 E.M.Raoop. cit. p.833
13 E.M.Raoop. cit. p.834
14 E.M.Raoop. cit. p.840
15 E.M.Raoop. cit. p.841
16 Lord Denning – Master of the Rolls – The Discipline of Law p.14
17 Lord Denning op.cit p.16

the judicial process. This has been vividly and illusively dealt with by **Lord Ried** and observed that **"*t****here was a time when it was thought almost indecent to suggest that judges make law- they only declare it. Those with a taste for fairy tales seem to have thought that in some* ***Aladdine's Cave*** *there is hidden the common law in all its splendor and that on a judge's appointment there descends on him knowledge of the magic words* ***Open Sesame.*** *Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales anymore."*[18] ***(italics supplied)***

Therefore as pointed out by one of the former Chief Justice of Sri Lanka, **Justice Shirani A. Bandaranayake** by quoting a *dictum* of one of the former Chief Justice of India, **Justice Bagawathi e**and observed that **"***law –making is an interesting and an inevitable part of the judicial process. Even when a judge is concerned with interpretation of a statute there is ample scope to develop and mould the law. It is the judge who infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society. By thus making and moulding the law, the judge takes part in the work of creation."*[19] ***(italics supplied)***

(2.2) Ironing Out the Creases for Finding the Intention.

As discussed in the foregoing chapter, the emergence of 'intention seekers' in 20th century preferred a new 'purposive approach' to the 'traditional literal approach' in seeking the intention of the Legislature from the words used in a text by a draftsmen of a statute. In ***Stock,*** **Viscount Dilhorne,** referred to the 'purposive approach' as a mean to abstract the intention of the Legislature, who made the law. **"***It is now fashionable to talk of a purposive construction of a statute. But it has been recognized since the 17th century that is the task of the judiciary in interpreting an Act to seek to interpret it according to the intent of them that made it***".**[20] ***(italics supplied)***

Therefore the 'purposive approach' of the 'intention seekers' though very slow, reinforced the method of interpretation to find the intention of parliament by adapting the words of a statute and even by giving a strained construction on them if necessary, to carry out the intention. On this basis in ***Nimmo v Alexander,*** **Lord Willberforce** said**.** *"If I thought that parliament's intention could not be carried out, or even would be less effectively implemented, unless one particular (even though unnatural) construction. Were placed on the words it has used, I would endeavour to adopt that construction***".**[20] ***(italics supplied)***

18 Hon. Sir Anthony Mason (Former Chief Justice of Australia, Chancellor, The University of New South Wales, National Fellow, Research School of Social Science Australian National University) – The Judge as Law – Maker published in Journal of the Society of Public Teachers of Law 1972

19 Chief Justice DR. Shirani A. Bandaranayake– Human Rights, the right to life, the Sri Lankan Perspective published in the BASL Journal 2004 vol.X pp.1-7

20 ***Stok v Frank Jones (Tipton) Ltd*** [1978] 1 WLR 231

The fact to be noted in purposive construction is that*"in a case of difficulty, recourse is had to the preambles. These are useful to show the purpose and intent behind it all. But much is left to the judges.*[21] *The enactments give only an outline plan. The details are to be filled in by the judges*"[22].***(Italics supplied)***The view of **Lord Denning** in ***Seaford Court Estate Ltd v Asher***could be identified as one of the landmark judgments in the field of law of interpretation of statutes which led to evolve anew theory of ***ironing out the creases,*** in order to have straightened rucks in the text of statutes.

"*Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. Ajudge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of parliament, and he must to do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature…. A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases****"*[23]***.(Italics supplied)***

Further elaboration made by **Lord Denning** in the same case of ***Seaford Court Estates Ltd*** **v** ***Asher,*** seems to be an ideology which is completely contrary to the traditional view of the 'strict constructionists' based on the text-bound literal approach. **Lord Denning** observed the following thus,**"***We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis****"*[24]. ***(italics supplied)***

21 ***Nimmo****v* ***Alexander*** [1968] Ac 107 at 130
22 Lord Denning op. cit. p.14
23 ***Seaford Court Estate Ltd v Asher*** [1949] 2 KB 481
24 ibid

This judicial disposition enlivened by **Lord Denning** has been thereafter followed and expounded by several judges who were with their robust thinking and panoramic views in the task of dispensation of justice. In ***Delhi Transport Corporation***[25] case, **Mukharji CJ** in his dissenting judgment by favouring to **Lord Denning** and observed as follows.

"It must proceed on the premise that the law making authority intended to make a valid law to confer power validly or which will be valid. The freedom, therefore, to search the spirit of the enactment or what is intended to obtain or to find the intention of the Parliament gives the Court the power to ***supplant and supplement*** *the expressions used to say what was left unsaid. This is a power which is an important branch of judicial power, the concession of which if taken to the extreme is dangerous,but denial of that power would be ruinous and this is not contrary to the expressed intention of the legislature or the implied purpose of the legislation". **(italics supplied)***His Lordship the **Chief Justice Mukharji** observed further and concluded thus; **"***where the statute is silent or not expressive or inarticulate, the court must 'read down' in the silence of statute and in the inarticulate of its provisions, the constitutional inhibitions and transmute the major inarticulate premise into a reality"*[26]***. (italics supplied)***

Therefore, it is no longer necessary for the judges to wring their hands and say that there is nothing for them to do. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judge can and should use their good sense to remedy it, by reading words in, if necessary, go as to do what parliament would have done, had they had the situation in mind.

All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislature - at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply; what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly. They are giving effect to what the legislature intended, or may be presumed to have intended.Therefore judge – made law is an important source of law along with sovereign legislation and customs.[27] The differentiation as viewed by **Prof. Glanville Williams**isas follows;

"judicial law making differs from sovereign legislation in that the latter starts with a clean slate and can frame whatever rules the policy suggests, whereas the former

25 ***Delhi Transport Corporation****v* ***DTCM Congress*** *AIR* 1991 SC 101 p.148
26 *op.cit.*p. 149
27 Lord Denning op. cit. pp 16,20& 21

works within the framework of existing law which, though not dictating the answer may, nonetheless ,limit the range of answers which the judge can give. Since law is expressed in words, and words have a penumbra of uncertainty, marginal cases are bound to occur. In such an event, the function of a judge in adjudicating them needs to be legislative. The distinction between mechanical administration of fixed rules and free judicial discretion is thus a matter of degree, not the sharp distinction that it is sometimes assumed to be. This is not to say that judges have an unlimited legislative power. A judge has the discretion to include a 'flying boat' within the rule as to 'ships' and 'vessels; he has no discretion to include a 'motor car' within such a rule"[28] ***(italics supplied)***

(2.3) **The Basic Legal Myth or Illusion of Precise Predictability**.

The essence of the basic myth or illusion is that the law must be entirely predictable. As discussed in foregoing chapters, legal drafting is always not within a foreseeable limit of human powers thus will not be free from errors due to human fallibility. Languages are not with precise terminologies of mathematical precision. And also wordsmay be of more than one definition and then they are not clear and precise. Therefore keeping all these inherent attributes ingrained in words and abilities, capabilities and qualities of men who handle legal drafting, in mind, the basic myth of exact predictabilityof statutes is henceforth to be dealt with.

In early stages of legal development this desire was more intense than now and there was what **Sir Henry Maine** has called "a superstitious disrelish of change" which went to the extent of making men oppose any modification of existing law even by statutory legislation. It has been partially overcome the superstitious antipathy to legal change so far as the change result from the action of legislative bodies, and no little part of law is modified each year by statutes enacted by state legislatures[29].

But such statutory legislation, while it may alter the law, does so,ordinarily only prospectively. It is the usual practice - to some extent it is required by constitutional prohibitions –that changes embodied in statutes enacted by legislative bodies should not be retroactive but should apply only to future conduct. Which is to say that, generally speaking, a legal novelty brought about through statutory legislation can be known before men do any acts which may be affected by the innovation. Insofar, a man can conduct himself in reliance upon the existing law, knowing, at the time he acts, that any changes thereafter made by a legislative body will not modify the law upon which he relied upon[30].

Consequently, absolute certainty and predictabilityare apparently not endangered by alterations of law made or adopted by legislatures.

28 Prof. Glanville Willams – Learning the Law (1945) pp 302,305
29 Jerome Frank *op. cit.* p 34
30 *ibid*

But if it is once recognized that a judge, in the course of deciding a case, can for the first time create the law applicable to that case, or can alter the rules which were supposed to exist before the case was decided, then it will also have to be recognized that the right and obligations of the parties to that case may be decided retroactively. A change thus made by a judge, when passing upon a case, is a change in the law made with respect to past events, - events which occurred before the law came into existence. Legal predictability is plainly impossible, if, at the time an act is done, it is done so with reference to law which, should a law suit thereafter arise with reference to that act, may be changed by the judge who tries the case. For then the result is that the case is decided according to law which was not in existence when the act is done and which the doer, therefore, could not have known, predicted or relied on when he acted upon[31].

If, therefore, one has a powerful need to believe in the possibility of any things like exact legal predictability, he will find judicial lawmaking intolerable and seek to deny its existence.

Hence the myth that the judges have no power to change existing law or make new law:it is a direct outgrowth of a subjective need for believing in a stable, approximately unalterable legal world – in effect, **a child's world**[32].

This view was directly favoured by **Subba Rao CJ** in ***L.C.GolakNath v. State of Punjab***[33] and made the following observations on the process and outcome of interpretation of statutes, **"***in deciding in each individual case by not 'what has been' but 'what may be'. This is the role and purpose of constitutional interpretation by the apex court of the country. I'm definitely of the opinion that time has come for the judicial interpretation to play far more active, creative and purposeful role in deciding what is according to law….. I believe that we must do away with* ***'the childish fiction'*** *that law is not made by the judiciary"*[34] ***(italics supplied)***

This remark might be challenged on the ground that the desire to avoid legal retroactivity is not 'subjective' but practical, because, it may be said, men cannot and will not engage in affairs without having in mind the pertinent law. Yet reflection reveals the fact that the supposed *practical* importance of avoiding legal retroactivity and uncertainty is much overrated, since most men act without regard to the legal consequences of their conduct, and therefore, do not actin reliance upon any given pre-existing law[35]

'Practically' says **John Chipman Gray**, "*in its application to actual affairs, for most of the laity, the law, for a few crude notions of the equity involved in some of its*

31 op.cit.p.35
32 ibid
33 AIR 1967 SC 1643
34 Supra (fn) n11p.838
35 Jerome Frank – op cit. p.35

general principles, is all ex post facto. When a man marries, or enters into a partnership, or buys a piece of land, or engages in any other transactions, he has the vaguest possible idea of the law governing the situation, and with our complicated system of jurisprudence, it is impossible it should be otherwise. If he delayed to make a contract or do an act until he understood exactly all the legal consequences it involved, the contract would never be made or the act done. Now the law of which a man has no knowledge is the same to him as if it did not exist"[36]***(italics supplied)***

Which is to say that the factor of uncertainty in law has little bearing on practical affairs. Many men go on about their business with virtually no knowledge of, or attention paid to, the so-called legal rules, be those rules certain or uncertain. If the law but slightly affects what a man does, it is seldom that he can honestly maintain that he was disadvantaged by lack of legal stability. Although, then, judges have made law, vast quantities of law, and judge-made innovations, retroactively applied, are devised yearly; although frequently a man must act with no certainty as to what legal consequences the courts will later attach to his acts; although compete legal predictability and with it safety from slippery change are therefore by no means possible, - yet retroactivity and the resulting unavoidable uncertainty are not as great practical evils as they are often assumed to be.[37] The 'no judge-made law' doctrine, it seems,is not, fundamentally, a response to practical needs. It appearsrather to be due to a hunger and a craving for a non-existent andunattainable legal finality- which, in turn, leads to a concept of **Judicial Somnambulism**, a static legal framework.

(3) Judicial Activism as a Tool for Social Engineering

Legislation is the major method of using the law as an instrument of social engineering and for bringing about social reforms. If wisely used the machinery of legislation can bring about a synthesis of change with continuity. It can prevent jolts in the onward march of the community and thus help in the smooth evolution of the society.[38]

Therefore, with the change of social and economic realities, the law too should undergo a change and reflect those realities. As society changes, the law cannot remain immutable.*"The law must… march in tune with the changed ideas and ideologies. Legislatures are, however, not best fitted for the role of adapting the law to the necessities of the time, for the legislative process is too slow and the legislatures often divided by politics, slowed down by periodic elections and overburdened with myriad other legislative activities..The process of amending a Constitution is too cumbersome and time-consuming to meet the immediate needs. This task must, therefore, of necessity*

36 *ibid*
37 *op.cit.p.36*
38 Dr.Lokendra Malik &Dr.Manish Arora – Justice H.R.Khanna Law, Life and Works p.91

fall upon the courts because the courts can by the process of judicial interpretation adapt the law to suit the needs of the society"[39] ***(italics supplied)***

Hence the judicial process falls short of its primary function if it fails at any given point of time to meet the ever changing requirements of modern society that is to adapt legal principles to meet fresh circumstances and needs. Thus a virile living system of law is ever seeking as every such system must to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of organized modern society[40]. As viewed by **Justice Oliver Holmes, "***the law must not be permitted to lag behind in narrowing the persistent gap between social needs and legal remedies. The ideais unattainable unless the Legislature and the Judiciary both perform their respective functions in bridging this gap".*[41] ***(italics supplied)***

To illustrate the above observation of **Justice Holmes**, it is to be noted that **Justice Krishna Iyer** of the Indian Supreme Court had found favour with, and expounded the following,

"Our judges are not monks or scientists, but participants in the living stream of our national life, steering the law between the dangers of rigidity on the one hand and of formlessness on the other. Our system faces no theoretical dilemma but a single continuous problem: how to apply to ever-changing conditions the never-changing principles of freedom. For the Indian judicial process, the nidus of these never-changing principles is the Indian Constitution. The best way to construe the scope of an Act of parliament is to not stop with the words of the sections. 'Our law (like all others) consists of two parts viz., of body and soul. The letter of the law is the body of the law and the sense and reason of the law is the soul of the law'….the social conscience of the judge hesitates to deprive the working class, for whom part IV of the Constitution has shown concern, of such rights as they currently enjoy on the strength of mere implication by a statute unless there are compulsive provisions constraining the court to the conclusion.".[42] ***(italics supplied)***

On this basis it is clear that the trend in statutory interpretation is towards a purposive oriented rather than a plain meaning rule in its rigid orthodoxy. The observation of the American Supreme Court on the above reads thus,**"***When the plain meaning has led to absurd or futile results…this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with*

39 ****Central Inland water Transport Corporation vTaranKantiSengupta*** (1986) 11 LLJ 171 (SC) *E.M.Rao*op.cit* p.922 *John Morison and Philip Leith – The Barrister's World and the nature of lawp.170

40 Mr.JusticeGratiaen – Obita Dicta p.64

41 ****ibid*** *Justice O.W. Holmes – The Common Law (42ndedn) p.121

42 SharathBabu and Rashmi Shetty – Social Justice and Labour Jurisprudence -Justice V.R.KrishnaIyer's Contributionsp.54

the policy of the legislation as a whole this court has followed that purpose rather than the literal words. When aid to construction of the meaning of words, as used in the statute is available, there can certainly be no 'rule of law' which forbids its use, however clear the words may be on 'superficial examination".[43] ***(Italics supplied)***

On this legal context, the present development and understating as to the role of a judge in the way of dispensation of justice has been succinctly summarized by **Justice Ashok Kumar Ganguly** of the Indian Supreme Court and concluded as follows; "*judges are not mere phonographic recorders but are empirical social scientists and the interpreters of the social context in which they work… an activist catalyst… and the judges'duty …. Is to uphold the constitutional focus on social justice without being in any way misled by the glitz and glare of globalization*"[44]. ***(italics supplied)***

Hence it has become a mistaken notion that judges cannot and do not make law as there only required and empowered to interpret and declare it. The accepted fact is that judges have an activist's role in moulding the law. As **Lord Denning** once referred to[45], The role of a judge is that "*he must not be a mere machine, a mere working mason laying brick on brick, without thought to the overall design. He must be an architect, thinking of the structure as a hole – building for society a system of law which is strong, durable and just. It is on his work that civilized society itself depends*" ***(italics supplied)***

Therefore the fact to be noted is that the proposition of non-static nature of law, has driven to germinate the concept of Judicial Activism, as a mechanism to minimize the gap between social needs and legal remedies. As a result the concept has broadened the issue of accessibility to justice departing from the 'traditional rule of standing' before the law, the ***locus standi***. "*Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons is by reason of violation of their constitutional and legal rights and such person or determinate class of persons is by reason of poverty or disability in a socially or economically disadvantaged position and unable to approach the Court for relief, any member of the public or social action group acting bona fide can maintain an application in High Court or the Supreme Court seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. This is no more than a radical generalization or extension of the technique followed in most countries in habeas corpus cases where the court usually acts on letters written by or on behalf of such or determinate class of persons. The Supreme Court has thus evolved what has come to be known as 'epistolary jurisdiction',*

43 ***United States v American Trucking Association*** (1940) 310 US 534

44 ***Harjinder SinghvPunjab State Warehousing corp***. pp 543 – 544 Appeal (Civil) No.6966/2009 Decided on 5.1.2010

45 *Forward **by Lord Denning** to **Rajeev Dhavan's** – The Supreme Court of India
Supra (fn) n_{19} at p.6

where the court can be moved by just addressing a letter on behalf of the disadvantaged class of persons"[46] ***(italics supplied)***

As a result of this innovative use of judicial power, however, the portals of the Court are thrown open to the poor,the ignorant and illiterate and their cases have started coming before the Court through public interest litigation. people now know that the Court has the constitutional power of intervention which can be invoked to combat repression and exploitation and ensure realization of constitutional and legal rights for persons under trial, convicted prisoners, women in protective custody, children in jail ,bonded and migrant labourers ,unorganized workers, scheduled castes and tribes, landless agricultural farmers who fall prey to faulty merchandization, women who are victims of flesh trade or dowry ,slum and pavement dwellers, and the kin of victims of extrajudicial execution .These and many other disadvantaged groups now have their problems brought before the courts through public interest litigation. These are unusual problems which call for extraordinary remedies, and they need a new kind of lawyering skill and a novel kind of judging[47].

Therefore the strategy of Public Interest Litigation was evolved by the Supreme Court reaching social justice to the deprived and the vulnerable sections of the community and making human rights meaningful for them. It is an instance of judicial activism at its best. It has revolutionized the judicial process by opening the door of justice to those who had no access for long years and making a radical departure from the traditional adversarial form of administration of justice. It has helped to develop human rights jurisprudence[48].

It is to be noted that there can be seen a clear example from the Sri Lankan legal contest in regard to the protection of right to life as a human right even in the absence of an express direct provision in the relevant chapter of the constitution on Fundamental Rights. The Supreme Court of Sri Lanka has interpreter Articles 11 and 13(4) of the constitution in order to bring in the fundamental right of right to life by way of its judicial activism, thus paved the way for enhancing the scope of fundamental rights espoused by right to life as the bedrock of all other rights guaranteed and enshrined in the Constitution[49].

(3.1) Judicial Imperialism *vis-a-vis* Judicial Oligarchy

Judicial activism which germinated by the Supreme Court gradually graduated into a sort of judicial imperialism as policy or principle adopted by judges to unite all

46 Judicial Activism & Public Interest Litigation - Justice P.N Bhagawati- Published in Human Rights, Human Values and the Rule of Law -Edited by A.R.B Amerasinghe and S.S Wijeratne. pp 197,198

47 Justice P.N Bhagwati – op. cit. pp.198,199

48 *Justice P.N Bhagwati – op. cit. p.206
* Mario Gomez – Emerging Trends in Public Law p.19

49 ****Amal Sudath Silva v. Kodithuwakku (1987) 2 SLLR 119***
****KotabaduDurageSriyani Silva v. ChanakaIddamalgoda OIC Police Station – Payagala****SCFR 471/2000 Decided on 08.08.2003*
****Wewalage Rani Fernando v. OIC Police Station – Seeduwa*** *SCFR 700/2002 Decided on 26.07.2004*

three wings of the government, the Legislature, the Executive and the Judiciary into one composite unit and bring themunder the majestic umbrella of Judiciary with the Court having the last word on all matters relating to the governance of people.[50]

By this way if Legislature exceeds its power the Court steps in. If the Executive exceeds its power thus also the Court steps in. The issue remains if Court exceeds the power, what can people do? It is proposed that this question has tobe viewed with the concept of the sovereignty in the people of the country and its inalienable character thereof.

Governmental power is one, among other two element of fundamental rights and franchise, all compose of the sovereignty of the people. Therefore, the people as the principal devolves their sovereign powers mainly upon their wings of the government and its instrumentalities and agencies with the legitimate hope of creating a just, fair and humane society. Among these powers, judicial power is the power, which every sovereign authority must have of necessity, to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property[51].

Therefore on this basis if the Legislature or the Executive exceed their powers relating to the life, liberty and property of the people, it will undoubtedly become a subject matter under preview of the Judiciary, the only organ created and established with judicial power, as defined above, to give binding and authoritative decision. Then the answer to the above question, when the Court exceeds it power what can the people do seems relatively nothing. Therefore the demarcation of boundaries between the Judiciary and other two organs must be one of self- imposed restrains not to embark on other territories, with the paramount sacrosanct concept of the benefit of the people or probonopublico. Hence any act of the Legislature or the Executive exceed their native powers in derogation of the rights of the people, and affects the life, liberty and property, itmust be under judicial review as a tool which safeguards the rights of the people.

On such a construction it will lead to create a '**judicial imperialism'**[52] which is an essential and inevitable exalted position as the guardian against state repression, governmental lawlessness and administrative deviance, a detached and remote relation with the concept of '**judicial oligarchy'**[53] what is sometimes called the 'aristocracy of the robe' or 'covert legislation' by which a clear violation of the tripartite theory of governmental powers, a criterion, which consists of the sovereignty of the people.

50 E.M Rao – op cit p.919
51 **Huddard Parker & co v Moorehead**8 Commonwealth Law Reports (CLR) 330 p. 357 Per Griffith CJ
52 *Supra (fn) n$_{11}$at p.919*
53 *Supra (fn) n$_{38}$at p.90*

The view of **Justice H.R Khanna**, of the Indian Supreme Court seems to be consistent with the rich tradition of self – indulged restraints or boundaries over the exercise of judicial – power *vis – a – vis* legislative or executive powers, reads thus,**"***the question thus turns on the point as to whether judges are absolutely free to decide the matters that come up before them in any way or are there any limitations subject to which the will of the judges masquerading as judicial discretion can be exercised. The answer to this was given by given* ***Justice Cardozo*** *when he said that the judge, even though when he is free, is not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw inspiration form consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in social life. Wide enough in all conscience is the field of discretion that remains"*[54]***. (Italics supplied)***

(4) Conclusion

In almost all parallel democracies, sovereignty is in the people and it is inalienable. Therefore, powers of the government of any kind whether legislative, executive or judicial is in the people. Thus the pragmatic exercise of these powers must and should contemplate only the benefit of the people who are vested with the sovereignty. Hence when the Legislature which is conferred with the primary power to legislate in order to bring legal reforms to remedy social needs, is inordinately delayed or slow in the legislative process, overburdened with myriad of other activities, the question arises as to the particular situation to be left unremedied or to be kept intact, unless and until the chaotic unrest is dealt with by the Legislature by making or introducing new laws to regulate the situation and to remedy the unrest that will be exactlyand undoubtedly related to life, liberty and property of the people who are deemed to be the principal sovereign of the State. What is to be aimed at, is introducing solutions to the grievances of the people within the existing legal framework of a country, the task is entirely devolved upon the Judiciary which consists of unelected handful of people *vis-à-vis* the Legislature with elected representatives of the people. Therefore the battle between unelected and elected, all are representatives of the people, ultimately leads to a battle among people. The critique behind this battle in the present day context more realistically, is that it is between more unlearned elected *versus* handful of learned unelected who are with sound legal knowledge, training and experience. The battle thus leads to the achievement of narrowing the persistent gap between social needs and legal remedies, which seems to be a collective responsibility of both Legislature and the Judiciary to enrich the necessities of the daily life of the people.

54 *ibid*

Therefore if the legislative measures are lagging behind the social needs or the march of the society, undoubtedly it will be the task of the Judiciary to find solutions or remedies to the societal needs by operating within the four corners of the language of a statute. The idea to be attained is the benefit of the people or *pro bonopublico*. Hence up to the point of the attainment of this goal no counterpart or agency or instrument of the government which is vested with the powers of the government, a criterion of the sovereignty of the people, will not gain supremacy above the people or their needs. Hence the judicial law making is essential to the life of the community as long as it is bridging the gap or narrowing the persistent gap between social needs and legal remedies which are unattainable within the scope of the prevailing legal framework generated by the Legislature of the country, as expounded by one of the greatest Presidents of the United States of America, **Abraham Lincoln,** at the **Gettysburg Adress,** democracy as one, of the people, for the people and by the people, thus contemplated and exalted only the people, their needs and their benefits.

PROMOTING INNOVATION AND CREATIVITY THROUGH INTELLECTUAL PROPERTY LAW: A SRI LANKAN PERSPECTIVE

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"Sri Lankans have innovating power and imagination and it is our duty not to stand aside but to give them a hand and push them forward."

(Lalith Athulathmudali, 1979)

1.1 Introduction

Intellectual property (IP) is all around us and reaches into everyone's daily life.[2] Perhaps, you might have seen the terms "all rights reserved" or the © mark on work you have read and the ® mark or the ™ symbol on certain goods that you have purchased in the marketplace. As well known, IP rights are the drivers of the knowledge-economy of the 21st century. Viewed through the lens of a well-respected Sri Lankan intellectual and poet, Munidasa Cumaratunga, a country, an enterprise or an individual who does not look for new things and innovative ways cannot rise in a competitive world.[3] More widely, the term 'IP' refers to types of property that result from creations of the human mind, the intellect. From a legal perspective, IP means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. Therefore, IP law regulates the creation, use, and the exploitation of mental and creative labour. More precisely, IP law creates property rights on a wide and diverse range of subject matter. Intellectual property rights have been prominently highlighted in the policy paradigm of the knowledge-based economy. Sri Lanka as a developing country is no exception to this reality.

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2 European Patent Office, *Intellectual Property Teaching Kit: IP Basics* (EPO Publication, 2017) 4.

3 NS Punchihewage, Promoting a Second-Tier Protection Regime for Innovation of Small and Medium-Sized Enterprises in South Asia: The Case of Sri Lanka (Nomos, Baden-Baden, Germany 2015) 77.

1.2 International IP Law and Sri Lanka

The internationalisation of IP law, regulation and policy began in the eighteenth and nineteenth centuries.[4] Interestingly, the multilateralisation of international IP quickly followed in the latter part of the nineteenth century through the negotiation and adoption of two important treaties; namely, the Berne Convention on Literary and Artistic Works of 1886 (Berne Convention) and the Paris Convention on the Protection of Industrial Property of 1883 (Paris Convention).[5] Later, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961 was adopted. Most significantly, in 1994 the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as TRIPS Agreement) established universal minimum standards of IP protection by creating another milestone in the history of IP law. Many consider the TRIPS Agreement a 'sea change' in international intellectual property law. International IP treaties cover various IP rights in varying degrees of detail and comprehensiveness. Hence, the treaty obligations that the contracting parties must adhere to equally vary.[6] In this regard, Sri Lanka ratified the Marrakesh Agreement establishing the WTO in June 1994 and is bound by legal obligations imposed under the TRIPS Agreement.[7] In terms of the impact of the TRIPS Agreement on Sri Lanka, it contains obligations concerning the protection of copyrights and related rights, trademarks, industrial designs, geographical indications, patents, semiconductors and undisclosed information, and includes the core obligations of the two main pre-existing IP substantive treaties, the Paris and the Berne Conventions, *via* reference.[8]

1.3 Current Sri Lankan IP Law

The intellectual property system in Sri Lanka originated during the British colonial period. Since 1860 a number of British Acts were made applicable to Sri Lanka and such laws continued to apply even after Sri Lanka gained independence. However, after the introduction of the new economic policy, namely, the free market economy in 1977, the Sri Lankan government introduced an IP regime, namely, the Code of Intellectual Property Act, No. 52 of 1979. The new law marked a turning

4 B Mercurio, 'Reconceptualising the Debate on Intellectual Property Rights and Economic Development' (2010) 3/1 The Law and Development Review 65, 71.

5 Ibid.

6 HG Ruse-Khan, 'Utility Model Protection in Pakistan-A Feasible Option for Incentivising Incremental Innovation?' (2012), Study conducted for the World Intellectual Property Organisation, 7. (copy on file with author).

7 Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1197 (1994) (TRIPS Agreement).

8 See also HG Ruse-Khan, 'Utility Model Protection in Pakistan-A Feasible Option for Incentivising Incremental Innovation?' (2012), Study conducted for the World Intellectual Property Organisation 7.

point in the evolution of the intellectual property system in Sri Lanka. The Intellectual Property Act, No. 36 of 2003 replaced the Code of Intellectual Property Act in 2003. The Act was introduced to ensure compliance of the Sri Lankan IP regime with TRIPS obligations. The rationale underlying its introduction has been spelt out in Parliament during the debate on the Bill as the promotion of national creativity, the protection of creative efforts, the enhancement of the integration of the national economy into the knowledge driven global economy, the attraction of more investment and the protection of consumer interests.[9]

1.4 Main Types of IP Rights

In the Sri Lankan context, the Intellectual Property Act, No. 36 of 2003 accords protection to the main areas of IP rights recognized by the multilateral IP treaties; namely, copyright and related rights, inventions, industrial designs, trademarks, geographical indications, undisclosed information including trade secrets, protection against unfair competition and layout designs of integrated circuits, etc. However, in this section of the report, the main types of IP rights that may have actual or potential impact on tourism and cultural promotion will be discussed.

1.4.1 Copyright and Related Rights

In modern time, IP especially copyright, plays a significant role in the knowledge economy. Sri Lanka as a developing country is no exception to this reality. The term copyright refers to the area of intellectual property law that deals with rights of the owners of literary, dramatic, musical and artistic works, cinematographic films and sound recordings. The Sri Lankan copyright law, nested in the IP Act of 2003, concerns the rights of the authors of protected works, their management and enforcement. Undoubtedly, the protection of copyright can positively contribute to the social, economic and cultural development of the country. In the Sri Lankan context, the intellectual property rights of the authors have been protected since 1911 and the current IP Act 2003 provides a comprehensive legal framework for the protection of copyright and related rights (neighbouring rights) in compliance with the international standards.

At the very outset, one has to understand the fact that the Sri Lankan copyright regime is based on Common Law copyright tradition as opposed to the European authors' rights regime.[10] Pursuant to section 6 of the Act, 'works' in literary, artistic or

9 See R Karunanayake - the former Minister of Commerce and Consumer Affairs (2003), Hansard Report-23 July 2003 (The Parliament of Sri Lanka 2003) 1048, 1049-1050. The Minister made this statement during the second reading of the Code of Intellectual Property Law Bill in Parliament.

10 Continental European authors' rights regime is based on the French droit d'auteur tradition, which sees intellectual creations as an embodiment of the spirit or soul of the creator. In contrast, the Common Law tradition regards copyright and related rights as property rights.

scientific domain shall be protected under copyright law. These works are protected by the sole fact of their creation and irrespective of their creative elements, quality or value, and does not need to have any literary or artistic merit.[11] However, to qualify for copyright protection, works must be 'original intellectual creations.' A work is 'original' in the copyright sense if it owes its origin to the author and was not copied from some pre-existing work. Perhaps more importantly, an original work is one that 'originates' in its expression from the author. The phrase 'intellectual' involves the communication of thoughts or feelings, output of the mind while the term 'creation' should be understood as the 'shaping of form of expression.' Copyright protection only relates to the form of expression and not to the underlying idea. Even though several Berne Union countries have established voluntary national registration systems for copyright and related rights, Sri Lanka does not have a system of registration of copyright and copyright protection in Sri Lanka is accorded without any formalities such as registration.

As per section 6(1) 'protected works' include all writings including computer programs, oral works such as speeches and lectures, dramatic, dramatic-musical works, pantomimes, choreographic works and other works created for stage production, stage productions of such works, musical works, audio visual works, works of architecture, works of drawing, painting, sculpture, engraving, lithography, tapestry and other works of fine arts, photographic works, works of applied arts, illustrations, maps, plans, sketches and three dimensional works relative to Geography, Topography, Architecture or Science. Moreover, derivative works such as translations, adaptations, arrangements and other transformations or modification of works and collection of works and data bases[12] whether in machine readable or other form, provided they are original by reason of the selection, coordination or arrangement of their contents, are also protected pursuant to section 7 of the IP Act.

Copyright protection in Sri Lankan shall not be extended to any idea, procedure, system, method of operation, concept, principle, discovery or mere data, any official texts of a legislative, administrative or legal nature as well as the news of the day published.[13] As in many other jurisdictions, exclusive rights granted by copyright law are subject to certain limitations such as 'fair use' or 'fair dealing'.[14] Even more importantly, the exclusive rights conferred under copyright law entail economic as

11 In this regard, the approach of the Sri Lankan judiciary is similar to the approach adopted by English Courts. See *Wijesinghe Mahanamahewa And Another V. Austin Canter* (1986 1 Sri LR 620, *Vasantha Obeysekera v A.C. Alles* CA 730/92 (F) (unreported), *Chandraguptha Amerasinghe v Associated Newspapers of Ceylon Ltd* (SC decided in 2012).

12 A database is a collection of information that has been systematically organized for easy access and analysis.

13 Section 8 of the IP Act clearly sets out works not protected.

14 Section 11 and 12 provide specific instances of fair use.

well as moral rights. The economic rights cover the rights relating to reproduction, translation, adaptation or transformation, public distribution including sale, rental, export or otherwise, rental of the original or a copy of an audio visual work, a work embodied in a sound recording, a computer program, a database or a musical work in the form of notation, irrespective of the owner of the copy or the original concerned, importation of the copies of the work, public display, public performance, broadcasting and other communication to the public.[15] The moral rights cover mainly the right to be named as the author of the work ('authorship right' or 'paternity right') and the right to protect the integrity of the work such as the right to object to any distortion or mutilation etc.[16]

Related rights, also referred to as neighboring rights, are protected under the sections 17 to 20 of the Sri Lankan IP Act. The law recognizes the rights of the performers, the producers of sound the recordings and broadcasting organizations. These rights safeguard the interests of the persons who contribute to make the copyright material available to the public or make certain productions, which express some kind of creativity or creative talents, or technical or organizational skills.[17] Pursuant to section 5 of the Intellectual Property Act, 'performers' mean singers, musicians, and other persons such as actors and dancers who sing, deliver, declaim, play in, or otherwise perform, literary or artistic works or expressions of folklore. Performers have the exclusive right to authorize or prohibit the fixation (recording) in any medium, the communication to the public or broadcast or transmission by cable of their live performance or any substantial part of it, as well as the reproduction of recordings of their live performances.[18]

1.4.2 Patent Rights

As evident from the world's leading irrigation systems and architectural wonders, during the reign of the ancient kings, Sri Lankans proved to be a creative and innovative people. Even today the world is amazed at how Sri Lanka's ancestors

15 Section 9 of the IP Act stipulates the exclusive economic rights enjoyed by the author of the work.

16 See Section 10 of the IP Act. Unlike economic rights, moral rights cannot be transferred to someone else, as they are personal to the creator. Even when the economic rights in a work are assigned to someone else as per section 16 of the IP Act, the moral rights in the work remain with the creator. However, in some countries, an author or creator may waive his/her moral rights by a written agreement, whereby he/she agrees not to exercise some or all of his/her moral rights. See generally, World Intellectual Property Organization (WIPO), Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises (WIPO publication No. 918, Geneva, 2006).

17 DM Karunaratna, *Elements of the Law of Intellectual Property in Sri Lanka* (Sarasavi Publishers, Nugegoda, Sri Lanka 2010) 98.

18 See World Intellectual Property Organization (WIPO), Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises (WIPO publication No. 918, Geneva, 2006).

built huge reservoirs such as the *Parakrama Samudraya* and at how the country put together a flawless irrigation network.[19] Invention and innovation are no doubt the engine of economic growth and development of a country, paving the way for many countries to become globally competitive. The protection of inventions lies at the heart of intellectual property which emanates from the need to reward innovation and creativity.

In the eyes of the law, a patent is a legal title protecting an invention.[20] Patents grant their owner a set of rights of exclusivity over an invention (a product or process that is new, involves an inventive step and is susceptible of industrial application) as defined by the 'claims.'[21] The legal protection conferred by a patent gives its owner the right to exclude others from making, using, selling, offering for sale or importing the patented invention for the term of the patent, which is usually 20 years from the filing date, and in the country or countries concerned by the protection.[22] The rationale underlying the patent system is to encourage invention and technical progress by providing a temporary period of exclusivity over the invention in exchange for its disclosure.[23]

Like any other IP right, a patent is a territorial right. Historically, the concept of patents, and consequently of IP rights, came into existence in Sri Lanka during the British colonial period, when the British Inventors' Ordinance of 1859 became applicable to Sri Lanka (then Ceylon).[24] Perhaps even more significantly, the first Sri Lankan patent had been granted to a British engineer in January 1861 for the invention of a coffee pulping machine.[25] The current patent regime in Sri Lanka is governed by the Intellectual Property Act, No. 36 of 2003 and the regulations made thereunder. The new Act was introduced to bring the Sri Lankan IP regime into compliance with TRIPS obligations. As mentioned previously, the rationale underlying its introduction has been spelt out in Parliament during the debate on the Bill as the promotion of national creativity, the protection of creative efforts, the enhancement of the integration of the national economy into the knowledge driven global economy, the attraction of more investment and the protection of consumer

19 S Fernando, 'Lanka Engineers Globally Recognized' Sunday Observer (Colombo 6 July 2014).

20 See, Article 28 of the Trade-Related Intellectual Property Rights (TRIPS) Agreement.

21 A claim forms part of the specification. The specification is essentially a description of the invention and the best method of performing it.

22 Organisation for Economic Co-operation and Development (OECD), *Patent Statistics Manual* (OECD 2009) 18, 18.

23 Ibid 21.

24 RMW Amaradasa, MAT de Silva and RP Pathirage, 'Patents in a Small Developing Economy: A Case Study of Sri Lanka' (2002) 17 Journal of Intellectual Property Rights 395.

25 Ibid.

interests.[26] Viewed from a user perspective, the Sri Lankan patent regime has, however, come under heavy criticism for being less attractive to domestic industries. Despite its comparatively long history, there are only a few cases available in the area of patent law and they hardly deal with any substantive patent law issues such as treatment of novelty and inventive step.

Patents are granted in Sri Lanka in relation to an invention. An invention is defined by the Act as an idea of an inventor which permits in practice the solution of a specific problem in the field of technology.[27] This means that the Sri Lankan patent law has adopted the 'problem-solution approach' to define an invention. Sri Lanka's IP Act provides protection for inventions relating to products as well as processes.[28] The following are not regarded as inventions within the meaning of an invention in the Act and are thus excluded from patent eligibility:[29]

- discoveries, scientific theories and mathematical methods;
- plants, animals and other microorganism other than transgenic microorganism and an essentially biological process for the production of plants and animals other than non-biological and microbiological processes;[30]
- schemes, rules, or methods for doing business, performing purely mental acts or playing games;
- methods for the treatment of the human or animal body by surgery or therapy, and diagnostic methods practiced on the human or animal body; provided however, any product used in any such method shall be patentable;
- an invention which is useful in the utilization of special nuclear material or atomic energy in an atomic weapon;
- any invention, the prevention within Sri Lanka of the commercial exploitation of which is necessary to protect the public order and morality including the protection of human, animal or plant life or health or the avoidance of serious prejudice to the environment.

Article 27(1) of the TRIPS Agreement requires that 'patents shall be available for any invention that is new, involves an inventive step and is capable of industrial

26 DM Karunaratna, 'Issues Related to the Enforcement of IP Rights: National Efforts to Improve Awareness of Decision Makers and Education of Consumers' (WIPO Advisory Committee on Enforcement, Third Session, Geneva May 2006).

27 See Section 62 (1) of the IP Act of Sri Lanka No 36, 2003. The 'word' technology may be understood as the systematic knowledge essentially required for the manufacture of a product.

28 See Section 62 (2) the IP Act of Sri Lanka No 36, 2003, the process patents are those patents which are for inventions which perform a function.

29 See Section 62 (3) of the IP Act of Sri Lanka No 36, 2003.

30 The clause in the IP Bill was scrutinized by the Supreme Court and the words *'other micro- organism other than transgenic micro organism'* were added after the word animal. See SC Special determination Nos. 14/2003 and 16/2003-the Supreme Court of Sri Lanka.

application'. Although the TRIPS Agreement requires WTO members to implement and enforce a comprehensive set of minimum standards in the protection of IP rights, it does not however define the term 'invention', nor does it specify how the three criteria for patentability are to be treated.[31] When it comes to Sri Lankan law, an invention is patentable if it is new, involves an inventive step and is industrially applicable.[32] Obviously, Sri Lankan IP law has adopted a similar approach taken by the TRIPS Agreement, in deciding the criteria of patentability; namely, novelty, inventive step/non-obviousness and industrial applicability. The application of these criteria in the Sri Lankan patent law has been comprehensively analyzed by Judge Ruwan Fernando in a recent decision of the Commercial High Court in *Ramawickrema Gamachchige Ravindra v Riyad Ismail*.[33]

Under Sri Lankan law, the statutory life of a patent is 20 years from the date of application for its registration.[34] From a legal perspective, a patent is not a right to practice, but a right to exclude.[35] In that sense, patent is a negative right as opposed to an affirmative right. Pursuant to Section 84 of the IP Act, a patent confers on its owner a bundle of exclusive rights to exploit the invention. Such rights include preventing third parties not having the owner's consent from the acts of making, using, importing, offering for sale, selling, and exporting the patented invention. Moreover, patent owners shall also have the right to assign, transfer or to conclude licensing contracts with regard to the rights conferred by the patent. This does not, however, mean that the exclusive rights granted by law for patent owners are without limitations.[36]

1.4.3 Industrial Design Rights

While a patent protects the technical solution or the inventive technical improvement in a product or a process, the new and original shape and external appearance of a useful object is protected by an industrial design right.[37] The more appealing such products are, the more likely it is that they will be bought by

31 See also, CM Correa, *A Guide to Pharmaceutical Patents* (vol I, South Centre 2008) 26-27.

32 See Section 63 of the Act which deals with protectable inventions.

33 See the Commercial High Court decision in *Ramawickrema Gamachchige Ravindra v Riyad Ismail* Case No. HC (Civil) 01/2010/IP, ("EZ Turbo Charcoal Stove") case, decided on 07 February 2018.

34 See Section 83 of the IP Act of Sri Lanka No 36, 2003.

35 Kinney and PA Lange, *Intellectual Property Law for Business Lawyers* (2010-2011edn, West Publishers 2010) para 2:1.

36 The possibility of granting compulsory licenses is provided for in the IP Act of Sri Lanka No 36, 2003 under Section 86 and it may operate as a limitation of the owner's right. Another possible exception on the rights of the owner of a patent is the prior user right recognized under Section 87 of the IP Act of Sri Lanka No 36, 2003.

37 S Alikhan and RA Masshelkar, *Intellectual Property and Competitive Strategies in the 21st Century* (Kluwer Law 2004) 8-9.

consumers.[38] Designs make a product attractive and appealing; hence they may add significantly to the commercial value of a product and increase its market ability. Design protection is wide enough to encapsulate designs of three-dimensional patterns such as toys, shoes, perfume bottles, cutleries, and even domestic furniture on the one hand, and two-dimensional patters such as textiles and wallpapers, on the other. Industrial design protection has developed worldwide. An industrial design may be defined as the (outward) appearance of a product or a part of a product which results from the lines, contours, colours, shape, texture, materials and its ornamentation.[39]

The current legal protection of industrial designs in Sri Lanka is governed by Part III of the IP Act No. 36 of 2003. It appears from the statutory language that industrial designs can also be protected under other IP regimes such as copyright, trademarks and unfair competition[40] and arguably, like in other jurisdictions such as in European and in the US, the overlap of rights makes cumulative protection possible in the area of design rights in Sri Lanka. For example, works of applied art are artistic works[41] used for industrial purposes by being incorporated in everyday products. Typical examples are jewelry, lamps, and furniture. Works of applied art have a double nature: they may be regarded as artistic works; however, their exploitation and use do not take place in the specific cultural markets but rather in the market of general purpose products.[42] In order to be eligible for protection under Sri Lankan law, any registerable design has to be new and must not be anti-social in the sense that it does not consist of any scandalous design or that it is contrary to morality or public order or public interest or is likely to offend the religious or racial susceptibilities of any community.[43] Under Sri Lankan law, an owner of a registered industrial design can enjoy his exclusive rights to exploit by preventing others from unauthorized making, selling, importing, or using of any product that is protected by design law.[44] The registration of an industrial design lasts for five years from the date of application and it can be renewed for two consecutive periods of five years. Thus, the statutory life of a registered design lasts for 15 years from the date of application.[45]

38 Y Takagi and others (eds), *Teaching of Intellectual property* (WIPO and CUP 2008) 85.

39 See art 3 of the Council Regulation (EC) No. 6/2002 of December 12, 2001 on Community Designs (Community Designs Regulation-CDR).

40 See Section 28 of the IP Act; "The protection of industrial designs provided under this Part shall be in addition to and not in derogation of any other protection provided under any other written law".

41 See section 6(1)(k) of the IP Act protect copyright protection of works of applied art.

42 See World Intellectual Property Organization (WIPO), *Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises* (WIPO publication No. 918, Geneva, 2006) 14.

43 See Section 29 of the IP Act of Sri Lanka No 36, 2003. See also DM Karunaratna, *Elements of the Law of IP in Sri Lanka* (Sarasavi Publisher 2010) 116.

44 See Section 47 of the IP Act of Sri Lanka No 36, 2003.

45 See Sections 45 and 46 of the IP Act of Sri Lanka No 36, 2003.

1.4.4 Trademarks, Certification Marks and Collective Marks

In the eyes of IP law, trademarks protect brands and goodwill is associated with the brands. Trademarks, therefore, provide the vehicle to protect characteristics specified in TM law such as signs, words, logos, slogans, etc. Trademarks are prime advertising tools, and are of paramount importance in the marketing and commercialization of goods and services to any business big or small. Therefore, an effective and efficient trade mark regime is a vital IP tool for competitiveness as it encourages the production and distribution of quality products. In the Sri Lankan context, three main categories of marks are recognized under the IP Act; namely, trademarks and service marks, certification marks and collective marks. As spelt out in section 101 of the Act, a trademark is a visible sign serving to distinguish the goods of one enterprise from those of other enterprises. The exclusive right to a mark under the Act is acquired by registration. It is only a visible sign that can be registered under the current IP Act of Sri Lanka. Therefore, non-traditional forms of trademarks, such as single colors, three-dimensional signs (shapes of products or packaging), audible signs (a sound mark) or olfactory signs (a smell mark), motion mark, or any other non-visual sign would not qualify for registration under the Sri Lankan law.

Pursuant to section 102(3) a mark may consist, in particular, of arbitrary or fanciful designations, names , pseudonyms, geographical names, slogans, devices, reliefs, letters, numbers, labels, envelopes, emblems, prints, stamps, seals, vignettes, selvedges, borders and edgings, combinations or arrangements of colours and shapes of goods or containers.[46] A mark is admissible for registration if it is not inadmissible on any of the grounds enumerated in sections 103 and 104 of the Act. Section 103 identified a set of grounds of inadmissibility known as objective grounds such as shapes or forms imposed by the inherent nature of the goods or services, or by their industrial functions, descriptiveness, generic designations, signs incapable of distinguishing the goods or services of different enterprises, scandalous signs, signs contrary to morality or public order or likely to offend religious or racial susceptibilities of communities, misleading signs, geographical names or surnames in their ordinary signification, signs that imitate or reproduce state emblems and flags etc., and marks, the registration of which has been sought in respect of goods or services the trading of which is prohibited in Sri Lanka. [47]

Furthermore, Section 104 sets out certain grounds of inadmissibility which concern third party rights. They include a mark misleadingly similar to an already registered or validly applied mark, a mark misleadingly similar to an unregistered mark earlier used in Sri Lanka. As per section 118 registration of a mark lasts for a

46 DM Karunaratna, *Elements of the Law of IP in Sri Lanka* (Sarasavi Publisher, Colombo, 2010) 185.
47 Ibid187.

period of ten years from the date of application and such registration can be renewed for consecutive periods of ten years. In that sense, the trademark right can last forever provided it is renewed in accordance with the law. The registered owner of a mark has the following exclusive rights in relation to a mark; (a) to use the mark; (b) to assign or transmit the registration of the mark; (c) to conclude license contracts involving the mark.[48]

One other significant aspect of the Sri Lankan trademark regime is that it accords protection for collective marks under the IP Act.[49] A certification can be defined as a mark indicating that the goods and services in connection with which it is used are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics.[50] The main feature of a certification mark is that it is used not by the proprietor of the mark but instead by his authorised users for the purpose of guaranteeing to the relevant public that goods or services possess a particular characteristic.[51] Moreover, in order to develop a joint marketing campaign for their products the use of collective marks plays a vital role. Sri Lankan law also recognizes the concept of certification marks.[52] A collective mark is defined as a mark distinguishing the goods or services of members of the association which is the proprietor of the mark from those of other undertakings. The main feature of a collective mark is that it is used as an indication to the relevant public that goods or services originate from a member of a particular association. It is therefore a sign of membership.[53]

1.4.5 Geographical Indications

Geographical indication (GIs) or products of origin-place link are one of the main themes in the IP law paradigm. The protection of GI products has attracted increasing attention among policymakers and scholars, both at the international and the domestic level. GIs convey an assurance of quality and distinctiveness which is essentially attributed to the fact of its origin. Therefore, GI as an IP tool is important to protect GI protected products from cheap imitations and help preserve their quality. As defined in the IP Act: 'a geographical indication means an indication which identifies any good as originating in the territory of a country, or a region or

48 See section 121 (1) of the IP Act.

49 See section 101 of the IP Act.

50 E Smith, 'Certification and collective marks – Paper prepared by the United Kingdom for the SCT'. Available at: <http://www.wipo.int/export/sites/www/sct/en/comments/pdf/sct21/cert_uk.pdf> access on 21February 2017.

51 Ibid.

52 See section 101 of the IP Act.

53 E Smith, 'Certification and collective marks- Paper prepared by the United Kingdom for the SCT'. Available at: <http://www.wipo.int/export/sites/www/sct/en/comments/pdf/sct21/cert_uk.pdf> access on 21February 2017.

locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.[54] When compared with a trademark, what is unique in a GI is the link between the product and the geographical origin (territory or region). For this reason, a GI derives its characteristics from the region's unique environment; namely, natural (climate, conditions of soil etc.) and human factors such as historical context, intergenerational skills and know-how. More specifically, 'Ceylon Tea', 'Indian Basmati', 'French Champagne', 'Greek Feta Cheese', 'Cuban Havana Tobacco', 'Italian Parma Ham' and 'Colombian Coffee' are a few prominent examples for internationally recognized GIs.

The underpinning rationale for the protection of GI is to prevent consumers from being misled as to the true origin of a product and also to protect the legitimate interests of the rightholders of GIs. Sri Lanka is well-known for "Pure Ceylon Tea" and its pristine quality and reputation which remain in the minds of global consumers. It is undeniable that GI protection in the Sri Lankan IP Act has been greatly motivated by the tea industry; one of the major earners of foreign exchange in the country. Under the IP Act of Sri Lanka, geographical indications can be protected under several areas of law: (i) sui generis protection accorded under section 161 of the Act, (ii) law of marks under section 103 of the Act; (iii) unfair competition law; and (iv) collective and certification marks.[55] A glimpse of the provisions (Section 161) in the IP Act of Sri Lanka reveals that the Act does not restrict special protection for wines and spirits, rather extends such protection to all other GI products. Thus, Ceylon Tea enjoys a higher level of protection under the IP Act of Sri Lanka. However, in the absence of a GI registration system, the protection of Sri Lankan GIs in foreign markets becomes challenging, if not impossible. This scenario has been created by the Article 24 (9) of the TRIPs Agreement which requires that a GI to be registered and protected in the country of origin in order to obtain protection at the international level. In this regard, the Sri Lanka introduced Intellectual Property (Amendment) Act, No. 7 of 2018 empowering the Minister to prescribe any geographical indication in respect of any goods or products for the purpose of IP Act 2003. However, the law remains inadequate and the problem faced by Tea and Cinnamen exporters continues. Therefore, it is partinent to refrom and modernize the IP Act to meet the present day needs.

1.4.6 Unfair competition and Undisclosed Information

In the realm of IP law, the protection against unfair competition falls outside the hard-core IP themes and is considered to be the 'fallback protection', especially when there are no other specific IP rights available. Arguably, one can make a strong

54 See section 101 of the IP Act, No. 36 of 2003.

55 DM Karunaratna, *Elements of the Law of IP in Sri Lanka* (Sarasavi Publisher, Colombo, 2010) 300-301.

case for developing a misappropriation-based unfair competition regime as a third IP paradigm for the protection of products that fall through the cracks between patent and copyright.[56] The concept of unfair competition, *concurrence déloyale,* emerged in France around 1850.[57] Over the years, unfair competition law has developed to remedy the *lacunae* between rights, and it provides an alternative approach to avoiding situations deserving of protection falling into the 'gap' which lies between the specifically defined IP right and the public domain, in particular, in guarding the interests at stake when new ideas are developed.[58]

The Sri Lankan IP regime also accords protection against unfair competition by virtue of section 160 of the IP Act. As defined in the Act, 'any act or practice carried out in the course of industrial or commercial activities contrary to honest practices constitutes an act of unfair competition'. Sri Lanka's IP Act of 2003 contains specific provisions on the protection against unfair competition. At first glance, the statutory scheme in section 160 first deals with the general clause followed by a list of non-exhaustive specific acts. The rationale for the protection against unfair competition is to prevent dishonest trade practices and safeguard the ethics of the business community.[59] This broad definition is comparable with the basic principle postulated in Article 10*bis* (2) of the Paris Convention and it has reinforced the general clause. The basic elements of unfair competition under Sri Lankan law are: (1) any act or practice; (2) contrary to honest practices; (3) carried out or engaged in, in the course of industrial or commercial activities. According to commentators, the law refers to both 'act and practices' and the word 'practices' is used in addition to 'act' in order to avoid a strict interpretation of the word 'act' which can also include 'omissions.'[60]

The meaning of 'contrary to honest practices' has been dealt with in the judicial pronouncements on the subject by Sri Lankan courts. It was held in the leading case of *Sumeet Research and Holdings Ltd v Elite Radio & Engineering Co. Ltd*[61] that section 160 (section 142 of the previous Act) mandates a higher standard of conduct - some norms of business ethics and does not merely restate existing legal obligations. It may well be a broad and flexible doctrine, capable of growing to meet the changing ethical needs of society, especially by preventing commercial unfairness which would

56 See DS Karjala, 'Misappropriation as a Third Intellectual Property Paradigm' (1994) 94 Columbia Law Review 2594, 2604-2605.

57 G Schricker, 'Unfair Competition and Consumer Protection in Western Europe' (1970) 1 International Review of Intellectual Property and Competition Law 415, 415.

58 C Colston and K Middleton, Modern Intellectual Property (2nd edn, Cavendish Publishing 2005) 37-38.

59 K Kanag-Isvaran, 'Unfair Competition-An Antidote to Dishonest Trade Practices' (1997) VII/1The Bar Association Law Journal 144-160.

60 DM Karunaratna, Elements of the Law of Intellectual Property in Sri Lanka (Sarasavi Publishers 2010) 324.

61 (1997) 2 Sri LR 393.

result from the appropriation by one person of the benefit which equitably belongs to another. In deciding what can constitute the dishonest, one should not forget that the criterion of wrongfulness is based on the legal convictions of the community and underscores the requirement that competition between enterprises should be fair and exercised in accordance with the public interest.[62] Moreover, Section 160 embraces a wide spectrum of specific acts with much-detailed examples of instances of unfair competition. This includes acts of causing confusion or being likely to cause confusion with respect to competitors' goods or services,[63] causing damage to goodwill or reputation including acts of dilution,[64] acts that are misleading such as advertisements, any false or unjustifiable allegations, discrediting or denigration of competitors, etc.[65] Most notably, the wording of the provision indicates that the aforementioned acts are examples and not exhaustive. Therefore, any act of unfair free riding on the back of other competitors' achievements (case of unfair coat-tail riding), comparative advertising, violating legal provisions not directly concerning competition to obtain through such violation an unfair advantage over other competitors, slavishly copying goods, services, publicity or other features of the trade of competitor, or touting such as offering bonuses and many other acts, although not expressly mentioned, would arguably come into this catalogue. At first sight, it appears that Sri Lankan law has given wide and comprehensive protection for unfair competition in compliance with its international obligations.

Even though trade secrets protection is a relative latecomer to the intellectual property (IP) pantheon, it has become a key aspect of creating a favourable business environment in any country. Trade secrets are often considered as the 'crown jewels' of a firm's intellectual assets.[66] In the eyes of the law, any information that is kept confidential in order to preserve competitive gains is considered a trade secret. Indeed, defining a trade secret is not easy, but it can include customer lists, formulae, practices, business strategies, software programs, advertising strategies, marketing plans, manufacturing processes and information about R&D activities, etc. The TRIPS

62 K Kanag-Isvaran, 'Unfair Competition-An Antidote to Dishonest Trade Practices' (1997) VII/1 The Bar Association Law Journal 144-160, 147. See also case law dealing with the protection against unfair competition such as *Sumeet Research and Holdings Ltd. v. Elite Radio & Engineering Co., Ltd* [1997] 2 Sri LR 393-409, *Societe Des Produits Nestle SA v. Multitech Lanka (PVT) Limited* [1999] 2 Sri LR.298-308, *Arpico Finance Company PLC v. Richard Pieris Arpico Finance Limited,* (SC [CHC] Appeal No. 41/2014 decided on 29 September 2014).

63 See Section 160(2); this sub-section in particular deals with the confusion caused by look-alike products and appearance of a product (get-up/trade dress).

64 See Section 160(3); significantly, anti-dilution protection has been introduced via this provision. Dilution can lessen the distinctive character of a trademark by blurring or tarnishment

65 See Section 160(4) and (5).

66 See NS Punchihewa 'Protection of Confidentiality of Trade Secrets in the Course of Legal Proceedings: A Sri Lankan Perspective', the Proceedings of the Annual Research Symposium of the University of Colombo, 2015.

Agreement has treated trade secrets as an IP right. Sri Lanka, being a state party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), has brought its IP laws into compliance with TRIPS obligations. More specifically, Section 160 of the Intellectual Property Act, No. 36 of 2003 and the common law action for breach of confidence constitute the foremost legal means of trade secrets protection in Sri Lanka.

Like in some other jurisdictions, under Sri Lankan IP law, trade secrets are referred to as confidential information. The trade secret protection in Sri Lanka does not exist as a standalone right and it has been treated as a sub-set of protection against unfair competition. Pursuant to section 160(6) of the IP Act, Sri Lankan law specifies conditions that need to be met in order to be protected as trade secrets; namely, (i) the information must be confidential; (ii) it should have commercial value because of its confidentiality; and (iii) the holder of the trade secret should have made reasonable efforts to keep it confidential. An analysis of the provision shows that 'confidentiality' functions as the gatekeeper for the protection of a trade secret.

1.6 Enforcement of IP Rights

In the Sri Lankan IP landscape, a comprehensive mechanism for the enforcement of Intellectual Property rights in Sri Lanka embracing civil remedies, criminal sanctions and customs control has been established. Moreover, a system of dispute resolution in the fields of copyright and related rights is also available.[67] The court is also empowered to make a variety of orders in respect of infringement actions including disposal of infringing goods, materials or implements used to commit the acts of infringement, the identity of the persons involved in production and distribution of infringing goods, interim orders including an order in the nature of Anton Pillar order and prevention of the continuation of the acts of infringement.[68]

As a general matter, in cases of violation of IP rights, Sri Lankan courts grant injunctions and award damages. The active use of the judiciary for IP litigation is an important aspect in enforcing IP rights. Moreover, the current IP enforcement mechanism in Sri Lanka has also been strengthened with criminal sanctions which allows for the imposition of fines and imprisonment or both. A special court

67 See generally, DM Karunaratna, *Elements of the Law of Intellectual Property in Sri Lanka* (Sarasavi Publishers 2010) 394-396.

68 Section 170(6) read with (7) shows that the provisions are structured on the basis of the Anton Pillar order. The section states that: "the Court shall have power to order interim measures relating to protection, *ex-parte*, where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder or where there is a demonstrable risk of evidence being destroyed". Furthermore, section 170(7) stipulates: "where interim measures have been ordered *ex-parte* the parties affected shall be given notice and shall on receipt of such notice be entitled to be heard as to whether the interim measures ordered should be modified or revoked".

with the first instance jurisdiction in respect of intellectual property matters has been established under the provisions of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996. Commonly called the Commercial High Court now exercises exclusive jurisdiction in respect of all proceedings under the IP Act, arising within its declared jurisdiction of indicial.[69]

1.7 Conclusion

In conclusion, the author emphasizes that Sri Lanka as a developing nation needs forward-looking policies to lay the foundation for incentivizing indigenous innovation in order to promote domestic creativity. Perhaps even more importantly, Sri Lankan policymakers should foresee an innovation-driven economy in order to avoid the 'Middle-Income Trap'[70] and promote innovation at all levels and to develop a culture of innovation. To that end, the current IP regime also needs to embrace modernization in line with the emerging trends in the world IP. Therefore, it is imperative for the country to address the perceived deficiencies in current IP regime to leap forward into a developed nation.

69 K Kanag-Isvaran, 'Unfair Competition-An Antidote to Dishonest Trade Practices' (1997) VII/1 The Bar Association Law Journal 144-160.

70 The term middle income trap refers to the situation in which a country's growth slows after reaching middle income levels. It is only a few countries in the world such as Poland and Taiwan that have succeeded in reaching high income status and sustained that growth.

Part - II

JUSTICE NIMAL GAMINI AMARATHUNGA MEMORIAL AWARD

WINNING ARTICLE

STRATEGIC LEGAL APPROACH AGAINST AGROCHEMICAL CATASTROPHE

Harshana de Alwis*

Magistrate/District Judge - Kebithigollawa.

Alarming revelations made in the post-mortem examinations of the victims of kidney diseases[1], overwhelming use of agro-chemical substances, hard water and consequent ground water contamination in the rural agricultural hearts of Padavi-Sripura to Rajarata exposes signs of a stealthy and silent catastrophe to which our both present and future generations are inevitably exposed. Facets of this disaster are strikingly characterized by the Chronic Kidney Disease of Unidentified Etiology (CKDu), uncertain research findings involving bio-accumulative effects of pesticides, weedicides including arsenicals and glyphosate growing to epidemic proportions and shocking tendency of farmers resorting to agrochemicals with no-control whatsoever while all tiers of agricultural and food authorities maintaining strict silence. Austria's recent ban of glyphosate[2], our country's periodical ban on glyphosate and prohibition of arsenical pesticides under the Control of Pesticides Act[3] brings us obvious dangerous potencies of the overwhelming use of these agro-chemicals. The operation of these agrochemicals in the food chain along with unique natural features of these areas such as hard water, hyper use of agrochemicals, nature of soil etc. seem to have poisoned mother's breast milk, cow milk, to a variety of food including every grain of rice although when and on what instance would bio-accumulative effects of these become injurious is uncertain due to limited scientific research.

* BA (Kelaniya), LLB (Sri Lanka)

1 Dr.Kumudu Dasanayake, Specialist Judicial Medical Officer, Padavi-Sripura & Dr. Champika Wicremasinghe, Director General Non-Contageous Diseases over Derana News dated 26th July 2019

2 Reuters News dated 2nd July 2019

3 Act No. 33 of 1980

Despite said scientific uncertainty, a plethora of environmental laws ranging from Penal Code offences relating to public nuisance, Control of Pesticides Act, Central Environmental Authority Act, Case Law developed under public nuisance jurisdiction as well as the fundamental rights and writ jurisdiction in the sphere of public law, to even International Conventions provide fertile soil for regulating such public nuisance whether stealthy, scientifically uncertain or otherwise. The significance of the public nuisance jurisdiction is the instantaneous relief characterized by the conditional orders, injunctions and urgent orders until ultimate solution is reached in the superior courts from a broad dimension. Such ultimate resorts necessarily involve orders against Central Environmental Authority, Registrar of Pesticides and local authority who act in violation of statutory duties, where a multifaceted balancing of conflicting but important interests is required.

Thus, public nuisance jurisdiction is as if the first aid or the emergency treatment to a dying patient in an accident, where the purpose is solely to keep the patient alive until a final cure is reached with proper medication. Especially in the context where the ultimate solution to this stealthy destruction necessitates compelling orders against administrative and statutory functionaries while the Magistrate's Court is not empowered to make such and such powers can exclusively be exercised by the superior courts like the Court of Appeal and the Supreme Court in pursuance of orders in the nature writs under Article 140 of the Constitution and the fundamental rights jurisdiction. However, the crucial role of the Magistrate's Court should not be underestimated for two reasons:

a. The possibility of instantaneous relief by means of Conditional Orders, Injunctions and Orders of Urgency in order to prevent irreparable damage temporarily and control the situation to some extent;

b. Magistrate's Court being the lowest court in the hierarchy of courts is the closest to people who are affected in the ground level and therefore, public nuisance action is decisive in creating strong initial public outcry, awareness and opinion, which is an integral element in remedying measures of this disaster;

c. Potency of the peace officers like police to quickly reach Magistrate's Court for the purpose of obtaining orders in assisting investigation, immediate reporting of ground situation as well seeking preventive orders especially due to partially inquisitorial nature of the jurisdiction of the Magistrate's Court;

Thus, discernibly in the absence of public nuisance jurisdiction intervening instantaneously in protecting public against this catastrophe, the environmental law notions such as precautionary principle, polluter pays principle, sustainable development and intergenerational equity along with our environmental law regime based on series of statutes, cases and persuasive international law conventions would

be reduced to mere policy statements. However, strong or wide this statement may be, past examples would undoubtedly demonstrate the significance of the public nuisance regime. The influential conditional orders and injunctions ordering closure of a chemical factory discharging harmful substances in preventing water pollution in the *Singalaka Standard Chemical vs. T.A Sirisena* Case[4], the stay orders issued by the Mallakam Magistrate's Court as well inquisitorial reports sought from experts during the preliminary stages of Chunnakam Power Plant oil-leakage case that resulted in the fundamental rights application against Central Environmental Authority (CEA) and Ceylon Electricity Board, orders staying the operation of factory manufacturing quarts grits in Kadugannawa despite valid permits issued by the Magistrate's Court of Kandy in *Jaltotage Don Keerthiratne vs. Paraketiwela Diddenigoda Gedara Niranjan*[5] etc. reflect the mode of strategy to be adopted in the preliminary stages against the stealthy agrochemical pollution.

Influential development in the sphere of public law enriching life to Directive Principles of State Policy in conjunction with public trust doctrine and bringing the right to clean and healthy environment as upheld in *Environmental Foundation Limited vs. Mahaweli Authority of Sri Lanka*[6], the pragmatic judicial approach giving persuasive effect to International Law Conventions such as; Stockholm Declaration, Rio De Janeiro Declaration in the light of public trust doctrine as upheld in the land mark master piece judgment of *Bulankulama vs. Minister of Economic Development* known as *Eppawela Phosphate* Case and recent cases of *WattegedaraWijebanda vs. Conservator General of Forests* to polluter pays principle effected in recent fundamental rights application against pollution caused by the Chunnakam Power Plant demonstrate the paramount dimension to be kept in mind by Magistrate's Court in reaching contextually appropriate interpretation to public nuisance provisions. However, despite a plethora laws in the environmental protection regime, effective legal mechanism to be adopted against the stealthy agrochemical catastrophe is a formidable issue. Thus, the objectives of this research are as follows:

1. Demonstrate a pragmatic legal strategic mechanism by which the stealthy catastrophe concerning agrochemicals and their multiplicity of harmful impact on the public could be controlled and prevented;
2. Ascertaining the broader dimension, where the legal guidelines are prescribed by the Superior Courts, to be considered by the Magistrate's Court in interpreting both substantive and procedural laws relating to public nuisance;
3. Overview of the ultimate solution to be reached in terms of the fundamental rights and writ jurisdictions; and ascertaining the possibility alternative

4 CA Appeal 85/1998 & SAELR Vol. 3 pg. 3
5 CA(PHC) APN 61 /2016 dated 19-9-2016
6 2010(1) Sri LR 19

system of organic agriculture in pursuance of just and equitable relief under fundamental rights;

Nature of the Stealthy Agrochemical Disaster

Direct, indirect or multifaceted impact of agrochemicals is heavily characterized by scientific uncertainty although the vast research conducted by many professionals resulted in identifying the Chronic Kidney Disease of Etiology(CKDu), contamination of breast milk of mothers with glyphosate, and thereby indicating the risk of every food including rice, meat and cow milk being contaminated with arsenicals. This is due to hyper polluting nature of these with its operation in the food chain resulting in bio-accumulation and bio-magnification. *Jayasumana et al* (2011) reported the presence of arsenic in drinking water, rice grown in the area, hair and patients of Chorionic Kidney Disease of unidentified etiology as well as body parts of Diseased CKDu patients from Sri Lanka's rice cultivation areas of North Central Province. This led to the hypothesis that the presence of arsenic in drinking water and food may be the potential cause of CKDu and the pesticides containing arsenicals may be the potential source of it[7]. High bio-accumulation capacity of carcinogen in human bodies have proven to cause number of health hazards in areas polluted with Arsenic and the amounts of pesticides imported by Sri Lanka escalates annually[8].

Shocking findings in relation to American Mother's Breast Milk Urine and Water[9] and the overwhelming use of glyphosate in Sri Lanka especially in the agricultural hearts of Padavi Sripura in the North Central Province along with the ground water hardness in said areas and presence of arsenic in the fertilizer Urea (Triple Super Phosphate) undoubtedly demonstrate magnitude of this stealthy catastrophe even though no-specific research involving the multiple effects of the presence of agro- arsenicals and glyphosate has not been conducted up to date[10]. Therefore, the potential harm of the arsenical pesticides and glyphosate may pervasively extend from ground water pollution, carcinogen or potential cancer, bio-accumulative effect growing to various cancer-causing and other complications, food including rice, cow milk, and meat stealthily containing arsenicals irrespective of the fact whether amounts are injurious or hazardous.

7 Jayasumana, M.A.C.S Paranagama P.A (2011) Chorionic kidney disease of unknown and arsenic in ground water in Sri Lanka, paper presented in ground water management workshop on challenges in ground water management Sri Lanka dated 15th March Colombo Sri Lanka

8 Jayasumana M.A.C.S quoting Kapaj et al, 2006

9 Zen Honeycutt, Moms Across America, Henry Rowlands, Sustainable Pulse, Glyphosate Testing Report: Finding in American Mother's Breast Milk, Urine and Water dated 7th April 2014

10 Inspired by the Derana News on Introducing Organic Agriculture, Comments made by Expert Judicial Medical Officer, PadaviSripura DH Dr. KumuduDasanayaka& Dr. ChamipikaWicremasinghe dated 29th July 2019

Legal Provisions- Arsenical Agrochemicals & Glyphosate-Consequences

The World Health Organization classifies pesticides with arsenic compounds as highly hazardous and thus, Arsenic containing pesticides are banned in Sri Lanka since 1995 and notified by the Extra-ordinary Gazette No.1190/24 dated 6th June 2001[11]. Glyphosate being an arsenical pesticide[12] was exposed to a total prohibition in Sri Lanka in 2015[13] and however, subjected to many controversies currently glyphosate is exclusively permitted in terms of tea and rubber industries only under few restricted trade names[14].

Presently, the sellers of pesticides are being detected and charged for unauthorized selling of glyphosate manufactured by the largest multinational manufacturer in the world and needless to state that farmers driven by poverty stricken conditions are compelled to resort to these in order to save labour costs, easiness, cost effectiveness or use with no-knowledge or compelled ignorance of its harmful effects. However, the law relating to arsenicals seems rarely implemented or unimplemented. Simultaneously, ground water, rice, etc. occasionally tested for research purposes reveal arsenical contamination at injurious levels despite the absence of specifically recognized standard as to what levels could be injurious or cacogenic. On the other hand, the cause and effect relationship as to what in fact causes this hazardous contamination is a research finding to be reached by skilled professionals.

Causal Nexus between Toxic Arsenic Levels in Ground Water, Vegetables, Rice and Pesticides in the context of Illegal Omissions by Authorities

Under Section 21 of the Control of Pesticides Act the Director of the Pesticides Advisory Committee is bound to appoint authorized officers who may ascertain whether any person has contravened any provision of this act or any regulation and such officers are empowered to do all such acts connected with or in exercise, performance and discharge of the powers and duties under the act. Said legal duties are further enhanced in terms of Section 24A of the Control of Pesticides Act, the registrar of pesticides, food inspector, public health inspector, gramaniladhari, or any public officer authorized in that behalf by the registrar of pesticides shall be empowered to institute proceeding and conduct prosecutions[15]. Thus, the registrar of pesticides is bound by legal duty to ensure compliance with the Control of Pesticides

11 Pg. 1, Jayasumana M.A.C.S Paranagama et al, Presence of Arsenic in Pesticides used in Sri Lanka

12 Zen Honeycutt, Moms Across America News, Arsenic and Heavy Metal sprayed on Food Crops dated 8th January 2018 & pg. 14 ibid 5

13 Gazette Extraordinary no. 1937 dated 23rd October 2015 and Gazette Extraordinary No. 2091/13 dated 2nd October 2018 under Section 11 of the Control of Pesticides Act

14 Gazette Extraordinary dated 13th September 2018 under Section 9 of the Control of Pesticides Act

15 Section 21 of the Control of Pesticides Act read with Section 24A of the same

Act, orders and regulations made thereunder. In the circumstances, focus is drawn towards Penal provisions relating to illegal omission by public servants;

Under Section 162 of the Penal Code, whoever, being a public servant knowingly disobeys any direction of law as to the way in which he conducts as public servant knowing it likely that he will by such disobedience, cause injury to any person or to the government. Simultaneously, substantive law provisions relating to public nuisance under Section 261 of the Penal Code reflects that a public servant who does an act or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public, is guilty of public nuisance. It is noteworthy that the proviso to said section expressly states that public nuisance is not excused on the ground that it causes some convenience or advantage.

In one hand arsenical pesticides have been totally banned or importation of pesticides containing Arsenic or Mercury as active ingredients is prohibited under the Extraordinary Gazette No. 1190/24 in terms of the Control of Pesticides Act while the research findings concerning the presence of arsenic in pesticides used in Sri Lanka conducted by the university academics reveals the potential nexus between CKDu, injurious or cacogenic effects of these and especially hard water in the agricultural areas of Padavi – Sripura developing intense consequences. On the other hand, although the presence of arsenic in locally grown rice has been reported from Sri Lanka[16] the presence of arsenic has hitherto not been investigated. Moreover, the research findings of Professor Priyani Paranagama as to Potential Link between Ground Water Hardness, Arsenic and Prevalence of CKDu demonstrate that hardness of water, agrochemicals; Arsenic and Cadmium are the risk factors of CKDu. The natural process in which Arsenic, Cadmium, Mercury and Uranium contained in fertilizer and pesticides with aromatic chemical structures developing those in drinking water and food resulting in dermal absorption and respiratory rest, consequent depositing in renal tissues, Tubular Interstitial nepripitis/tubular atrophy, which is intensified by hard water, soil type, heat stress, dehydration demonstrably reflect a reasonable relationship[17].

Multiple Criminal Prosecutions

In this context, discernibly, the registrar of pesticides has been exposed to liability being prosecuted under Section 162 and 261 of the Penal Code if the direct causal nexus between the cause of the epidemic presence of arsenic in drinking water, ground water, food, rice and soil and unlawful use of agrochemicals could be established. Establishing evidentiary burden of scientific proof of said causal

16 (Jayasekera and Frietas, 2004 Yamily et al, Chandrajit et al 2010) quoted by Jayasumana M.A.C.S
17 Paranagama P.A, Potential Link between Ground Water Hardness, Arsenic and Prevalence of CKDus

relationship between illegal omission and consequent injury to public as required by criminal prosecution in the Magistrate's Court is a formidable task involving expert witnesses and their analytical reports. Furthermore, especially due to skill and expertise of the office of registrar of pesticides knowledge, which is the *mens rea* in respect of the offences in question could be imputed, the Magistrate is also empowered to call expert reports during the preliminary stages of investigation in terms of section 124 of the Code of Criminal Procedure Act No. 15 of 1979 (hereinafter referred to as 'CCPA').

Public Nuisance Jurisdiction-

The discussion under of this title is focused on the perspective of the prevention of agro-chemical nuisance under discussion.

Public Nuisance is strikingly characterized by three fundamental instantaneous remedies, namely Conditional Orders and Injunctions while another rapid form order to be utilized in case of an extreme urgency under Section 106 of CCPA:

1. **Conditional Orders in terms of Section 98 of the CCPA**: The Magistrate's Court is empowered to make *ex parte* orders to the effect that any trade or occupation or merchandise by reason of it being injurious to health or physical comfort of the community be suppressed, removed or prohibited. Moreover, in case where any way lake, harbour lake, river or channel, which is or may lawfully be used by the public or from any public place, is obstructed or subjected to nuisance, the same be ordered to be removed. Upon receipt of a report by the police or other information and on taking such evidence as the magistrate thinks fit, the said orders could be made.

Injunctions in terms of Section 104 of the CCPA: The Magistrate making an order under Section 98 of CCPA considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public an injunction could be issued in order to compel such person to obviate or prevent such danger or injury; unlike the equitable injunction under civil law the proof irreparable or irremediable damage need not be alleged. Only imminent or serious danger may be *prima-facie* inferred so that the Magistrate is required to form an opinion or consider that an injunction should be issued to prevent imminent danger or injury. Although this injunctive relief is considered redundant, the most obvious conclusion is that the legislature in its wisdom would have foreseen the practical need of an empathetic remedy intended for detail orders. One example being, if a conditional order is made against importer and the distributor of arsenical pesticides and the registrar of pesticides subjected to legal controversies for the removal of injurious merchandise, a Section 104 injunction could be resorted to connected and incidental injunctive

orders for positive assistance in the removal process, disclosure of the nature of chemical substance inclusive of manufacturer's findings, temporary purification measures etc.

Urgent Orders in terms of Section 106 of the CCPA- Urgent cases of nuisance is a relief available in view of express and obvious forms of public nuisance is a separate remedy, which may be resorted against sudden harm or against imminent irreparable danger.

On account of the nature of the agro-chemical disaster and its pervasive effects, one of the formidable issues is to ascertain against whom such order could be made. It is a practical question as to whether an order against registered distributors an effective remedy since the market for arsenicals could operate in black market. However, despite scientific uncertainty, a reasonable nexus between the use of arsenical agrochemicals extensively over a period of time and ground water pollution in a wide range from pollution of the well water, including toxic water contained in irrigation systems, mainly in tank water could be demonstrated. (Traditional Wewa, which is the center of the irrigation system).

Overcoming Barriers-No-powers to Make Orders against Public Officers

One of the most formidable issues confronted in implementing public nuisance in this context, is the question of against whom an order could be made under this chapter in order to achieve the intended objectives.

Orders against registered distributors may not be effective since frequently, the use of arsenicals and glyphosate operate in black market and orders against farmers would be an absurdity especially pursuant to the fact that the farmers are the direct victims of this tragic scenario, who are compelled to resort to said agrochemicals. Unlike in the aforesaid limited or exceptional instance where criminal action could be instituted against public officers under Section 162 and 261 of the Penal Code all courts are subjected to general rule in terms of Section 24(2) of the Interpretation Ordinance that Magistrate's Court or any other court is un-empowered to make any order and injunction against the public officers. It is noteworthy that the obvious intention of legislature demonstrable in terms of Section 24 and proviso to Section 22 of the Interpretation Ordinance read with Article 140 of the Constitution in relation to the orders in the nature of writs and fundamental rights chapter of the Constitution reflects undesirability especially for lower courts to make orders against the public officers and therefore, the powers of making orders against public officers should be exclusively vested in the Superior Courts like the Court of Appeal and the Supreme Court[18].

18 Section 24(2)-Interpretation Ordinance, Proviso to Section 22 of the Interpretation Ordinance- and the legal development under Article 140 of the Constitution and Fundamental Rights

While vehemently keeping the general rule preventing especially Magistrate's Court making orders against the public officers, this paper strives to ascertain the possibility of extension of public nuisance jurisdiction to orders against public officers in extremely limited and restricted circumstances. Thus, the focus is placed on Section 98(1) (a) of the Code of Criminal Procedure Act relating to conditional orders:

Whenever a Magistrate considers on receiving a report or other information and on taking such evidence (if any) as he thinks fit -
(a) that any unlawful obstruction or ***nuisance*** *should be removed from any way, harbour,* ***lake,*** *river, or channel which is or may be lawfully used by the public or from any* ***public place****; or…*

Simultaneously, the term public place is broadly defined under Section 98(4) of CCPA:

For the purpose of this section a ***" public place"*** *includes* ***also property belonging to the State*** *or a corporation or vested in any public officer or department of State for public purposes and ground left unoccupied for- sanitary or recreative purposes.*

Although this section contemplates direct nuisance activity conducted by a public corporation or department and said term has so far been provided with a restricted interpretation this reflects an exception to general rule preventing any-order, injunction or otherwise being made by a court like the Magistrate's Court.

As section 98(1) expressly refers to removal of "nuisance" it is worthwhile ascertaining what constitutes public nuisance for the purpose of this section. As defined by Halsbury, public nuisance is one which inflicts damage, injury or inconvenience on all the (public) or on all members of a class of public who come within the sphere or neighborhood of its operation…..The question whether the number of persons affected is sufficient to constitute a class is one fact.

In *AG Vs. PYA Quarries Limited*[19], Lord Denning wrestled with the threshold and offered this test; the nuisance is a public nuisance where it is;

"*so widespread in its range or indiscrimination in its effects that it is not reasonable to expect one person to take proceedings in its own responsibility to put a stop to it, but that it should be taken the responsibility of the community at large*"[20]

Agrochemical nuisance whether stealthy, scientifically uncertain or otherwise seems have been identified within the scope of said definition of the public nuisance and substantive law definition of Section 261 of the Penal Code involving illegal omissions, which causes any common injury, danger or annoyance to the public provide fertile grounds to identify stealthy agro-chemical injury within the definition

19 1957 2[QB] 169
20 Pg. 20, D.A.P Weeraratne, Public Nuisance, Criminal Procedure in Sri Lanka Part-03

of nuisance as contemplated by Section 98(1) (a) of CCPA. Thus, the purpose of legislature in terms of the Public Nuisance chapter of the CCPA read with Section 261 of the Penal Code is instantaneous measures such as conditional orders and injunctions be issued against the polluter of nuisance irrespective of whether such nuisance is caused by public corporation, department etc. under the control of public officers or otherwise.

In respect of the Section 72 of the State Lands Ordinance, the right to use and flow the management and control of the water in a public lake subjected to restrictions is vested in the state and in the exercise of that right, the state by its officers and servants, may enter any land and take such measures as may be prescribed for the conservation and supply of such water and its more equal distribution, beneficial use and protection from pollution and for preventing unauthorized obstruction of public streams. Careful scrutiny of the laws relating to management and control of water in a public lake such as Irrigation Ordinance, Agrarian Development reveal that those laws are not designed from a perspective of preventing nuisance. Even the Nuisances Ordinance does not impose any mandatory duty on any public officer to act against pollution or prevention. However, in terms of Section 10 of the National Environmental Act, which defines mandatory powers, functions and duties of the Central Environmental Authority (CEA) as amended by the Act No. 53 of 2000, the CEA is vested with mandatory duty to require any local authority to comply with and give effect to any recommendations relating to environmental protection for the prevention of the discharge of untreated sewage or substandard industrial affluents or toxic chemicals into soil, canals or water ways.

Harmonious Construction: The Rule of Harmonious Construction is when there is a conflict between two or more statutes or two or more parts of a statutes the interpretation consistent with all the parts of statute or purpose of statutes must be adopted. This rule seems a combination of purposive theory of interpretation, mischief rule and *ut res margis valeat quom pareat* doctrine. As it is the settled rule in Indian Case *Union of India vs. B.S Agrawal (AIR 1998 SC. 1537)* that an interpretation, which results in hardship, injustice, inconvenience or anomaly should be avoided and that which support sense of justice should be adopted.

In the Indian Supreme Court Case of *Venkataramana Devaru vs. State Mysore*[21] the rule of harmonious construction resolving a conflict between Article 25(2)(b) and 26(b) of the Constitution of India and it was held that the right of every religious denomination or any section thereof to manage its own affairs in the matters of religion is subjected to law made by state providing for welfare and reform throwing

21 Special Leave to Appeal No. 327 of 1957. STATE OF MYSORE. Petitioner; Versus... SRI VENKATARAMANA DEVARU & OTHERS

open of Hindu Religious institution of public character to all classes and sections (Article 25(2) b).

Thus, the despite the general prohibition under Section 24(2) of the Interpretation Ordinance preventing Magistrate's Court from making orders against public officers, in pursuance of the harmonious construction, the provisions section 98(1)(a) of the CCPA read with Section 261 and 162 of the Penal Code could be extended against public officers like the registrar of pesticides and members of CEA for the purpose of ensuring that legislative purpose pertaining to the Law relating to Public Nuisance is not defeated. Although said construction is contrary to Interpretation Ordinance, harmonious construction permits an extremely limited exception exclusively for the purpose of preventing public nuisance consequent to agrochemicals, which in its very nature irreparable, though silent.

Legal Strategic Mechanism:

Parallel to the institution to Public Nuisance action seeking conditional orders and injunctions, multiplicity of criminal actions must be designed in relation to various laws ranging from Section 261 and 162 of the Penal Code against the Registrar of Pesticides and officers of the CEA, Control of Pesticides Act against sellers by the Authorized officers to even action by the Public Health Inspectors complaining the injurious nature of the food such as rice, cow milk, vegetable etc. under Food Act, well water, ground water etc. The advantage of this multiplicity of actions is three-fold:

a. Investigations and expert opinions could be obtained in respect of separate criminal complaints in terms of Section 124 of CCPA upon the application of police for the purpose of establishing causation between the harmful effects and illegal omission on the part of the relevant authorities and thereby, the back ground could be developed for the public nuisance action;

b. Both multiple criminal prosecutions and Public Nuisance actions with one constantly influencing the other would create strong public opinion in the ground level especially in the context where Magistrate's Court being the lowest peripheral court closest of court and direct participation of general by public petition and environmental organizations.

c. Outbreak of controversial legal scenarios especially on account of high public officials being called as accused and orders being made against them, investigations and discussion by experts would invariably be opened. This threefold scenario would create the fertile platform, for ultimate solution to be reached in the superior courts in concurrence with the higher officials, scientific expertise paying way to desirable legislative reforms.

Striking Instances of Public Nuisance:

In the recent Case, *Jalthotage Don. Keerthi Wicremaratne & Naotunne Rajaguru vs. Paraketaella Diddenigoda Niranjan Premakumara et al*[22], on a complaint under Section 98(b) of CCPA resulting public nuisance caused by the operation of factory manufacturing quartz grits, where the issue whether the Magistrate's Court is empowered to inquire into the validity of permit, it was held by Hon. Justice Walgama that if a person who has been issued with a license is charged in the Magistrate's Court for an act of public nuisance, the jurisdiction of the Magistrate is not ousted to try the offender. Such license should not be considered as prima facie evidence of the fact that the person holding license has been authorized to do which if not for license would be precluded from doing. The purpose of issuing license under Environmental Act is to balance environmental concerns with the development needs. Sustainable development is an attempt to reconcile two contradictory human rights, namely the right to development and the right to environmental conservation. In this back drop it is abundantly clear that in said premises that the Learned Magistrate could still make an order under Section 98 of the Criminal Procedure Code, even if the petitioner holds a valid license if the act complained of is a public nuisance in terms of Section 98 of the Criminal Procedure Code.

Singalanka Standard Chemicals vs. Talangama Appuhamige Sirisena et al is a revision application seeking reversal of a conditional order by the Magistrate's Court of Homagama halting the operation of a chemical factory on the basis of public nuisance caused by sulfuric acid polluting well water and environment in general. Although both conditional orders and injunctions in terms of Section 104 of the CCPA were prayed for as the order was initially issued for two weeks and periodically extended, the order in question cannot be defined as an injunction under Section 104 of CCPA but a conditional order for all purposes. Under the provisions of Criminal Procedure, Magistrate's Court is entitled to take prompt action and issue a conditional order instantaneously and thereafter investigate into complaint…….[23]

The significance of these decisions is the extensive scope of public nuisance jurisdiction that the offenders could be subjected to conditional orders notwithstanding valid license issued by authorities like CEA. Thus, this would operate as an indirect means of questioning the validity of a decision of a public authority which a Magistrate is not otherwise entitled.

Recent Fundamental Rights Application No. 141/2015, which upheld the polluter pays principle ordering Rs.20 million compensation as a part of substantial loss and harm caused to the residents of Chunnakam area consequent to the

22 CA(PHC) APN 61/2016 dated 15th September 2016, Hon. P.R Walgama J
23 C. A Appeal 85/1998

contamination of ground water and soil in the vicinity of thermal power station of Northern Power Company took its shape and public outbreak pursuant to the initial orders of Magistrate's Court of Mallakam ordering arrest of the officials responsible for pollution. This extended to several instantaneous orders for the protection of public from ordering fresh drinking order be supplied to people living in 2km radius of the power station, due to the suspicion that polluting oil in ground water is moving northwards, the attention of the environmental authorities were drawn towards facilitating suitable remedial action and complaints by the public should be examined by such environmental agency officials in collaboration with water supply and drainage and health officials[24]. Some of these orders seemed to have been made under Section 104 in the nature of positive order injunctions under 104 of CCPA to prevent serious kind of damage while some are in the nature of Section 106 urgent orders having positive effect.

Desirable Dimension for the Interpretation of Legal Provisions in the Public Nuisance Law Regime

One of the formidable obstacles impeding implementation of Public Nuisance Law against stealthy agrochemical catastrophe is the scientific uncertainty in establishing cause and effect between agrochemicals and its consequences such as CKDu, water and food contamination in injurious proportions especially in the context where this task requires a considerable scientific and medical expertise. Influential cases like the *Singalanka Standard Chemicals vs. T.A Sirirsena, Chunnakam Power Plant case* etc. emphatically focus instantaneous nature of relief irrespective of scientific proof in the first instance. The Precautionary Principle of the Environmental Law enshrined in Article 15 of the Rio Declaration on Environment and Development 1992 is as follows:

"In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation"

In the land mark judgment, *Bulankulama vs. The Secretary, Ministry of Industrial Development and others*, His Lordship Hon. A.R.B Amarasinghe stated that;

"*In my view, the proposed agreement must be considered in the light of foregoing principles. Admittedly the principles set out in the Stockholm and Rio De Janeniro Declarations are not legally binding in the way in which act of parliament would be. It may be regarded merely as "soft law". Nevertheless, as a member of the United Nations,*

24 Colombo Telegraph dated 31st May 2017, Court Orders Arrest of Chunnakam Power Plant Officials, Order dated 30th May 2017 by Hon. A. Judeson, Magistrate, Mallakam.

they could hardly be ignored by Sri Lanka. Moreover, they would in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the Supreme Court in particular, in their decisions."

His Lordship Hon. Justice Weeramantry in the *New Zealand vs. France* case, which involved a dispute between two countries over the France's intention to conduct underground nuclear tests before the International Court of Justice, although majority dismissed the application of New Zealand, in dissent Hon. Justice Weeramantry citing Precautionary Principle, stated that

Where a party complains to court of possible environmental damage of an irreversible nature, which another party is committing or threatening to commit, the proof or disproof of the matter alleged may present difficulty to claimant as necessary information may largely be in the hands of the party causing damage.

The law cannot function in protection of the environment unless a large principle is evolved to meet the evidentiary difficulty, and environmental law responded with what has come to be described as the precautionary principle –a principle gaining increasing support as part of the international law of the environment.[25]*"*

It is obvious that the Rio and Stockholm Declarations with their constant application in cases such as *Eppawala Phosphate*, *Wattegedara Wijebanda vs. Divisional Forest Officer of Forestry* etc. by the superior courts of Sri Lanka as persuasive guide lines have now become not only soft laws but a part of our law that same could not be disregarded in the operation of public nuisance regime, which is entirely grounded on a precautionary premise. Moreover, Directive Principles of State Policy and Fundamental Duties enshrined in Chapter VI of the Constitution reflect that the state shall endeavor for full realization of international Law. Although these Directive Principles are not justiciable and do not confer any legal right or obligation, these directive principles are given life by our superior courts by linking the same with the public trust doctrine.

Article 27(14) of the Constitution:

Environmental Foundation Limited vs. Mahaweli Authority of Sri Lanka & others.[26]

"*Although it is expressly declared in the Constitution that the Directive Principles and fundamental duties "do not confer or impose any legal obligations and are not enforceable in any court of law or tribunal courts have linked Directive Principles to*

25 Professor Carmena Guneratne, Environmental Law OUSL lwu3314, quoting the Request for examination of the situation in accordance with Paragraph 63 ICJ dated 20-12-1974, Nuclear Tests Case

26 2010 (1) SLR 1 at 19

public trust doctrine and have stated that these principles should guide state functionaries in the exercise of their powers."

Subjected Article 29 of the Constitution on non-justiciability, in terms of article 27(1) of the Constitution, the Directive Principles shall guide both parliament and in the enactment of laws:

29. The provisions of this Chapter do not confer or impose legal rights or obligations and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal.Thus, these principles provide important guide-lines even for Courts in implementation and interpretation of public nuisance laws.

2nd Dimensional Concern

Another significant guideline could be observed in the proviso to Section 261 of the Penal Code that public nuisance is not be excused on the ground that it causes some convenience or advantage. In *Khalid & other vs. Chairman of Municipal Council Sri Jayawardenapura Kotte 1996/1997 Dumping Garbage Rajagiriya MC No. 68114/4*[27] upheld that the public nuisance shall not be excused on the basis that it causes any convenience or advantage and furthermore, in view of 121 of Urban Council Ordinance, court pointed out that garbage must be disposed of in a manner that causes nuisance while technicalities like Section 220 of the Urban Council Ordinance has no-application to Section 98 of CCPA.

Thus, in balancing conflicting but important interests, despite economic concerns or impact on national economy, public nuisance causing irreparable damage against environment and public health and greater environmental concerns must be given priority.

Next Dimensional Concern is the Burden of Proof in relation to Public Nuisance Action

Although the burden of proof in criminal action is entirely placed in the prosecution, the burden of proof for the purpose of public nuisance litigation is a worthwhile question to be ascertained. The moment a conditional order is made, the respondents responsible for alleged nuisance is required to show-cause why the same should not be made absolute and if respondents fail in show cause the order shall be made absolute. Furthermore, in order to vacate a conditional order, a heavy burden of proof is on the respondents. This implied shift of burden of proof demonstrably reflects the approach of the public nuisance law based on the Precautionary Principle. His Lordship, Justice Weeramantry, in the case of *New Zealand vs. France* brings out

27 1996 Vol 3(3) SAELR 69, E.A.P Weeraratne quoting Public Nuissance

a vital issue pertaining to the burden of proof when cause of pollution is exclusively within the knowledge of the polluter. As discerned by his Lordship Weeramantry, the law cannot function for the protection of environment unless a principle is evolved to confront this evidentiary difficulty.

In view of the agrochemical destruction, especially in the context where nature of the chemical substance including the true active ingredient, its functionality and the potential impact is exclusively within the knowledge of the manufacturer and with some limited information being disclosed to licensing authority like the registrar of pesticides, this evidentiary barrier becomes considerable obstacle on account of the stealthy nature of the catastrophe.

In this regard, the shift of burden of proof in relation to Section 106 of the Evidence Ordinance is a vital provision to be resorted in overcoming this evidentiary difficulty. Section 106 of the Evidence Ordinance is as follows:

When any fact is especially within the know-ledge of any person, the burden of proving that fact is upon him.

Thus, if it could be *prima facie* inferred in public nuisance petition that the chemical structure information and potential impact of agrochemical substance is exclusively within the knowledge of the manufacturer, the burden of proving causation and effect relationship could be displaced to polluters.

Is Arsenicals Agrochemicals and Glyphosate a Persistent Pollutant?

The preamble to the Stockholm Convention on Persistent Organic Pollutants dated 23rd May 2001 reads; "*Aware of the health concerns, especially in developing countries, resulting from local exposure to persistent organic pollutants, and impact on Women and through them, upon future generations*". The transmission of POPs and the agrochemicals having similar characteristics to POPs through breast milk upon future generations seems inevitable in Sri Lankan and similarly to the agrochemicals POPs are a group of toxics, which are cacogenic extending to adverse health effects. POPs are persistent in environment pursuant to its nature traveling vest distances through water and air with bio-accumulative effects and bio- magnification effect through persistence in the food chain.

The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade dated 10th September 1998 provides a regulative frame work for pesticides on the basis of environmental and health concerns. These regulative measures although not focused on total ban of pesticides would be a preliminary step in confronting the current agrochemical disaster. The Stockholm Convention on POPs is focused on the ultimate goal of eliminating POPs.

Importing Arsenical Pesticides or Arsenic related compounds is illegal under current law in Sri Lanka and urgent scientific investigation must be conducted for the identification of the point sources of environmental arsenic causing massive health hazards and especially due to the absence of reported research concerning the presence of arsenic below the bedrocks below Sri Lankan and mass pesticides that are excessively used in paddy farming is attributed as one of the most likely sources of arsenic in ground water and soils in Rajarata area. The research of Dr. Jayasumana and Professor Priyani Paragama et al. recommends rainwater harvesting for drinking purposes, promoting natural and traditional methods of pest control, public awareness of chronic toxicity of arsenic and potential risk in agrochemical based agriculture and phytoremediation to remove arsenic in ground water and soil may be a prudent measure[28].

However, tragic scenario in ground level farmers of Padavi Sripura to Rajarata is that organic agriculture based on traditional pest control and organic fertilizer seems idealism rather than a reality.

Influential Environmental Litigation in the Sphere of Public Law:

Ultimate Solution to Problem:

In terms of Article 3 of the Constitution, the sovereignty is in the people and it is inalienable and in terms of Article 4(d) the fundamental rights, which are by the Constitution declared and recognized shall be respected, secured and advanced by all organs of government and shall not be abridged, restricted or denied. This is the basis of public trust doctrine that the powers vested in administrative and statutory authorities are neither absolute nor unfettered and said powers are held in trust for people for the purpose for which they were conferred[29]. The climax of this doctrine could be observed in *Water's Edge case*[30] where the operation of public trust was extended despite the immunity of the president in terms of the Constitution and her Ladyship Shiranee Thilakawardene observed: "*Being a creature by the Constitution - the President's powers in effecting action of the government or of State officers is also necessarily limited to effecting action by him that accords with the Constitution. In other words President does not have the power to shield; protect or coerce the action of state officials or agencies when such action is against the tenets of the Constitution or Public Trust, and any attempts on the part of the President to do so should not be followed by the officials.....*"

His Lordship Prasanna Jayawardena quoting "Mono Lake" Case, in SC/FR Application 141/2015 *Ravindra Gunewardena, Chairman Central Environmental*

28 Pg. 14 & 15, Jayasumana M.A.C.S, P.A Paranagama et al, Presence of Arsenic Pesticides in Sri Lanka
29 De Silva vs. Ahukorala 1993(1) Sri LR 283
30 SugathpalaMendis vs. ChandrikaBandaranayakaKumaranathunge 2008(2) Sri LR 229

Authority, Sri Lanka Electricity Board, Chief Minister Northern Province et al. quoting the Supreme Court of California," *the public trust is more than one affirmation create power to use public property for public purpose. It is an affirmation of duty of the state to protect the people's common heritage of streams, lakes, marshlands and tide lands surrendering right only in those rare cases when the abandonment of right is consistent with the purposes of the trust*." This often cited observation duly highlights the duty placed on the State and state agencies as trustees of the public. Thus, Brossard J observed that "*public trust protects environmental and recreational values*."

Her Ladyship Thilakawardena J, in *Wattegedara Wijebandara vs. Conservator General of Forestry* decided that "*the right of all persons to the useful and proper use of the environment and the conservation thereof has been universally recognized and also under the national laws of Sri Lanka. While the environmental rights are not alluded specifically under the fundamental rights chapter of the Constitution,* ***the right to clean environment and the principle of intergenerational equity with respect to protection and preservation of environment are inherent and meaningful reading of article 12(1) of the Constitution."***

In the *Chunnakam Power* Plant oil leakage case, Prasanna Jayawardena PCJ observed in furtherance *"while I am in respectful agreement justice Thilakawardena, I wish to add in my view, when article 12(1)of the Constitution is read with Article 27(14) of the Constitution, it vests in the citizens of Sri Lanka a fundamental right to be free from unlawful, arbitrary, or unreasonable executive or* ***administrative acts or omissions, which cause or permit the causing pollution or degradation of environment****……"*

Further, with regard to the case, it seems to me that when Article 12(1) guarantees that "all *persons are equal before the law and are entitled to equal protection of the law*" , it vests in the residents of the *Chunnakam* area a constitutionally protected right to be protected by the provisions of the National Environmental Act to the same extent residents elsewhere in the country would be protected by the same this in turn, grants the residents of the Chunnakam area the right to legitimately expect that CEA and BOI will fulfill their duties under the Act and applicable regulations in relation to 8th Respondent's thermal power station and not act in breach of their duties. ……Therefore, an arbitrary or unreasonable failure on the part of CEA and BOI to perform their duties under the National Environmental Act and their regulations made thereunder which causes loss, damage and inconvenience to the residents of the Chunnakam area will entail a violation of their rights guaranteed by Article 12(1).

In *Environmental Foundation Limited vs. Mahaweli Authority of Sri Lanka [2010(1) Sri LR at pg. 19]*, His Lordship Ratnayake observed that *"Although it is*

expressly declared in the Constitution that the Directive Principle of State Policy and fundamental duties do not confer or impose legal rights or obligations are not enforceable in any court or tribunal, Courts have linked Directive Principles to the public trust doctrine and have stated that these principles should guide state functionaries in the exercise of their powers."

In view of the agrochemical dilemma under discussion, the relief sought in the public law litigation involving orders in the nature of writ applications in terms of Article 140 of the Constitution and under fundamental rights jurisdiction of the Supreme Court is threefold:

1. The mandamus or just and equitable relief for violation of equality and equal protection against members of the Central Environment Authority and relevant local authorities due to omission and failure to perform duties in contravention of the legitimate expectations;
2. The mandamus against the Registrar of Pesticides extending to cancellation of licensing issued against distributors of arsenical pesticides and review of the licenses of glyphosate;
3. Transformation of the Sri Lankan Agricultural system to a one with substantially regulated pesticides with the ultimate goal of organic agriculture based on a mixture of traditional methods and modern technology; this could only be sought under fundamental rights jurisdiction;

Mandatory powers, duties and functions of the CEA are defined in the Section 10 of the Central Environmental Authority Act, which includes:

"The powers, functions and duties of the Authority shall be:

(c) to undertake surveys and investigations as to the causes, nature, extent and prevention of pollution and to assist and co-operate with other persons or bodies carrying out similar surveys or investigations;

(d) to conduct, promote and co-ordinate research in relation to any aspect of the environmental degradation or the prevention thereof, and to develop criteria for the protection and improvement of the environment;

(e) to specify standards, norms and criteria for the protection of beneficial uses and for maintaining the quality of the environment; (i) to require any local authority to comply with and give effect to any recommendations relating to environmental protection within the limits of the jurisdiction of such local authority and in particular any recommendations relating to all or any of the following aspects of environmental pollution;"

Legitimate Expectation:

On account of the wide scope of powers and duties of the CEA, it is a question whether omissions and failures on the part of CEA could be directly linked to the agrochemical disaster in pursuance of establishing omission of statutory duties. However, Gazettes prohibiting arsenical pesticides and periodical total ban of glyphosate with the current restriction of the same gives rise to a legitimate expectation by the conduct of the registrar of pesticides and other authorities to the effect that CEA being the center statutory body vested with extensive powers and entrusted with mandatory duties to undertake surveys, research and investigations to prevent pollution (agrochemical pollution whether stealthy or otherwise) that said powers shall be legitimately be used for the benefit of public and in trust for public.

On the other hand, the power to require any local authority to comply with any regulations and make recommendations in order to prevent discharge of toxic chemicals into soil, canals or water ways, along with the power of CEA to require local authorities to comply with recommendations, reflects a further legitimate expectation that recommendations and directions local authorities like pradeeshiya sabas appropriately to regulate use of pesticides, introduction of alternate traditional methods etc.

Multinational Property Development Limited vs. Urban Development Council Colombo, His Lordship Ranaraja held that "*in the public law field individuals may not have strictly enforceable rights but legitimate expectations. Decisions affecting such legitimate expectations are subjected to judicial review*"

In *W.K.C Perera vs. Professor Daya Edirisinghe [1995 (*1) Sri LR 148] His Lordship Mark Fernando discerned that;

"Article 12 of the Constitution ensures equality and equal treatment even where a right is not granted by common law, statute or regulation, and this is confirmed by the provisions of Articles 3 and 4(d). Thus whether the Rules and Examination Criteria have statutory force or not, the Rules and Examination criteria read with Article 12 confer a right on a duly qualified candidate to the award of the Degree and a duty on the University to award such degree without discrimination and even where the University has reserved some discretion, the exercise of that discretion would also be subject to Article 12, as well as the general principles governing the exercise of such discretions."

Especially on account of the unique natural factors of Padavi-Sripura and Rajarata such as hardness of water, nature of soil, heavy use of arsenicals and glyphosate, which are the triggering and intensifying factors of the disaster, the failures and omission of the CEA to conduct research investigations and make alternative recommendations have deprived the environmental protections and the right to clean environment, which is now recognized as an integral element of

equality and equal protection. Directive Principles of State Policy in conjunction with public trust doctrine in the context is demonstrably a violation of right to equality and equal protection in terms of Article 12(1) of the Constitution, which gives right to just and equitable relief under Article 126 of the Constitution. Moreover, Article 4(d) of the Constitution that imposes a paramount duty on all organs of state to advance, secure and respect fundamental rights, read with the Article 12(1) of the Constitution along with Section 10 of the Central Environmental Authority Act demonstrate fertile grounds for mandamus orders in the nature of writs in terms of Article 140 of the Constitution.

It is noteworthy that in order to ascertain final relief to agrochemical catastrophe in the public law sphere, writs in the public interest and fundamental rights application should not be attempted in isolation but must be done in the background in which strong public opinion is created by the public nuisance action with conditional orders against distributors and member of local authority and multiplicity of criminal action placing expert evidence in court. The very purpose of legal mechanism in pursuance of multiple criminal prosecutions followed by public nuisance action is to create strong public opinion, discussion with expert research findings while placing temporary halts to the catastrophe. This will develop fertile soil for fundamental rights and writs, where the ultimate solution as aforesaid could be approached. It is significant to note that the scope of just and equitable relief under fundamental rights may extend to experiments and research in pursuance of the purpose of Central Environmental Act.

Conclusion:

Extensive use of agrochemicals containing arsenical pesticides, glyphosate, natural circumstances like hard water and nature of soil seems the most potential cause of health hazards such as CKDu in Padavi-Sripura Rajarata. Despite the scientific certainty, this has developed to a stealthy catastrophe with every item of food including rice, being contaminated with toxicity with potential effect on both our present and future generations.

Potential legal remedy to this disaster is multifaceted legal strategy of which the preliminary stage is focused on multiple criminal prosecutions against high officials such as registrar of pesticides and members of CEA based on illegal omission under Section 261 and 162 of the Penal Code. Parallel multiple criminal prosecutions, Public Nuisance action could be maintained against said officials and distributors of pesticides. Harmonious Interpretation to Section 98 of the Code of Criminal Procedure Act and Section 24 of the Interpretation Ordinance containing the general rule ousting Magistrate's Court from making orders against public officers

permit extremely limited but desirable exception to this general rule in pursuance of legislative object under public nuisance law. Dimension under which public nuisance law is interpreted is threefold, which is based on precautionary principle of environmental law. Thus, the process involving multiple criminal prosecutions, conditional orders and injunctions in terms of public nuisance chapter under CCPA against high officials irrespective of the success, would invariably open strong public opinion, expert investigation and scientific research creating fertile grounds for ultimate solution in the public law sphere. Public trust doctrine as enshrined in Article 3 read with Article 4(d) of the Constitution, judicial approach of linking Directive Principles of State Policy with the public trust doctrine and treating international law conventions as persuasive guidelines enlarges the scope of the Article 12(1) equality and equal protection of the Constitution to the right to clean and healthy environment as defined in Directive Principles.

This legal development demonstrated in *Eppawala Phosphate Case, Water Edge Case, EFA vs. Malhaweli Authority, Wattegedara Wijebanda vs. Conservator General of Forestry to Chunnaka Power Plant Case*; provide a strong platform for ultimate solution to the agrochemical catastrophe. Therefore, the omission of statutory duties by CEA and registrar of pesticides that resulted in the agrochemical dilemma constitutes a violation of equality and equal protection in terms of Article 12(1) of the Constitution paving way to just and equitable remedy.

SKY IS NOT THE LIMIT - A SYNOPSIS ON SPACE LAW

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"Two things inspire me to awe – the starry heavens above and the moral universe within"

- Albert Einstein -

Introduction

Space and all things connected to or incidental thereon has left mankind spellbound from the beginning of time. Early humans feared the natural phenomena and worshipped the sun and other celestial bodies. The wonderment which started from "Twinkle Twinkle Little Star …" has resulted in so many amazing literatures in all aspects. Even with the advent of the computer age, advancement of technology and globalisation, the allure of a twinkling star still makes one wonder in awe.

History reveals that the human being by nature wanted to advance his betterment. His natural curiosity resulted in so many inventions, starting from the wheel to the steam engine and the modern-day computer and technology. It is this curiosity and the want to conquer the unknown that has resulted in Space Law.

With the launching of the Soviet Satellite Sputnik 1 in 1957 and the U.S. Satellite Explorer 1 in 1958 both these countries took an active interest in International Space Law. Although there was dialog before these activities, these events paved way to establish that traditional laws of sovereignty that allow any nation to claim for itself the uninhabited and uncivilized lands are not viable in Space territories and that countries cannot extend the boundaries of their dominion indefinitely into the Space regions above them.[1]

Objective of this Article

In the light of the fact that, Space exploration has accelerated to such an extent that even space tourism is no longer a dream that needs to be fulfilled, the main

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objective of this article is to provide an introduction to this novel area of law which is gaining momentum and would require a lot of development in the near future and to identify the possible drawbacks and shortcomings.

However, this is not an exhaustive exercise, for just as the Space is infinite; it seems that the literature and issues pertaining to Space Law has become infinite too. The matters that need to be addressed are of such varying nature. Given the functioning of International Law, all these complex issues cannot be dealt in a single article as this and therefore, reference would be made to the most prominent of the international legal instruments that deal with the Outer Space and matters connected to or incidental thereto, and only the legal instruments that necessitate further discussion within the parameters of this Article are discussed at length.

What is Space Law?

As the name indicates, Space Law is simply the law governing space related activities. It comprises of a variety of international agreements, treaties, conventions and United Nations General Assembly resolutions as well as rules and regulations of international organizations.[2] Justice Weeramantry observed and exemplified the practical importance of this area of law in relation to the launching of Sputnik I and II, where the said activity caused interference to terrestrial radio communication in England, the United States and the Netherlands as far back as in 1975.[3]

Although the origin of Space Law cannot be pinned to an exact date, the successful beginnings of space exploration seem to have spurred the need to regulate activities in outer space. The launching of the (then) U.S.S.R satellite Sputnik 1 and the launching of Explorer 1 by the United States culminated in the active interest in developing an international space policy.[4] Literature pertaining to space law and related activities were no longer purely academic or in abstract. The furtherance of space activities required that there be laws to regulate human activities in outer space.

The Legal Framework

Space Law is a new branch of international law and the United Nations Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space is considered to be the main framework for Space Law principles and procedures. In 1959, the General Assembly set up the Committee on the Peaceful Uses of Outer Space (COPUOS) to govern the exploration and use of Space for the benefit of all humanity. The Committee paved way for five multilateral treaties, five sets of principles and related resolutions that have been adopted by the United Nations General Assembly.[5] These instruments could be listed as follows.

- Treaty on Principles Governing the Activities of States in the Exploration and Use

of Outer Space, including the Moon and Other Celestial Bodies.

This Treaty was adopted on 19th December 1966, and was opened for signature on 27th January 1967. The Treaty entered into force on 10 October 1967.

- Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space.

  Adopted on 19th December 1967, this Agreement was opened for signature on the 22nd April 1968 and entered into force on 3rd December 1968.
- Convention on International Liability for Damage Caused by Space Objects.

  The Convention was adopted on 29th November 1971 was opened for signature on 29th March 1972 and entered into force on 1st September 1972.
- Convention on Registration of Objects Launched into Outer Space.

  Adopted on 12th November 1974 and opened for signature on 14th January 1975 this Convention entered into force on 15th September 1976.
- Agreement Governing the Activities of States on the Moon and Other Celestial Bodies.

  The Agreement was adopted on 5th December 1979, opened for signature on 18th December 1979 and entered into force on 11th July 1984.

The United Nations oversaw the drafting and formulation of five sets of principles adopted by the General Assembly, including the Declaration of Legal Principles. These are:

- Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (adopted on 13th December 1963).
- Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting (adopted on 10th December 1982).
- Principles Relating to Remote Sensing of the Earth from Outer Space (adopted on 3rd December 1986).
- Principles Relevant to the Use of Nuclear Power Sources in Outer Space (adopted on 14th December 1992).
- Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries (adopted on 13th December 1996).

Other resolutions adopted by the General Assembly:

- Resolutions 1721 A and B (XVI) of 20th December 1961.
- Resolution 55/122 of 8th December 2000.
- Resolution 59/115 of 10th December 2004.
- Resolution 62/101 of 17th December 2007.

An analysis on all the foregoing Treaties and principles is beyond the scope of this Article. However, a brief description is required on the five main principles set out above for the purpose of this exercise.

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

Termed simply as the "Outer Space Treaty" this Treaty provides the rudimentary legal framework on Space Law and deals with the peaceful exploration of the outer Space. Article I of the Treaty sets out that the exploration of outer Space would be carried out for the benefit and in the interests of all countries. Furthermore, it provides that the moon and other celestial bodies as well as the outer Space are not subject to national appropriation by any means. Article IV bans the stationing of weapons of mass destruction in outer Space and prohibits military activities on the Moon and other celestial bodies. In addition, States parties should bear international responsibility for national activities in outer space, irrespective of the fact whether those activities were carried out by governmental agencies or by non governmental entities.[6] The Treaty sets out guidelines to safeguard and promote international cooperation among member States where the guiding principles would be international cooperation and mutual assistance.

Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space

This Treaty while elaborating on the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies is mainly concerned with providing assistance to astronauts in any accident or distress and incidental situations. The extensiveness of the desire to safeguard the space personnel is clearly depicted in Article 3 of the said Agreement where, in the event that any information is received or a discovery is made that the personnel of a space craft have alighted on the high seas or in any other place not under the jurisdiction of any State, contracting parties which are in a position to extend assistance in search and rescue operations are required to render assistance for the speedy rescue of the space craft and personnel in distress.

Convention on International Liability for Damage Caused by Space Objects

Also known as the Liability Convention, in Article II, it enumerates that a launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to an aircraft in flight.[7] However, if two or more States jointly launch a space object, they shall be jointly and severally liable

for any damage caused.[8] This convention comprehensively sets out in which instances a State Party would be held liable and to what extent. However, the provisions of this Convention do not apply to the damage caused by a Space object of a launching State to the nationals of that particular launching State and also to the foreign nationals who are participating in the operation as a result of an invitation by the particular launching State.[9] It further provides for a setting up of a Claims Commission[10] where a settlement is not reached for a claim for compensation between State parties through diplomatic negotiations.

Convention on Registration of Objects Launched into Outer Space

This is also referred to as the Registration Convention, and as the name implies it provides for the registration of space objects that are launched into the Earth orbit or beyond. The responsibility of the registration vests with the launching State.[11]

This convention has provided that a Register be maintained by the Secretary-General of the United Nations in which the name of launching State or States, an appropriate designator of the space object or its registration number, date and territory or location of launch, basic orbital parameters and the general function of the space object are set out.[12] In addition, where a State Party is unable to identify a space object which has caused damage, or which may be hazardous, that State Party could request other State Parties to help identify the space object. The Convention states that assistance would be rendered on equitable and reasonable conditions and that arrangements under which such assistance shall be rendered would be the subject of agreement between the State Parties concerned.[13]

Agreement Governing the Activities of States on the Moon and Other Celestial Bodies

Also referred to as the Moon Treaty, this provides that all activities on the Moon, including the exploration and use shall be carried out in accordance with international law, in the interest of maintaining international peace and security and promoting international cooperation and mutual understanding with due regard to the corresponding interests of all other States Parties. An inspection of the provisions of this reveals that the underlying requirement is that the Moon shall be used exclusively for peaceful purposes and that the use of Moon to further any hostile acts in respect of the Earth is prohibited.[14] However, the non – ratification of this Treaty by the United States of America, the Russian Federation, and the People's Republic of China which are considered the main Space faring countries, it is considered a failure from an International Law standpoint.[15]

International Space Law - Challenges

The main challenge of Space related law is that, similar to international law, it would be binding only on the State Parties that ratify them. As a perusal of these documents reveal, a signatory to these instruments are at liberty to withdraw their ratification with notice to the Depository Governments. Hence there will be practical difficulties of enforcement although the implications for non-compliance could result in sanctions, loss of recognition and legitimacy among the other Space faring State Parties.

The possible complexities of Space Law were highlighted quite recently when NASA astronaut Anne McClain was accused by her ex-partner a Ms.Worden for identity theft and improper access to Ms.Worden's bank account because Ms. McClain allegedly accessed her ex partner's bank account on a NASA computer. It is claimed that the crime was committed while Anne McClain was on a mission on the International Space Station.[16]

However, according to the news report, this was not the first time complex legal issues have emerged in respect of space related activities. It lists out several instances where complexities arose in respect of space exploration and also space tourism. For example, according to the report, in 2011, NASA intervened where a space engineer's widow was trying to sell a moon rock and in 2013 a Russian satellite was damaged after colliding with debris from a satellite that China had destroyed on a previous occasion while in 2017, an Austrian businessman had sued a space tourism company seeking to recover his deposit for a planned trip that was not progressing.[17]

In the light of the above scenarios, what would be the most serious issues that could arise in respect of space crimes?

Without argument, these would be the questions as to the discovery and jurisdiction in respect of the particular crime so alleged.

As the previous news report indicates, discovery of extra-terrestrial bank communications would be quite difficult since the discovery and ascertainment would render inspecting sensitive data on Space computers. However, the most important potential issue would be that pertaining to the ascertaining of jurisdiction.

The Anne McClain case, would come under the purview of the intergovernmental agreement signed to support the International Space Station[18], and the question of jurisdiction would not be in issue as both the parties involved are U.S. citizens and the alleged crime was committed on a U.S. station. Therefore, the United States have jurisdiction over the matter.[19] However, the issue of jurisdiction would have been quite complicated if another national was involved or the incident took place outside the U.S. station. In addition, although the fact that the Agreement provides that affected countries may negotiate settlements in cases of this nature,

this option may not be feasible on a greater scale depending on the complexity of the crime involved. It is well accepted that consensual negotiation would be feasible only up to a certain extent in the present legal framework. The speed in which outer space activities are carried out, demands that rules be established to address crimes in outer space to overcome ambiguity and to safeguard the rights of an individual as well as State Parties since with the advent of space tourism, space crime would be taken to another realm altogether.

The United Nations Treaties on Outer Space are not exhaustive of jurisdiction issues either.

For example, Article XIII of the Outer Space Treaty[20] provides that any practical questions arising in connection with activities carried on by international intergovernmental organizations under the Treaty shall be resolved by the States Parties to the Treaty either with the appropriate international organization or with one or more States members of that international organization, which are Parties to the Treaty. An analysis of this provision reveals that this Treaty is based on equality and seeks to promote international cooperation in the peaceful exploration of outer space.[21] This objective is exemplified in Article III which requires States Parties to the Treaty to carry on activities in the exploration and use of outer space in the interest of maintaining international peace and security and promoting international cooperation and understanding. Further Article VI states that State Parties to the Treaty shall bear international responsibility for national activities in outer space whether such activities are carried out by governmental agencies or non-governmental entities. Hence, a State Party would be responsible for the activities carried out by non-governmental entities of that particular State Party. In addition, where damage is caused to a State Party to the Treaty or to its natural or juridical persons by another State Party which launches or procures the launching of a space object that State Party is internationally liable and the ownership of objects launched into outer space is not affected by their presence in outer space.[22] These provisions are constricted to the jurisdiction of a particular State Party in respect of an individuals or organisations that are subjects of that particular State Party. It is apparent that these provisions are inadequate in dealing with the present Space advancements.

The question of jurisdiction and compliance is best illustrated with reference to the Liability Convention.[23]

Under this Convention, although a launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight,[24] if the damage was caused elsewhere than on the surface of the Earth, to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter would

be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.[25]

The Convention however does not define "fault" and therefore it is open for debate in the case of any damage which falls under this provision of the Convention.

Furthermore, on the requirement that a launching State has conducted its activities in conformity with international law, in particular the Charter of the United Nations and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, exoneration from absolute liability would be granted to that launching State where it establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents.[26] "Intent" as well as "gross negligence" would rely heavily on the circumstances and cannot be defined in an absolute sense.

The Convention provides for claims for compensation as well as a Claims Committee if a settlement of a claim for compensation cannot be agreed upon through diplomatic negotiation. Further, it provides that, the decision of the Commission shall be final and binding if the parties *have so agreed*.[27] (emphasis added) Otherwise the Commission shall render a final and recommendatory award which the parties shall consider in *good faith*.[28] (emphasis added) Again, what is to be considered in good faith will pose a question with the new developments in the outer space explorations.

A perusal of the Treaties, Principles and other international instruments reveal that, steps have been taken to safeguard the pristine quality of the Outer Space. However, at present, where the space travel is limited to trained personnel on limited expeditions, it seems that these international instruments seem to be adequate; the incidents are scarce that it is possible to deal with them on a case by case basis. However, the rapidity of the expansion of Space travel cannot be ruled out where Space tourism would be available to all. Then the liability of State parties would multiply on several facets.

In addition, questions of Space debris, mining rights, environmental issues as well as intellectual property issues will also require to be addressed upon and National Laws formulated[29] should reflect the expectations of the International community. However, a discussion on National Laws on this aspect is beyond the scope of this Article.

Future of Space Law

The possible threats and the requirement to evolve is best illustrated with refence to the Outer Space Treaty and the Moon Treaty.

The fact that the Outer Space Treaty focusses only on States and does not cover the activities of private institutions has already given rise to questions on jurisdiction. According to Jill Stuart, Visiting Fellow, Department of Government, London School of Economics and Political Science, many private companies have exploited the provisions of this convention and have already offered to sell plots of land on celestial bodies such as the moon.[30] The argument is that the Treaty only bans national appropriation and therefore, private companies or individuals could claim celestial territory, *since they are not countries (emphasis added)*[31]

This has prompted the United States to pass the Space Act of 2015 which provides that US citizens may engage in commercial exploration and exploitation of space resources which in turn has resulted in the paradox that the US may simultaneously claim celestial territory while not violating the Treaty.[32]

The failure of the Moon Treaty too would have significant impact on the future space activities such as Space mining. It is argued that had this Agreement been ratified, it would provide an international regime which oversees the extraction of resources from celestial bodies. It is further agued that this Agreement which attempted to set forth the rules for resource use was rejected specifically because of the issue of resource and benefit sharing.[33]

The Sri Lankan perspective

Sri Lanka has already ratified the Outer Space Treaty and the Liability Convention as per the Status of International Agreements relating to activities in Outer Space as at 1st January, 2019 published by the Committee on the peaceful Uses of Outer Space.[34]

It seems that Sri Lanka has ratified two of the most impacting Treaties since the Outer Space treaty prevents exclusive ownership of celestial bodies thereby keeping the Space open for all countries to explore and the Liability Convention expands on the liability rules created in Outer Space Treaty. As discussed before these Treaties would enable fair exploration of outer Space and provides for the damages caused by Space related activities.

Sri Lanka being a dualist country, a Treaty ratified by the Government would not automatically alter the laws of the State unless it is incorporated into the national law by legislation. Therefore, the ratification of the above Treaties would not reap the benefits they offer unless Sri Lanka formulates national legislation to meet the international standards. Sri Lanka is yet to instigate laws pertaining to outer Space and although not considered a major Space faring country yet, Sri Lanka does promise advancements in outer Space activities.[35]

As the forgoing discussion revealed, the rapid development in outer Space activities would not leave any nation in isolation. As a part of the global community, Sri Lanka too is expected to join to safeguard the outer Space as well as our planet – the Earth. In addition, the absence of domestic Space Law should not hinder the Sri Lankan standing in technological and scientific advancement and knowledge sharing on a regional as well as on a global level.

Conclusion

In an era where the science and Space experts believe that humans need to consider moving off-planet in the foreseeable future[36], the establishment of a set of laws that would govern the peaceful existence and harmony in outer Space is imminently required. Hence the existence of a legal regime which assures not only outer space harmony but guarantees the benefits derived from outer space for the benefit of all mankind is crucial to the advancement of Space related activities. The need for a healthy outer Space legal regime is a must in view of all the practical drawbacks it inherently possesses. Not to be isolated in the progress of outer Space activities, Sri Lanka as an individual State is required to take action to address the challenges that Space advancements would necessarily pose.

When Neil Armstrong stepped onto the surface of the moon he famously said "that's one small step for a man, one giant leap for mankind." To what extent this leap has unfolded is unfathomable considering the rapid developments and new discoveries in connection with the outer Space at present. Although the possibility of a regulating body where enforcement of the international instruments could be carried out would be essential, up to which extent this could be carried out would be a matter to be considered in the light of equity, equality and human rights considerations. As Helen Keller[37] stated, "Optimism is the faith that leads to achievement. Nothing can be done without hope and confidence."

The sky is not the limit where the Space infinitely promises a massive solace to the betterment of all humans. However, to what extent should the resources of Outer Space be exploited and utilised as well as the limitations on feasibility require careful consideration. As with any other law, the practical application alone would reveal the weaknesses and the strengths of any international Space Law regime.

Law is an evolving phenomenon similar to the very existence of Outer Space. However, which of the two, Law or the exigencies of Outer Space activities would evolve faster would undoubtedly impact the ultimate safeguard of the Outer Space.

Endnotes

1 https://www.britannica.com>topic

2 "Space Law" www.unoosa.org>oosa>ourwork

3 The Law in Crisis, Bridges of Understanding, C.G. Weeramantry, Capemoss, London 1975

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6 Article VI, ibid

7 Under Article I

Article I (a) defines "damage" to mean loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of intergovernmental organizations;

Article I (b) states that "launching" includes attempted launching;

Article I (c) states that "launching State" means,

(i) A State which launches or procures the launching of a space object;

(ii) A State from whose territory or facility a space object is launched;

Article I (d) states that "space object" includes component parts of a space object as well as its launch vehicle and parts thereof.

8 Article V

9 Article VII

10 Article XIV

11 The convention in Article I defines the term "launching State" to mean,

(i) A State which launches or procures the launching of a space object

(ii) A State from whose territory or facility a space object is launched.

The term "space object" includes component parts of a space object as well as its launch vehicle and parts thereof.(Article I(b))

12 Article III and IV

13 Article VI

14 Article 2 and 3

15 The Moon Treaty: failed international law or waiting in the shadows? by Michael Listner, The Space Review, www.thespacereview.com>article

16 NASA Astronaut Anne McClain Accused by Spouse of Crime in Space – The New York Times, 10/7/2019

https://www.nytimes.com/2019/08/23/us/nasa-astronaut-anne-mcclain.html

17 ibid.

18 Space Station Intergovernmental Agreement (https://aerospace.org>policy_archives)

This agreement was entered among the Government of Canada, Governments of member States of the European Space Agency, Government of Japan, The Government of the Russian Federation, and the Government of the United States of America. The central objective of the ISS partner States was to regulate specific aspects of a permanently inhabited, multinational research oriented facility in outer space.

19 Article 5 of the Agreement deals with the Registration, Jurisdiction and Control and paragraph 2 of Article 5 stipulates that each Partner shall retain jurisdiction and control over the elements it registers in accordance with the Registration Convention mentioned in paragraph 1 of Article 5, and over personnel in or on the Space Station who are its nationals.

In addition, Article 22 provides for Criminal Jurisdiction where Canada, the European Partner States, Japan, Russia and the United States may exercise criminal jurisdiction over personnel in or on any flight element who are their respective nationals.

20 i.e. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

21 Articles X and XI

22 Article VIII

23 i.e. Convention on International Liability for Damage Caused by Space Objects.

24 Article II *ibid.*

25 Article III *ibid.*

26 Article VI *ibid.*

27 Article XIX (2)

28 ibid.

29 For example, the U.S. Commercial Space Launch Competitiveness Act (H.R.2262), China's Space Activities (White Paper of 2003) etc.

30 The Outer Space Treaty has been remarkably successful – but is it fit for the modern age? Theconversation.com/the-outer-space-treaty-has-been-remarkably-successful-but-is-it-fit-for-the-modern-age-71381

31 ibid.

32 ibid.

33 Ambiguous Laws Could Prevent Us from Taking Full Advantage of Celestial Resources https://futurism.com/ambiguous-laws-could-prevent-us-from-taking-full-advantage-of-celestial-resources

34 A/AC.105/C.2/2019/CRP.3 (Committee on the Peaceful Uses of Outer Space, Legal Subcommittee, Fifty-seventh session Vienna, 9-20) unoosa.org/oosa/oosadoc/data/documents/2019

35 Sri Lankan endeavours in outer Space is beyond the scope of this article and therefore, would not be discussed at this juncture.

36 Space race: Abandon Earth's sinking ship and move to SPACE – expert says Earth is DYING, by Sebastian Kettley, https://www.express.co.uk/news/science/1191843/space-race-earth-is-dying

37 Helen Keller was an American author, political activist, and lecturer. She was the first deaf-blind person to earn a Bachelor of Arts degree.

JUDICIAL INDEPENDENCE AND THE RULE OF LAW: A CRITICAL ANALYSIS OF SRI LANKAN CONSTITUTIONS

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Introduction

Independence of judiciary is indispensable in any democratic system of governance and is considered as one of the essential elements of Rule of Law. Every civilized society has seen the need for an impartial and independent judiciary. Since the establishment of the democratic form of governments in the world there is a worldwide debate on the issue that the judiciary should be independent from any type of pressures and pulls i.e., from both within and outside. The justification for an independent judiciary thus is the prevention of abuse of power by a tyrant majority and the upholding of the Rule of Law.

Historical experiences indicate that all democratic systems are founded on a certain set of values, especially the Rule of Law. It is commonly assumed that the independence of the courts and judicial independence constitute one of the pillars of the Rule of Law in a democratic State, and that the Rule of Law is the foundation of a democratic society. The Rule of Law ensures the equality of citizens before the law and secures the protection of their rights and freedoms. The main premise of the idea of the Rule of Law is that in a State governed by the law no-one is above the law. The key to fostering and establishing the Rule of Law is to ensure that the judiciary is not only independent but appears to be independent, in order to gain the confidence of the public. According to Judge Weeramantry, "A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the

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Rule of Law. Even when all other protections fail, it provides a bulwark to the public against any encroachments on its rights and freedoms under law".

The people of a nation may lose confidence in the Executive, or the Legislature but it will be an evil day if they lose their confidence in its judiciary. With our democracy constantly put at risk by various factors, such as terrorism, fundamentalism, or different kinds of radical populism, along with the commercialization and political dependence of the media, and the exploitation of the law by the governing class, and also with governments at times abusing the political power, the judiciary is on the frontlines as the protector of the Constitution, constraining the executive and other organs of the State. In such situations democratic order is protected primarily through the currently applicable legal system and it is the judiciary, as the guardian of the Rule of Law that finds itself under pressure from those abusing their power in the pursuit of political goals.

The judiciary is the guardian of human rights and civil liberties. The judiciary contributes vitally in the preservation of peace and order by settling disputes between the State and Citizens and among Citizens which leads to a harmonious and integrated social existence. It also provides impartial control over governance by the State. Thus, an independent judiciary is required to maintain balance between the interests of individuals and society and for the Rule of Law to prevail. Therefore, an independent judicial system is considered sine qua non of a vibrant democratic system and all leading democracies of the world emphasizes on this need time and again.

Historical Origin of Judicial Independence

Any discussion on judicial independence is primarily based on the doctrine of separation of power. The principle of the separation of powers is considered the cornerstone of an independent and impartial justice system. Jean Bodin in his work " The Republic" had stated way back in 1576, that "*To be at once legislator and judge is to mingle together justice and the prerogative of mercy, adherence to the law, and arbitrary departure from it; if justice is not well administered, the litigating parties are not free enough, they are crushed by the authority of the sovereign*". However, what Bodin advocated was a differentiation of functions rather than a separation of powers. The justification for a separate judiciary that is independent of control by those wielding executive and legislative power came when the idea arose that individuals had rights and privileges that need to be defended even against the State.[1] The concept of the independence of the judiciary thus arose as one that would constrain authoritarian rule and prevent arbitrary punishment.

It was French philosopher Montesquieu who lived in the 18th Century who propounded the idea of an independent judiciary. He believed in the theory

of separation of powers of the three branches of the Government, namely, the Legislature, the Executive and the Judiciary, and believed that "*when the legislative and executive powers are united in the same person… (that) there can be no liberty. Likewise (that) there will be no liberty if judicial power is not separated from the legislative and executive. He saw the separation of these powers as an insurance against arbitrary rule, for the different limbs of governmental power would then act as checks and balances upon each other*".[2] In its broader sense the doctrine of separation of power means merely that one department of government should not be in a position to dominate the others. In the words of Hood Phillips: "*What the doctrine must be taken to advocate is the prevention of tyranny by the conferment of too much power on any one person or body, and the check on one power by another*."

On the role of the judiciary Montesquieu concluded that: There is no liberty, if the power to judge is not separated from the legislative and executive powers. "*Were the judicial power joined to the legislative, the life and liberty of citizens would be subject to arbitrary power. For the Judge would then be the legislator. Were the judicial power joined to the executive, the Judge would acquire enough strength to become an oppressor*." He based his theory on the assumption that the 18th Century English Constitution had a strict separation of powers. However, there was no perfect separation in the British experience. In the United Kingdom thus judicial independence came into being in 1701 with the enactment of the Act of Settlement.

Impressed by Montesquieu's views pioneering fighters for American Freedom, namely, Alexander Hamilton and James Madison in a series of essays in "The Federalist" reiterated the principle in 1788 in terms that: "*The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny*".[3] For Hamilton and Madison judicial independence therefore was an essential aspect of the separation of powers. Thus, this philosophy found its way into the Federal Constitution of the United States, which rigidly separated the executive, judicial and legislative functions of government.[4]

In the two centuries that followed, the concept of independence of the judiciary as a safeguard of individual liberty became gradually accepted in all liberal democratic societies. Many Third World countries have adopted Constitutions based on the "Westminster Model" and as in Britain, these constitutions allow a certain degree of overlapping of functions of various organs of government. Although there is no rigid separation of powers, by and large the spheres of the executive, legislative, and judicial functions have been demarcated so that the exercise of their powers may be limited to their particular fields. The business of a constitutional government is so complex and it cannot define the area of each department in such a manner as

to leave each independent and supreme in its allotted sphere",[5] therefore, watertight compartmentalization of powers is not possible. Thus, in today's multi-functional complex government extreme separation of powers is impossible of achievement and largely unworkable.

The concept and content of judicial independence has also received considerable attention at national, regional and international levels. Article 1 of the *United Nations Basic Principles on the Independence of the Judiciary* requires that judicial independence '*be guaranteed by the State and enshrined in the Constitution or the law of the country*', and says that '*it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary*".[6]

In the *Bangalore Principles* the Judicial Integrity Group identifies following seven "values" representing the standards that all judges are expected to uphold: independence, impartiality, integrity, propriety, equality, competence and diligence. *The Beijing Statement of Principles of the Independence of the Judiciary adopted at the 6th Biennial Conference of Chief Justice of Asia and the Pacific* states that "*judicial independence is essential to the attainment of the judiciary's objectives and to the proper performance of its functions in a free society observing the rule of law*".[7] The Beijing Statement also concerns broader issues relating to judicial independence including: appointments, tenure and remuneration, judicial behavior and objectives, immunities, and jurisdiction.[8]

Further,the *Council of Europe's Recommendation on the Independence of Judges* states that the independence of judges must be guaranteed by inserting specific provisions in constitutions or other legislation and that *"[t]he executive and legislative powers should ensure that Judges are independent and that steps are not taken which could endanger the independence of Judges*".[9]

The Universal Charter of the Judge, an instrument approved by judges from all regions of the world, establishes that "*The independence of the Judge is indispensable to impartial justice under the law. It is indivisible...*"[10]*The Commonwealth (Latimer House) Principles* require that the three branches of government should maintain high standards of accountability, transparency and responsibility in the conduct of all public business. They acknowledged that judicial independence and delivery of efficient justice services were important for maintaining the balance of power between the Executive, Legislature and Judiciary.[11]Thus, it suffices to say that judicial independence has been the subject of considerable attention by groups well-equipped to elaborate upon its meaning.

Meaning of Independence of Judiciary

The dictionary meaning ascribes "independence" as "*The state or quality of being independent*"[12]. In other words, it signifies something that it is not dependent

on or controlled by any other agency, organ of State or authority. Thus, judicial independence means that courts ought to enforce the law and resolve disputes fairly, impartially, and according to the facts and law, without regard to the power and preferences of the parties appearing before them or according to the whim or fear of the legislature or executive. The Rule of Law requires that laws apply equally to both ordinary citizens and public officials, and that they protect the rights of individuals against the power of the state in both the political and economic spheres. In this respect the Rule of Law and judicial independence are inextricably linked with liberal democracy.

The independence of the judiciary does not mean just the creation of an autonomous institution free from the control and influence of the executive and the legislature. The underlying purpose of the independence of the judiciary is that Judges must be able to decide a dispute before them according to law, uninfluenced by any other factor. For that reason, the independence of the judiciary is the independence of each and every Judge. But whether such independence will be ensured to the Judge only as a member of an institution or irrespective of it is one of the important considerations in determining and understanding the meaning of the independence of the judiciary.[13]

According to Israel Justice Shimon Shetreet independence of the judiciary means and includes *the independence of the judiciary as a collective body or organ of the government from its two other organs as well as independence of each and every member of the judiciary (the Judges) in the performance of their roles as Judges. He states that without the former the latter cannot be secured and without the latter that the former does not serve much purpose. Therefore, the two, even if separable, must be pursued together. A system which ignores one or the other cannot make much progress towards, much less achieve, the independence of the judiciary*.[14]

Thus, ensuring that Judges decide cases fairly and independently is only one element of judicial independence. Just as individual Judges themselves must be independent, the judiciary as an institution must also remain impervious to manipulation and outside influence. Judicial independence therefore, implies both that Judges must be individuals of integrity and must decide cases before them in accordance with the principles of judicial independence and be free from outside interference, and also that the judiciary as an institution functions autonomously, without interferences from the other branches of government, in regulating its own administrative and internal arrangements. There are several features therefore that determine the existence or non- existence of an independent judiciary. They are: method of appointment of Judges, their salaries and emoluments, the security of their tenure, manner of their removal, conditions of service, judicial ethics and conduct of Judges and disciplinary procedures.

Sri Lankan Historical Experience

Under the judicial system in ancient Sri Lanka (known as Ceylon)the ruler was not perceived in the guise of a legislator. Different sets of customs each applicable to a different group was law. The rule of the King and of his subordinates was simply to interpret and clarify this law. Therefore, in theory there was no combination of the role of legislator with that of the Judge. On the other hand, executive and judicial functions were often placed in the same hands. "In the Kandyan state there was no separation of powers, executive and judicial. All officers from the King to the vidanas exercised judicial powers".[15]

The period of colonial rule under the Portuguese and the Dutch saw the beginning of functional separation between the executive and the judicial branches of government. Under the Portuguese rule there was an official, the ouvidor, whose functions were limited to the imposition of fines, corporal punishment and imprisonment of minor officials and greater judicial authority was wielded by the Portuguese Captain General and his civil officials (dissavas).[16] Though in theory the ouvidor was accountable for his work only to the High Court in Goa, in practice he was subservient to the Portuguese Captain General.[17] Thus, in reality there was no separation of judicial and executive power.

The same pattern was followed by the Dutch administration too despite having established an elaborate system of courts, since judges under the Dutch rule were servants of the East India Company and depended on the patronage of the Company for their career prospects.[18] This system suited the needs and objectives of the colonial state which were the maintenance of peace and order to enable the control and exploitation of the trade and of the economic resources of the colony.[19]

Subsequently, under the British rule, administrators tried to refrain from interfering with the judiciary and the Supreme Court of Ceylon developed to become a superior court of appeal manned by professional Judges. However, during much of this period there were limitations to judicial independence especially in relation to lower courts. Revenue collecting and judicial functions were fully separated only in 1856 and until such time many officers exercising judicial functions were directly subject to the British civil administration.[20] The appointment of Judges from the ranks of the Civil Service also continued till 1939. While the above constrains in relation to state control did not apply to judges of the Supreme Court (SC), a survey of its decisions reveal that despite a few published clashes (*the conflict with General Wemyss in 1804, who took exception to the execution of sentences of whipping and hanging on the military parade ground and when brought up on a charge of contempt appeared with his staff wearing sidearms and bayonets; and the Bracegirdle case in 1937)*, it rarely challenged the government of the day.[21]

Nevertheless, the transition from a colonial judiciary to an independent judiciary in post 1948 was remarkably smooth partly due to developments under the Donoughmore Constitution which strengthened judicial autonomy including the establishment of a Judicial Service Commission. Therefore, although "there was no long heritage of a separate judicial branch in Sri Lanka, our colonial history bequethed us at independence, a sturdy judicial arm which was itself heir to a healthy British tradition of independence".

This attitude changed by 1972 and there was a growing impatience among politicians about the tendency of the judiciary to sit in judgment on their decisions especially in relation to the judicial review of legislation. Felix R. Dias Bandaranaike, stated: "*We are trying to reject the theory of the separation of powers. We are trying to say that nobody should be higher than the elected representatives of the people, nor should any person not elected by the people have the right to throw out the decisions of the people elected by the people*…." Thus, the solution that was tried in the First Republican Constitution of 1972 was to make the legislature (The National State Assembly- NSA) supreme.[22] It was not only legislative and executive power that was to be exercised by the NSA but also – "*the judicial power of the People through courts and other institutions created by law except in the case of matters relating to its power of the people may be exercised directly by the NSA according to law*".[23]

Though the framers of the 1972 Constitution attempted within the ideological framework to ensure some autonomy for the judicial arm, the judicial structure under the Constitution was nevertheless criticized by many. The previously existing Judicial Service Commission was replaced by a Judicial Services Advisory Board (JSAB) and a Judicial Services Disciplinary Board (JSDB). This change was hardly compatible with the independence of the judicial function.[24]It was stated that the most crippled arm of the government under the 1972 Constitution was undoubtedly the judiciary.[25]H.W. Thambiah was also critical of the provisions that related to the independence of the minor judiciary and the Select Committee appointed to revise the Constitution in 1978 proposed changes that would give greater constitutional protection both to the superior courts and to the judges in the lower courts.

Constitutional Safeguards for the Independence of the Judiciary under the 1978 Constitution.

The theory of separation of powers are engraved in Articles 3 and 4 of the Second Republican Constitution of 1978. Article 4 of the Constitution, describes as follows the mode in which the powers of government are to be exercised:

The legislative power of the people shall be exercised by Parliament…

The executive power of the people… shall be exercised by the President…

The judicial power of the people shall be exercised by Parliament through courts….

On a superficial view, there is no separation of legislative and judicial power as both these powers are to be exercised by Parliament. However, in practice the judicial function of government is to be exercised through courts and thus, the courts become an important player in the process of governance. The courts held in **In Re The Nineteenth Amendment to the Constitution**[26] "…*This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another.*"

As a direct consequence of this theory the powers of the Supreme Court and the Court of Appeal are entrenched in the Constitution.[27] This is an improvement in comparison to earlier Constitutions. Under the Independence Constitution since there was no delineation of jurisdiction of courts in the Constitution itself, the legislature was deemed to have the power to take away the jurisdiction of any courts. [28] In the case of the 1972 Constitution not only did the NSA have this power but it actually exercised it by the Administration of Justice Law No. 44 of 1973. The 1978 Constitution specifically protects the role of the Supreme Court as the "highest and final superior court of record in the Republic" in respect of election petitions, appeals, constitutional matters, fundamental rights and the breach of privileges of Parliament.[29] The Constitution similarly protects the powers of the Court of Appeal.[30]

A clear statement in the Constitution that the judiciary is independent has both political and legal value. Thus, it must be noted that the 1978 Constitution has a separate sectional heading titled "Independence of the Judiciary".[31] This deals with the appointments, disciplinary control, salaries, retirement and removal of Judges. Furthermore, Article 111C (2) lays down special provisions with regard to interference with the judiciary.

The process of appointment of Judges is an important factor in guaranteeing judicial independence, and thus, when the appointment process is entirely in the hands of the executive the likelihood is high that Judges will be appointed based on their political allegiance and creating a judiciary that is unlikely to be independent of the executive. Therefore, a Constitution should provide sufficient safeguards against purely political appointments in order to secure judicial independence. According to Article 107 the Chief Justice, the President of the Court of Appeal and every other Judge of the Supreme Court and the Court of Appeal shall, subject to the approval of the Constitutional Council, be appointed by the President. Though under this Article the power to appoint Judges to the superior courts is with the President, it has been restricted by Article 41C which provides that:"*No person shall be appointed by the*

President to any of the Offices specified in the Schedule, unless such appointment has been approved by the Council upon a recommendation made to the Council by the President". The Council referred to in Article 41C is the Constitutional Council which acts as the approving authority in relation to judicial appointments to the superior courts.

Further, in terms of Article 107 (2) President may initiate proceedings for the removal of a Judge of the Superior Court. Such order of the President made after an address of Parliament must be supported by a majority of Members of Parliament including those not present and the grounds for such removal must be either proved misbehavior or incapacity. It has been further provided that a resolution for the presentation of such an address shall not be entertained by the Speaker, unless not less than one third of the total number of members of Parliament signs such resolution which must set out full particulars of the alleged misbehavior or incapacity. [32] An important factor in deciding the independence of the judiciary is to identify as to who initiates the removal proceeding and under the present Constitution it is the President who initiates these proceedings. Political influences in removal proceedings are therefore not wholly absent. With regard to removal of High Court Judges, Article 111(2) provides that the President shall have disciplinary control and the power to remove High Court Judges on the recommendation of the Judicial Service Commission (JSC). The independence of Judicial Officers other than the Judges of the Supreme Court and Court of Appeal and High Court is secured by vesting their appointment, transfer, dismissal and disciplinary control in the JSC.

The JSC under the 1978 Constitution was a return to the independent Judicial Service Commission that functioned from 1948 to 1972. The JSAB and the JSDB established under the 1972 Constitution were considered ineffective in preventing political interference within the minor judiciary. The reason being political control over the JSAB was ensured by requiring that two of the five-member commission be officers other than Judicial Officers,[33] and the actual appointees turned out to be, the Secretary to the Ministry of Justice and the Attorney General. Similarly, while the JSDB was a respected body with the Chief Justice and two other Supreme Court Judges, those who were not satisfied with the decisions of this body could appeal to the Cabinet and this again raised fears of political influence. However, the Judicial Service Commission under the present Constitution consists of the Chief Justice and the two most senior Judges of the Supreme Court appointed by the President, subject to the approval of the Constitutional Council.[34] In terms of Article 111L interference with the Commission is an offence.

Further, the salaries of the Judges of the SC and the CA shall be determined by Parliament and charged on the Consolidated Fund,[35] and the salary and pension entitlements of above Judges cannot be reduced after appointment.[36]

Article 110 (2) states that no Judge of the SC or CA is permitted to perform any other office (whether paid or not) or accept any place of profit or emolument, except with the written consent of the President. It is further provided that no person who has held the office as a permanent Judge of the SC or CA may appear or practice in any court, as an Attorney-at-law at any time without the written consent of the President.[37]

The 1978 Constitution also places a great premium on the importance and integral nature of fundamental rights. A perusal of the Preamble reveals that the fundamental rights enshrined in chapter III espouse and are founded upon two broad principles, rooted in democratic governance and the Rule of Law, i.e. liberty/ freedom and equality. The Rule of Law means *"the authority of the courts of law to test all administrative actions by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved persons bring the appropriate action before a competent court.*" Few instances in which the Rule of Law has been invoked by our courts to grant relief to the aggrieved citizen is given below to demonstrate the vibrancy of the Rule of Law in the realm of public administration.

Wijeyaratne v Warnapala[38] Sripavan J, as he then was, stated "*It has been firmly stated in several judgments of this Court that the "Rule of Law" is the basis of our Constitution.*

Jayawardena v Dharani Wijayatilake, Secretary Ministry of Justice and Constitutional Affairs and Others[39] court held that: "*Respect for the Rule of Law requires the observance of minimum standards of openness, fairness and accountability in administration and this means ……..that the process of making a decision should not be shrouded in secrecy.*"

In ***Premachandra v Major Montague Jayawickrema***[40] the Court stated: "….*our Constitution and system of government are founded on the Rule of Law; and to prevent the erosion of that foundation is the primary function of an independent Judiciary.*"

In ***Sugathapala Mendis v Chandrika Kumaratunga***[41] it was held that, "T*he President, like all other members of the citizenry, is subject to the Rule of Law, and consequently subject to the jurisdiction of the courts, is made crystal clear by a plain reading of the Constitution….."*

Thus, in terms of constitutional structure the independence of the judiciary seems to have been better safeguarded under the Second Republican Constitution than before.

The Working of the Constitution, 1978 - 2018

The actual constitutional provisions relating to the judiciary seem to be well designed. However, the working of the Constitution regardless of party coloursover

the last four decades has roused a great deal of apprehension about the preservation of judicial independence.

The fears began to be voiced from the very outset and were first centered on Article 163 which provided for all Judges of the Supreme Court and the High Courts to cease to hold office on the commencement of the Constitution. This was in contrast to Article 164 where it was provided that all Judges of the lower courts would continue to hold office. Once the Constitution came into force, President J.R. Jayawardena did not re-appoint seven out of the nineteen Judges and thus Article 163 became a means of reducing the guaranteed tenure of some Judges of the superior courts. In this regard Dr. Colvin R. De Silva in "Monkeying with the Judiciary" states that "if the government had been dissatisfied with any one of the Judges it could have used the machinery available in the Constitution to deal with the problem."

Government resentment at adverse judgments is not new in Sri Lanka and two highly contentious instances were the impeachment of Chief Justices Samarakoon and Shirani Bandaranayake. When Chief Justice Samarakoon delivered a speech at a prize giving critical of then President's government policy, the regime commenced impeachment proceedings, but before the Select Committee of Parliament concluded its proceedings the Chief Justice had retired and the Committee found him not guilty of impeachable offences but held that his speech was not appropriate to the high office.

Dr. Shirani Bandaranayake, was appointed the first woman Chief Justice of Sri Lanka on 18th May 2011. Though her appointment to the Supreme Court was controversial and unsuccessfully challenged in court[42], her appointment as Chief Justice was considering her seniority in the judiciary. However, following a decision of the Supreme Court bench headed by the Chief Justice perceived by the then government as an affront to its authority, impeachment proceedings were initiated against Chief Justice Dr. Bandaranayake.[43] During this period several writ applications were filed in the CA seeing to prohibit the Parliamentary Select Committee (PSC) from continuing with its proceedings. The CA[44] during the process of hearing these applications referred a question of constitutional interpretation to the SC and the PSC was "requested" by the SC[45] to defer impeachment proceedings until the court could decide on the constitutionality of Standing Order 78A.[46] However, the PSC disregarding the Supreme Court's request continued to hold proceedings. Meanwhile the Supreme Court in its determination[47] on the question of interpretation held "*that the investigation and proof of charges in an impeachment motion must be exercised by a body established by law. Since Standing Orders of Parliament are not recognized as "law" in terms of the Constitution, they could not establish a body with powers to investigate and prove charges. Thus, it was held that any powers of investigation*

and proof must be provided by Acts of Parliament".[48] Subsequently, the Court of Appeal issued judgment holding that in the light of the interpretation given to the relevant constitutional provisions by the SC, it had no alternative but to issue a writ quashing the PSC report.[49] Notwithstanding these judicial pronouncements the then government proceeded with impeaching Chief Justice Bandaranayake.

A moot point with regard to investigation of above nature is whether the power of Parliament to remove a Judge of the SC or CA for misbehavior could be interpreted to mean that Judges are answerable to Parliament for their conduct. On this issue it has been pointed out by legal experts that "Article 111C (earlier Article 116) of the Constitution states that a Judge shall perform his functions without being subject to any directions or other interference by anybody, except a superior court tribunal or institution or person entitled under the law to direct or supervise such a Judge. Thus, the courts through which the judicial power of the people is said to be exercised are not required to be answerable or be responsible to Parliament for the exercise of their judicial power. Nor is the judiciary part of Parliament. Further, the practice of using Select Committees to investigate the conduct of Judges is detrimental to judicial autonomy."

Article 107 (3) empowers Parliament to provide by law or by Standing Orders for the investigation of alleged misbehavior or incapacity of Judges. In the light of previous experiences with the use of this Article to investigate the conduct of Judges through PSC, the need of the hour is to enact legislations in accordance with the judgments of the Supreme Court and the Court of Appeal delivered in this regard setting out the procedures to be followed, the burden of proof, the standard of proof of any alleged misbehavior or incapacity and the right of the Chief Justice or any Judge of the superior courts to appear before and be heard by the PSC in person or by a representative.

These instances may not convey the true picture of the working of the judiciary in Sri Lanka and one could point out many instances where the government has accepted and abided by the adverse judicial judgments. A case in point is the unanimous judgment delivered by seven Judges of the Supreme Court following petitions filed challenging the Presidential proclamation on the dissolution of Parliament last year. Sri Lanka had remained mired in political uncertainty since October 26, 2018, when then President withdrew his party, from the coalition government, dismissing the Prime Minister and appointing the former President as the Prime Minister. This move was considered by many legal experts as unconstitutional. The SC in its judgment in this case stated thus: "*….if this Court were to deny relief merely on the basis that the Petitioners have failed to establish unequal treatment', we would in fact be inviting the State to equally violate the law.' It*

is blasphemous and would strike at the very heart of Article 4 (d) which mandates every organ of the State to respect, secure and advance the fundamental rights recognized by the Constitution. Rule of Law dictates that every act that is not sanctioned by the law and every act that violates the law be struck down as illegal".[50] In this instance the historical judgment delivered by the Supreme Court was respected by all other branches of the government and Rule of Law thus prevailed.

Conclusion

Judicial independence is a fundamental constitutional value that commands almost universal approval. One time Prime Minister of England Sir Winston Churchill speaking in the House of Commons said " *The principle of complete independence of the Judiciary from the Executive is the foundation of many things in our life. The Judge has not only to do Justice between man and man, he has to do justice between citizens and the State. He has to ensure that administration conforms with the law and to adjudicate upon the legality of the exercise by the Executive of its powers*". This article sets out to study judicial independence in the light of the provisions of the Second Republican Constitution of Sri Lanka. The present Sri Lankan Constitution ensures that every organ of the state or other constitutional and non-constitutional bodies are kept within their limits and prevents non encroachment on the sphere of each other, and thus, preventing chaos. Further, it is also evident from the preceding paragraphs that our present Constitution contains number of provisions to protect and ensure an independent judiciary. However, the actual implantation of the said provisions has at times left much to be desired. In conclusion it is re-emphasized that any State action that harms the morale of the judiciary needs to be carefully watched, since "*the future of the judiciary as the custodian of the public conscience of this country does not rest in abstract constitutional principles or arrangements. It depends on the quality of those who assume the judicial mantle and their capacity to be morally outraged by injustice and discriminatory practices and to draw on the armoury of their legal power to redress their grievances*.[51]

Endnotes

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LAW RELATING TO CUSTODY OF CHILDREN IN SRI LANKA

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Additional District Judge-Kandy

Introduction

In Sri Lanka a minor is a person under the age of 18 in general context. Child custody or custody of a minor is a term used to describe who will be responsible for a child's life. Typically, custody initially lies with one or both of a child's birth parents, but custody can also be transferred to other family members, adopted parents, and other caregivers. From a legal point of view, child's custody refers to one or more people who are able to physically care for a child, as well as take legal responsibility for all matters pertaining to a child's well-being. This article will analyze the provisions regarding the custody of minors under the Acts and Judicial decisions within the common law and personal laws in Sri Lanka. Generally, in Sri Lanka the District Court is considered as the Upper Guardian of minor children in respect of custody matters.

Provisions under the Judicature Act[1]

Every Family Court shall be a court of record and shall have sole original jurisdiction in respect of matrimonial disputes, actions for divorce, nullity and separation, damages for adultery, claims for maintenance and alimony, disputes between spouses, parents and children as to matrimonial property, custody of minor children, dependents' claims, guardianship and curatorship matters, claims in respect of declaration of legitimacy and illegitimacy and marriage, adoption and applications for amendment of birth registration entries, claims for seduction and breach of promise of marriage and such other matters provided for by any other law.[2] However

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these provisions shall not, affect the provisions of the Kandyan Marriage and Divorce Act and the provisions of the Muslim Marriage and Divorce Act.Under a subsequent amendment effected to the Judicature Act, every District Court shall be deemed to be a Family Court when exercising jurisdiction vested in a Family Court under the Judicature Act or any other written law.[3]

An application for the custody of a minor child or of the spouse of any marriage alleged to be kept in wrongful or illegal custody by any parent or by the other spouse or guardian or relative of such minor child or spouse shall be heard or determined by the Family Court; and such court shall have full power and jurisdiction to hear and determine the same and make such orders both interim and final as the justice of the case shall require.[4] An application under this provision has to be made to the relevant District Court where the minor resides.

Provisions under the Civil Procedure Code

In Civil Procedure Code chapter of matrimonial actions[5] have provisions regarding the custody of minor children. In a matter before a District Court the court after a decree of separation may, upon application by way of summary procedure for this purpose, make from time to time all such orders and provisions, with respect to the custody, maintenance, and education of the minor children, the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending.[6]

In any action for obtaining a dissolution of marriage or a decree of nullity of marriage, the court may from time to time, before making its decree absolute or its decree (as the case may be), make such interim orders, and may make such provision in the decree absolute or decree, as the court deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the action, and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the court.[7]

The court after a decree absolute for dissolution of marriage or a decree of nullity of marriage may, upon application by petition on summary procedure for the purpose, make from time to time all such orders and provisions, with respect to the custody, maintenance, and education of the minor children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said court as might have been made by such decree absolute or decree (as the case may be), or by such interim orders as aforesaid.[8]

Therefore, a party to a matrimonial action filed under Chapter XLII of the Civil Procedure Code can move for an order in respect of the custody of a minor

during the pendency of the action under Section 621 of the Civil Procedure Code and whereas after the case is concluded and even after the decree absolute is filed party to the said action can move for an order in respect of the custody of a minor under Section 622 of the Civil Procedure Code.

Powers of Magistrates regarding the custody of a minor

There are some instances where the Police files reports in Magistrate's Court and move for custody orders regarding minors. These reports are filed under the provisions of the Children and Young Persons Ordinance.[9] The Children and Young Persons Ordinance of Sri Lanka defines a "child" as a person under the age of 14 and "a young person" as a person between 14 and 16 years. Magistrate or Magistrates of that court when that court is sitting as a Juvenile Court can make orders regarding the care and protection of a child or a young person under the provisions of the said ordinance.

A child or young person who, having no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, is either falling into bad associations, or exposed to moral danger, or beyond control or a child or young person who being a person in respect of whom any of the offences mentioned in the First Schedule of the Ordinance has been committed or, being a member of the same household as a child or young person in respect of whom such an offence has been committed or, being a member of the same household as a person who has been convicted of such an offence in respect of a child or young person or, being a female member of a household whereof a member has committed an offence under section 17 of the Ordinance in Registration another female respect of that household member of requires care or protection or a child in respect of whom an offence has been committed under section 77 (which relates to the punishment of vagrants preventing children from receiving education) is considered as a child or young person in need of care or protection.[10]

If a Magistrate's Court sitting as Juvenile Court is satisfied that any person Courts in brought before the court under this section by any officer of a local authority, or by any police officer or authorized person, is a child or young person in need of care or protection, the court may either;

a. if he has attained the age of twelve years, order him to be sent to an approved or certified school; or
b. commit him to the care of any fit person, whether a relative or not, who is willing to undertake the care of him; or
c. order his parent or guardian to enter into a recognizance to exercise proper care and guardianship; or

d. Without making any other order, or in addition to making an order under either of the last two foregoing paragraphs, make an order placing him for a specified period, not exceeding three years, under the supervision of a probation officer, or of some other person appointed for the purpose by the court.[11]

Any officer of a local authority, or any police officer or authorized person having reasonable grounds for believing that a child or young person is in need of care or protection may bring him before a Magistrate's Court sitting as a Juvenile Court.[12]

When there is a matrimonial dispute between husband and wife one party may make a complaint to a police regarding the custody or access of the children and Police will file a report in Magistrate's Court and seek an order in respect of custody or access. However, the Magistrate's Court will have the jurisdiction to make orders in respect of custody of a minor only if that minor can be considered as a person in need of care or protection under the Children and Young Persons Ordinance. Therefore, unless there are circumstances where a minor can be considered as a person in need of care or protection under the Children and Young Persons Ordinance the Police cannot report facts to the Magistrate's Court and seek orders regarding the custody of a minor for a mere matrimonial dispute between two spouses even the spouses are living separately.

The Concept of the Best Interest of the Child

The importance of the best interest of child is mentioned in the United Nations Convention of Rights of Child[13], that in all actions concerning the children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of child shall be a primary consideration to which Sri Lanka is also a part of, and also an active member of it. Our country also signed the said Convention on 12th of July 1991 and therefore we should concern this concept in our statutes and also in judicial decisions. This concept is adapted to our legislations such as; The Adoption of Children Ordinance No. 24 of 1941 [as amended][14] and International Covenant On Civil And Political Rights (ICCPR) Act, No. 56 of 2007.[15]

The doctrine of best interest of child is used to choose the best for the child when a matrimonial case or and other parental issue such as an adoption case where the child could not live with all the family members. In ***Samarasingha Vs Simon***[16] the Court considered that allowing a child to grow up with her own brothers and sisters will be a point to consider the best interest of a child.

In ***Pemawathie Vs Kudalugoda Aratchi***[17] the court held that under the Roman - Dutch law, the mother of the child is the natural guardian and is entitled as such to the custody of the child as against a stranger, however, the interests of the child would be gravely affected by an interference with its present custody, the claim of the stranger to custody would be preferred to the claim by the mother.

Therefore, it is an accepted norm that the court should consider the welfare and best interest of the child when considering any order pertaining to a child. In a recent judgment No. ***NWP/HCCA/KUR/ 32/2018[LA]***[18] delivered in Civil Appeallte High Court of North Western Province High Court Judge Dr. Sumudu Premachandra pointed out following factors should be considered by the judges in their parenting orders pertaining to a child. They are namely:[19]

(a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;

(b) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;

(c) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;

(d) the child's cultural, linguistic, religious and spiritual upbringing and heritage;

(e) the child's views and preferences, if the court considers it necessary and appropriate to [gather this information] given the child's age and stage of development and if the views and preferences can reasonably be [gathered]; Such as probation officer, school teachers…

(f) the nature, strength and stability of the relationship between the child and each parent or guardian; and each sibling, grandparent and other significant person in the child's life;

g) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and

(h) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on;

  (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and

  (ii) the appropriateness of an arrangement that would require cooperation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

The Court can consider those factors by the evidence of parties and also from calling an independent report from probation office of the relevant area.

Consent of the Minor and its' relevance in a custody issue

There is no mandatory provision in the Judicature Act or in Civil Procedure Code to consider the consent of the child before making an order in a custody issue, but when considering decided cases by higher courts it is clear that there is no legal bar to consider such consent by the courts in respect of a custody issue. In the recent judgment decided by the Civil Appeallate High Court of the North Western Province[20] it was decided that if the court considers it necessary and appropriate to get the consent of the child by considering the child's age and stage of development and if the views and preferences can reasonably be gathered the court should consider the consent fact too in deciding the custody or access of the child. In Adoption of Children Ordinance[21] there is a provision which states that an adoption order shall not be made in respect of a child over the age of ten years except with the consent of such child.[22]

The consent of the child can be gathered from the evidence of the said child and also by a report from probation officer. This has to be decided by considering circumstances of the case and without affecting the emotional and mental status of the child. In a case where the court thinks that taking evidence from the child in courtroom is not suitable then the court can call for a report from relevant Probation office whereas the probation officer can discuss with the child and both parents and submit a detailed report about the consent of the child as well as the status of parents to the court. Therefore, it is better to consider the child's consent in respect of custody issues before making an order regarding the custody or access of the child, if it is appropriate due to the age and stage of development of the child.

Important Judicial Decisions regarding the Custody of Children

In ***Samarasingha Vs Simon***[23] it was held that Where a parent has surrendered the custody of a child to another, the mere assertion of his natural right is not sufficient to entitle him to claim back the child. The court will not disturb the status quo unless there is good ground for doing so. A good ground is that it would not be detrimental to the best interests of the child that she should return to her home.

In ***A. D. Weragoda Vs R. Weragoda***[24] and anotherthe court held that the court will decide who is to have the custody of the child after taking into account all the factors affecting the case and after giving due effect to all presumptions and counter presumptions that may apply, but bearing in mind the paramount consideration that the child's welfare is the matter that the court is there to safeguard and rights of the

father will prevail if they are not displaced by considerations relating to the welfare of the child, for a petitioner who seeks to displace those rights must make out his or her case.

The court held in ***Maulawathie Vs E. A. Wilpus***[25] and another that so long as the bond of matrimony subsists, the father, as the natural guardian, has the preferential right to the custody of a child born of the marriage. Where the mother seeks to obtain the custody; the burden is on her to prove that the interests of the child require that the father should be deprived of his legal right.

In ***Frugtniet Vs H. Edwin Fernando and Two Others***[26] it was held that under the Roman-Dutch law the father and the mother are entitled to the custody of the children of their marriage, and the father has a preferential right. But if the father fails or neglects to concern himself with the care of his children, the mother is entitled, by reason of her natural guardianship, to apply for a writ of habeas corpus in respect of a child who is in the custody of a third party. In such a case, however, if the child had been handed over to the third party by the mother herself on the understanding that it would not be claimed back, the welfare and happiness of the corpus is the paramount consideration and the mother's natural right is not sufficient per se to entitle her to claim back the child.

In all questions of custody of children, the interests of the children stand paramount. Questions of matrimonial guilt or innocence of a parent would not therefore be the sole determining factor in questions of custody, though they are not factors which will be ignored. Court further held that the interests of the children being paramount, the rule that the custody of very young children ought ordinarily to be given to their mother ought not to be lightly departed from. This was held in ***Precia W. Fernando (nee Perera) Vs Dudley W. Fernando and Two Others***[27].

In ***Martha Ivaldy Vs F. P. Ivaldy***[28] it was held that under the Roman-Dutch Law, where there has been no legal dissolution of the common home, the father's right to the custody of his minor children remains unaffected by the fact of the separation of the spouses, and can only be interfered with on special grounds, such, for example, as danger to the life, health or morals of the children.

Justice Shiranee Tilakawardena in ***Muthiah Jeyarajan Vs Thushiyanthi Jeyarajan and Others***[29] held that Courts should look for cogent and substantial evidence to effect a change in the life of the child and further held that the ultimate criterion to be considered as having importance is the consideration which require that the child's sense of security should be ensured.

It was held in ***M. H. M. Subair Vs M. S. M. Isthikar and Two Others***[30] that under the Muslim law, the father of a male child who is over the age of seven years does not have an absolute right to the custody of the child. After the age of seven years

a male child has the option to decide whether he should remain with the fatheror the mother. It is also clear from the authorities that the prime consideration is the welfare of the child.

In ***D. Endoris Vs D. Kiripetta and Two Others***[31] it was held that that a court will not deprive a parent of the custody of a child for the reason only that it would be brought up better and have a better chance in life if given over, to another. It is for the person seeking to displace the natural right of the father to the custody of his child, to make outhis case that consideration for the welfare of the child demands it.

In ***Jayawardane Vs Ranaweera***[32] the court held that the powers conferred by section 621 are wider than the jurisdiction conferred by section 24 (3), Judicature Act; section 621 does not restrict the power of the District Court to any specific situation. It is a wider general power and further held that the court should have realized that a father's custody of his child is not illegal unless such custody is inviolation of an order of court.

In a recent judgment of ***Janaka Pushpakumara Kalansooriya and Another Vs Jagath Priyanatha Epa and Others*** [decided on 03/04/2019][33] the Supreme Court held that the natural parents have a right to keep the child in their custody and if the welfare of the child would not be affected, no argument can be brought forward to deprive the said legal right of the natural parents.

Conclusion

In a matrimonial action under the Civil Procedure Code or custody action under the Judicature Act the Court may decide to give the physical custody of the child to either father or mother in most cases. However, the Courts must have to consider the fact that the child should have direct or indirect contact with both parents even if the physical custody has been given to a father or mother. It is an accepted norm that the court should consider the welfare and best interest of the child when considering any order pertaining to a child. State parties to the convention on the Rights of the Child shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests[34]. In this regard as a final observation courts should be mindful to the remarks stated by Hon. High Court Judge Dr. Sumudu Premachandra in the aforesaid judgment No. ***NWP/HCCA/ KUR/ 32/2018[LA]*** decided on 14/12/2018 by Civil Appeallate High Court of North Western Province which states as follows:-[35]

"Therefore, it is clear unless contrary to the best interest of the child, child should have direct contact with both parents. It should be noted that contact to both parent is a right of the child, not a right of a parent or any other person. There is an expectation in law

that where parents have separated, the parent the child who lives with allows a reasonable amount of contact with the other parent. This is basically for the welfare of the child. For a child parents are sun and moon. He or she should have both."

Endnotes

1 Act No. 02 of 1978 as amended
2 Sec 24[1] of the Judicature Act
3 Act No. 71 of 1981
4 Sec 24[3] of the Judicature Act
5 Chapter XLII
6 Sec 620 of the Civil Procedure Code
7 Sec 621 of the Civil Procedure Code
8 Sec 622 of the Civil Procedure Code
9 Ordinance No. 48 of 1939 [as amended]
10 Sections 34[1] [a]-[c] and 34[2] of the Ordinance
11 Section 35[1] [a]-[d] of the Ordinance
12 Section 35[2] of the Ordinance
13 Article 3[1] of the convention
14 Sec 4 [b] of the Ordinance
15 Sec 5[2]- In all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interest of the child shall be of paramount importance.
16 43 NLR 129
17 75 NLR 398
18 Decided on 14th December 2018
19 WP/HCCA/KUR/ 32/2018[LA] at pages 10 and 11
20 WP/HCCA/KUR/ 32/2018[LA] decided on 14/12/2018
21 No 24 of 1941 [as amended]
22 Section 3[5] of the Adoption Ordinance
23 43 NLR 129
24 66 NLR 83
25 70 NLR 90
26 74 NLR 448
27 70 NLR 534
28 57 NLR 568
29 1999 [1] SLR 113
30 77 NLR 397
31 73 NLR 20
32 2004 [3] SLR 37
33 SC Appeal 12/2018
34 Article 9[3] of The Convention on the Rights of the Child
35 WP/HCCA/KUR/ 32/2018[LA] at page 9

PRESIDENTIAL IMMUNITY UNDER THE CONTEMPORARY SRI LANKAN CONSTITUTION: IS IT A STRONG PRESIDENTIAL PILLAR WITH UNFETTERED CONSTITUTIONAL SUPPORT OR NOT?

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Magistrate - Siyambalanduwa.

Prologue

"When the world was without a king
And dispersed in fear in all directions,
The Lord created a king
For the protection of all.

He made him of eternal particles
Of indra and the wind,
Yama, the sun and fire,
Varuna, the moon, and the Lord of Wealth.

And, he has been formed
Of fragments of all those gods,
The king surpasses
All other beings in splendour.

Even an infant king must not be despised,
As though a mere mortal,
For he is a great god
In human form."

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So states The Laws of Manu[1]. But does a monarch and in the present democratic States an Executive President wield such a great power to be considered almost immortal and sired by the Gods? Is Presidential Immunity a mere mythical creature created within the womb of the Supreme Law? Let's us consider this question within the reign of the Executive President born out of the 1978 2nd Republican Constitution as amended of Sri Lanka. For this purpose we must first venture into the realm of the relevant Constitutional provisions of the 1978 2nd Republican Constitution as amended. And thereafter consider the judicial literature and other legal texts if any.

The Election, the Appointment and the Term of Office of the Executive President

The framers of the 1978 2nd Republican Constitution as amended has stated that "There shall be a President of the Republic of Sri Lanka, who is the Head of the State, the Head of the Executive and of the Government, and the Commander - in - Chief of the Armed Forces."[2] and that "The President of the Republic shall be elected by the People, and shall hold office for a term of five years."[3]

The framers have taken another step and has prescribed the exhaustive criteria for a person to possess to be eligible to be appointed as the Executive President of Sri Lanka, his or her election and the continuation and the expiration of his or her term of office in the words that "Any citizen who is qualified to be elected to the office of President may be nominated as a candidate for such office by a recognised political party; or if he is or has been an elected member of the legislature, by any other political party or by an elector whose name has been entered in any register of electors."[4]

And furthermore the framers were of the view that "Every person who is qualified to be an elector shall be qualified to be elected to the office of President unless he is subject to any of the following disqualifications –

(a) if he has not attained the age of *thirty* five years;

(b) if he is not qualified to be elected as a Member of Parliament under sub-paragraph (d), (e), (f) or (g) of paragraph (1) of Article 91; and

(c) if he has been twice elected to the office of President by the People.

(d) if he has been removed from the office of President under the provisions of sub-paragraph (e) of paragraph (2) of Article 38."[5]

1 The Wonder that was India. A Survey of the Culture of the Indian Sub Continent before the coming of the Muslims, A.L. Basham, BA PhD FRAS and a Reader in the History of India in the University of London, 16th Edition, Grove Press Inc. New York at pg. 84 - 85

2 Article 30 (1)

3 Article 30 (2)

4 Article 31 (1)

5 Article 92

However, “No person who has been twice elected to the office of President by the People shall be qualified thereafter to be elected to such office by the People.”[6]

The framers have stated that, "The poll for the election of the President shall be taken not less than one month and not more than two months before the expiration of the term of office of the President in office."[7] and that, "The President of the Republic shall be elected by the People and shall hold office for a term of five years."[8]

The framers go on to state that, "Notwithstanding anything to the contrary in the preceding provisions of this Chapter, the President may, at any time after the expiration of four years from the commencement of his term of office, by Proclamation, declare his intention of appealing to the People for a mandate to hold office by election, for a further term."[9]And "upon the making of a Proclamation... the Commissioner of Elections shall be required to take a poll for the Election of the President." [10] Thereafter, "Where a poll for the election of a President is taken, the term of office of the person elected as President at such election shall commence on the expiration of the term of office of the President in office."[11]

Furthermore, it has been intended by the framers that "The person declared elected as President at an election held under this paragraph shall, if such person is the President in office, hold office for a term of five years commencing on such date in the year in which that election is held being a date after such election or in the succeeding year, as corresponds to the date on which his first term of office commenced whichever date is earlier; or is not the President in office, hold office for a term of five years commencing on the date on which the result of such election is declared."[12]

The Powers, Duties and Responsibilities of the Executive President

The founding fathers of the 1978 2nd Republican Constitution as amended have not created a President who is a mere Constitutional scarecrow but somewhat of a powerful creature of the Constitution harbouring a wealth powers, duties and responsibilities which must be executed through executive decisions. It is expected by the founding fathers that, "It shall be the duty of the President to ensure that the Constitution is respected and upheld; promote national reconciliation and integration; ensure and facilitate the proper functioning of the Constitutional Council and the institutions referred to in Chapter VIIA (The Constitutional Council); and on the

6 Article 31 (2)
7 Article 31 (3)
8 Article 30 (2)
9 Article 31 3A (a) (i)
10 Article 31 3A (a) (ii)
11 Article 31 (4)
12 Article 31 3A (d) (i) (ii)

advice of the Election Commission, ensure the creation of proper conditions for the conduct of free and fair elections and referenda."[13] And also that the, "The President shall, by virtue of his office attend Parliament once in every three months. In discharge of this function the President shall be entitled to all the privilege, immunities and powers of a Member of Parliament, other than the entitlement to vote, and shall not be liable for any breach of the privilege of Parliament or of its members."[14] However it is interesting to note that "Upon such assumption of office the President shall cease to hold any other office created or recognised by the Constitution and if he is a Member of Parliament, shall vacate his seat in Parliament. The President shall not hold any other office or place of profit whatsoever."[15]

It is intended by the founding fathers that "In addition to the powers, duties and functions expressly conferred or imposed on, or assigned to the President by the Constitutional or other written law, the President shall have the power to make the Statement of Government Policy in Parliament at the commencement of each session of Parliament; to preside at ceremonial sittings of Parliament; to summon, prorogued and dissolve Parliament; to receive and recognise, and to appoint and accredit Ambassadors, High Commissioners, Plenipotentiaries and other diplomatic agents; to appoint as President's Counsels, attorneys- at - law who have reached eminence in the profession and have maintained high standards of conduct and professional rectitude....; to keep the Public Seal of the Republic, and to make and execute under the Public Seal, the acts of appointment of the Prime Minister and other Ministers of the Cabinet of Ministers, the Chief Justice and other judges of the Supreme Court, the President of the Court of Appeal and other judges of the Court of Appeal, and such Grant's and dispositions of lands and other immovable property vested in the Republic as the President is by law required or empowered to do, and to use the Public Seal for dealing all things whatsoever that shall pass that Seal; to declare war and peace; and to do all such acts and things, not inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage the President is authorized or required to do. The President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka grant a pardon, either free or subject to lawful conditions; grant any respite, either indefinite for such period as the President may think fit, of the execution of any sentence passed on such offender; substitute a less severe form of punishment for any punishment imposed on such offender; or remit the whole or any part of any punishment imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence. The President may in the case of any person who is or has

13 Article 33 (1) (a) – (d)

14 Article 32 (3)

15 Article 32 (2)

become subject to any qualifications specified in paragraph (d), (e), (f), (g) or (h) of Article 89 or sub - paragraph (1) of Article 91 grant a pardon , either free or subject to lawful conditions; or reduce the period of such disqualification. When any offence has been committed for which the offender may be tried within the Republic of Sri Lanka, the President may grant a pardon to any accomplice in such offence who shall give information as shall lead to the conviction of the principal offender or any one of such principal offenders, if more than one."[16]

Is the Executive President constitutionally accountable for his Executive Decisions?

Another interesting feature of the 1978 2nd Republican Constitution as amended is that the office of the Executive President is peculiarly a master and not a slave. The Executive President enjoys sumptuous protection in the exercise of his or executive powers and duties and is ingeniously capable of becoming a crucially dominating factor within our democracy. It has been constitutionally accorded that "While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or committed to be done by the President either in his official or private capacity;... Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of the powers of the President under Article 33 (2) (g)."[17]

Nevertheless, it is not intended by the founding fathers that the Executive President is coddled, cuddled and sheltered under the robe of Presidential Immunity for the Executive President is nonetheless a fallible human being whose exalted position and vast power can be denounced and abused by the Executive President himself due to his fallible human qualities. Such an Executive President must constantly be reminded that he has a great mission as a chosen man considered by the Public for the unique wisdom and genius endowed upon him to steer the nation's course. An Executive President who is immersed in such splendid power who abuses it might be subject to vivid public criticism even viciously by the people. Since his life is sheltered he may not face such acts in the face unless through courageous media activism under the concepts of the freedom of speech and information.

To prevent such warfare the founding fathers have invented the concept of Constitutional Presidential Responsibility. It is stated that "The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties, and functions, under the Constitution and any written law, including the law for the time being relating to public security."[18]

16 Article 33 (2) (a) – (h) and Article 34 (1) (a) – (d) and Article 34 (2) (a) and (b) and Article 34 (3)

17 Article 35 (1) and proviso 2 to Article 35 (1)

18 Article 33A

And further the founding fathers are of the view that even though that the Executive President cannot be made liable for criminal or civil conduct while he or she holds such office however it has been provided that, "Where provision is made by law limiting the time within which proceedings of any description may be instituted against any person, a period of time during which such person holds the office of President of the Republic of Sri Lanka shall not be taken into account in calculating any period of time prescribed by law." [19]And "nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney - General, in respect of anything done or committed to be done by the President, in his official capacity:..." [20] Furthermore, "The immunity conferred by the provisions of paragraph (1) shall not apply to proceedings in the Supreme Court under paragraph (2) of the Article 129 and to proceedings under Article 130 (a) relating to election of the President or the validity of a referendum."[21]

In fettering the immense constitutional power inherited by an Executive President the founding fathers have invented a constitutional machinery to remove from office a tyrannical presidential dictator.

Can the Executive President be constitutionally removed from office if he or she violates any Constitutional or Statutory provisions? If so How?

The framers of the 1978 2nd Republican Constitution as amended are of the view that, "Any Member of Parliament may, by a writing addressed to the Speaker, give notice of a resolution alleging that the President is permanently incapable of discharging the functions of his office by reason of mental or physical infirmity or that the President has been guilty of intentional violation of the Constitution, treason, bribery, misconduct or corruption involving the abuse of the powers of his office, or any offence under any law, involving moral turpitude and setting out full particulars of the allegation or allegations made and seeking an inquiry and report thereon by the Supreme Court. No notice of such resolution shall be entertained by the Speaker or placed on the Order Paper of Parliament unless it complies with the provisions of sub - paragraph (a) and such notice of resolution is signed by not less than two - thirds of the whole number of Members of Parliament; or such notice of resolution is signed by not less than one - half of the whole number of Members of Parliament and the Speaker is satisfied and such allegation or allegations merit inquiry and report by the Supreme Court. Where such resolution is passed by not less than two - thirds of the whole number of Members (including those not present) voting in its favour, the allegation or allegations contained in such resolution shall be referred by the Speaker

19 Article 35 (2)

20 Proviso 1 to Article 35 (1)

21 Article 35 (3)

to the Supreme Court for inquiry and report. The Supreme Court shall, after due inquiry at which the President shall have the right to appear and to be heard, in person or by an attorney- at- law, make a report of its determination to Parliament together with the reasons therefor. Where the Supreme Court reports to Parliament that in its opinion the President is permanently incapable of discharging the functions of his office by reason of mental or physical infirmity or that the President has been guilty of any of the other allegations contained in such resolution, as the case may be, Parliament may by a resolution passed by not less than two - thirds of the whole number of Members (including those not present) voting in its favour remove the President from office."[22]

Is it constitutionally possible for the Executive President to violate fundamental human rights guaranteed under the 1978 2nd Republican Constitution through his or her Executive Decisions?

As mentioned earlier in terms of the proviso to Article 35 (1) that "provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney General, in respect of anything done or committed to be done by the President, in his official capacity."

And in terms of Article 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.” (Chapter III)

In terms of the Article 126 (1) which states the substantive law, it has been stated by the constitutional framers that, "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognised by Chapter III or Chapter IV."

Hence it is trite law that the Executive President cannot be made personally liable for fundamental rights or language rights violations as a direct or indirect result of an Executive Decision or Decisions taken by him or her. Thus the limit is that the Attorney General can be made a Respondent and the Attorney General can be directed by the Supreme Court to rectify such violations on behalf of the Executive President.

22 Article 38 (2)

Are the Superior Courts in Sri Lanka vested with the absolute jurisdiction to judicially review the Executive Decisions taken by the Executive President?

It is intended by the framers of 1978 2nd Republican Constitution as amended that "Every public officer, judicial officer and every other person as is required by the Constitution to take an oath or make an affirmation on entering upon the duties of his office, every holder of an office required under the existing law to take an official oath and every person in the service of every local authority and of every Public Corporation shall take and subscribe the oath or make and subscribe the affirmation set out in the Fourth Schedule. Any such public officer, judicial officer, person or holder of an office failing to take and subscribe such oath or make and subscribe such affirmation after the commencement of the Constitution on or before such date as may be prescribed by the Prime Minister by Order published in the Gazette shall cease to be in service or hold office."[23]

The framers have prescribed the oath that such officers should take in the Fourth Schedule to the Constitution as follows;

"FOURTH SCHEDULE

Articles 32, 53, 61, 107, 165

"I… do

Solemnly declare and affirm

–––––––––––––––––––––––– that I will faithfully perform the duties

Swear

and discharge the functions of the office of…… in accordance with the Constitution of the Democratic Socialist Republic of Sri Lanka and the law, and that I will be faithful to the Republic of Sri Lanka and that I will to the best of my ability uphold and defend the Constitution of the Democratic Socialist Republic of Sri Lanka."

The framers have interpreted the term Judicial Officer as follows;

"judicial officer", [other than in Article 111M], means any person who holds office as –

(a) a Judge of the Supreme Court or a Judge of the Court of Appeal;

(b) any Judge of the High Court or any Judge, presiding officer or member of any other Court of First Instance, tribunal or institution created and established for the administration of Justice or for the adjudication of any labour or other dispute but does not include a person who performs arbitral functions or a

23 Article 165

public officer whose principal duty or duties is or are not the performance of functions of a judicial nature."[24]

Hence it is interesting to note that the framers of the Constitution have intended that the Justices of the Superior Court must swear to uphold and protect the Constitution in the discharge of their duties as Justices of the Superior Courts.

Within this purview in this context we must consider whether the Superior Courts in Sri Lanka vested with the absolute jurisdiction to judicially review the Executive Decisions taken by the Executive President?

In determining whether the Executive Decisions of the Executive President come under the wing of judicial review of the superior courts it is prudent to first examine separately the jurisdiction granted by the 1978 2nd Republican Constitution as amended to the two superior courts in Sri Lanka, namely the Supreme Court and the Court of Appeal.

The constitutional jurisdiction of the Supreme Court is limited to the following;

1. "The Supreme Court of the Republic of Sri Lanka shall be the highest and final superior Court of record in the Republic and shall subject to the provisions of the Constitution exercise –
   (a) jurisdiction in respect of constitutional matters;
   (b) jurisdiction for the protection of fundamental rights;
   (c) final appellate jurisdiction;
   (d) consultative jurisdiction;
   (e) jurisdiction in election petitions;
   (f) jurisdiction in respect of any breach of the privileges of Parliament; and
   (g) jurisdiction in respect of such other matters which Parliament may by law vests or ordain."[25]
2. "The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution:

Provided that –

(a) in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83;

(b) where the Cabinet of Ministers certifies that a Bill, which is described in its long

24 Article 170
25 Article 118

title as being for the amendment of any provisions of the Constitution; or for the repeal and replacement of the Constitution, intended to be passed with the special majority required by Article 83 and submitted to the People by Referendum, the Supreme Court shall have and exercise no jurisdiction in respect of such Bill;

(c) where the Cabinet of Ministers certifies that a Bill which is not described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, is intended to be passed with the special majority required by Article 84, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83 or whether such Bill is required to comply with paragraphs (1) and (2) of Article 82 ; or

(d) where the Cabinet of Ministers certifies that any provision of any Bill which is not described in its long title as being for the amendment of any provision of the Constitution or for the repeal and replacement of the constitution is intended to be passed with the special majority required by Article 84, the only question which the Supreme Court may determine is whether any other provision of such Bill requires to be passed with the special majority required by Article 84 or whether any provision of such Bill requires the approval by the People at a Referendum by virtue of the provisions of Article 83 or whether such Bill is required to comply with the provisions of paragraphs (1); and (2) of Article 82.[26]

3. "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution and accordingly, whenever any such question arises in the course of any proceedings in any other court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasi-judicial functions, such question shall forthwith be referred to the Supreme Court for determination. The Supreme Court may direct that further proceedings be stayed pending the determination of such question.[27]

4. "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.[28]

5. "The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and

26 Article 120 (a) – (d)

27 Article 125 (1)

28 Article 126 (1)

the judgments and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.[29]

6. "If at any time it appears to the President of the Republic that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer that question to that Court for consideration and the Court may, after such hearing as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon.[30]
7. "The Supreme Court shall have the power to hear and determine and make such orders as provided for by law on –
   (a) any legal proceeding relating to election of the President or the validity of a referendum;
   (b) any appeal from an order or judgment of the Court of Appeal in an election petition case:.[31]
8. "The Supreme Court shall have according to law the power to take cognizance of and punish any person for the breach of the privileges of Parliament[32]
9. "Subject to the provisions of the Constitution and of any law the Chief Justice with any three Judges of the Supreme Court nominated by him, may, from time to time, make rules regulating generally the practice and procedure of the Court..[33]

The constitutional jurisdiction of the Court of Appeal is limited to the following;

1. "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance tribunal or other institution may have taken cognizance: Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."[34]

29 Article 127 (1)
30 Article 129 (1)
31 Article 130
32 Article 131
33 Article 136 (1)
34 Article 138 (1)

2. "The Court of Appeal may in the exercise of its jurisdiction, affirm, reverse, correct or modify any order, judgment, decree or sentence according to law or it may give directions to such Court of First Instance, tribunal or other institution or order a new trial or further hearing upon such terms as the Court of Appeal shall think fit."[35]
3. "The Court of Appeal may further receive and admit new evidence additional to, or supplementary of, the evidence already taken in the Court of First Instance touching the matters at issue in any original case, suit, prosecution or action, as the justice of the case may require."[36]
4. Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of *certiorari, prohibition, procedendo, mandamus* and *quo warranto* against the judge of any Court of First Instance or tribunal or other institution or any other person : provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal".[37]
5. "The Court of Appeal may grant and issue orders in the nature of writs of habeas corpus to bring up before such Court –
   a) the body of any person to be dealt with according to law; or
   b) the body of any person illegally or improperly detained in public or private custody, and to discharge or remand and person so brought up or otherwise deal with such person according to law:

   Provided that it shall be lawful for the Court of Appeal to require the body of such person to be brought up before the most convenient Court of First Instance and to direct the judge of such court to inquire into and report upon the acts of the alleged imprisonment or detention and to make such provision for the interim custody of the body produced as to such court shall seem right ; and the Court of Appeal shall upon the receipt of such report, make order to discharge or remand the person so alleged to be imprisoned or detained or otherwise deal with such person according to law and the Court of First Instance shall conform to and carry into immediate effect, the order so pronounced or made by the Court of Appeal :

35 Article 139 (1)
36 Article 139 (2)
37 Article 140

Provided further that if provision be made by law for the exercise by any court, of jurisdiction in respect of the custody and control of minor children, then the Court of Appeal, if satisfied that any dispute regarding the custody of any such minor child may more properly be dealt with by such court, direct the parties to make application in that court in respect of the custody of such minor child."[38]

6. "The Court of Appeal may direct –
   (i) that a prisoner detained in any prison be brought before a court-martial or any Commissioners acting under the authority of any Commission from the President of the Republic for trial or to be examined relating to any matters pending before any such court-martial or Commissioners respectively ; or
   (ii) that a prisoner detained in prison be removed from one custody to another for purposes of trial."[39]
7. "The Court of Appeal shall have the power to grant and issue injunctions to prevent any irremediable mischief which might ensure before a party making an application for such injunction could prevent the same by bringing an action in any Court of First Instance :

   Provided that it shall not be lawful for the Court of Appeal to grant an injunction to prevent a party to any action in any court from appealing to or prosecuting an appeal to the Court of Appeal or to prevent any party to any action in any court from insisting upon any ground of action, defense or appeal, or to prevent any person from suing or prosecuting in any court, except where such person has instituted two separate actions in two different courts for and in respect of the same cause of action, in which case the Court of Appeal shall have the power to intervene by restraining him from prosecuting one or other of such actions as to it may seem fit."[40]
8. "The Court of Appeal shall have and exercise jurisdiction to try election petitions in respect of the election to the membership of Parliament in terms of any law for the time being applicable in that behalf."[41]
9. "The Court of Appeal may, *ex mero motu* or on any application made, call for, inspect and examine any record of any Court of First Instance and in the exercise of its revisionary powers may make any order thereon as the interests of justice may require."[42]

38 Article 141
39 Article 142
40 Article 143
41 Article 144
42 Article 145

10. "The Court of Appeal shall also have and exercise all such powers and jurisdiction, appellate and original, as Parliament may by law vest or ordain."[43]

Hence no one can argue that the framers of the 1978 2nd Republican Constitution as amended had not invested in the Superior Courts any other jurisdiction other than what is stated in the preceding Articles. Thus it is clearly evident that the Superior Courts are not vested with the jurisdiction to judicially review the Executive Decisions of the Executive President unless it relates to a breach or an imminent breach of a fundamental right or a language right recognised by Chapter III and Chapter IV of the Constitution. Even such an action can only be filed against the Attorney General.

If the Superior Courts attempt to review the Executive Decision of an Executive President, even in the guise of a fundamental rights or language right violation if such a decision does not commit such violations, the Superior Courts are themselves violating constitutional provisions they have solemnly sworn to protect and uphold.

Under what grounds can the Attorney General are made legally liable for the Executive Decisions of the Executive President on behalf of the Executive President?

As already discussed the Attorney General can be made legally liable on behalf of the Executive President for the Executive Decisions taken by him or her only if the consequences of such a decision or decisions results in a breach or an imminent breach of a fundamental right or a language right.

The framers of the 1978 2nd Republican Constitution as amended had prescribed in Chapter III and Chapter IV the following as the fundamental rights and the language rights that can be violated by an Executive Decision of the Executive President for which the Attorney General can be made liable;

The Fundamental Rights

1. "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."[44]
2. "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[45]
3. "All persons are equal before the law and are entitled to the equal protection of the law."[46]

43 Article 138 (2)
44 Article 10
45 Article 11
46 Article 12 (1)

4. "No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds : Provided that it shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any language as a qualification for any employment or office in the Public, Judicial or Local Government Service or in the service of any Public Corporation, where such knowledge is reasonably necessary for the discharge of the duties of such employment or office : Provided further that it shall be lawful to require a person to have a sufficient knowledge of any language as a qualification for any such employment or office where no function of that employment or office can be discharged otherwise than with a knowledge of that language."[47]
5. "No person shall, on the grounds of race, religion, language, caste, sex or any one of 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."[48]
6. "Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons."[49]
7. "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."[50]
8. "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 such judge made in accordance with procedure established by law."[51]
9. "Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court."[52]
10. "No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment."[53]

47 Article 12 (2)
48 Article 12 (3)
49 Article 12 (4)
50 Article 13 (1)
51 Article 13 (2)
52 Article 13 (3)
53 Article 13 (4)

11. "Every person shall be presumed innocent until he is proved guilty: Provided that the burden of proving particular facts may, by law, be placed on an accused person."[54]
12. "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. Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations. It shall not be contravention of this Article to require the imposition of a minimum penalty for an offence provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed."[55]
13. "The arrest, holding in custody, detention or other deprivation of personal liberty of a person, by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or the Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967, or such other law as may be enacted in substitution therefor, shall not be a contravention of this Article."[56]
14. "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 and 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."[57]

54 Article 13 (5)
55 Article 13 (6)
56 Article 13 (7)
57 Article 14 (1)

15. "A person who, not being a citizen of any other country, has been permanently and legally resident in Sri Lanka immediately prior to the commencement of the Constitution and continues to be so resident shall be entitled, for a period of ten years from the commencement of the Constitution, to the rights declared and recognized by paragraph (1) of this Article."[58]
16. "Every citizen shall have the right of access to any information as provided for by law, being information that is required for the exercise or protection of a citizen's right held by:-

(a) the State, a Ministry or any Government Department or any statutory body established or created by or under any law;

(b) any Ministry of a Minster of the Board of Ministers of a Province or any Department or any statutory body established or created by a statute of a Provincial Council;

(c) any local authority; and

(d) any other person, who is in possession of such information relating to any institution referred to in sub-paragraphs (a) (b) or (c) of this paragraph.

No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary."[59]

The Language Rights

1. "The Official Language of Sri Lanka shall be Sinhala." [60]
2. "Tamil shall also be an official language." [61]
3. "English shall be the link language." [62]
4. "The National Languages of Sri Lanka shall be Sinhala and Tamil." [63]
5. "A Member of Parliament or a member of a Provincial Council or a Local Authority shall be entitled to perform his duties and discharge his functions in Parliament or in such Provincial Council or Local Authority] in either of the National Languages. [64]

58 Article 14 (2)
59 Article 14A (1) and Article 14A (2)
60 Article 18 (1)
61 Article 18 (2)
62 Article 18 (3)
63 Article 19
64 Article 20

6. A person shall be entitled to be educated through the medium of either of the National Languages."[65]
7. "Sinhala and Tamil shall be the languages of administration throughout Sri Lanka and Sinhala shall be the language of administration and be used for the maintenance of public records and the transaction of all business by public institutions of all the Provinces of Sri Lanka other than the Northern and Eastern Provinces where Tamil shall be so used: Provided that the President may, having regard to the proportion which the Sinhala or Tamil linguistic minority population in any unit comprising a division of an Assistant Government Agent, bears to the total population of that area, direct that both Sinhala and Tamil or a language other than the language used as the language of administration in the province in which such area may be situated, be used as the language of administration for such area."[66]
8. "In any area where Sinhala is used as the language of administration a person other than an official acting in his official capacity, shall be entitled :

(a) to receive communications from and to communicate and transact business with, any official in his official capacity, in either Tamil or English;

(b) If the law recognizes his right to inspect or to obtain copies of or extracts from any official register, record, publication or other document, to obtain a copy of, or an extract from such register, record, publication or other document, or a translation thereof, as the case may be, in either Tamil or English;

(c) where a document is executed by any official for the purpose of being issued to him, to obtain such document or a translation thereof, in either Tamil or English;"[67]

9. "In any area where Tamil is used as the language of administration, a person other than an official acting in his official capacity, shall be entitled to exercise the rights and to obtain the services, referred to in sub paragraphs (a), (b) and (c) of paragraph (2) of this Article, in Sinhala or English."[68]
10. "A Provincial Council or a Local Authority which conducts its business in Sinhala shall be entitled to receive communications from and to communicate and transact business with, any official in his official capacity, in Sinhala and a Provincial Council or a Local Authority which conducts its business in Tamil shall be entitled to receive communications from and to communicate and transact business with, any official in his official capacity, in Tamil:"[69]

65 Article 21(1)
66 Article 22
67 Article 22 (2)
68 Article 22 (3)
69 Article 22 (4)

11. "A person shall be entitled to be examined through the medium of either Sinhala or Tamil or a language of his choice at any examination for the admission of persons to the Public Service, Judicial Service, Provincial Public Service, Local Government Service or any public institution, subject to the condition that he may be required to acquire a sufficient knowledge of Tamil or Sinhala, as the case may be, within a reasonable time after admission to such service or public institution where such knowledge is reasonably necessary for the discharge of his duties:"[70]
12. "All laws and subordinate legislation shall be enacted or made and published in Sinhala and Tamil, together with a translation thereof in English :" [71]
13. "All Orders, Proclamations, Rules, By-laws, Regulations and Notifications made or issued under any written law other than those made or issued by a Provincial Council or a Local Authority and the Gazette shall be published in Sinhala and Tamil together with a translation thereof in English."[72]
14. "All Orders, Proclamations, Rules, By-laws, Regulations and Notifications made or issued under any written law by any Provincial Council or Local Authority and all documents, including circulars and forms issued by such body or any public institution shall be published in the language used in the administration in the respective areas in which they function, together with a translation thereof in English."[73]
15. "All laws and subordinate legislation in force immediately prior to the commencement of the Constitution, shall be published in the Gazette in the Sinhala and Tamil Language as expeditiously as possible."[74]
16. "Sinhala and Tamil shall be the languages of the Courts throughout Sri Lanka and Sinhala shall be used as the language of the courts situated in all the areas of Sri Lanka except those in any area where Tamil is the language of administration. The record and proceedings shall be in the language of the Court. In the event of an appeal from any court records shall also be prepared in the language of the court hearing the appeal, if the language of such court is other than the language used by the court from which the appeal is preferred:"[75]
17. "Any party or applicant or any person legally entitled to represent such party or applicant may initiate proceedings and submit to court pleadings and other

70 Article 22 (5)
71 Article 23(1)
72 Article 23 (2)
73 Article 23 (3)
74 Article 23 (4)
75 Article 24 (1)

documents and participate in the proceedings in courts, in either Sinhala or Tamil."[76]

18. "Any judge, juror, party or applicant or any person legally entitled to represent such party or applicant, who is not conversant with the language used in a court, shall be entitled to interpretation and to translation into Sinhala or Tamil provided by the State, to enable him to understand and participate in the proceedings before such court and shall also be entitled to obtain in such language any such part of the record or a translation thereof, as the case may be, as he may be entitled to obtain according to law."[77]

Exceptions to the Rule

The founding fathers of the 1978 2nd Republican Constitution as amended was of the opinion that fundamental rights can be lawfully abrogated by an Executive Decision of an Executive President in the following instances. Namely;

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. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security."[78]
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."[79]
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."[80]
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."[81]
5. "The exercise and operation of the fundamental right declared and recognized by Article 14(1)(g) shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation to –

76 Article 24 (2)
77 Article 24 (3)
78 Article 15(1)
79 Article 15(2)
80 Article 15(3)
81 Article 15(4)

(a) the professional, technical, academic, financial and other qualifications necessary for practicing any profession or carrying on any occupation, trade, business or enterprise and the licensing and disciplinary control of the person entitled to such fundamental right; and

(b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise."[82]

6. "The exercise and operation of the fundamental right declared and recognized by Article 14(1)(h) shall be subject to such restrictions as may be prescribed by law in the interests of national economy."[83]

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. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security."[84]

8. "The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them."[85]

Are the Superior Courts of Sri Lanka constitutionally empowered to review the Executive Decisions of the Executive President if such Decisions violate the provisions of the 1978 2nd Republican Constitution as amended?

The framers have stated that in Sri Lanka, "Unless Parliament is sooner dissolved, every Parliament shall continue for five years from the date appointed for its first meeting and no longer, and the expiry of the said five years shall operate at dissolution of Parliament." (Article 62(2))

However, the framers were of the opinion that, "The President may by Proclamation, summon, prorogued, and dissolve Parliament: Provided that the President shall not dissolve Parliament until the expiration of a period not less than four years and six months from the date appointed for its first meeting, unless

82 Article 15(5)
83 Article 15(6)
84 Article 15(7)
85 Article 15(8)

Parliament requests the President to do so by a resolution passed by not less than two - thirds of the whole number of Members (including those not present), voting in its favour." (Article 70(1))

Nevertheless, what will happen if suddenly the Executive President, for reasons best known to himself or herself, takes an Executive Decision and decides to dissolve the Parliament before the time period within which he or she is empowered to do so?

It cannot be argued that such an Executive Decision is contrary to the intention of the framers of the 1978 2nd Republican Constitution as amended.

The next question that arises is can the Superior Courts of Sri Lanka, like a knight in shining armour, come to rescue of the damsel in distress, the Parliament, and impose leverage on the Executive President by judicially reviewing such a decision?

The straightforward answer is simply a No. The reason for this has been given by the framers of the 1978 2nd Republican Constitution as amended, themselves.

It is intended by the framers that, "While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by the President, either in his official or private capacity: Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney - General, in respect of anything done committed to be done by the President, in his official or private capacity:....." And this relates to a violation of a fundamental right or a language right. (Article 35(1))

However the Executive President's Decision to dissolve the Parliament prior to the time period within which he is empowered to do so is not a violation of a fundamental right or a language as evident from the fundamental rights and language rights discussed above. Hence it is a violation of a provision of the Constitution and the Executive President has a duty to "ensure that the Constitution is respected and upheld," (Article 33(1) (a)).

If so what is the constitutionally legitimate remedy?

It is the view of the framers that the, "The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security." (Article 33A)

Hence the remedy is provided for such an Executive President to be removed by the Parliament through a no confidence motion in terms of the provisions of Article 38(2) and the role of the Superior Courts in such proceedings are limited only to act as a forum of inquiry and report to the Parliament. (Article 38(2) (c) (d) and (e).

Constitutional interpretations given to the powers of the Executive President in the United States of America; Can the Superior Courts arbitrarily interpret constitutional provisions relating to the powers of the Executive President without the relevant constitutional jurisdiction to do so?

In the Supreme Court decision of William Marbury Vs James Madison, Secretary of State of the United States,[86] it has been held by Chief Justice John Marshall and agreed to by Justices William Cushing, William Paterson, Samuel Chase, Bushrod Washington and Alfred Moore that;

"By the Constitution of the United States, the President is vested with certain important political powers; in the exercise of which he is to use his or her own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of those duties, he is authorised to appoint certain officers who act by his authority and in conformity with his orders. In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by advertising to the act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such officer, can never be examinable by the courts." (pg. 165 – 166)

"The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power, to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained." (pg. 178 – 179)

" "No person" says the Constitution "shall be convicted of treason unless on the testimony of the witnesses to the same overt act, or on confession in open court." Here the language of the Constitution is addressed specifically to the Courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of courts sufficient for conviction, must the constitutional principle yield to the legislative act?.....it is apparent, that the framers of the Constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature."(pg.179 – 180)

86 5 U.S. (1 Cranch) 137, Decided on 24.2.1803

"Why otherwise does it direct the judges to take an oath to support it? This path certainly applies, in an especial manner; to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?" (pg. 180)

"The oath of office too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. If it in those words, "I do solemnly swear that I will administer justice with respect to persons and equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me according to the best of my abilities and understanding, agreeably to the Constitution, and the laws of the United States."(pg. 180)

"Why does a judge swear to discharge, his duties agreeably to the Constitution of the United States, if that Constitution forms no rule of his government?...."(pg. 180)

"If such be the real state of things, this is worse than solemn mockery. To prescribe or to take this oath, becomes equally a crime." (pg. 180)

"It is also entirely worthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance to the Constitution, have that rank." (pg. 180)

"Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle supposed to be essential to all written Constitutions that a law repugnant to the Constitution is void; and those courts, as well as other departments, are bound by that instrument."(pg. 180)

In the Supreme Court decision of Richard M. Nixon, *President of the United States Vs. United States*[87] it has been held by Chief Justice Burger that;

"In the performance of assigned constitutional duties each branch of government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.... Many decisions of this Court, however have unequivocally reaffirmed the holding of *Marbury Vs. Madison* 1 Cranch 137, 2 L. Ed. 60 (1803) "It is emphatically the province and duty of the judicial department do say what the law is." "(pg. 3105 – 3106)

"And in *Baker vs. Carr* 369 U.S. at 211..."Deciding whether a matter has any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretations, and is a responsibility of this court as the ultimate interpreter of the Constitution.... we therefore reaffirm that "it is the province and duty of this court to say what the law is"..... *Marbury Vs. Madison* supra 1 Cranch at 177, 2 L. E.d. 60."(pg. 3105 – 3106)

87 94 Supreme Court Reporter 3090, 418 U.S. 683, Decided on 24.7.1974

In the Supreme Court decision of Clinton, *President of the United States et. al Vs. City of New York et. al*[88] it has been held by Justice Breyer that, "The President unlike most agency decision makers, is an elected official. He is responsible to the voters, who in principle, will judge the manner in which he exercises his delegated authority....." (pg. 490)

In the same decision it has been held by Justice Kennedy that;

"Separation of powers was designed to implement a fundamental insight; concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: "The accumulation of all powers, legislative, executive and judicial, in the same hands....may be justly be pronounced the very definition of tyranny" "(pg. 450)

"Quoting Montesquieu, the Federalist Papers made the point in the following manner: "When the legislative and executive powers are united in the same person or body, says he there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." Again; "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator. Were it joined with the executive power, the judge might behave with all the violence of an oppressor." The Federalist No 47 Supra, at 303." (pg. 451)

From these Superior Court decisions it clear as crystal that in other jurisdictions the Superior Courts are reluctant to absorb into themselves a jurisdiction to judicially review the Executive Decisions of an Executive President and unduly step into the shoes of the legislative and the executive branches of the government unless such a jurisdiction is vested in them by the Constitution. The Superior Courts have accepted their constitutional limitations that the only jurisdiction they have are to interpret the laws when required and not to make laws or to review Executive Decisions of an Executive President who is only politically responsible to his or her electors. The Superior Courts have admitted that the Supreme Law of the land is the Constitution and all the other laws are subordinate to it and laws that have not been enacted in pursuance to the constitutional provisions are unlawful. The Superior Courts are of the view that in interpreting a law they must refer to and adhere to the provisions in the Constitution and if they assume unto themselves a jurisdiction that have not been granted to them by the Constitution they would be violating the Constitution which they have sworn to uphold and protect and if they violate constitutional provisions they are going against the oath they have taken to protect and to uphold the Supreme Law of the land and are becoming tyrants. Hence Superior Courts cannot Judicially review and arbitrally intervene into Executive Decisions of an Executive President

88 524 U.S. 417 (1998), Decided on 25.6.1998

unless they are vested with jurisdiction to do so by the Supreme Law of the land which is non-other than the Constitution.

The Social Contract and its relationship with the Constitution: How does it affect the Judicial Decisions of the Superior Courts to review Executive Decisions of the Executive President?

The preamble to the 1978 2nd Republican Constitution as amended is undoubtedly impregnated with the principle of Social Contract. It is significant to note what the preamble says, in theoretical evidence;

"**SVASTI**

The PEOPLE OF SRI LANKA having, by their Mandate freely expressed and granted on the Sixth day of the waxing moon in the month of Adhi Nikini in the year Two Thousand Five Hundred and Twenty one of the Buddhist Era (being Thursday the Twenty first day of the month of July in the year One Thousand Nine Hundred and Seventy seven), entrusted to and empowered their Representatives elected on that day to draft, adopt and operate a new Republican Constitution in order to achieve the goals of a DEMOCRATIC SOCIALIST REPUBLIC, and having solemnly resolved by the grant of such Mandate and the confidence reposed in their said Representatives who were elected by an overwhelming majority, to constitute SRI LANKA into a DEMOCRATIC SOCIALIST REPUBLIC whilst ratifying the immutable republican principles of REPRESENTATIVE DEMOCRACY and assuring to all People s FREEDOM, EQUALITY, JUSTICE , FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of SRI LANKA and of all the People of the World, who come to share with those generations the effort of working for the creation and preservation of a JUST AND FREE SOCIETY:

WE, THE FREELY ELECTED REPRESENTATIVES OF THE PEOPLE OF SRI LANKA, in pursuance of such Mandate, humbly acknowledging our obligations to our People and gratefully remembering their heroic and unremitting struggle to regain and preserve their rights and privileges so that the Dignity and Freedom of the Individual may be assured, Just, Social, Economic and Cultural Order attained, the Unity of the Country restored, and Concord established with other Nations,

do hereby adopt and enact this

CONSTITUTION

as the

SUPREME LAW

of the

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA."

And the separation of powers afterwith;

"In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.[89]

The Sovereignty of the People shall be exercised and enjoyed in the following manner:–

(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;

(b) the executive power of the People, including the defense of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;

(d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and

(e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament and at every Referendum by every citizen who has attained the age of eighteen years and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors."[90]

To comprehend properly this philosophical agreement, we must be mindful of and comprehend what it actually embodies.

Referring to the earliest primitive citations of the Social Contract, it has been written that; "In the early days of the cosmic cycle mankind lived on an immortal plane ,and, dancing on air in a sort of fairyland, where there was no need of food or clothing, and no private property, family, government or laws. Then gradually the process of cosmic decay began its work, and mankind became earthbound, and felt the need of food and shelter. As men lost their primeval glory distinctions of class (Varna) arose, and they entered into agreements one with another, accepting the institutions of private property and family. With this theft, murder, adultery, and other crimes began, and so the people met together and decided to appoint one man among then to maintain order in return for a share of the produce of their fields and

89 Article 3

90 Article 4 (a) – (e)

herds. He was called the "Great Chosen One" (Mahasammata), and he received the title of Raja because he pleaded the people.... The story of Mahasammata gives, in the form of myth worthy of Plato, one of the world's earliest versions of widespread contractual theory of the State, which in Europe is specially connected with the names of Locke and Rousseau. It implies that the main purpose of government is to establish order, and that the king, as the head of the government, is the first social servant, and ultimately dependent on the suffrage of his subjects."[91]

In his work "The Social Contract" Rousseau [92]is of the opinion that the "Social Contract" means;

"The contract's terms reduce themselves, when clearly grasped, to a single stipulation, namely: the total alienation to the whole community of each associate, together with every last one of his rights. The alienation is made without reservations, so that, in the second place, no more perfect union is possible, and no associate has any subsequent demand to make upon the others. For if the individual retains any rights whatsoever, this is what would happen: There being no common superior able to say the last word on any issue between him and the public, he would be his own judge on this or that point, and so would thus persist; and the association would necessarily become useless, if not tyrannical. Each gives himself to everybody, that, in the third place, he gives himself to nobody; and since every associate acquires over every associate the same power he grants to every associate over himself, each gains an equivalent for all that he loses, together with greater power to protect what he possesses. If, then, we exclude from the social contract everything not essential to it, we shall find that it reduces itself to the following terms: "Each of us puts into common pool, and under the sovereign control of the general will, his person and all his power. And we, as a community, take each member until ourselves as an indivisible part of the whole." This act of association forthwith produces, in lieu of the individual persons of the several contracting parties, a collective moral body. The latter is made up of as many members as there are voices in the assembly, and it acquires, through the said act of association, its unity, its collective self, its life, and its will. A public person formed by other persons uniting in the manner just described was in the past called a city; nowadays it is called a republic or body politic."(pg 32 - 33)

This body politic is the sovereign.

91 The Wonder that was India. A Survey of the Culture of the Indian Sub – Continent before the coming of the Muslims, A.L. Basham, BA PhD FRAS and a Reader in the History of India in the University of London, 16th Edition, Grove Press Inc. New York at pg. 82

92 The Social Contract or Principles of Political Right by Jean Jacques Rousseau, Translated by Willmoore Kendall, With a New Introduction by Roger Sruton, Cultural Critic, Philosopher and a Professor, The Skeptical Reader Series, 2009, Gateway Editions, Regnery Publishing Inc. Washington D.C.

Rousseau is further of the opinion that; "....sovereignty is purely and simply the exercise of the general will, and can in no circumstances therefore be alienated." And that; "Sovereignty is indivisible - and for the self-same reason by which I have shown that it is inalienable: A given will is either general or it is not." (pg 49)

Rousseau explains that; "If the state, i.e., the city, is purely and simply a moral person whose life is in the unity of its members, and if it's most urgent concern is its own preservation, then it must have universal coercive power - i.e., power to set in motion and direct each of its parts in the manner most advantageous to the whole. The social contract therefore gives the body politic an absolute power over its members, like that which nature gives to a man over his limbs. And it is to this power, where it is under the direction of the general will, that - as I have already said - I apply the term sovereignty..... What then is an act of sovereignty, in the strict sense of that term? It is an agreement between the body politic and each of its members, not therefore between a superior and an inferior. It is a lawful agreement, because it is based on the social contract. It is an equitable agreement, because everybody is a party to it. It is a profitable agreement, because it can have no object other than the general welfare. And it is a binding agreement, because it is backed up by collective force and supreme authority....Clearly, then, the power of the sovereign, absolute and sacred and inviolable though it is, does not and cannot exceed the outer limits of the general agreements among the citizens." (pg 57 - 60)

A legitimate question arises in the mind of a scrupulous reader as to why the people enter into a social contract?

Rousseau gives an answer to it in the following terms;

"It is not true that the individuals, in entering into and fulfilling the social contract, are making any real sacrifice. Their situation is actually better as a result of the contract than it was before. They have not given something away, but rather made what is purely and simply a profitable exchange: an uncertain and precarious way of life for one that is better, more secure....." (pg 61)

Rousseau argues that the medium through which the social contract is executed is the "Government". According to the view of Rousseau as written in the following terms;

"The legislative power - must belong - to the people, and the people only;..... The executive power, by contrast, cannot belong to the collectivist qua law - making sovereign body;..... All this points up the need for a special agency whose responsibility it would be: to Marshall the energies of the body politic, and set them to work as the general will may direct; to serve as a means of communication between the state and the sovereign; and to accomplish within the collective person, in a manner of speaking, that which the link between body and soul accomplishes within the individual man.

We need then, look no further for the reason for having a government in the state. It is however, merely the sovereign's agent. To confuse it with the sovereign is to fall into error. What then is the government? I define it as follows: A body that has been created to maintain communication between subjects and sovereign, and that, accordingly, occupies an intermediate position between them. It is charged with the execution of the laws, and the preservation of both civil and political liberty. The several members of this body are called officials or kings - or, what amounts to the same thing, rulers, and the body as a whole is called the prince..... Who argue that the act by which a people places itself under rulers is not in any sense a contract; it is purely and simply a grant of commission - or, if you like, an employment. The rulers, in performing the duties attaching to this employment, are - I repeat - mere agents of the sovereign; they exercise, in the latter's name, precisely the amount of power it has placed in their hands. Nor is that all: The actual alienation of that power by the sovereign would be contrary to the purpose for which the association was formed, and irreconcilable with the nature of political society. Thus the sovereign is entitled to limit or modify or revoke the power it places in their hands when and as it sees fit. I shall, then, use the term government, or supreme administration, to denote the legitimate exercise of executive power, and the term prince, or magistrate, to refer to the man or body of men responsible for the said supreme administration." (pg.100 – 101)

Hence in more simple terms the "Social Contract" stipulates that an individual member of a society alienates himself and all his rights totally and absolutely to the whole community. Once this multitude of members are United into one body it is called the body politic. This body politic in turn is known as the sovereign. The legislative power, the executive power and the judicial power is contained within this sovereign body politic. The government is not the body politic itself neither is it the superior of the body politic nor is it inferior. But rather the government is defined as an intermediary body established between the subjects and the sovereign to communicate between them or to keep both these fractions in touch with the other. It is entrusted with the legislative, executive and the judicial power of the sovereign to be exercised for the benefit of the sovereign and its subjects through the execution of laws and maintaining political and civil liberty. The will that dominates the government is the general will of the body politic or the sovereign. The power vested in the government is only the power the public or the body politic vests in it. If it tries to act beyond the limits of the general will it loses its intermediary role. If the government assumes a particular will of its own as opposed to and stronger than the general will and abuses the general will for its own selfish benefits contrary to the benefit of the body politic, the social union will disappear and the body politic will be dissolved for a dictatorship government with a sovereign of its own and the sovereign established by law by the general will will collide with each other.

Furthermore it can be said that sovereignty is not represented but it consists of the general will of the community of people or the body politic. The government consists of the agents of such people but not their representatives. They do not have a will of their own but they execute the sovereign will granted to them by the people themselves. Hence they cannot decide on their own arbitrarily contrary to the general will of the people. Hence any law that the people have not ratified through their agents in government is null and void for it is not an existing law at all.

Thus it would be considered a devious and an act of a twisted mind if agents of the people who are entrusted by them to exercise their sovereign executive, legislative and the judicial power act in such a manner unauthorized by law which have not been approved by the people, who are the true owners of such sovereign powers. Therefore in cannot be argued that the organs of the government to whom the body politic has endowed and entrusted the sovereign power of executive, legislative and judicial cannot in any manner whatsoever execute acts in the exercise of those powers that are not approved by the people collectively. If they arbitrarily or mistakenly do so, such acts become void for it is not the law.

In other words to explain more explicitly, the written Constitution enacted through the general will and accepted by the people or the body politic as the Supreme Law of the State in which the body politic or the people live cannot be abrogated as a whole or as individual provisions and the three organs of the government entrusted with the sovereign powers of the body politic or the people cannot execute their executive, legislative and the judicial powers contrary and in opposition to the guidance granted to them by the Constitution in their proper execution which is for the general benefit of the body politic or the people as agreed upon by them through constitutional provisions in the Constitution itself.

Therefore it is unambiguous that when exercising jurisdiction it is not the will of the body politic that the Superior Courts should override what is clearly written in the Constitution and review Executive Decisions of an Executive President and thus act arbitrarily beyond the limits imposed upon their jurisdictions when they do not have the constitutional permission by the body politic to do so. If, unfortunately they do so, either arbitrarily or mistakenly, they are in breach of the Constitution which they have solemnly sworn to uphold and protect in contradiction to such oath given by them to the general public or the sovereign they in turn undoubtedly breach the Social Contract embodied within the Constitution as its true spirit.

Epilogue

Once again to conclude, it must be borne in mind that without moot the Constitution is always the Supreme Law and the citadel of the Social Contract. Not just

taking a glimpse but when boldly trespassing into the constitutional inner chambers of the Superior Courts, it is evident that the power wielded by the Superior Courts over the Executive Decisions of the Executive President is constitutionally limited only to the jurisdiction of inquiry and report in removing a President from office by the Parliament through a no confidence motion, and a violation of a fundamental right or a language right, as envisaged by the constitutional framers. Otherwise there seems to be an absolute absence of jurisdiction to judicially review the Executive Decisions of an Executive President. Hence the Superior Courts cannot impose unto themselves a non-existent review jurisdiction over the Executive Decisions of an Executive President.

Thus in articulating all these constitutional provisions, to be on the same page with the constitutional framers, honestly it must be noted that absolute and unlimited power of judicial review of Executive Decisions of an Executive President is a mere myth and a fantasy, existing only within the depths of the judicial minds of the Superior Courts, which has no constitutional solidarity.

As mentioned prior, the Constitution, being superior over every statute, constantly reminds us of the futility of trying to be obsessed with unreal constitutional jurisdictions which can be made to suffer humility in the eyes of the body politic for after all it is the Constitution, which is the primary agreement between the rulers and the ruled. And impeccable assumption of such jurisdiction is constitutional suicide for its unlawful and violates the Constitution which the judiciary has taken a solemn oath to protect and uphold and thus astonishingly undermines in turn the true spirit of the Social Contract.

Hence to conclude further it is without argument that unfettered judicial review of Executive Decisions taken by the Executive President in discharge of his duties to the body politic granted to him by the body politic, who have elected him to such an exalted position, is an astounding breach in the Social Contract and a constitutional violation. It must never be forgotten that at the hands of a violation of constitutional provisions, the Social Contract dies a rather savage and a brutal death.

Finally, it is also spectacular to note that in the contemporary democracies, and in this case in Sri Lanka under the provisions of the 1978 2nd Republican Constitution as amended, the Executive President is no longer an absolutely powerful dictatorial monarch exercising the divine power of the Gods but merely an ordinary human being to whom the people or the body politic have surrendered their sovereignty to be governed for their benefit and well being.

The Executive President is merely the guardian or the trustee of the sovereignty or namely the Executive Power of the People which has been entrusted to him by the Constitution or the Supreme Law of the land. And this trusteeship is based on the

principles of the Social Contract which he must honour. The Constitution has not granted to him the absolute control over the Executive Power of the People but he must be accountable to the Legislature or the Parliament for his exercise of this Executive Power or he can be constitutionally impeached. Hence the Executive President is politically accountable and will be hesitant to commit mischief in the exercise of his immense Executive Power but will be cautious in his Executive Conduct as the Executive President and not let his country prostrate.

But moreover the bitter truth must be revealed that it is not within the purview of the judiciary to constitutionally fetter the immunity of the Executive President by judicially questioning the legality or the propriety of the Executive Decisions of the Executive President unless it relates to a violation of a fundamental right or a language right. If the judiciary takes a bold step over these boundaries and trespass over the realm of constitutional immunity of the Executive President, they are going against the Constitution they have solemnly sworn to protect and uphold and in turn they are in breach of the terms of the Social Contract which is the life and breath of the Constitution itself.

To this extent the Presidential Pillar of Immunity over the Executive Decisions of an Executive President is Constitutionally supported and it is not an absolute myth but a guarded constitutional reality.

In the words of William Henry Harrison "There is nothing more corrupting, nothing more destructive of the noblest and finest feelings of our nature, than the exercise of unlimited power."

(William Henry Harrison 1773 - 1841, the Ninth President of the United States, Letter to Simon Bolivar, 27th September 1829 quoted in the "The Life of Major General William Henry Harrison: Comprising a Brief Account of His Important Civil and Military Services, Philadelphia, PA: Gregg and Elliot, 1840)

And it is righteous to end this discussion with the words of Honourable Francis Thackeray William Pitt, Earl of Chatham that; "Unlimited power is apt to corrupt the minds of those who possess it; and this I know, my Lords: that where law ends tyranny begins."

(William Pitt 1839, "Correspondence of William Pitt, Earl of Chatham, pg. 387, Edited by William Stanhope Taylor and John Henry Pringle)

SURETIES, FORFEITURE OF BONDS & CONSEQUENCES THEREOF

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Abstract:

The terms "bail" and "surety" are co-related terms in Criminal Law. Granting of bail is needed to ensure the accused's presence at a criminal trial. In most instances, sureties are insisted upon by courts when persons are released on bail and this is the most common method of releasing persons on bail. Also signing a bail bond is a promise that the suspect/accused will appear in the specific criminal proceeding and the failure of the suspect/accused to appear so will cause the signatories to the bond to pay to the court the amount designated.

It is true that the Surety plays an important role for due administration of justice while acting as a bridge between the accused and the court. As front line persons in the administration of justice judges have to bear in mind the importance of court-surety relationship and the serious nature of the obligation which is undertaken by the sureties. However, some reported cases reveal situations where the sureties had to suffer unnecessarily due to the failure of courts from resorting to the due process of law in dealing with some issues relating to sureties. Moreover, in Sri Lanka, prevailing statutory provisions on this area is not adequate for having sufficient and meaningful sureties. As far as the procedure of forfeiture of bonds is considered, statutory provisions on the same are not devoid of some deficiencies, but case laws fill the gaps and they together provide the proper procedure that should be followed by the courts, when dealing with the issues relating to sureties, especially when the bonds are forfeited and the sureties are imprisoned. Also, laws in other jurisdictions provide lessons to remedy the deficiencies under Sri Lankan law.

Key words: Bail, surety, bonds, forfeiture of bond & consequences thereof, surety-court relationship, due administration of justice, Criminal Law.

Introduction:

In Sri Lanka, majority of the applications made in criminal courts (especially in Magistrate's Courts) daily relate to requests for the grant of bail and among various types of bail bonds surety bail is the most popular one. Even if there are statutory provisions to deal with issues relating to sureties, some instances where the sureties had to suffer unnecessarily in consequence of their failure to fulfill obligations as sureties are not rare. Therefore, this is an attempt to discuss the legal provisions relating to the sureties in Criminal Law and the main objective is to discuss the applicable legal provisions on forfeiture of a bond, consequences thereof and the decided cases on the same in order to find out whether is there any deficiency or loophole in the law. Also this article is significant to have an understanding of the importance of the surety's role in due administration of justice and the importance of adhering to the procedure prescribed by the law, when the courts forfeit the bonds and imprison sureties.

Releasing persons on Bail & Surety Bond:

Before discussing the term "surety", it is necessary to know about the term "bail" since they are interrelated terms. Under Sri Lankan law there is no statutory definition for the term "bail"[1]. However, the right to have an accused released pending his trial giving adequate assurance that he will stand trial and submit himself to sentence if found guilty is generally known as the right to bail. In Sri Lanka provisions relating to bail bonds and sureties are embodied in the Code of Criminal Procedure Act No.15 of 1979 and also in the Bail Act No.30 of 1997. According to section 27 of the Bail Act, the provisions of Bail Act will prevail notwithstanding anything to the contrary in the Code.

Section 7(1) of the Bail Act, stipulates several methods of releasing a suspect on bail[2]. Section 7(1)(c) involves the execution of a bond with one or more sureties and this is the most common method of releasing suspects on bail. Sections 8 to 12 of the Bail Act deal with the nature of bail bonds, liability of sureties and the quantum of bail.

In terms of section 8 of the Bail Act, the person produced before court should be released on bail the moment the bond is executed. Section 9 of the same provides for the ordering of sufficient bail when the bail first taken is insufficient. As provided in section 10 of the Bail Act in determining whether a person is a sufficient surety for the purpose of section 7(1) (c) the court shall have regard to the question whether such person is likely to be able to secure the attendance of the person suspected or accused, in terms of the bond.

The format of the bond that is still used by the courts is the format provided in the Administration of Justice Law and when a person signs the bond as a surety he/she is bound by the conditions thereof. Where surety is required, it clearly says amongst other things that;

> "…….I/We do hereby declare myself/jointly and severally declare ourselves and each of us/surety/sureties/ for the said……..that he shall appear in the above court on ……..and shall continue so to appear until otherwise directed by the court. If he makes default in doing so, I/We hereby bind myself/ourselves to forfeit to the Republic of Sri Lanka the sum of Rs……..."

Accordingly, it is apparent that the surety's duty is limited to ensure the presence of the accused in the court.

Discharge of Sureties:

As far as the release or discharge of sureties is concerned, the Code of Criminal Procedure Act No.15 of 1979 does not contain sufficient provisions relating to sureties and their release. Consequently, there were some instances where the Magistrate's Courts used to remand the sureties in circumstances when the suspect/accused did not appear in court. However, section 18 of the Bail Act of 1997 has provided for this omission and in terms of section 18(1) of the act any surety may make an application to the court at any stage of a case for the release of such surety from the obligation. The provisions of section 18(1) could be invoked by a surety at any stage irrespective of the fact that the suspect/accused is attending court.

Once such an application is made the court is required to issue a warrant for the arrest of the suspect for whom the surety has come forward[3]. Once the person is arrested and produced before court or appears in court voluntarily, the court may make an order releasing the surety from his obligation. The court must also direct the suspect/accused to produce a new surety.

In instances where the suspect is absconding the surety could arrest the suspect and bring him before court. Once the suspect is arrested and produced so the court would release the surety and direct the suspect to furnish a new surety[4].

Also section 18(5) of the Bail Act provides a penal provision for persons who may abuse the process in furnishing bail as well. If the court is of the opinion that a particular surety or the application made under section 18(1) is without a valid and an acceptable ground, the court may direct such surety to pay a sum not exceeding Rs.1500/- by way of a fine. In default of such payment the surety could be sentenced to a period not exceeding six months.

Forfeiture of a Bond:

The word 'forfeiture' is synonymous with the word 'confiscation' and it was derived from the Latin *confiscatio*, "joining to the *fiscus*, i.e, transfer to the treasury. It is a legal seizure by a government or other public authority.[5]

In the case of **Tarani Yadav** v **State**[6], word 'forfeiture' had been defined as "The word "forfeited" means that a condition imposed upon the executant of the bond and agreed to by him has been contravened."

As per Black's Law Dictionary (Fifth Edition), it means to lose, or lose the right to, by some error, fault, offence, or crime; to incur a penalty; to become liable to the payment of a sum of money, as the consequence of a certain act.

However, here it is due to the fault of the accused and the surety becomes liable to pay the value of the bond as a result of failure to fulfill an obligation as the surety.

Statutory Provisions and Decided Cases relating to Forfeiture of a Bond in Sri Lanka:

Chapter XXXVII of the Code of Criminal Procedure Act No.15 of 1979 deals with the provisions as to bonds and section 422 of the same deals with the procedure on forfeiture of a bond. This section is as follows:

(1) Whenever it is proved to the satisfaction of the court by which a bond under this Code has been taken, or when the bond is for appearance before a court to the satisfaction of such court that such bond has been forfeited, the court shall record the grounds of such proof and may call upon any person bound by such bond, to pay the penalty thereof or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid the court may proceed to recover the same by issuing a warrant for the attachment and sale of the movable or immovable property belonging to such person.

(3) Such warrant may be executed within the local limits of the jurisdiction of the court which issued it and it shall authorize the distress and sale of any movable or immovable property belonging to such person without such limits when endorsed by the Judge within the local limits of whose jurisdiction such property is found.

(4) If such penalty be not paid and cannot be recovered by such attachment and sale the person so bound shall be liable by order of the court which issued the warrant to simple imprisonment for a term which may extend to six months.

(5) The court may at its discretion remit any portion of the penalty mentioned and enforce payment in part only.

According to the wordings of section 422(1), it is not clear about the procedure up to forfeiture of a bond, from the absence of the accused. Even if it says that, "…when the bond is for appearance before a court to the satisfaction of such court that such bond has been forfeited, the court shall record the grounds of such proof and …", it is silent as to who has the burden of satisfying the court that the bond has been forfeited or as to on what grounds it should be considered so. Also, it does not mention about the requirement of issuing notice to the surety or affording a chance to the surety to show cause before a bond is forfeited. Consequently, it lacks transparency and it may lead to uncertainty in relevant law. However, other sub sections of the same are clear.

In order to understand the applicability of above mentioned legal provisions, it is necessary to look into some important decided cases on the subject.

In the case of ***E.G. Podiappuhamy v. H.M. Seneviratne***[7], the court held that, when a person has executed a bond standing surety for an accused person's appearance in court, the absence of the accused without excuse is in itself sufficient prima facie proof that there has been a breach of the undertaking given in the bond. There are no further grounds that a Magistrate need to record before the surety is called upon to show cause why his bond should not be forfeited.

In the case of ***Jayakodi v. Wijewardane***[8] it was held that a Magistrate has no power to impose a default sentence under section 411 of the Criminal procedure Code, without proceeding to recover the penalty from a surety by issuing a warrant for the attachment and sale of the movable or immovable property belonging to the surety.

In the case of ***De Silva v. S.I.Police, Kandy***[9], in forfeiting a bond given by a surety for the production of an accused person in court whenever requested to do so, a Magistrate made order in the following terms:- "Surety is asked to show cause why her bond should not be forfeited. She has no cause to show, I forfeit the surety's bond, In default six weeks simple imprisonment. Time till 20th March, 1963. Remand 01st accused.."

Here, the court held that the order of forfeiture should be set aside as the learned Magistrate had failed to comply with the provisions of section 411(1) and (4) of the Criminal Procedure Code. He should have recorded the grounds of proof that the bond had been forfeited and it is only if the penalty cannot be recovered by attachment and sale that he could have imposed the sentence of imprisonment.

In the case of ***In re Anulawathie Perera***[10] it was held that when an accused is remanded in custody for some other case, the Magistrate cannot confiscate the bail bond.

Rupasena & Another v. Hussain Babu & Others[11]

The High Court has directed the two sureties of the original accused to deposit a sum of Rs. 50,000/- in cash with two sureties acceptable to court and made order, that in default of the deposit of the said bail that the sureties be remanded. However in the application for revision against that order the court held that

(1) There is no provision in law for the High Court Judge to remand sureties.

(2) It is to be noted the provisions with regard to failure of the sureties to fulfil their obligation have been set out in Section 422 of the Criminal Procedure Code. Upon the failure of the two sureties to produce the accused in court, the learned Trial Judge should have notified the sureties to show cause as to why the bond should not be cancelled.

CA (PHC) APN No: 133/12[12] is a case where the petitioner (surety) contended that he had been imprisoned by the High Court otherwise than by adhering to the due process of law.

In this case the surety was arrested and produced before the High Court, since the accused failed to attend court. Thereafter the surety was released to enable him to produce the accused on the next date. In obedience to the order of court, on that date, he produced the accused through an attorney- at- law. At this stage the High Court Judge took no steps to cancel his bail and ordered the accused to observe" *ata sil" (eight precepts)* at a named temple on all four Poya days of the month and to surrender the two firearms on the next date. On that day the suspect avoided court and the surety who presented himself was sentenced to 3 years rigorous imprisonment for non-payment of the value of the bond.

Here the Court of Appeal observed that several questions arise as to the legality of the various orders made by the High Court Judge and it was held *inter alia* that;

- The bond had been forfeited after the surety had produced the accused and undue leniency shown to the accused by court with full knowledge of his involvements. In the circumstances, it is totally unfair to treat the surety bond as having been forfeited.
- The concept of bail is the recognition of the liberty of a person between the time of his arrest and verdict subject to the condition that he re-appears in court for his trial until its conclusion or until he is sentenced.
- The grant of bail, cancellation, forfeiture etc, requires a greater command of the legal principles. It is an established principle of law that the grant of bail or refusal is a judicial discretion and not a mere discretion.
- No judge is empowered to apply the law at his whims and fancy.

- It is the duty of the court, to maintain the integrity and confidence of the system of taking sureties, as it is of considerable importance to encourage law abiding persons to come forward to assist the release of suspects on bail, since the grant of bail is regarded as the rule and refusal an exception.
- A surety bond has to be strictly construed because the violations of its terms provides for interference with the personal liberty and/or deprivation of property rights.
- Before a decision is taken to forfeit a bail bond not affording a hearing to a surety would be a gross violation of the principles of natural justice and the express provisions of the Code of Criminal Procedure. Such an order of forfeiture would be liable to be quashed on account of such violation.

Also the Court of Appeal emphasized that the surety should not be put into unnecessary inconvenience or embarrassment otherwise than by resorting to the due process of law, as the surety stands as a bridge between the accused and court.

In the recent case of ***SC Appeal No. 82/2016***[13] (decided on 21.09.2017), the appellants had signed a bail bond for Rs.02 millions to produce the accused on each and every day that the case is called. The accused did not appear in court and the Magistrate issued warrants on the accused and the sureties and after inquiry the Magistrate made an order to forfeit the money stated in the bail bond. Since they failed to pay the said amount, the Magistrate made an order to recover the said amount, as a fine. In default of the fine he sentenced the sureties to six months simple imprisonment.

The High Court dismissed the appeal of the sureties and thereafter they appealed to the Supreme Court. Here the Supreme Court held that when a surety is produced before a Magistrate for failure to produce the suspect or the accused he must act under section 422(2)[14] of the Code of Criminal Procedure Act. The Magistrate is empowered to act under section 422(4)[15], only after he complied with section 422(2) of the Code of Criminal Procedure Act.

Accordingly the Supreme Court decided that the learned Magistrate has failed to comply with section 422(2) of the Criminal Procedure Code and he has failed to give reason for not complying with the same section. Therefore the Supreme Court set aside the order of the Magistrate and the order of the High Court Judge refusing to set aside the said order of the Magistrate. Also the Magistrate was thereby directed to act under section 422 of the Criminal Procedure Code in order to recover the amount stated in the bail bonds from each surety.

As far as the above discussed cases are taken into consideration, it is clear that, the higher courts have emphasized the importance of affording a hearing to the surety before forfeiting the bond, since it is in accordance with the Principles of Natural Justice.

Importance of the Surety's Role in due Administration of Justice:

A person is guilty of an offence only after being found so by a competent criminal court and since it takes a fairly long time the accused must be released on bail wherever it is expedient to do so. Consequently, concept of bail covers the most important aspect of criminal legislation and its' purpose is to secure the presence of the accused or suspect when required without hardship. Availability of the accused at a criminal trial is essential in order to ensure "*audi alteram partem*" rule. That is, both parties must be heard for the due administration of justice and the lack of this principle would lead to miscarriage of justice. However, avoidance of a criminal trial is the normal tendency of an accused since he may be imprisoned if he is convicted. In that perspective, the role of the surety is of utmost importance in ensuring the accused's presence at a criminal trial. The surety shoulders that serious and heavy obligation, while acting as a bridge between the accused and the court.

It is pertinent at this stage to refer to above discussed unreported judgment of ***CA (PHC) APN No: 133/12***[16], where Justice Salam, made following observations.

"The benefit of taking surety bail are twofold. Firstly the surety is bound to exercise some form of supervision on the accused, and report to court if there is a concern that he will abscond. On the other hand, it is designed in such a way so as to discourage the accused from jumping bail as the member/members of his family and/or friends who provided the sureties will be driven into unnecessary embarrassment. In our experience, it is comparatively rare for an accused to keep away from court when meaningful sureties are in place. This is the advantage of bringing in family members or close friends into the scene than to simply depend on Government servants as sureties which may appear to be a meaningless exercise that was not heard of in the past. As the surety stands as a bridge between the accused and court, the surety should not be put into unnecessary inconvenience or embarrassment otherwise than by resorting to the due process of law."

Also it is clear that once a bond is signed as a surety he is bound by the conditions of the bond and it is a binding contract among the surety, the accused and the court. Releasing a suspect/accused on bail in effect means the court hand him over to the surety who is considered to be a bridge between the suspect/accused and the court. In other words the suspect/accused is enlarged on bail by the court since the surety shoulders that burden. This has a powerful influence on the decision of court as to whether or not to grant bail.

Also it is noteworthy here to remind the following phrase observed by Sundaresh Menon CJ (Singapore) in the Case of ***Public Prosecutor v Yang Yin***[17] since it shows a real pull of forfeiture of a bond.

"The threat of **forfeiture** acts as a veritable Sword of Damocles that hangs not over the accused but over his nearest and dearest thereby disincentivising the accused from absconding."

Moreover, it is clear that the surety helps for the smooth functioning of the justice administration when he is producing the accused before court regularly, thereby avoiding the delay in court proceedings.

Consequently, the surety plays a very important role in our criminal justice system. Furthermore, above discussed cases reveal the importance of taking surety bail, court-surety relationship and adhering to the prescribed procedure by law when a bond is forfeited.

Practical Scenario:

In practice, avoidance of the court by the accused is a common factor which affects the delay in court's proceedings in our country. It is the practice of court to issue notice to the surety when the accused does not appear in court. Once the surety is present he is offered a chance to produce the accused. In the event of surety's failure to do so, surety is given a chance to show cause as to why the bond value should not be forfeited. If the surety fails to satisfy the court that he took all possible steps to ensure the attendance of the suspect/accused, the court will recover the full amount in the bond. Up to this point, all above steps can be justified, despite the lack of transparency in section 422(1) as discussed before, since they are in accordance with the Principles of Natural Justice.

However, if the penalty is not paid by the surety, next step of recovering it, is problematic as per the prevailing Magistrate's Courts practice. Because, the common method is to recover it as a fine (with a default sentence), and it is very hard to find out situations where the courts have recovered the penalty by issuing a warrant for the attachment and sale of the movable or immovable property of the surety as it is in the statutory provisions. It might be argued that it is impracticable due to the cumbersome procedure that has to be followed in doing so and it may negate the very purpose of forfeiting a bond which is of penal nature.[18] However, referring such cases to the higher courts is not common due to various reasons.

Moreover, some reported cases also reveal the situations where the courts have recovered the amount of the bond as a fine without adhering to the procedure prescribed by law. However, the question arises as to whether the courts can deviate from the procedure prescribed by law in forfeiting a bond and imprisoning a surety by putting him into unnecessary inconvenience otherwise than by resorting to the due process of law.

Some Salient Features of the Law relating to Surety Bonds and their Forfeiture in Some Other Jurisdictions:

Basis of the Laws is alike

As discussed previously, in Sri Lanka there are statutory provisions to deal with the issues relating to sureties and likewise, in other jurisdictions as well there can be seen the existence of similar statutory provisions on the same with some variances or modifications. However, the basis of them is alike and only some salient features of the same will be discussed here.

India – Issue of notice to surety is not necessary

In **India** chapter 33 of the Criminal Procedure Code, 1973 provides the general provisions relating to bail and bail bonds. However, the issue of notice to the surety before forfeiting the bond is not necessary in India. The wordings of section 446(1) clearly show that if a term of a bond is violated, the bond automatically stands forfeited. All that is required is that the court has to satisfy that the bond has been forfeited. Then show cause notice has to be issued as to why surety be not asked to pay the penalty. All orders passed under section 446 shall be appealable. In India, there is a series of cases in favour of this.[19]

Yashodha v State[20]

"Significantly no notice to the surety is contemplated before the forfeiture".

(However, section 422(1) of the Code of Criminal Procedure Act in Sri Lanka is not clear on this issue)

India – Necessity of making a Declaration by the surety (More requirement for a sufficient surety)

Also, under an amendment introduced in 2005, every person standing surety to an accused person must make a declaration before the courts as to the number of persons to whom he stood surety including the accused, giving all the relevant particulars.[21] In Sri Lankan law there is no need for such a declaration.

Also section 8(2) of the Bail Act of **UK** provides that the suitability of sureties, their financial resources, character and previous convictions also has to be taken into consideration.

Singapore – Statutory duties of the surety are elaborated.

It is clear that in **Sri Lanka** the statutory obligation of the sureties are mainly to secure the attendance of the accused in courts and other than that they have no statutory duties. However, unlike in Sri Lanka, in **Singapore** the duties of the sureties

are statutory and elaborative. The nature of their duties is set out in section 104(1) of the Criminal Procedure Code[22]. Accordingly, a surety must–

(*a*) ensure that the released person surrenders to custody, or makes himself available for investigations or attends court on the day and at the time and place appointed for him to do so;

(*b*) keep in daily communication with the released person and lodge a police report within 24 hours of losing contact with him; and

(c) ensure that the released person is within Singapore unless the released person has been permitted by the police officer referred to in section 92 or 93 (as the case may be) or the court to leave Singapore.

Singapore & England – Obligations of the sureties are more emphasized (Less chance for surprising of consequences)

Both in **Singapore** and **England** courts have taken pains to emphasize the sureties' obligations and it is therefore unsurprising that consequences of significant gravity potentially attach to any breach of such obligations. The courts have often emphasized that the obligation which comes with standing bail for an accused person is not merely a moral one, but has serious legal consequences attached with it. The bailor undertakes real risks, when an accused fails to surrender to his bail.[23]

US - Professional Bailsmen

In US, types of bail bonds differ from the Federal to individual States. As far as the surety bonds are concerned this service is provided commercially by a bail Bondsman. The bail agent guarantees to the court that they will pay the forfeited bond if a defendant fails to appear for their scheduled court appearances. So the third party must have adequate assets to satisfy the face value of the bail bond. This can be seen in many other jurisdictions as well. However, in our country habitual/ professional bailsmen are prohibited (section 18(5) of the Bail Act).

Singapore – Law on forfeiture of bond is more transparent and more principles governing forfeiture were laid down by a series of cases.

The court has a discretion regarding the forfeiture of the bond and it may decide to forfeit the whole or any part of the bond or not to forfeit any amount, having regard to all the circumstance of the case.[24] The court will first consider whether the surety has shown sufficient cause for the non-forfeiture of the bond amount. Second, if the court finds that the surety has failed to show sufficient cause, the court will determine, in the exercise of its discretion, the extent to which the bond is to be

forfeited.[25] The surety bears the burden of satisfying the court that sufficient cause exists such that forfeiture should not take place.

Moreover, in **Singapore** there are so many cases which have laid down the principles governing forfeiture and the case of ***Cher Ting v Public Prosecutor***[26] is an important case on the same. For an instance, a surety's plea that he lacks the financial wherewithal to suffer the consequences of forfeiture is not generally a sound reason to reduce the amount forfeited. This point has been repeatedly emphasized in a number of judgments of **Singapore** and **English courts**.[27]

Conclusion & Suggestions:

Despite the important role of the surety for due administration of justice, there are instances of deviation by the courts in due process of law when a bond is forfeited. Also, it is a true that the law in practice is different from the law in statutory books and hard reality is found in the practical scenario, however, as pointed out in above cited cases, it is clear that no judge is empowered to apply the law at his whims and fancy and no court has jurisdiction to deviate from the procedure prescribed by the law in forfeiting a bond and imprisoning a surety.

As far as the statutory provisions on the surety bonds are concerned, it is clear that sureties have less obligations and thus a less chance for having meaningful or sufficient sureties under Sri Lankan Law. However, when the statutory law relating to procedure of forfeiting surety bonds and decided case laws on the same are considered together, it is not ambiguous, but the statutory provisions alone are not devoid of ambiguities to a certain extent as discussed previously.

However, in order to avoid some practical difficulties in dealing with issues pertaining to sureties and for accepting sufficient and meaningful sureties, it is suggested to introduce amendments to the existing statutory provisions on the same and in this context we can resort to the salient features of the law in other jurisdictions as well, to the extent they suit to our criminal justice system.

Endnotes

1 The term "bail" is defined in Black's Legal Dictionary as the process by which a person is released from custody on the undertaking given by a surety or on his or her recognizance to appear in a future stage of the proceedings of court & it was defined as "the release or setting at liberty of a person arrested or imprisoned either on his own recognizance or upon others becoming sureties for his appearance on a future date" by Alles J. in the case of Kanapathy Vs. Jayasinghe (66 N.L.R. 549).

2 "Whenever any person suspected or accused of, being concerned in committing or having committed, a non-bailable or bailable offence appears, is brought before, or surrenders, to the court having jurisdiction, the court may release such person -

(a) on an undertaking given by him to appear when required;

(b) on his own recognizance;

(c) on his executing a bond with one or more sureties;

(d) on his depositing a reasonable sum of money as determined by court;or

(e) on his furnishing reasonable certified bail of the description ordered by court:

provided that where the person has appeared before court on summons and is ordered to be released, he shall be enlarged on his own recognisance or on his giving an undertaking to appear when required, unless for some reasons to be recorded the court orders otherwise."

3 Section 18(2) of the Bail Act.

4 Section 18(4) of the Bail Act.

5 Weeratna D.A.P, Confiscation/Forfeiture of Property, 2016 at p.22

6 (1962) Cr.LJ 627 AIR 1962 Pat 431

7 74 NLR 367

8 62 NLR

9 63 CLW 109

10 60 N.L.R.407

11 1997 (1) SLR 379

12 CA (PHC) APN No. 133/12, HC Tangalle Case No.HCT 59/2006

13 SC Appeal No. 82/2016, SC (SPL) LA. Application No.101/2015, High Court Colombo Case: HCMCA 20/14, Magistrate Court Colombo Case No.28028/03

14 "If sufficient cause is not shown, and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the moveable or immovable property belonging to such person"- se.422(2)

15 "If such penalty be not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable by order of the Court which issued the warrant to simple imprisonment for a term which may extend to 06 months"- se.422(4)

16 Ibid at 12.

17 Public Prosecutor v Yang Yin (2015) 2 SLR 78 at 35- real pull of bail

18 This is based on a discussion held with some stake holders.

19 info@latestlaws.com accsssed on 24.10.2019

20 54 (1994) DLT 637

21 Section 441 A to the CPC as amended in 2005

22 Cap 68, 2010 Rev. Ed.

23 see Cher Ting Ting v PP (2017) SGHC 13

24 As provided in section 104(2) of the CPC{*Cap 68,Rev Ed}, if the surety is in breach of any of his duties, the court may having regard to all the circumstances of the case, forfeit the whole or any part of the amount of the bond and the section 107(1) then sets out the procedure to be followed on forfeiture of the bond.

25 See Loh Kim Chiang v Public prosecutor[1992] 2 SLR(R) 48 at p.11 and Re Ling Yew Huat & Anor [1990] 2 MLJ 124 & Valliamai v Public Prosecutor [1962] MLJ 280]

26 Ibid at 23

27 https//www.supremecourt.gov.sg accessed on 24.10.2019

LAW GOVERNING CONTRACTS BY ELECTRONIC MAIL

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1.0 Introduction

The contracts formed by electronic mail (email) had inadequate legal protection due to lack of provisions in the statutory law until the enactment of Electronic Transactions Act No. 19 of 2006 and its subsequent Amendment Act No.25 of 2017. Neither legislation nor Common Law had sufficiently addressed this issue in the past. The two rules namely Receipt Rule and the Postal Rule have been developed by the Courts to determine the time of Acceptance in Contracts. This study analyses which one of the above two rules suits better in contracts by email and how Electronic Transactions Act has addressed the issue.

2.0 Formation of a Contract

A contract is a legally enforceable agreement between two or more parties. In order to form a valid contract, certain legal elements should exist, namely offer, acceptance, consideration and legally binding intention.[1] Thus, a contract cannot be formed, if at least one of these elements does not exist. The person who makes the offer is referred to as the offeror while the receiver is referred to as the offeree. On receipt of the offer, the offeree has a responsibility to convey the acceptance if he agrees to the terms and conditions stipulated in the offer.

3. 0 Offer and Acceptance

Although offers could include a set of conditions, acceptance could not contain any options or conditions for the purpose of forming the contract. In other words,

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the acceptance should be an unconditional expression. For instance, in ***Carmarthen Developments Ltd v. Pennington***, replying to an offer by exercising an option provided by the offeror was not considered by the Court as a valid form of acceptance.[2]

According to Mindy Chen Wishart as mentioned in '*Contract Law*', though offers could be revoked,[3] acceptances could not be revoked.[4] For example, the offeror could withdraw his offer at any time before the acceptance is duly communicated. If the offer was revoked, then the contract is deemed to be not properly formed. Once the acceptance is communicated, the offeror has no option to revoke his offer. Therefore, acceptance has become a significant element required in order to form a legally binding contract between parties.

4. 0 Communication of Acceptance

In order to make a successful acceptance, it should be communicated properly to the offeror. The Court has developed two basic rules to determine the time of acceptance, (1) the 'Receipt Rule' and (2) the 'Postal Rule'. Subsequently, these rules have been recognised in many domestic legislations and international treaties.

4.1 Receipt Rule

The 'Receipt Rule' is the commonest rule of acceptance applied in contracts. According to Joseph Chitty as mentioned in '*Chitty on Contracts*', this rule is also referred to as the 'General Rule'.[5] As held by Lord Denning in ***Entores Ltd v. Miles Far East Corporation,*** Lord Wilberforce in ***Brinkibon Ltd v. Stahag Stahl G.m.b.h***., and Justice Macpherson in ***Eastern Power Limited v. Azienda Comunale Energia E Ambiente*** and as cited in ***Re Viscount Supply Co***, the acceptance is deemed to be communicated, only when it is received by the offeror.[6] For instance, X makes an offer to Y at a meeting in a coffee shop. Y verbally accepts it. If X does not hear Y's voice of acceptance due to the blaring noise of a fisticuff at the adjoining table, then the acceptance is deemed not to have been communicated properly to X, because according to the receipt rule, X should hear Y's voice in order to form the contract.

One of the main factors behind this rule is, the speed of communication, because in a face to face conversation, both parties could deliver messages instantly. Later, with the development of Information and Communication Technology (ICT), the Receipt Rule has been extended to a number of other instant communication methods, such as telephone, fax, telex and web transactions. Consequently, the Receipt Rule has been widely recognised as an established principle which could be considered in order to determine the time of acceptance of a contract in both domestic and international sale of goods governed by the Article 15 (1) of the UN Convention on Contracts for the International Sale of Goods and Section 4:205 of the Draft Common Frame of Reference II of the European Union.[7]

4.2 Postal Rule

The Postal Rule had been developed as an exception to the Receipt Rule, because the latter had not provided solutions for certain issues in contracts concluded by letters. One of the main issues is the non-instantaneous character of the postal service. The delay in the postal service had resulted in a number of unnecessary legal consequences which the offeree had to face. In addition, non-delivery or lost of letters during the post could confuse both parties. According to Justices Barnewall & Alderson in ***Adams and Others v. Lindsell and Another***, Lord Justice Kay in ***Henthorn v. Fraser*** and Lord Justice James in ***In re Imperial Land Company of Marseilles v. Harris***, where the acceptance is communicated via post, the contract deemed to be properly concluded once the letter is posted.[8]

In other words, the time of the acceptance should be determined by considering when the letter was dispatched by the offeree by putting it inside the post box or handed over to the post office or the postal agent. As held by Lord Justice Thesiger in ***The Household Fire and Carriage Accident Insurance Company (Limited) v. Grant*** and Lord Blackburn in ***Alexander Brogden and Others v. The Directors, &C., of the Metropolitan Railway Company***, once the letter is dispatched, it is presumed that it has gone beyond the control of the offeree.[9]

As held by Justice Kelly in ***Henkel and Another v. Pape,*** Justice Farwell in ***Bruner v. Moore*** and as cited in ***Henthorn v. Fraser***, the Postal Rule had been extended to telegrams by considering the telegram as a belated communication technology.[10] Even if the letter is lost in the mail or never had it been delivered to the addressee, the contract is deemed to be concluded from the date of posting the letter as held by Lord Justice Thesiger **in *The Household Fire and Carriage Accident Insurance Company (Limited) v. Grant.***[11] This is the salient feature of the Postal Rule. The Court decided in ***Dunlop and Others v. Vincent Higgins and Others***, the delivery of the acceptance is immaterial in deciding the formation of the contract.[12]

Further, the Postal Rule had been developed to avoid the risk of revocation. For instance, there is a possibility of a revocation of the offer by the offeror before the letter of acceptance reaches him. Acceptance might not reach the offeror due to loss, delay or a postal strike. In such a situation, the offeree would have to face an irreparable loss if the offeror revokes the offer. Such losses were expected to be prevented by the application of the Postal Rule.

5. 0 Electronic Contract

An electronic contract is a contract formed by electronic communication for both offering and acceptance. According to Section 11 of the Electronic Transactions Act No.19 of 2006 of Sri Lanka,

'*Unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed in electronic form. A contract shall not be denied legal validity or enforceability on the sole ground that it is in electronic form*'.[13]

6. 0 Contracts by Electronic Mail

For the purpose of this study, the contracts formed by electronic mail, are those contracts where both offer and acceptance are made exclusively by email. For instance, in a situation where the offer is made by any mode of communication other than email, and the acceptance made by email, then it is not considered as an 'email contract' in the context of this paper. The contracts formed by offers communicated by fax and acceptance by email as discussed in ***Immigration Storage Company Ltd v. Clear plc***,[14] do not fall within the purview of this study.

The Court decided in ***Bernuth Lines Ltd v. High Seas Shipping Ltd (The Eastern Navigator),*** that contracts formed by email are considered valid[15] and binding on parties. An email of acceptance with the offeree's name written below the text, have same legal validity of a formal letter of acceptance duly signed by the said party. In order to ensure the authenticity and the integrity of electronic messages, digital signatures could be used, which are now recognised by Section 7, 17 (a) and 26 of the Electronic Transactions Act No.19 of 2006 of Sri Lanka (as amended in 2017), Section 7 (1) of the Electronic Communications Act 2000 c. 7 of UK and Section 9B (2) of the Requirements of Writing (Scotland) Act 1995 c. 7.[16] Such digital signatures are currently admissible in evidence as mentioned in Section 21 (3) of the Electronic Transactions Act No.19 of 2006 of Sri Lanka and in Section 7 (1) Electronic Communications Act 2000 c. 7 of UK.[17]

In a situation where a new contract has been initiated with an email offer by one party, the other party could respond through the same email thread instead of composing a new email resulting in a series of conversations, could be considered as a valid single legal document for the purpose of formation of a contract. As held in ***Green (Liquidator of Stealth Construction Ltd) v. Ireland***, such a series of negotiations could be treated as a single legal document.[18] In ***Nicholas Prestige Homes v. Neal***, Lord Justice Ward held that, a sales contract formed by email was binding on the parties.[19] Hence, if any party denies the legal validity of an email contract and refuses to discharge his obligations, then it would be considered a breach of contract and consequently become liable to pay damages to the obligee.[20] Therefore, it is evident that email transactions which contain all necessary elements required to form contracts in general, are legally valid and binding.

7. 0 Acceptance Communicated by Email

One of the main considerations of this study is, analysing the present law related to acceptance communicated by email. Acceptance is significant in a contract, because without properly communicating it, a contract could not be formed. Email contracts are made by electronic communication which transmits data messages from one person to another, from one device to another or from a person to a device or vice versa, by means of an electronic communication network.[21]

The term 'Electronic' has been interpreted in Section 26 of the Electronic Transactions Act No. 19 of 2006 of Sri Lanka as, '*information generated, sent, received or stored by electronic, magnetic, optical, or similar capacities regardless of the medium*'.[22]

Electronic Communication is '*any communication made by means of data message*'.[23] The main issue with the acceptance of an offer, when communicated by email is whether it falls within the purview of the Postal Rule or the Receipt Rule.

If the Postal Rule applies upon email transactions, then the acceptance is deemed to have been communicated, once the message is dispatched by the offeree. On the other hand, if the Receipt Rule applies, unless the offeror receives the message of acceptance, the contract could not be formed. Therefore, it is important to identify which one of the above two rules suits better for email contracts, for both organisations and individuals to transact their businesses without uncertainty.

8. 0 Which Rule applies better in Email Contracts?

There are a number of arguments for and against the application of the Postal Rule upon email contracts have been raised,[24] based on the speed and authenticity of communication. If the communication of an acceptance is delayed and unreliable, then instead of the Receipt Rule, the Postal Rule should be applied. Some legal authorities are of opinion that email is a slow and unreliable means of communication and therefore, the application of the Postal Rule is considered more suitable. Scholars, who suggested the application of the Postal Rule in email contracts, have identified two weaknesses in its communication such as the delay and unreliability of the process. Since Postal Rule has certain limitations which prevent extending it to emails, it is necessary to analyse whether Receipt Rule could be extended as a solution.

According to John D. Gregory as mentioned in '*Receiving Electronic Messages*', email is an instantaneous means of communication[25] where both delivery and acknowledgement are also considered instantaneous. It has been suggested by Deveral Capps in '*Electronic Mail and the Postal Rule*', that emailed acceptances should be deemed effective from the moment that they are available for collection.[26] As held in ***Entores Ltd v. Miles Far East Corporation***, the Receipt Rule has been

applied to contracts made face to face, telephone, fax and telex as the delivery and acknowledgement of those communication methods are instant.[27]

For instance, in a face to face contract, if the recipient did not hear the message due to any reasonable interruption, then it should be presumed that no contract had been formed between the parties, because acceptance had not been properly communicated to the offeror. Further, in telephone and mobile conversations, occasionally there could be congestions on the network or the connection might be interrupted during the conversation. In such situations, if the offeror does not hear the acceptance properly, then a contract could not be formed between them, because an acceptance is deemed to be received only when the receiver hears the voice of acceptance properly through the telephone, as Lord Justice Denning held in the aforesaid case ***Entores Ltd v. Miles Far East Corporation***.[28]

However, an argument could be advanced whether an acknowledgement of acceptance by email is practically instantaneous or not. The solution to this issue could be found in the 'Automated Delivery Receipt System (ADRS)' which generates delivery receipts and sends them once the acceptance is delivered to the offeror. Another issue is whether or not such a machine-generated acknowledgment made by ADRS has characteristics similar to an acknowledgement in face to face contract.

The solution to the said particular issue is available in web based contracts. For instance, when considering the online purchases via web based information systems such as Amazon and EBay, the Receipt Rule has been applied in Sri Lanka by Section 14 (2) (a) and (b) of the Electronic Transactions Act No.19 of 2006 of Sri Lanka, in the UK by the Regulation 11 of the Electronic Commerce (EC Directive) Regulations 2002 No.2013 and in the European Union by Article 11 (1) of the E-Commerce Directive 2000/31/EC.[29]

Since the aforesaid ADRS has the ability to generate acknowledgements without human interference. If such automated acknowledgements are considered valid for the purpose of applying the Receipt Rule upon online contracts, then it is not unreasonable to apply the same for email contracts. Therefore, it is evident that the acknowledgement in an email contract could become instant along with the support of an ADRS.

Furthermore, the function of 'reading' is not a compulsory requirement under the Receipt Rule in order to determine the conclusion of a contract. In ***Lady Elizabeth Anson v. Trump***, the Court held that the acceptance of a fax was deemed to be properly communicated when it was received, despite the fact whether it was read by the recipient or not.[30] Hence, in this context the sender's awareness of the receipt of the message plays an important role rather than his awareness of reading the message by the receiver. Thus, even in email acceptance the issue to be addressed is

not whether the message was read, but whether it was received by the offeror properly and the offeree had a reasonable awareness of the receipt of message. Such awareness could be essentially made by the ADRS that exists in emails. Therefore, if the sender is properly aware that the acceptance is received by the recipient in an email contract, then it is not irrational to extend the Receipt Rule to acceptance by email, because both fax and email are benefitted from delivery receipts in a similar way.

However, one could raise the issue as to whether every offeror has the facility of generating Delivery Receipts installed within their email service package. Sometimes, this function may not be available in the Email Client itself. On the other hand, there might be instances where the users have not enabled the option of Delivery Receipt for different reasons. For instance, one may disable the delivery receipt option to increase the processing speed of the email server. In addition, there could be events where users are not aware as to whether such a facility does actually exist on their Email Management Software. These are certain issues which required to be analysed in an attempt to extend the Receipt Rule to email contracts.

Since emails are instantaneous methods of communication, it is possible to compare it with features of online contracts formed via websites. There is no substantial distinction between emails and online contracts in respect of communication of acceptance. The Section 14 (2) (a) and (b) of the Electronic Transactions Act No. 19 of 2006 of Sri Lanka has adopted the 'Receipt Rule' in order to determine the time of receipt of a data message, electronic document, and electronic record or other communication.[31] Therefore, the Receipt Rule has already been extended by the legislature to determine the conclusion of both email and the online contracts. In other words, the Receipt Rule is now applicable to electronic contracts irrespective of whether they are formed by email or online web sites.

However, a contrary approach could be seen in of E-Commerce Directive 2000/31/EC and the implemented legislation in the UK. Article 11 (1) of the E-Commerce Directive 2000/31/EC and the Regulation 11 (2) (a) of the Electronic Commerce (EC Directive) Regulations 2002 No.2013 have adopted the Receipt Rule in order to determine the time of communication of the acceptance of online contracts.[32] However, the Regulation 11 (3) of the Electronic Commerce (EC Directive) Regulations 2002 No.2013 has explicitly excluded emails from the said provision.[33] One could argue that the said difference between EU Directive and Regulations leads to an implementation error or lacuna in the UK law. On the other hand, an argument could be advanced that provisions in the Electronic Transactions Act No.19 of 2006 of Sri Lanka (as amended in 2017) are well drafted and comprehensive enough to cover both email and online contracts.

Eventually, it is not unreasonable to extend the Receipt Rule to emails, because at today emails are considered instant and a reliable means of communication. Consequently, it is evident that, there is a wider possibility to extend the Receipt Rule to acceptance by email.[34]

9. 0 Common Law Approach

The general principles of Common Law which govern contracts are still applicable in modern contracts including the ones made by emails. According to Section 17 (c) of the Electronic Transactions Act No. 19 of 2006 of Sri Lanka,

'*The accepted principles of Common Law relating to contracts that the offeror may prescribe the method of communicating acceptance, shall not be affected by anything contained in this Chapter*.[35]

However, in consideration of the Common Law approach to the issue whether Receipt Rule or Postal Rule should apply in email contracts, according to Lilian Edwards and Charlotte Waelde as mentioned in '*Law and the Internet',* there are no established direct legal authorities available to be applied,[36] because such contracts do not have a long history of case law.

Therefore, only cases which are indirectly related are available for reference in the context of disputes pertaining to business contracts formed by emails. For instance, ***The Thomas & Gander v. BPE Solicitors***[37] is a matter related to a share purchase agreement which discussed certain issues relating to email communication. In this case, Justice Blair had referred to old telex cases and held that the same principles could be applied to email contracts.[38]

However, the said application by Justice Blair seems irrational, because the telex and the emails have substantially distinct features in the context of modern communication technology. Further, the position of the Court was vague, because the Court had the view that email could be either instant or not in certain situations. Hence, the Court has not introduced a proper rule to be applied upon acceptances by emails.

Further, in determining whether an acceptance has been duly communicated, the Court has further considered where the risk lies. According to Mindy Chen Wishart as mentioned in '*Contract Law*', the risk must be determined depending on who had the control of the communication system at the point of receipt.[39] For instance, if the system is under the control of the offeror such as a telephone, he should bear the risk and if the system is under the control of the offeree or a third party, the risk lies with the offeree. Therefore, in the case of emails, the risk should be borne by the offeree.[40] However, these risk factors do not have a wide relevance to suggest a clear and constant rule for acceptance by email.

In ***University of Plymouth v. European Language Centre,***[41] the Court held that the previous contracts of the parties should be considered in order to determine the conclusion of an email contract. However, this argument is not reasonable as there could be certain occasions where the parties have never made contracts between themselves in the past. On the other hand, though parties have a previous contractual history, a new contract between them would not be valid, unless the new terms and conditions were properly informed.[42] Hence, the view of considering the previous contractual practice between parties, could not be widely applicable to the problem domain. In ***Raymond Bieber & Others v. Tethers Ltd,*** the Court has focused on the validity of an acceptance sent via email.[43] However, in this matter the Court has not illustrated any rule relating to the acceptance communicated by emails.

10. Provisions in the Electronic Transactions Act No. 19 of 2006

The Electronic Transactions Act No. 19 of 2006 is the principal legislation governing E-Commerce transactions in Sri Lanka. One of the primary objectives of enacting this statute as mentioned in Section 2 (a), was to facilitate domestic and international electronic commerce by eliminating legal barriers and establishing legal certainty.[44] This law further intends to encourage the use of reliable forms of electronic commerce[45] and promote public confidence in the authenticity, integrity and reliability of data messages, electronic documents, electronic records or other communications.[46]

The Electronic Transactions (Amendment) Act No. 25 of 2017 inserted a new provision as Section 11A including the definition of 'Invitation to make Offers' and made further amendments to the 'Time and Place of Dispatch and Receipt of Electronic Records' in Section 14 of the principal enactment. The term 'the Act' is used in the following discussion and texts to refer the amended and consolidated version of the Electronic Transactions Act No. 19 of 2006.

10.1 Electronic Contract and Mailbox

The Act has recognised the formation of an 'Electronic Contract' and its legal validity. In addition to that, a definition has been provided to the term 'Electronic Mailbox' which is used to receive messages in transactions by email.

a) Electronic Contract

Electronic contract has been recognised by Section 11 of the Act as,

'*In the context of contract formation, unless otherwise agreed by the parties, an* ***offer*** *and the* ***acceptance*** *of an offer may be expressed in electronic form. A contract shall not be denied legal validity or enforceability on the sole ground that it is in electronic form*'.[47]

The 'Electronic Form' means 'any information generated, sent, received or stored by electronic, magnetic, optical, or similar capacities regardless of the medium'.[48] A definition of 'electronic communication' has been included by the 2017 Amendment of the Act. Accordingly, 'Electronic Communication' means any communication made by means of data message'.[49]

b) Electronic Mailbox

The term 'Electronic Mailbox' has been introduced within the interpretation of 'Electronic Address' by 2017 Amendment to the Act. The Section 26 of the Act says,

'*electronic address' means a communication network or an* ***electronic mailbox****, telecopy devise or a designated portion or location in an information system that a person uses to receive a data message, electronic document, electronic record or any communication*'.[50]

10.2 Invitation to Treat

The invitation to treat has been explained by Ewan McKendrick in '*Contract Law'*, as an expression of willingness to commence negotiations, which would lead to the conclusion of a contract at a later date.[51] This has been defined in Section 11A of the Electronic Transactions Act No. 19 of 2006 (as amended in 2017) as,

'*A* ***proposal*** *to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of any information systems, shall be considered as an* ***invitation to make offers****, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance*'.[52]

10.3 Offer

a) Time of Dispatch of Offer

The time of dispatch of the offer has been defined in Section 14 (1) of the Act as,

'*Unless otherwise agreed to between the originator and the addressee,* ***the dispatch*** *of a data message, electronic document, electronic record or other communication occurs, when it leaves an information system under the control of the originator, or if the data message, electronic document, electronic record or other communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the data message, electronic document, electronic record or other communication is received*'.[53]

b) Place of Dispatch of Offer

The place of dispatch of the offer has been defined in Section 14 (3) of the Act as,

'*Unless otherwise agreed between the originator and the addressee, the data message, electronic document, electronic record or other communication is* ***deemed to be dispatched*** *at the place where the* ***originator has his place of business****, […].*'

c) Place of Receipt of Offer

The place of receipt of the offer has been defined in Section 14 (3) of the Act as,

'*Unless otherwise agreed between the originator and the addressee, the data message, electronic document, electronic record or other communication is […]* ***deemed to be received*** *at the place where the* ***addressee has his place of business****.*

10.4 Acceptance

a) Time of Receipt of Acceptance

The time of receipt of the acceptance has been defined in Section 14 (2) (a) of the Act as,

"*Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message, electronic document, electronic record or other communication shall be determined as follows, namely-*

if the addressee ***has designated an electronic address*** *for the purpose of receiving data message, electronic document, electronic record or other communication, time of receipt occurs at the time when the said data message, electronic document, electronic record or other communication becomes* ***capable of being retrieved by the addressee****;*

if the addressee ***has not designated an electronic address*** *or has indicated another electronic address for the purpose of receiving data message, electronic document, electronic record or other communication, time of receipt occurs at the time when the said data message, electronic document, electronic record or other communication becomes* ***capable of being retrieved by the addressee*** *at that electronic address* ***and the addressee becomes aware*** *that the said data message, electronic document, electronic record or other communication has been sent to that electronic address.*

(b) For the purpose of this subsection, a data message, electronic document, electronic record or other communication is ***presumed to be capable of being retrieved*** *by the addressee when the said data message, electronic document, electronic record or other communication* ***reaches the addressee's electronic address****.*'

a) Place of Dispatch of Acceptance

The place of dispatch of the acceptance has been defined in Section 14 (3) of the Act as,

'*Unless otherwise agreed between the originator and the addressee, the data message, electronic document, electronic record or other communication is* ***deemed to be dispatched*** *at the place where the* ***originator has his place of business****, […].*'

b) Place of Receipt of Acceptance

The place of receipt of the acceptance has been defined in Section 14 (3) of the Act as,

'*Unless otherwise agreed between the originator and the addressee, the data message, electronic document, electronic record or other communication is […]* ***deemed to be received*** *at the place where the* ***addressee has his place of business****.*

10.5 Acknowledgement

a) Acknowledgement of Offer & Acceptance

The method of acknowledgement has been defined in Section 13 (1) of the Act as,

'*Where the originator has not agreed with the addressee that acknowledgement of receipt be given in a particular form or by a particular method, such an acknowledgement may be given by-*

(a) any data message, electronic document, electronic record or other communication by the addressee, automated or otherwise; or

(b) any conduct of the addressee, sufficient to ***indicate to the originator*** *that the data message, electronic document, electronic record or other* ***communication has been received****'.*

b) Receipt of Acknowledgment of Offer & Acceptance

The receipt of acknowledgement has been defined in Section 13 (2) and 13 (3) of the Act. If the originator has stipulated that the message shall be binding only on receipt of an acknowledgement of receipt, then Section 13 (2) applies. Accordingly,

'*Where the originator* ***has stipulated*** *that data message, electronic document, electronic record or other communication shall be binding only on receipt of an acknowledgement of receipt of such data message, electronic document, electronic record or other communication by him, then, unless acknowledgement has been so received, the data message, electronic document, electronic record or other communication shall be deemed to have never been sent by the originator*'.

On the other hand, if the originator has not stipulated that the message shall be binding only on receipt of an acknowledgement of receipt, then Section 13 (3) applies. Accordingly,

'*Where the originator* ***has not stipulated*** *that the data message, electronic document, electronic record or other communication shall be binding only on receipt of such acknowledgement of receipt, and the acknowledgement of receipt had not been received by the originator within the time specified or agreed, or if no time has been specified or agreed to, within a reasonable time, then the originator may give notice to the addressee stating that no acknowledgement of receipt has been received by him, and*

specifying a reasonable time by which the acknowledgement of receipt must be received by him, and if no acknowledgement of receipt is received within the aforesaid time limit he may after giving notice to the addressee, treat the data message, electronic document, electronic record or other communication as though it has never been sent.'

11. Conclusion

Before the enactment of Electronic Transactions Act No.19 of 2006, there was an issue regarding which one of the two rules, namely Postal Rule and Receipt Rule suits better in contracts by electronic mail. Although Receipt Rule has been often applied in email contracts, yet arguments have been raised that Postal Rule also could be extended due to the fact that on the one hand email was not instantaneous and on the other not reliable as a means of communication. However, this stand does not hold good any more, as at today emails are considered one of the speediest and most reliable modes of communication and therefore, it is not appropriate to extend the Postal Rule to email contracts.

The Electronic Transactions Act No. 19 of 2006 and its subsequent Amendment Act No. 25 of 2017 have adopted the Receipt Rule and introduced an advanced version of it by providing alternative methods of acceptances, based on the existence and non-existence of a designated electronic address. The legislature has further introduced the definition of acknowledgement of the receipt of acceptance, in order to eliminate any gray area within the law governing contracts by electronic mail.

Endnotes

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12 *Dunlop and Others v. Vincent Higgins and Others* [1848] 1 H.L. Cas. 381, 9 E.R. 805 (QB) 812.

13 Electronic Transactions Act No.19 of 2006 of Sri Lanka, s 11.

14 *Immigration Storage Company Ltd v Clear plc* [2011] EWCA Civ 89, 135 Con. L.R. 224.

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17 Electronic Communications Act 2000 c. 7 of UK, s 7 (1); Electronic Transactions Act No.19 of 2006 of Sri Lanka, s 21 (3).

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